Women, Children And Domestic Violence: Current Tensions And Emerging Issues
Women, Children And Domestic Violence: Current Tensions And Emerging Issues

Cover Page Footnote
This conference was held at the Fordham University School of Law on April 26 & 27, 1999. It has been edited to remove the minor cadences of speech that appear awkward in writing.
WOMEN, CHILDREN AND DOMESTIC VIOLENCE: CURRENT TENSIONS AND EMERGING ISSUES

A Conference Sponsored by the Fordham University School of Law Domestic Violence Advocacy Center and Battered Women's Rights Clinic, Supreme Court, Appellate Division, First Department, Lawyers Committee Against Domestic Violence and New York State Judicial Committee on Women in the Courts
WOMEN, CHILDREN AND DOMESTIC VIOLENCE: CURRENT TENSIONS AND EMERGING ISSUES

A Conference Sponsored by the Fordham University School of Law Domestic Violence Advocacy Center and Battered Women's Rights Clinic, Supreme Court, Appellate Division, First Department, Lawyers Committee Against Domestic Violence and New York State Judicial Committee on Women in the Courts

LIST OF PARTICIPANTS

MARY ELIZABETH BARTHOLOMEW
Staff Attorney, Sanctuary for Families Center for Battered Women's Legal Services

HON. LAURA DRAGER
Supreme Court Justice

MONICA DRINANE
Attorney-in-Charge, Juvenile Rights Division Legal Aid Society

HON. RONNIE ELDRIDGE
City Council Member

HON. LEE ELKINS
Justice, Brooklyn Family Court

HON. BETTY WEINBERG ELLERIN
Presiding Justice, Appellate Division First Department

JULEY FULCHER
Public Policy Director, National Coalition Against Domestic Violence

HON. JUDITH GISCHE
Justice, Bronx Supreme Court

HON. ROGER L. GREEN
Chair, Standing Committee on Children and Families

MARLENE HALPERN
Supervising Attorney, Juvenile Rights Division Legal Aid Society

BETH HARROW
Coordinator, Family Law Unit, Brooklyn Legal Services Corp. A

MARY HAVILAND
Co-Director, Family Violence Project, Urban Justice Center

HELEN HERMAN
Director of Academic Programs, Fordham University School of Law

TASHA HIGHTOWER
Advocate

LEAH A. HILL
Assistant Clinical Professor, Battered Women’s Rights Clinic

CATHERINE HODES
Social Work Supervisor, Park Slope Safe Homes

CHARLES HOLLANDER
Deputy General Counsel, Administration for Children’s Services

MARIA L. IMPERIAL
Executive Director, Association of the Bar of the City of N.Y. Fund, Inc.

HON. JOSEPH LAURIA
Administrative Judge, New York Family Court

KATHERINE LAW
Director, Law Guardian Program, Appellate Division, First Department

DORCHEN LEIDHOLDT
Director, Sanctuary for Families Center For Battered Women's Legal Services

BETTY LEVINSON
Partner, Levinson & Kaplan

MICHELLE MAXIAN
Attorney-in-Charge, Criminal Defense Division, Legal Aid Society

HON. ESTHER MORGANSTERN
Justice, Brooklyn Supreme Court

HON. WILLIAM RIGLER
Justice, Brooklyn Supreme Court

HON. GAYLE ROBERTS
Justice, Bronx Family Court

HON. JACQUELINE W. SILBERMANN
N.Y.S. Administrative Judge, Matrimonial Matter

LISA SMITH
Chief, Domestic Violence Bureau, D.A.’s Office, Kings County

EVAN STARK
Associate Professor, Rutgers University (Newark)

CAROL STOKINGER
Chief, Child Abuse and Domestic Violence Bureau, D.A.’s Office, N.Y. County

SUSAN URBAN
Domestic Violence Coordinator, director, Interagency Affairs, Administration Children’s Services

HARRIET WEINBERGER
Director, Law Guardian Program, Appellate Division, Second Department

ANDREA WILLIAMS
Staff Attorney, NOW Legal Defense and Education Fund

ED YOUNG
Commanding Officer, NYPD Domestic Violence Unit

JOAN ZORZA
Editor, Domestic Violence Report
WOMEN, CHILDREN AND DOMESTIC VIOLENCE: CURRENT TENSIONS AND EMERGING ISSUES

A Conference Sponsored by the
Fordham University School of Law
Domestic Violence Advocacy Center and
Battered Women's Rights Clinic,
Supreme Court, Appellate Division, First Department,
Lawyers Committee Against Domestic Violence and
New York State Judicial Committee on Women in the Courts*

TABLE OF CONTENTS

INTRODUCTION ................................................ 569
Hon. Betty Weinberg Ellerin

WELCOMING REMARKS, APRIL 26, 1999 ...................... 572
Helen Herman

KEYNOTE ADDRESS, APRIL 26, 1999 ............................ 575
Hon. Roger L. Green

WHEN ARE BATTERED WOMEN NEGLIGENT MOTHERS? .... 582
Marlene Halpern (Moderator)
Monica Drinane
Hon. Lee Elkins
Beth Harrow
Leah A. Hill
Catherine Hodes
Charles Hollander
Barbara Stock
Susan Urban

PAVED WITH GOOD INTENTIONS: MANDATORY ARREST
AND DECREASING THE THRESHOLD FOR ASSAULT ... 629
Dorchen Leidholdt (Moderator)
Hon. Laura Drager
Mary Haviland
Tasha Hightower
Michelle Maxian
Lisa Smith

* This conference was held at the Fordham University School of Law on April 26 & 27, 1999. It has been edited to remove the minor cadences of speech that appear awkward in writing.
Carol Stokinger
Ed Young

IN THE TRENCHES AWARDS ........................................ 672
Hon. Betty Weinberg Ellerin (Honoree)
Maria L. Imperial (Honoree)

JUDGES PANEL: HOW EFFECTIVELY DO THE COURTS AND
ADVOCATES ADDRESS THE SAFETY OF WOMEN AND
CHILDREN? .................................................. 680
Hon. Michael Nadel (Moderator)
Hon. Judith Gische
Hon. Joseph Lauria
Hon. Esther Morganstern
Hon. William Rigler
Hon. Gayle Roberts

WELCOMING REMARKS, APRIL 27, 1999 ...................... 708
Leah A. Hill

KEYNOTE ADDRESS, APRIL 27, 1999 ......................... 713
Hon. Ronnie Eldridge

TRENDS AND TACTICS ON THE FEDERAL FRONT .......... 722
Andrea Williams (Moderator)
Juley Fulcher
Susan Goldberg
Linda Garder
Marcellen Hearn
Leslye Orloff
Joan Zorza

THE ROLE OF ADVOCATES, GUARDIANS AND FORENSIC
EXPERTS IN CUSTODY AND VISITATION CASES ........ 773
Hon. Jacqueline W. Silbermann (Moderator)
Mary Elizabeth Bartholomew
Katherine Law
Betty Levinson
Evan Stark
Harriet Weinberger

APPENDIX A .................................................. 812
Hypothetical
Introduction

Hon. Betty Weinberg Ellerin

Mothers who are victims of domestic violence and their encounters with our courts are the subjects of this conference, whose proceedings are recorded in the *Fordham Urban Law Journal*. Unfortunately — and time and again participants of this conference bear witness that this is the experience in New York — these women find the legal system is not always an ally in their quest for safety, but yet another source of danger in their lives.

Conference speakers give a clear and disturbing picture of how we ascribe a kind of omnipotence to mothers vis-à-vis their children. If children are hurt, it is assumed that those at fault must be the mothers, and they are likely to be blamed even when it is the father who strikes the blows, lands the punches or terrifies the child. Somehow, we imagine they should have been able to snatch the children out of harm's way.

The implications of holding mothers strictly accountable for the fates of their children are disastrous for the women whose lives are dominated by the temper, rage or will to control of men in their lives. Since they may be seen as the source of the very danger they are trying to avert, women cannot count on the courts to help them and may find the legal system ready to turn on them. As the papers in this volume detail, mothers seeking orders of protection in New York City's Family Court frequently find themselves the subject of child neglect proceedings. So real is the danger of a child protection agency stepping in (not just filing a petition but having children placed in foster care), that some advocates for battered mothers at the conference say they would do just about anything to avoid evoking the power of the family court to help their clients find safety.

At the same time the responsibilities of women are inflated, the accountability of men for their own violence is lost. The focus on the mother blurs the role of the fathers who created the danger. Too often, still, the question asked is: “Why didn’t she stop him or get the children out of the way or leave?” instead of: “Why did he threaten, hit or punch her?” And, as long as the wrong question is asked, the incorrect answers will certainly be found. Sadly, instead of searching for ways to use the agencies of the law to stop the violent and abusive behavior of men, legal processes will be used to sever children’s ties to their mothers.
The tendency of perceived solutions to backfire and the power of backlash are other obstacles faced by abused mothers. Mandatory arrest policies and statutes, put in place to assure that abusers are subject to criminal law for their violence, have been turned against women. Men have found ways, sometimes with the acquiescence or tacit approval of the police, to have the women they have abused arrested on invalid charges. At the same time, the research on the dangers of domestic violence to children has strengthened the hands of those who would convert a women’s search for safety into an attack on her as mother. Used against battered women is the research that demonstrates the ways children are likely to be abused themselves and the dangerous effects of domestic violence on children within a household even if they are never subjected to violence. Given the level of responsibility ascribed to mothers, the research becomes an argument for taking the children from the mother rather than yet another reason for removing the father from the household.

Ultimately, the answers to these problems lie in making sure the ways victims of domestic violence think about their lives and the events that bring them into court are given voice, so that they have a chance to supplant stereotypes. The advocates who participated in this conference know full well how rarely women imagine their search for safety in opposition to that of their children. More often, these women place the welfare of their children above their own and make their moves in the fraught atmosphere of family violence in a way calculated to minimize the chances of harm to their children. They usually understand instinctively how dangerous leaving an abuser can be. They may be rightly convinced that no matter how imperfect their efforts to find safety, no one, not a case worker, foster parent or judge, will ever care nearly as much about the well-being of their children as they themselves. Until courts find ways to make sure victims’ perceptions of abuse are heard, credited and incorporated into legal processes, the legal system will continue to falter in its efforts to do the right thing for domestic violence victims who care for children.

As a judge who has devoted many years to New York State’s court system, I find the failures documented in this volume and the need for the strategies to overcome them doubly troublesome. The fate of women who still face an uncertain response from the court system in itself is disturbing, but the fact that frequently it is the courts that are failing them saddens me. The courts should do better and are currently making great efforts to do so under the lead-
ership of our chief judge. These efforts coupled with the commitment and intelligence of those who have contributed to this publication will, I have no doubt, ensure that the legal system will become a dependable ally for women and children in their search for safety from domestic violence.
WELCOMING REMARKS,
APRIL 26, 1999

MS. HERMAN: On behalf of Dean John Feerick and Fordham University School of Law, I want to welcome you to the third in a series of conferences on domestic violence held at our school.

It is a privilege for our school to be a co-sponsor of this important conference with the Appellate Division, First Department; the Lawyers Committee Against Domestic Violence; the New York State Judicial Committee on Women in the Courts; and other sponsoring organizations.

I would like to extend a special welcome to the conference’s featured speakers, the Honorable Roger Green, Assembly Member and chair of the Standing Committee on Children and Families, and the Honorable Ronnie Eldridge, who is a City Council Member. I particularly want to thank all of the distinguished panelists and moderators who come from the judiciary, private practice, public service organizations and law enforcement, and whose participation makes this such an outstanding conference.

In addition, I would like to recognize the Honorable Betty Weinberg Ellerin, Presiding Justice of the Appellate Division, First Department, and Maria Imperial, executive director of the Association of the Bar of the City of New York Fund, Inc., both of whom are being honored today with the first annual Lawyers Committee Against Domestic Violence “In the Trenches” Award.

I am proud to note that Fordham Law School participates in the fight against domestic abuse through our Battered Women’s Rights Clinic, directed by Professor Leah Hill, who is one of the conference moderators, our Center for Family and Child Advocacy, co-directed by Professor Ann Moynihan of Fordham Law School and Dr. Virginia Strand of the Fordham Graduate School of Social Services and our Public Interest Resource Center’s Domestic Violence Advocacy Center, which this year made an extremely generous contribution to support this conference.

We would particularly like to extend special thanks to the members of the Lawyers Committee Against Domestic Violence and its co-chairs, Julie Domonkos, who is the director of Government Affairs at Victim Services, and Catherine Douglass, who is the executive director of the Network for Women’s Services, for doing an extraordinary job of putting together today’s program. Also, special thanks to all the student board members of the Fordham Domestic Violence Advocacy Center.
This conference, entitled "Women, Children and Domestic Violence," examines one of the most agonizing, and also elusive, issues affecting our nation today — the exploitation and abuse of some of the most vulnerable members of our community.

I know how much Dean Feerick values the commitment that all of you are making in the campaign against domestic violence, and on his behalf, I salute your outstanding efforts and wish you a very successful conference.

I would now like to turn over the program to Julie Domonkos and Catherine Douglass.

MS. DOUGLASS: I am Cathy Douglass, and I would like to thank Helen Herman, who just preceded me. She has gone far beyond what one would expect from the lead person at a sponsoring organization to ensure the success of this conference.

The Lawyers Committee Against Domestic Violence (the “Committee”) is a co-sponsor and has really taken the lead role in putting the substantive program together. The Committee is a growing, vital organization that encourages all those interested to participate by joining it. There are no dues other than hard work. We meet every month. Every other month we have what we call practice seminars, where we educate ourselves about legal issues, bringing in outside people. Every other month we work through committees that look at civil and criminal issues affecting families that are experiencing domestic violence.

We have more than fifty members. The real criterion for membership is that you are willing to work on one of our committees. You need not be a lawyer. Most of us are lawyers, hence the name, but there are members who are not lawyers.

Now I would like to introduce my co-chair of the Committee, Julie Domonkos.

MS. DOMONKOS: First, I want to thank our interpreters, Kelly Shanahorn and Jennifer Kagan. Thank you for being with us today and providing the interpreting services. We appreciate it.

Also, there is a Hypothetical in the materials handed out to all participants. The panels will be referring to and using this as an interactive tool during the two days of the forum.

Now, it is my pleasure to introduce our keynote speaker, Assembly Member Roger Green, who has represented the 57th Assembly District of Downtown Brooklyn since 1981. The Committee invited Assemblyman Green to speak here today because of his long

1. See Hypothetical, infra app. A.
history of dedication to and concern for issues that affect New York State's families. Assemblyman Green has been the chair of the Assembly's Standing Committee on Children and Families since 1993. In that role, he has legislative oversight for New York State's laws pertaining to adoption, child protection, juvenile justice, day care and family preservation. In the area of juvenile justice, he has constantly reminded us that juvenile offenders are still our children and that it is our obligation to ensure that they not grow up surrounded by violence.

In his capacity as chair, Assemblyman Green initiated and contributed to significant reforms in the child welfare system, including the 1996 enactment of Elisa's Law, which increased the capacity for oversight, monitoring, accountability and public disclosure in the child protective system. This year, he worked to ensure New York's compliance with the Federal Adoption and Safe Families Act of 1997, always keeping in focus that the primary permanency plan for children is safe reunification with their families.

Assemblyman Green is the legislative creator of the New York State Martin Luther King Institute on Nonviolence, which promotes the study of civil rights, social history and nonviolence. He also originated the Center for Law and Social Justice, which was created in order for students of Medgar Evers College and the residents of central Brooklyn to address issues concerning the ongoing struggle for social and economic justice.

These are but a few highlights from the career of a long-time advocate for children and youth. In his remarks this morning, Assemblyman Green will challenge us, as he always does, to confront the issues of race, class and social and economic justice, which must underlie any discussion of family violence.

Since we began planning this conference to challenge ourselves and to address some of the toughest issues in the field of domestic violence, I am very excited to introduce our keynote speaker, Assemblyman Roger Green.

---

Keynote Address,
April 26, 1999

Assemblyman Green: Thank you very much. I am very pleased to be here, and, as usual, would like to express my heartfelt appreciation to the organizers of this extraordinary event. I would like to thank Cathy Douglass and Julie Domonkos and the Committee for this event.

I come here today not to present a didactic lecture on the issue of women, children and domestic violence, but instead as a student, like many of the members of the State Legislature. This really represents a new paradigm in family law for us. As it is evolving, and sometimes even moves in revolutionary spurts, we are all students in this process.

I view Elisa’s Law as critical to a number of different areas that I am concerned about, especially the issue of child abuse and neglect. Because this is National Child Abuse and Neglect Month, I think it is very appropriate that this conference is called again to look at the issue of women, children and domestic violence.

I would like to look at this through the eyes of an African American, who grew up in central Brooklyn and how questions of race, class and gender impact on family law, and sometimes, how we engage in acts of avoidance with respect to these issues. I will try to do this the best way that I know how, which is to talk about my own experiences growing up in central Brooklyn, my observations of how things were and how our culture has changed. Although the changes may not be great, we can observe how we are being challenged in the state legislature, and in the courts and in other segments of our society to address the issues of women, children and domestic violence.

I grew up in the Bedford-Stuyvesant section of Brooklyn on Madison Street between Sumner and Troop — an area they call “the soul and the hole.” I lived at 452 Madison Street, and there was a park bench out in front of the house where all the women would assemble from time to time. As a young man, I had the opportunity to sit near the park bench and hear them discuss different issues.

I remember one of the things I often heard them say: “There is nothing more dangerous to a home than an unemployed male.” I would sit back and try to figure that out.

When I was born, many men were returning from both World War II and the Korean War, and that community was, at that time, essentially still a working class and working poor community. As
time went on, the surplus population of people coming up from the South found that they would hit a brick wall of unemployment. Increasingly, more men in that community were unemployed.

I was amazed at how the women in that community would go to extraordinary lengths in order to organize themselves and their lifestyles, and the extent to which they would go to ensure that there would not, in fact, be unemployed men within their household.

I remember my grandmother coming up from Wilmington, North Carolina, and she would meet with my aunts who had migrated from the South to New York before her. One of the first things she would ask was, “How are you doing?” The second thing is, “How is your love life?” The third thing is, “Does he have a job?” She would hold her breath until they essentially said, “Yes, he has a job.” She still would not believe it, but she would look them in the eye and ask, “Does he have a job?” It went back to those words I used to hear on the park bench, again: “The most dangerous thing that you can put in a household is an unemployed man.”

In school, my colleagues and I would talk about what was going on in the house. I remember stories of young men seeing the dissolution of their family before their own eyes. It would start with, again, a loving father returning home, maybe from the Korean War, and then, over a period of time, far too many of the households in Bedford-Stuyvesant would have walls that were peppered by men who had punched holes into them. After a period of unemployment, that behavior tends to happen. You come home and the first thing that you strike is the wall. It always struck me how many homes of my friends I would visit had fist marks in the walls.

Eventually, flesh replaced the fist marks in the wall. Men began striking out — first at the woman in the household, and then, inevitably at the children, because they would stand up to the abuse. Many of my friends told me stories of how they jumped in between their mothers and fathers and how they wrestled him to the ground, followed by the father leaving, throwing his hands up, and the son shouting out the door, “Never come back! Get out of here! I do not want to see you again.” Far too often, that is exactly what would happen, but in some cases, the worst of situations would occur: the father would return and become even more abusive.

These are things that I thought about when I was elected to office. Thus, questions of race, class, gender and dynamics within a family continue to come up in my mind. Eventually, what I under-
stood was that this was something that was not isolated to Bedford-Stuyvesant, but that perhaps white working poor and working class women, including the trailer parks in Appalachia and in other sections of New York State, were enduring the same thing. There was some commonality there, and perhaps even some common language.

As I entered public life, one of the things that occurred was the Lisa Steinberg case, which raised new questions of race, gender and power, and the culture of violence within the household. For the first time, I was challenged to think about the whole issue quite differently — no longer simply looking at it in the context of class, the relationship between unemployment and violence in the household. Then, I was looking at this in the context of pure power and issues of culture: how our culture has set up certain autocratic structures within our families and how that is played out — sometimes to terrible ends. That case really represented an extreme example of human alienation, human disconnection, violence, nihilism and sexism.

Years later, there was Elisa Escuerdo, a Latino sister who died at the hands of her mother, and indeed of her mother’s lover, although in the press it was the mother who was primarily demonized as crazy. And yes, she was crazy. The question was who drove her crazy? I do not think we ever got there. What we simply saw was this angelic child who had lost her life. We never went deeper than that to see the dynamics that drove this mother to the brink of engaging in one of the most horrendous acts of the human condition, which is for a mother to kill her own child.

Lurking in the background, every now and then in the articles — and clearly I saw it when the information of the case came before my desk — was the issue of the father, and how the father had abused the mother and, in the process, had also abused these children. I tried to contextualize all of this in the context of law and public policy, and looking at it also in terms of how certain other dynamics are happening within our community.

In another example from my personal experience: When I first entered office, if I had a speaking engagement on a Monday morning, I would either take the train or the Greyhound bus to Albany. I no longer take the Greyhound bus to Albany though.

Now, if I were to go to 42nd Street and jump on the Greyhound bus to get to Albany, it would be filled with women, commonly

defined in street parlance as "mules," who are carrying drugs from New York City to Albany and other parts of the state. These women are essentially in the underground economy, where there is a ruling class and "glass ceiling," similar to what we have in some of the Fortune 500 corporations and in government. In the underground economy, the drug lords push and force women, using their power, to serve as mules, carrying drugs and drug products to other parts of the state.

Increasingly, once the bus arrives in Albany, law enforcement officials will be there to arrest these women. Then, as a result of the Rockefeller drug laws, they will be sent away for many, many years.

The consequences of that scenario are now faced by children and family law. Today, we have two million children in this country whose parents are incarcerated in state and federal prisons. Most of them happen to be women, and far too many are women of color. All of them are poor and working class women.

I repeat this to give you my perception of the challenges that we are facing with respect to issues of women, children and domestic violence.

This year we had to adopt a law called the Adoption and Safe Families Act ("ASFA"), which promulgated new laws that would ensure the safety of children in our child welfare system. Again, there were issues that we had to confront that were part of the laws we were developing.

One issue, for instance, was something as simple as mandating fingerprinting of all foster parents in the child welfare system. There had been cases in which many children had been abused and neglected, not only by their natural parents, but also by foster parents.

One of the things that occurred as we were deliberating this bill and trying to enact it into law, was that we had called for fingerprinting not only for foster parents, as well as for adoptive children, because my mind went back to Lisa Steinberg and Elisa Escuerdo.

However, the Senate and governor refused to enact a bill that would call for fingerprinting of both foster parents and parents in private adoptions. The major problem existed with foster parents, who were primarily working poor parents, and children of color.

---

5. See, e.g., Spiros A. Tsiurbiuos, Is It Time to Change the Rockefeller Drug Laws?, 13 ST. JOHNS J. LEGAL COMMENT 613 (1999) (commenting on the Rockefeller Drug Laws and describing current debate as to whether they should be changed).
and mostly women of color involved in foster care. Again, it showed the challenges that we face in society, in which we continue to develop public policy that is skewed based upon race and class.

There was also the issue of considering domestic violence when the court issues a protective order. This was an issue that we won, but that was a victory secured through a real struggle. We had to struggle to educate members of the legislature that this was a prescription in law that we needed. The issues of domestic violence were not even being considered when we were developing this bill.

What I would like to do at this point is to go back and raise some issues that had been highlighted in 1995, when my colleague, Assemblywoman Helen Weinstein, had developed a roundtable on Domestic Violence and Child Abuse. I really would like to place this out there as issues of inquiry, because, again, I come here as a student and not as someone who has a handle on all of these issues. Below are some of the questions that were raised in 1995 that we are still grappling with:

- Is there a common ground between domestic violence and child protective advocates? The minutes of the roundtable discussion indicate that there was general agreement that domestic violence should be a factor in making child custody decisions.
- Strict liability would be inappropriate in these hearings.
- We should strive to provide services to ensure the safety of both mother and child.
- Most participants agreed that the aim should be to maintain the mother and the child at home, although this is increasingly difficult.
- A number of the participants highlighted creative approaches in other jurisdictions. They particularly raised the example of the Boston Children's Hospital Awake program.
- It was also pointed out that in New York, as is necessary, the primary mission of Child Protective Services ("CPS") is to protect the child, and that for CPS to work, the bottom line requires the isolation of the child's needs from the needs of other family members. This again raises serious issues, particularly with those policies that uplift the goal of family preservation. Indeed, when we were dealing with ASFA, the reform focuses on the issue of family preservation.
- There were other issues that dealt with questions of evidence of domestic violence against respondents, and the question of rebuttable presumption or affirmative defense against neglect. While a number of participants opposed the laws that were being proposed by Assemblywoman Weinstein at the time,
they believed that these laws could, in fact, if not done very carefully, exacerbate the number of mothers that would be separated from their children.

- There was a call for coordinated services. One of the common themes was the need to take steps to prevent the cases from occurring in the first place and from going to court. Since then, there have been a number of different programs that have been established to do just that.

- One of the major issues raised was that there were no shelters at the time for the over 800 children who would be caught in cases of domestic violence. Most of the sheltering programs at that time were designed primarily for women, while none created an integration with children, who were also affected by either domestic violence or child abuse and neglect.

Let me close by essentially challenging you over the next two days to look at these issues in the context of race, class and gender. It is particularly important that any of you who practice law, those of you who are jurists and those of us who are in the state legislature, continue to really challenge ourselves to understand that we have not yet successfully grappled with the contradictions of race, class and gender in our family law.

Laws that are intended to address the problem of domestic violence do, in fact, represent a new paradigm. They are being played out, however, in the context of ongoing issues that are related to race and class as well.

We need to double up our efforts so that we can develop new law free from these contradictions. I have to honestly tell you that as the author of AFSA, that we have many miles to travel before we reach that reality.

This past year was a major challenge for us in the state legislature, acknowledging the fact that something as simple as fingerprinting for both foster care and private adoptions could not get enacted into law, primarily because, quite honestly, the plutocrats in Albany viewed that as a threat to their private practice, and also because it would not be the type of political tool that they need in some cases to continue the demonization of certain populations.

So it is my hope, in the final analysis, that the women of El Barrio and the women of Bedford-Stuyvesant and, eventually, the women of the trailer parks in Appalachia, will not only find common language, but common ground to struggle, and to create new law that does justice to women who have been victimized by violence, and also to ensure the survival, protection and development of all children.
With that I would like to thank you for allowing me to share a few remarks with you. I regret that I must leave, but I want to thank you for this extraordinary panel and conference that you have put together for this morning and for tomorrow. I hope you will send me all of the conference proceedings, in the hopes that perhaps we can contextualize some of the insight that will be learned into new law as we continue to reform the child welfare system and children and family law. Thank you very much.
WHEN ARE BATTERED WOMEN NEGLIGENT MOTHERS?

MS. DOMONKOS: I would like to introduce the moderator of our first panel, Marlene Halpern. She is the Supervising Attorney for the Volunteer Division of the Legal Aid Society. Prior to that, for over ten years, she was the Family Law Coordinator of Legal Services for New York City. The focus of that practice was to keep children safely at home with their families and out of the foster care system. Prior to that, she was with Bronx Legal Services. She has taught at Hofstra University and has written for the Interdisciplinary Newsletter on Families and Children At Risk.

MS. HALPERN: I am honored to be here today and to follow Assemblyman Green, who was far too modest in speaking about his accomplishments and his integrity as New York State passed the Adoption and Safe Families Act of 1997 ("ASFA"). In a time of political pressure, to put in a rather draconian bill that would hurt essentially low-income women and children in our state, he worked to create the best bill possible under the political climate for constituents here and elsewhere.

Before I introduce everyone, I should note that this is such a timely topic. Unfortunately, we have not talked enough about domestic violence and child neglect and the child welfare system. There is such integration between the two, but we seem to have always divided ourselves between people who work in the child welfare arena and people who work in the domestic violence arena and never really come together. This is very exciting, especially in light of recent legal changes and changes in terms of practices that are going on right now.

I want to quickly introduce all the panelists. First, we will allow everyone to present her or his discussion, then we will discuss the Hypothetical,8 lastly, time permitting, we will take questions or present other questions to the panelists.

Susan Urban, who, since 1997, has been deputy director of the Office of Interagency Affairs of the Administration for Children's Services ("ACS") and also ACS’s Domestic Violence Coordinator. She has been responsible for the implementation of ACS’s Domestic Violence Initiative. Susan’s work goes beyond 1997, and has been dedicated to this area of practice and has diligently been trying to assess the best programs to protect both children and women.

---

8. See Hypothetical, infra app. A.
Catherine Hodes is the Social Work Supervisor at Park Slope Safe Homes. I had the pleasure of meeting Catherine about two years ago. Park Slope Safe Homes is a model program in terms of how it counsels women and their families in these horrendous situations and how it tries to keep families together where possible.

Leah Hill, who I have had the pleasure of knowing many years as a young attorney who practiced in Legal Services, started out in East Brooklyn Legal Services, then went to Harlem Legal Aid. She has always represented women who are trying to maintain their families, keep their children in the community and raise strong children. She then went to the academic setting and has been teaching young students what advocacy is all about and what the legal profession entails. We are happy to have her here. She heads the Battered Women’s Rights Clinic here at Fordham University School of Law, and she is affiliated with many various organizations in the city that focus on domestic violence.

Sitting to my immediate left is Charles Hollander, who is the Deputy General Counsel to the Division of Legal Services for ACS. I have known Charlie since 1976 when he worked at the Juvenile Rights Division and represented children. At that time, we were colleagues, sometimes adversaries, and I would have to say he always gave consideration to what would be best for children and what kind of services could be put in the home so that children could go home safely. He then went on to work for the Office of Legal Affairs and now is presently with the Administration of Children’s Services, as I said. He has dedicated his professional life to this area.

Sitting immediately to my right is Beth Harrow, who is the coordinator of the Family Law Unit at Brooklyn Legal Services Corp. Beth works in the Williamsburg office of that organization. She has been in Legal Services for approximately thirteen years, focusing on preserving families and communities. She was really the initiator of a demonstration project that was funded for a number of years by the state legislature on preserving families and keeping children at home safely. We are very happy to have Beth here. She is, in my opinion, one of the foremost attorneys in the city on representing women and men, who are faced with charges of child abuse or neglect, where children are in danger of going to foster care.

Immediately to Beth’s right is the Honorable Lee Elkins, who is a judge with the Brooklyn Family Court. Unfortunately, this is my first experience meeting Judge Elkins, but I have heard much
about him, all praiseworthy. He is sitting presently in the Permanency Part of Brooklyn Family Court, which is the part that handles abuse and neglect proceedings. He has also sat on criminal court. He has co-authored a book, *The New York Law of Domestic Violence*.\(^9\) Prior to that, he was a criminal defense attorney with the Legal Aid Society and also Special Prosecutor for Police Corruption in the Attorney General's Office. We are very honored to have him here today.

Sitting last, but not least, is Barbara Stock, who is Assistant Attorney in charge of the Bronx Trial Office of the Juvenile Rights Division in the Legal Aid Society. As many of you may know, the Legal Aid Society's Juvenile Rights Division represents children. We are happy to have Barbara here to talk about the role of the law guardian and the insight that she brings, since the whole theme of this conference is battered women and the emerging tensions between them and their children and how to resolve them. We are very honored to have you here.

MS. HODES: Thank you, Marlene. I am Catherine Hodes from Park Slope Safe Homes Project, where we work with battered women, and have been for twenty-two years. In the past year, we hired a children's program specialist and coordinator, and so we really are, along with many of our colleagues, very seriously pursuing appropriate kinds of services and intervention for children. We are really thinking of the battered women that we work with as mothers, and the impact that being a mother, who is also being battered, has on their relationship with their children and their relationship with the various systems they come into contact with.

We have a lot to talk about with this issue, but I want to highlight four particular points.

First of all, when we are talking about charging battered mothers with failing to protect their children because of the presence of domestic violence in their lives, we are losing one of the key points that domestic violence advocates and battered women have been highlighting for twenty years, and that is the issue of accountability.

In the past decade, the domestic violence community has been instrumental in trying to define the impact of domestic violence on children. I think in the first decade of the movement we were focusing on very concrete safety issues and getting shelters off the ground. The kids were there, tagging along, but we were not focus-

---

ing on their needs. That has really changed in the last five to ten years.

In highlighting the ways that children are harmed by the exposure to violence in their homes, we sought to influence outcomes related to policy, legislation, intervention and prevention. It is with a great deal of frustration that we now find ourselves increasingly assisting battered mothers who are being charged with neglecting their children for exposing them to domestic violence or for engaging in acts of domestic violence. Those are descriptions that I find particularly dismaying in their ability to erase accountability of the abuser and place further blame upon the victim. I am sure we are going to hear a lot more about accountability as this panel progresses.

The second point that I want to speak about is that very often battered mothers are offered options that do not address the very complex realities of their lives. If they do not take those options, they are punished. Battered mothers find themselves in particular binds that are unique to being battered women who happen also to be mothers. I want to illustrate that bind with three facts:

- First, battered mothers are told that leaving is the only appropriate option. As many of you in this room already know, seventy-five percent of battered women visiting emergency rooms have already left the relationship, and over a third of women killed by a partner are killed at the time they are attempting to leave the abusive partner. Leaving can be more dangerous than staying. Often, when a woman leaves, the batterer takes retaliatory action against the children. For example, reporting the mother to ACS for child abuse or neglect, threatening to harm the child during visits, or even kidnapping the children.

- Second, battered mothers are told to locate shelter or alternative housing. There are approximately one thousand shelter beds available in New York City, and on any given night these beds are filled to ninety-eight percent capacity. On average, it takes eighteen months before a battered woman can locate affordable permanent housing. One battered woman that we worked with at Park Slope Safe Homes Project lost her children to foster care due to domestic violence, and even after satisfying all the demands placed upon her with regards to domestic violence, her children remained in care for an additional year while she attempted to secure an apartment.

- Third, battered mothers are told to obtain orders of protection. As many of you in this room already know, seeking a family court order of protection can result in an escalation of
the violence. It also frequently conflicts with visitation orders, may generate an ACS investigation and is routinely ignored by the batterer. Violations of these orders usually do not result in substantial penalties and rarely result in the battering father being charged with neglect or endangerment.

The third point that I want to make is that battered mothers will not reach out for help from the very systems that are designed to help them if we proceed in the direction that we have been going as far as charging them with a failure to protect their children. If disclosing the domestic violence can result in punitive action against the victim, then the spirit of the advocacy and the legislation for which we have all worked so hard is being violated. Battered mothers are damned if they do not reach out for help, but ironically, they are damned if they do.

The chilling effect of charging battered mothers with failure to protect their children is that they will be reluctant to call the police, to speak to Social Service advocates, to speak up in court and to obtain the help that they need, knowing that they will be investigated by Child Protective Services, that they may be charged with neglect or that they may lose their children to foster care. Further, they know that the focus of accountability will be on their actions rather than on the abuser’s. In addition, knowing that any effort they have made to protect their child will be ignored or dismissed or minimized, mothers are more likely to remain in the abusive homes, isolated, afraid, but at least together with their children.

The last point that I would like to make is that conceptualizing battered mothers' safety needs as separate from the best interests of her children leads to actions that re-victimize battered mothers and their children. We need to begin to re-conceptualize the idea of the best interests of the child in cases of domestic violence to include an understanding that the child’s interests can best be served by providing protection, safety planning and services for the battered mother.

Today’s Hypothetical is a good case in point.10 Here is a battered mother who has police and hospital records of abuse; she has criminal and family court orders of protection; she has been granted temporary custody by a judge; she has a safe place to stay; and she has begun to develop a supportive advocacy network. How is she failing to protect her child? How is this child’s removal in the child’s best interest?

10. See Hypothetical, infra app. A.
Thank you.

MS. HALPERN: Thank you, Catherine. We will now turn to Susan to talk about the role that she would play in terms of these two systems, trying to bring them together. We had Catherine start off, obviously, as someone who would have a wide breadth of knowledge about domestic violence and the dynamics and who might first meet the woman coming into her office.

MS. URBAN: Thank you. Good morning.

I am Susan Urban. I serve two functions with ACS. I am the Deputy director of the Office of Interagency Affairs, which is an office created to help build collaborative efforts and break down barriers between ACS and other city agencies that lead to children not being served as well as they should be. I also serve as the ACS Domestic Violence Coordinator.

I was very pleased and relieved, frankly, that Charlie Hollander is on this panel, because I do not have the charge of describing and defending Division of Legal Services and ACS policy on this issue. I can leave that to him.

I would like to spend a little time telling you about various initiatives that are going on in ACS and how the agency is moving forward.

Catherine Conroy at Columbia University School of Social Work, who has also been working in this field a long time, talks about domestic violence as being the prism through which every child welfare case should be viewed. I think those of you in the room who have worked in this area for many years understand that domestic violence is prevalent in a large number of cases, that the only sensible approach to a child welfare case is looking at domestic violence first and having universal assessments on every case for domestic violence and appropriate intervention if domestic violence is uncovered.

When I came to the agency a couple of years ago, it was with the charge of focusing ACS attention on this issue.

That was an unrealistic hope. The agency is undertaking literally dozens of reform initiatives that Commissioner Scapetta has pledged to do and they are all very important initiatives. Domestic violence really was not part of the reform plan. It takes a lot of pushing to get the agency to address this in the way that this conference will make clear it needs to be addressed, which is very broadly as well as deeply. The agency has pledged to pay attention to this matter, and I think its willingness to hire a domestic violence coordinator was an indication of that.
This issue has been fermenting at for least ten years, since the *Hedda Nussbaum/Lisa Steinberg* case. At that point, the Interagency Task Force Against Domestic Violence started a Child Welfare Committee in an attempt to bring child welfare and domestic violence advocates to the same table. That committee continues to this day, meets monthly and has been a vibrant committee, taking on a role of both prodding ACS and doing advocacy.

That committee, which had several people from the child welfare administration on it, pushed very hard to get the agency thinking about this issue. Out of that came a pilot project in the Manhattan Field Office in 1993, where workers were trained to assess for domestic violence on every case. Columbia University School of Social Work evaluated the works of that pilot and discovered that if workers were trained to assess for domestic violence, they found it. It is laughable on the one hand, but on the other hand, it is the kind of thing where any researcher will tell you that you have to demonstrate what everybody knows to be true, so you say "the data supports this conclusion." We could then say that the data supported the conclusion.

Through Ruth Messinger's office, preventive services programs were given extra money to begin to focus on family violence. All of this was done in close collaboration with the Urban Justice Center, which has been working with the agency ever since 1993-1994, mostly on a pro bono basis, in order to help ACS figure out how to work with this.

At this point, we have twenty-seven preventive services programs that make up the Family Violence Prevention Program. These are preventive programs in all five boroughs that have a commitment to giving their workers expertise on domestic violence, both assessing for it in every new case and then knowing how to do effective safety planning and effective intervention when domestic violence is found — which it is, by the way, in a huge proportion of cases coming to preventive services.

With the Urban Justice Center, we will increase over this year those twenty-seven programs to add another thirty, so that fifty-seven preventive programs will have this expertise to work with families, with the hope being — and it already happens to some extent — that the Child Protective Services offices will know that there is an area with expertise where families can be referred, giv-

---

ing them more options than just removal into foster care. I think that is one important initiative that the agency is undertaking.

Additionally, trying to focus on the issue of abusive partner accountability, these same preventive programs have been trained to run groups for abusive partners, using the twenty-six week model that is recommended by the state office for the Prevention of Domestic Violence. John Aponti, who is familiar to many of you, has taught the group that is learning how to do this work and is now supervising the groups that are ongoing. Again, over the next year we hope to at least double, if not more, the number of groups that are underway for abusive partners within the child welfare system. What we are trying to do is create a system so that child protective workers, whose mission is to do a quick accounting and move the case along, will have places to forward the case that they can feel comfortable with and where the family will be getting the services they need.

Also, in the Division of Child Protection, great headway was made with the hiring in the Manhattan Field Office of a domestic violence specialist, named Cheryl Ann Myers. She now has no caseload. Her only mission in the Manhattan Field Office is to assist workers on domestic violence cases. So we are trying to move with the Massachusetts model that is used by Child Protective Services and bring it to our field offices here.

People should know that if they have problems with ACS, they are welcome to call me, although it may not be the most effective thing they can do because I am a one-person office. The ACS Office of Advocacy, the Parents' Rights Unit, will get involved in these cases, and so I urge you to remember that, in terms of a place you can tell your clients to call if they are having a problem with their Child Protective Services case.

Also, ACS is working on an initiative with the domestic violence police unit of the Police Department to form a joint response on a pilot basis between ACS and the Police Department in the Manhattan Field Office. I believe that is something that we are going to have to watch very carefully to make sure that it is done in a way that does not further re-victimize the victim.

Thank you.

MS. HALPERN: Thank you, Susan. It was very exciting to hear about the preventive services programs and the expansion. I wonder if there has been any data accumulated or an evaluation done at this time as to those cases that go through this preventive services domestic violence program — is there a different outcome?
Are they handled differently, and how many more children may remain at home than in a case that does not go through this process?

MS. URBAN: Because of a lack of funding, we do not have a good thorough evaluation of this project, but Columbia University School of Social Work had done some preliminary evaluations of 550 questionnaires filled out by the preventive programs. What those questionnaires primarily showed was that cases coming to Preventive Services, where they knew domestic violence was an issue, were twenty percent of their caseload. With the use of the questionnaire, that figure jumped to fifty percent of the caseload.

Furthermore, another interesting question was, “Are you afraid of your partner,” and “How afraid are you of your partner?” Some sixty-five percent of the respondents were either very afraid or somewhat afraid of their partner. That is an even more interesting figure.

But we do not have a good outcome measure. Hopefully, that is being developed with the recent funding of the Urban Justice Center.

MS. HALPERN: Thank you. I open the discussion now to Leah Hill, who teaches here at Fordham University School of Law, to talk about the work that she does in this area.

MS. HILL: I wanted to begin with a little history of how I came to this work because I think it is an important perspective that many of you might share. As Marlene said, I started out doing family law work in south Brooklyn, knew very little about family law, but was convinced by Florence Roberts to come and give it a shot.

I ended up working on primarily abuse and neglect cases, representing women who were mostly poor in Brooklyn Family Court, and also representing women in matrimonial proceedings who were also mostly poor. In most of the matrimonial actions, women were claiming physical cruelty, and it was amazing to see that the vast majority of those cases involved severe physical abuse.

What was similar about the two kinds of cases that we did was what I “perceived” as the hostility towards these women in the court system and from the service providers. I say perceived because at that time I think that a lot of what I was feeling was perception, although a lot of it was real.

It seemed that everyone, particularly in abuse and neglect cases, saw the clients as almost demonized. Case workers were hostile, family court judges seemed hostile, law guardians were hostile.
Nobody wanted to talk to me when I would come to court, and I really believed that my clients shared the goals of everyone else in terms of keeping the family together and helping their children.

In the proceeding, no one wanted to talk about the violence. When cases were settled, I remember there was a judge in Brooklyn who would insist that we minimize the violence and say “Do not give us all that stuff about he punched her in the eye and she had a black eye — just say ‘struck.’” It was amazing to me that this kind of quieting of violence was going on.

I would literally leave family court with a tremendous headache. I thought everybody was evil. “Just let’s bomb the place,” I would be thinking, because it felt so hostile.

After the first year, I realized that not everyone was hostile. I made a number of contacts throughout the system. There were law guardians who would talk to me. Charlie Hollander may not remember me, but I remember calling his office because I could never get anything from the case workers, and I was able to get results from him.

What struck me, as I stepped back from that experience, is that what I saw as the biggest problem, and what probably influenced my perception of hostility, was a lack of understanding about the roles that people played in the system. I did not understand what the social workers, who were evaluating my clients, were doing. I would look at their notes and think, “Oh my God, this is so hostile, this is so judgmental.” Sometimes it really was, but other times I did not understand what their roles were and I did not consider the overwhelming caseloads at the family court and the pressures that must have been on the judges to move cases along, nor the fact that the system really did not allow us to have the kind of trials we needed to have.

I think in some sense that is still the case. Particularly now when we have more and more women coming forward and filing claims, the system is really coming to a standstill in many ways.

I remember in some of the matrimonial actions where we had women with immediate needs for orders of protection, we would send them to 346 Broadway. I do not know what happened over there, but again the system was so fragmented, no one was talking to anyone, and it felt very hostile. I think that is less so today.

It is one of the reasons why I am doing the work that I am doing, but I think that where we need to move is to a system where people understand the different roles and where people talk to each other and work together to bring about results for clients.
When I think about the work that I am doing now in the Battered Women's Rights Clinic and in a group called the Family and Child Advocacy Center at Fordham University School of Law, which is an interdisciplinary program between the School of Social Work and the School of Law that is really dedicated to doing interdisciplinary research, I try to bring together different parts of the system to work towards real results for clients.

What stands out for me about the program this year is that for the first time, in addition to the Battered Women's Rights Clinic, there is also the Family and Child Protection Clinic, which is a clinic dedicated to representing women in abuse and neglect cases. Students who take those classes have an opportunity to work in the Battered Women's Clinic with clients who are victims of domestic violence, and in the Family and Child Protection Clinic with clients who are threatened with losing their families.

What we have begun to see is the overlap. For the first time this year, we had students from both of those clinics working on one case. This woman had more lawyers than anybody in the system. But it was an interesting process. We were coming at it from so many different ways, but we were able to see how to blend services in a way that addressed all the client's needs, and I think it was an interesting learning experience for students.

I have enjoyed seeing the students' reactions to the system, because a lot of them reacted in the same way that I did when I started to do this work. We have talked about that and we have tried to think about ways to break down that hostility and to bring different sides together to garner results.

It has not been easy, but I think that is really where we need to be looking. I have been to other parts of the country where I hear about innovative programs that are bringing these systems together. The child abuse and neglect system and the domestic violence system are bringing about results, and there is not the hostility that there is in New York, which to a large extent still does exist.

Again, a lot of it was perception, but a lot of it was reality, and a lot of it comes from a lack of understanding and a refusal to communicate. I see this center as one way for me to try and think about ways to bridge that gap between all the different systems.

MS. HALPERN: Thank you, Leah. Leah, I just want to ask you a question. At the center, I believe social work students work with law students on these topics.

MS. HILL: Yes.
MS. HALPERN: Have you found a tension between those two disciplines as they face the same client; and, if so, what has been a methodology or how have you thought about trying to resolve that so the client gets represented but also the social work students understand — that there is a meeting between the students in the two disciplines on how they are going to approach the issue?

MS. HILL: There are tensions, but I do not see that as a bad thing. Because I think that since we are trying to bring about a collaborative approach to these cases, the tensions get worked out. We talk about them and try to get them to understand why, for example, a social worker needs to do a psycho-social assessment and why so much history has to come from the client, such as “Who was your grandmother and what did she do?” We try to understand what that process is about.

The social work students, on the other hand, try to understand why lawyers are very protective about confidentiality, and why it is a little troubling to have someone asking a client about whether or not her mother was in a relationship that was abusive.

I think the tensions are good because we are learning. I am constantly learning. I have been doing this work for thirteen years, and I still feel very new. I believe it is working well.

MS. HALPERN: Now, I introduce someone who has one of the harder jobs here, as Susan indicated — Charlie Hollander. He is going to talk about ACS and, I presume, each person’s approach to the cases involving domestic violence, and how she or he addresses that and how the courts become involved.

MR. HOLLANDER: Thank you, Marlene. It is a pleasure to be here this morning.

Domestic violence obviously is a major issue and it is of great concern to ACS. Although, as Susan said, it was not addressed directly in the reform plan, I can assure you from my own personal conversations with Commissioner Scapetta going back to the very beginning of ACS, a little over three years ago, that this is a major concern at ACS.

One of the questions that we have had to deal with is: How do we address our primary mission of protecting children in a context of domestic violence without in fact appearing to be victimizing the victim again, which is not necessarily how I would describe it, but I believe many others would? This is not always that easy, as is obvious.

I want to say that, first of all, I have sat on the New York City Child Fatality Review Panel for about seven years, and in that time
there have been numerous child fatality cases where there has been domestic violence. I do not think that should be surprising to anybody here. It is a fact of life. This heightens ACS's concern that in a household where there is domestic violence, there is an increased risk of harm to a child.

Now, of course, there is clearly great risk of emotional harm to the child, but there is also, unfortunately, great risk of physical harm to a child. Our mission primarily is to protect children. We do not see our mission as removing children wholesale. I expect some of you may disagree with that, but that is not in fact what we see ourselves as primarily doing, nor is it what we want to do or like to do.

However, there are times when, in the judgment of the case work people at ACS, a removal is necessary and appropriate. That is always tested in court. The parent always has the right to go to court, even if we are lax in fulfilling our obligation to get to court.

The fact is, however, that the parent's obligation, if she cannot or will not — and I think many times it is cannot — protect herself is nevertheless to make it safe for her child. That does lead to what some people might certainly perceive as "victimizing the victim," which is removing the child. Removing the child in the psychological sense may not be the best thing either. The child almost certainly would want to be at home with its parent.

I think that there is a question here of services, of advocacy, and generally of an understanding of the problem that is really lacking at this point in the development of our understanding of domestic violence. It is easy for our case workers to remove a child. When I say "easy," I do not mean in a literal sense. I think it is an extremely difficult decision and a difficult action to take. But in terms of "What do you do to protect a child? Well, we'll remove the child." It is much harder to have faith that the primary custodial parent — and usually we are talking about a mother who is usually the victim of the domestic violence — would be able to enforce an order of protection. That is one of the real problems.

What should a court do, let alone ACS? Although the court has tools available to keep the child at home or return the child by issuing an order of protection or a temporary order of protection, it will not use them if there is little faith or belief that the parent will in fact enforce that? There is a real tension there. The children in these cases are usually very young and unable to protect themselves. So how do we deal with that?
I am not here to say that I have any magical answers. I will say that I like what Leah said a few minutes ago, about the collaborative effort that is required. Unfortunately, here in New York City and in other parts of New York State, we are a very litigious society. People stake out their positions and advocate them vigorously. As some of you know, we get sued very often on all types of things, policy matters, and it is sometimes difficult to even begin a dialogue. I am particularly pleased that I am part of this group this morning and that a dialogue, hopefully, can continue the process that Susan mentioned is ongoing.

I do not believe children should be removed unless it is absolutely necessary to protect the child. However, I am not a case worker on the scene conducting the investigation. The judge in the family court did not see the household or the conditions therein. The judge only knows what is given to him or her as evidence.

I would also like to add one last thing before turning the microphone back to Marlene. I am sorry that I missed Assemblyman Green's keynote address. ASFA, both in terms of the congressional and state mandate, is, first and foremost, the health and safety of the child. That may sound easy, but we all know that is extremely difficult. What is "health and safety of a child" except in some of the more obvious circumstances? Is she really protected better by removal from this household, or is it too wrenching for her emotionally to be separated from her parent such that we would be better off leaving her at home?

I cannot speak for ACS on that, but I will tell you personally that I would much prefer to see the child at home, if I felt comfortable that she would be safe.

We have had, unfortunately, too many cases where the parent has had an order of protection and has failed to enforce it. We have had even more difficult ones, where the parent has tried to enforce the order of protection and there has been such violence that the man has broken down the door, managed somehow to get in the home and harmed the parent. Sometimes the child gets in the middle of that struggle and is actually physically hurt.

We have the legislative requirement of putting the health and safety of the child first and foremost. In determining what that is, we would be aided by input from others who could provide us with perhaps alternative concepts and viewpoints, assist in service provision and recommend resources.

We are going to a system of neighborhood-based services. We are heading there rapidly. I think that this also holds great promise...
for addressing some of the domestic violence matters that we have raised.

With that, I will turn this back to Marlene. Again, I am grateful to be here and look forward to what emerges from the two-day conference.

MS. HALPERN: One question: The topic of this workshop was "When are battered women negligent mothers?" I am going to presume that in every case where there is domestic violence the intervention is to charge the woman with failure to protect and bring that case to court. I am curious whether or not the Office of Legal Affairs has standards in terms of how they evaluate a case that comes before it on whether or not the case rises to the level of the situation we are being faced with, where a petition has to be filed. If there are standards, what are they and how are they utilized? Specifically, how do you decide if this is a matter where there is still domestic violence where you should file a neglect or an abuse petition, or if this is one where there is domestic violence, but no filing is required?"

MR. HOLLANDER: For the last ten months, I have not been directly involved with the court units or cases. My responsibilities have shifted at the Division of Legal Services. However, I can tell you the approach I took when I was Deputy General Counsel for Child Protection, and I believe this approach is still in place.

The issue should be viewed as: "Is there an imminent risk to the child?" This inquiry is the only legal standard for removing the child and for the court to continue that removal via a remand — at least until there has been a finding of fact. The question, therefore, "Is there an imminent risk to the child?"

Of course, that assumes that we have not only removed the child, but now we have to file that petition or return the child promptly, all within the first twenty-four hours.

The way that I have always analyzed it, and would advise my staff when the question arose, was to determine whether the child would be safe at home with various interventions and what level of intervention was needed to keep the child safe in our opinion. Initially, it should be the minimal level of intervention that would keep the child safe, not the maximum. You do not want to gamble, as I said. The result of being wrong is much too serious, the consequences are much too grave.

However, not every instance requires the ultimate intervention of removing the child and filing the case.
The standards I applied were: "What's the history? Has the parent been cooperative in the past? Does the parent seem willing to work with whatever services are appropriate? Is there a history of abusive relationships? Will she start to work with somebody and then go back to a pattern?" We have to assess these issues.

Currently, this assessment is extremely difficult. There is often very little known about the individual and her history, and we are faced with a reality, assuming that the allegations in the report that led to the investigation and the removal were true. But we have to look at what we know, we have to look at what the history is in terms of the actions of the parent; what kind of support groups are available for the parent, such as her family, her friends, her neighbors; and is she willing, if necessary, to leave her home and go into a battered women's shelter, if admitted?

Sometimes the issue is, "Well, we'd like to do all these things, and she's amenable, but there's no service available right now." That is awful. But again, our concern has to be first and foremost the interests of the child.

However, keeping the child in care, going to court, filing a petition and saying that the mother was neglectful, would be an escalating series of responses to the presenting issue.

One other aspect of this issue is that we do not always have the child in care when we file a petition, nor do we want the child in care. On occasion, frankly, when we go into court without having removed the child, the judge may remand the child to us nevertheless, but that is a different issue.

A lot of people confuse neglect in a case with removal — but they are not synonymous. Sometimes we will go to court if we believe that the situation requires the intervention of a judge to provide that extra support or push that the parent needs in order to protect the child. That often works. It is not a very large percentage of our cases, but it is not unknown at all. It is, I think, a preferred route many times.

One would have make this analysis of the history and services available in making the judgment as to whether to remove, to file, and or take any other measures regarding the child.

MS. HALPERN: Thank you. I want to introduce Beth Harrow. Beth represents both women and men who have been charged with neglect or failure to protect.

MS. HARROW: Thank you. I think it is wonderful that we are talking about many of the changes that we would like to see hap-
pening, as well as the dialogue that we are attempting and the policy changes that we would like to see implemented.

From the perspective of a parents’ rights attorney for the last thirteen years, I do not see a whole lot that has changed for my clients, which consist largely of poor women of color who are brought before family court and charged with neglect and abuse. I am here today specifically to deal with the issue of domestic violence in Article 10 proceedings.¹²

Whenever I have spoken on this issue, and as long as I am doing this work, I do not want to see children hurt at home. I believe that children should be safe in their homes. So I am not someone who thinks that every parent is able to parent their children.

As a Legal Services attorney, because we do have discretion in the types of cases that we take, and are retained counsel and not assigned counsel, and because our resources are very limited, we take very few cases. We take cases where we really believe that the parent can safely parent their child and that, without our help and advocacy, that is not likely to happen.

Another thing that came to me in preparing for this and reading the Hypothetical¹³ is that I am glad that there is a coming together of domestic violence and child protective advocates. I have to say that I would be very careful as a domestic violence advocate about advising a woman who is involved with domestic violence in her home and young children to voluntarily go to family court for anything. Considering the times in which we are living and the implementation of ASFA in New York, I would be very careful. I would advise her. I would make sure that she understood exactly what she might be letting herself in for.

It is bad enough when family court and ACS get into your life involuntarily without subjecting yourself to them voluntarily when I think there are other ways to get the protection and the services. I was furious at the advocate in the Hypothetical who advised her to go to family court.

I looked at a number of my cases over the last few years to see if they stood out in some meaningful way. I decided to talk to you briefly about cases that come in at the very beginning, when there has just been a removal of the children, focusing on what should be done, what I should do and what I should look at. These are cases


¹³ See Hypothetical, infra app. A.
where the children have been out of the home for a period of time, where there has been a finding, and now I am trying to get the children home at an extension of placement possibly. Then, there are cases where the children are home after a case involving domestic violence and some of the problems that clients present us and the kind of vigilance that we have to maintain.

One of the worst cases I had occurred in 1992. I was alerted to this case from the Brooklyn District Attorney’s office. The woman was a Brooklyn resident. A child had been killed in the home. The child had been drowned. There had been severe domestic violence in the home. The woman’s teeth had been knocked out, her eye was swollen shut, and the six other children in the household had been removed. Both parents had been arrested. The District Attorney called us, saying that it looked like the case against the mother was going to be dropped, that she appeared to be a complete victim, absolutely powerless to defend against this man, and they felt that she needed representation in family court.

I took the case and decided to go forward with a 1028 proceeding. For the benefit of those who do not know, when a case is initially filed in family court, the parent has a right to ask for an immediate return of the child at a hearing that has to be granted within three days of the request. The standard at that hearing is imminent danger of the children. I decided to ask for that hearing, feeling that he was out of the house, that she could parent the children if services would be put into place. In retrospect, it was a terrible mistake although not fatal to the case; this was clearly what she wanted.

I should just back up slightly and say that when women come to me in this situation, the thing that they want more than anything is their children home. They do not want to know about the legal theories of failure to protect. They do not want to know about ASFA and the importance of safety in the home. They want their children back. Before I do anything as an attorney, I try to explain the proceeding, what we can do, the pros and cons of doing it, and then she has to tell me, “Do you want to do this?”

So we went ahead with the Article 10 proceeding. In retrospect, it was a mistake. She did not look like she could take care of a house plant, let alone parent herself. She was a mess.

Very shortly after the case worker’s testimony, we decided to waive the rest of the 1028 and we put in a 722(c) motion, which is

---

15. See N.Y. Cty. Law, ch. 11, § 722(c).
a request for the court to provide funds for a social worker and funds for a battered women's expert. We also tried to get the children immediately placed with a relative, and that was the best thing we could do at the time. We did get the children to a relative and we are able to move the woman out of the house and near the relative so that she could at least see the children frequently.

With the money for a social worker, we were able to get someone who could get her into a heavy-duty counseling program and begin putting the services together that she would need to safely parent the children.

In terms of the battered women's expert, this came out almost on the heels of Judge Schechter's decision in *Glenn G.*[^16^] I knew what we would be up against, but I felt that she wanted to fight this and that the only way we could do it would be with an expert in domestic violence. I got names from the domestic violence community, and the judge in that case granted us very liberal funding for this expert. This was Dr. Julie Blackman, who had done much of the Battered Women's Syndrome work and had testified in criminal court cases. Dr. Blackman came, she met with our client, interviewed her and wrote a report for the court. The report was that she was a battered woman and that she was helpless to defend against this man.

I had great reservations about going ahead with the fact finding based on this report mostly because I did not think I was going to get anywhere, that we would get the finding. This kind of dovetailed with ACS coming up with a plan for us where she would admit to improper supervision and the children would be returned home very quickly.

That is a terrible thing to be faced with. As a Legal Services attorney, I was trained that making an admission was the easy way out, that most of the time it probably was good to go to trial. In this case, after discussing it with my client, we made the admission. The end result is that the children did come home quickly.

One of the broader points to make here is that in many of these cases, as in any case where you are litigating, there are issues arising in court, in your client's life, in the social services arena that you refer to in your conversations with the client. I always say that I think being a good attorney is not only being able to do a good cross-examination or draft a good motion, but also being able to negotiate, to mediate, to talk with your adversaries and to be able

to say, "Look, what do you need to do to send these children home? What will make the ACS or JRD attorney feel safe? What do we need to do to get these children home?"

Another case that also arises at the beginning stage is a case where children had been home on supervision from a previous neglect proceeding — three children: six-year-old twins and a thirteen-year-old girl. The twins began reporting to their therapist that they were being hit at home by their father, and mommy and daddy fought. ACS came back in on a new neglect action and removed the twin children.

We went forward with a 1028 hearing because my client claimed there was no domestic violence in the house, she was not a battered woman and she could keep him under control. Again, it did not work out very well.

At the end of the case worker's testimony, the judge took us into chambers and said, "Counselor, I am not returning these children, and unless you get your client and this thirteen-year-old at home with her into shelter by the end of the day today, I am removing that child from the household as well." I said, "Judge, you cannot do that. You do not have jurisdiction over this child. She's not a subject child." He replied, "Counselor, this is what I am doing."

At the lunch break I had to find her a place to stay although this woman claimed that she was not a victim of domestic violence. Because we work closely with a number of community groups, we were able to get her a bed in a safe house where she was able to stay with this child. Then she did acknowledge the domestic violence and we sent her to the Emergency Assistance Unit, and she and the child are now living in a Tier Two shelter.

The more problematic ones are cases where the children have been out of the home for a period of time, and not only was domestic violence an initiating factor, but perhaps there also was drug abuse or emotional problems. Very often, the woman has dealt with the latter issue. She has overcome the drug problem; she has letters from her program; and she has been sober for one or two years. What keeps coming up at every extension of placement, year after year, is, "But is she really going to be able to protect the children? Well, she was involved in a violent situation before. How do we know she's going to be able to protect the children now?"

The things that we do involve putting in motions for 722(c) funds to get a social worker to work with us. Often, the mother is in a follow-up rehab program, in counseling or in some sort of family
program where we can get support. We look for witnesses or letters to testify as to her growth, her insight into the problems, and even going so far as asking for a plan that includes surprise visits by the social worker or the ACS case worker.

In cases where we know where the man is when he is not in the house, we document where he lives. I have brought in letters that she has brought to Public Assistance asking to get him off the budget, letters that she has written to the Housing Authority where she has asked to get him off the lease.

In a case that I have been working on for a very long time, we have two children at home and two others, who are the youngest, coming home on weekend visitation with a plan for trial discharge in the summer. The extension of placement was last week. ACS is onboard with this plan and the children's attorney, who is not JRD, because JRD has been conflicted off the case, says, "Well, I do not know," and "I do not know what we are going to do. I mean, everyone is onboard. I imagine we will have a hearing. I think we will prevail."

This is a follow up to what Leah said earlier, and I do not know if it is because we come from the same background that we see this the same way. It is incredible to me the difference between the way a woman is perceived when she comes in filing for an order of protection or for custody with domestic violence in the home and how she is treated by all the players in the system, as compared to when she comes in as a respondent in a child protective proceeding. As Leah said, the disdain, this feeling that she will never be able to parent, even acknowledging, "Yes, she has completed the drug program and yes, she has dealt with all of the other issues," but this constant "How do we know, how do we really know?"

I would love to see some of this goodwill and input of services and excessive monitoring put into place that would make everyone feel safe. I would love to see a part similar to the model parts that are now in the family court and the Drug Treatment Court in Manhattan where, with this heavy monitoring and heavy supervision, children are coming home more quickly. My perception is that it is because everyone is feeling a little bit safer. They are seeing the mother every two weeks in court; she is really becoming a human being to them. The services and the clinicians that are in place working with her are talking to everybody. These are real human beings.

When someone says, "Well, they removed the children," it is not like just a phrase in the wind. Imagine someone coming into your
home, knocking on your door, with the authority of the police, and saying, "We are removing your children." Then you would have to deal with it — deal with the system.

MS. HALPERN: As an attorney who represents parents in family court, how would you approach a situation where a client came into your door with a domestic violence issue? It was obvious that she needed the assistance of the court, but you also know that by having her go to court you would expose her in certain ways because now she is known? That is the problem. She is now known and there might be some intervention more than she wants or you want. So how would you advise her and what would you do in that situation?

MS. HARROW: I have to say in all honesty I, as an attorney doing this work, would almost always say, "Do not go to family court. You can if you want to, though."

Again, I think that many of the things that she would be seeking, in terms of an order of protection from criminal court, would be possible. If she has the children and a safe place to be with the child, such as a relative or access to community-based organizations that we would try to get her connected to, which would get her into safe housing, if she did not have it, then we would work with her.

MS. HODES: You cannot always get housing without an order of protection.

MS. HILL: One of the things I was going to say, Beth, and I think this is in part what you are saying, is that you try to fix the case. You try to fix the case before the client goes into court to answer all of those concerns that are going to come up. Can she protect the child? One thing we realize as advocates is that the order of protection, while it works in a lot of cases, really does not make people safe necessarily.

MS. HARROW: Oh, yes. As one advocate said to me, it is not a bulletproof vest. An order of protection is a piece of paper.

MS. HILL: Exactly. You could jump through a million hoops before you send this client into court, and you still cannot guarantee the safety of anybody in that situation. But I think we do what we can to try, especially if clients insist on getting an order of protection or need it for other reasons. We do what we can to fix the case before we end up going into court to see the family court judge.

I think also, as advocates, we are so desperate to protect our clients that we do sometimes push the order of protection, the in-
tervention, as the answer, and often the realization is that it really is not the solution.

MR. HOLLANDER: When I was speaking before I mentioned how, in analyzing these cases, I would certainly look at the history and what had happened in the past as I believe most case workers would as well. One of the things that would be very important is whether the mother made any attempts to take any action to protect herself and the child. And so, Beth, in this instance, if it seemed that she should have sought an order of protection and had not, if in fact there was ultimately a child protective investigation, that would be a factor that would weigh, in a sense, against keeping the children with her, at least at this point in time, or, even thinking whether she would enforce an order of protection if she did not seek one at an earlier point in time.

MS. HARROW: I know. But, Charlie, you and I both know that while this investigation is ongoing, ACS has taken the child out of the home. Before they file, they will do this investigation, but the child is already removed.

MS. HALPERN: What we have illustrated here is a double-edged sword or bind that many of our clients find themselves in between these two systems.

At this point, as always happens before we go before the judge, the law guardian gets to speak.

MS. STOCK: My experience has been that where there is domestic violence there are also a number of other problems occurring in the family, including child abuse, substance abuse, children not receiving medical care, children not attending school or a lack of permanent housing.

One particular case I had involved a family with six children ranging in age from eight to fourteen years old. The petition alleged domestic violence, physical and sexual abuse against the children, failure to protect, and educational and medical neglect. There were two anonymous 2221s\textsuperscript{17} called in and investigated six and eight months prior to the petition being filed. They were both unfounded. The parents and children denied anything was wrong.

Months prior to the petition being filed, the three youngest children were seen collecting empty soda cans from the garbage bins around Columbia University. Undergraduate students living in the dorms began noticing the children late at night. At first, there was no communication between the students and the children. As sev-

\textsuperscript{17} A 2221 is a report from the Police Department to a case worker indicating potential abuse.
eral months passed, the students began speaking to them and es-
established a friendship. They would allow the children to come into
the fraternity house to take a break from collecting cans. The chil-
dren would watch television and talk.

They said their father used crack. He made them collect empty
cans so they could give him money at the end of the day. Each
child had a quota, and they were beaten or sent out again if they
did not meet it. Any possessions they had of any value were taken
by the father and sold. The children would go to sleep at night, and
in the morning the stove was gone, another time the refrigerator.
One night, two children went to sleep in their beds and woke up
the next morning on the floor — the father had sold their beds.

The students began feeding the children and giving them money
so that they would not have to collect the cans. The children ap-
peared thin, unkempt and never went to school. Not knowing what
to do, the students went to Columbia School of Social Work and
asked a professor for advice. One of the students then called in a
report to the State Central Registry.

The police and ACS investigated. Their investigation revealed
all the children except the fourteen-year-old girl were beaten. One
was burned, and two had infections from cuts that went untreated.
The children would go for days without eating, and if the mother
was caught sneaking food to them, she was beaten. The father was
making two of the children watch porno movies, and the investiga-
tor believed that the father was prostituting the fourteen-year-old
and forcing her to steal for him.

The father was arrested and released pending his criminal trial.
Attempts to get the father out of the house or move the mother
and children into a shelter were unavailing. She was terrified of
him, emotionally dependent on him and would not leave him. She
would not get an order of protection nor cooperate with ACS. The
children were removed.

Attempts were made to normalize their lives. They were en-
rolled in school and participated in after-school programs, their
medical needs were met, and they received therapy to address their
abuse and the domestic violence. They had supervised visits with
their parents.

The mother eventually took a plea and there was an inquest
against the father. The judge made a finding and entered a final
order of protection against the father. The children were placed
for twelve months.
As it turned out, the family was known to Massachusetts Department of Social Services and there were pending criminal charges and an outstanding warrant for the father. During the family court case, the father vanished. He later turned up in the Massachusetts prison.

At the first extension of placement, the mother’s situation greatly improved. She had entered therapy to address the domestic violence, she completed parenting skills courses, obtained housing, cooperated with ACS and was visiting her children on a regular basis. The children were discharged to her with ACS supervision for twelve months. That was in 1995, and they are doing well.

The factors I considered in determining whether to return the children were: my clients’ desires to return home; the mother’s participation in domestic violence counseling and other services; her willingness to enforce the order of protection; her cooperation with ACS; her willingness to cooperate with services for her children; and, whether she had a source of income and suitable housing.

If the father had been in the picture, I would have considered whether he was willing to enter into and complete domestic counseling, and whether he would abide by the conditions of an order of protection. If he refused to cooperate, I would have insisted that he be excluded from the home.

Many battered women lack the resources to escape violent family situations and adequately feed, clothe and house themselves and their children on their own. Most of the families we see in family court are poor, and poor women are less able to relocate; hire lawyers; obtain access to health care; obtain skills and training to become employable; or obtain affordable day care, counseling and other services or access support systems.

If we are to protect children, we must also protect their mothers from domestic violence. That means providing them with the resources to assist them in planning and implementing a safe exit for themselves and their children.

Domestic violence experts agree that the most dangerous time for a woman is at the point of separation or at the time when the decision is made. The news media recently reported that a Manhattan investment manager was hospitalized with a broken nose and jaw, receiving more than one hundred stitches after she was attacked by her husband with a barbell while she slept. Three of
her six children were home at the time. It was reported that her husband became enraged when she asked him for a divorce.

Domestic violence has a profound effect on the physical and emotional well-being of children. Every lawyer, social worker and paralegal in my office who interviews a child that has witnessed his father pummeling his mother, sustained broken bones at the hands of a parent or been the victim of sexual abuse can attest to that fact.

We see that children's relationships with their abusive parent is conflicted. Sometimes, children will tell you they still love their parent, while also expressing feelings of anger, disappointment, resentment, fear and pain.

Children who witness domestic violence experience a great deal of stress, which manifests itself in a variety of ways, including insomnia, bed wetting, headaches, stomach aches, eating disorders, asthma, substance abuse, depression, suicidal notions, truancy, low self-esteem and antisocial behavior. One of the most direct consequences of witnessing domestic violence may be the attitude a child develops concerning the use of violence in conflict resolution. Studies suggest that children's exposure to violence may generate attitudes justifying their own violence. Education, training and community outreach are critical. Recently, city funding was made available for a pilot project in five New York City public schools to create a comprehensive program addressing domestic violence. A domestic violence coordinator was at each of the five sites every day to oversee the program. There was a counseling component dealing with domestic violence, which included crisis intervention, outreach to the community and training for school personnel.

Two weeks ago, I was in Washington, D.C. at the American Bar Association's Ninth Annual Conference on Children and the Law. One of the featured speakers was Dr. David Satcher, the Surgeon General. He told a story about a star NCAA college basketball player who was drafted by the Chicago Bulls. This young man could not believe that he would be playing basketball with the great Michael Jordan. The first night of his professional career, the coach put him into the game with about twenty seconds remaining. He was fouled, went to the line and scored one point. Michael Jordan scored sixty points that night. After the game, a reporter interviewed the rookie and asked him what he would remember about that night. He looked the reporter in the eye and said he would remember that on this night he and Michael Jordan combined to score sixty-one points.
Domestic violence is a major problem in our society. Management of this problem requires a collaborative effort. Regardless of the degree of contribution of the members of the team, all are extremely important.

MS. HALPERN: Barbara, I know the Juvenile Rights Division has social workers on staff, and they are actually quite fortunate in having that multidisciplinary model. Are these the types of cases you utilize social workers on, and, if you do, what type of assessment do they do in this situation? Particularly, do they consider assisting the mother and making the mother safe as part and parcel of making the child safe?

MS. STOCK: Yes, we do. We do have social workers. In fact, I left out part of the story in my case because it actually was more involved. The respondent father and mother lived in Massachusetts. This man and woman lived with another woman in the same household, and the respondent father and this other woman had a child. Of the six children, one of them was the son of the woman in Massachusetts. When we found out about it, we contacted Massachusetts and we had the records sent here. A social worker worked with me on this case. Together, we went up to Massachusetts and spoke to the Department of Social Services. We assessed the mother's situation up there, and eventually we were able to return that child to the mother in Massachusetts.

We look at the safety factors for the child. There is an assessment. Sometimes there is a conflict between the social worker and the lawyer as to what should happen in the case. But for the most part, we work together and we assess the criteria that I set out before as to what we look for. Those are the criteria that we use.

MS. HALPERN: Thank you. Finally, we have Judge Elkins, who is hopefully going to address the viewpoint from the judiciary on this issue, which is eventually what it all comes down to sometimes.

JUDGE ELKINS: I have the easy role of reconciling all these different points of view.

If you do not come away with anything else about the law in this area, I think it is important to know that there is no per se rule. I think that is what Lonell J. stands for.18 Lonell J. was a case that was appealed from the Bronx Family Court, where the judge had said that, absent expert testimony, you could not find that there

---

was neglect as a result of domestic violence because you could not
determine the impact on the children.

The Appellate Division disagreed. In that particular case, the
child was seven months of age and obviously could not be inter-
viewed. There was a case worker who did testify that the child had
psychosomatic illnesses, vomiting, and was dirty and disheveled
and essentially not cared for. The Appellate Court was prepared
to attribute the child's condition in part to the domestic violence as
a causal matter, relying on the findings of the legislature in amend-
ing section 240 of the Domestic Relations Law, which states that
domestic violence must be considered as a factor in custody cases,
if not a presumption, in favor of granting custody to the non-abu-
sive parent.19

I do think it would be helpful for those of you who are perhaps
not as familiar with the literature as some of the panelists, to look
at the legislative findings in the Amendment to section 240 of the
Domestic Relations Law, which became effective as of May 1996
and may be found in the Laws of 1996, Chapter 85.20 The legisla-
tive findings are also cited by the Appellate Division in the Lonell
J. case.21

But Lonell J. does not stand, in my opinion, for the proposition
that victims of domestic violence, are as a matter of law, neglectful.
It does not stand for that proposition.

I am a little concerned about a subsequent case in the First De-
partment that said severe domestic violence is neglect as a matter
of common sense.22 That is true, but I think you need a little more
analysis.

That is why I say there are no per se rules. You have to look at
the facts of every case. As Charlie Hollander has said, among the
things that you have to consider are: Has there been domestic vio-
lence in the family for a long time? What efforts, if any, has the
mother made — usually, of course, it is the mother who is the vic-
tim — to get help or to protect the children?

As a form of benchmark case, I refer to a Third Department
case, In re Melissa U.23 I think it is illustrative of how the family
court approaches these cases.

Melissa U. was a case where the appellate court had reversed the family court’s dismissal of a neglect petition against the respondent mother. After her paramour broke into her home in the middle of the night and severely beat and terrorized her in front of her two daughters, whom he threatened repeatedly throughout this ordeal, the respondent mother escaped to a neighbor with her daughters and called the police. The paramour was arrested and charged.24

Now, if that were as far as it went, I think that the mother did everything that she could be expected to do under the statute, which measures objectively whether a reasonable and prudent parent would have taken those same steps to protect the child from harm or from the imminent danger of harm.25 What else could she have done? She acted appropriately. The appellate court agreed with that. The appellate court found that the respondent acted appropriately under the circumstances and could not be faulted for failing to anticipate her paramour’s violent assault, even though she knew of his violent tendencies.26 The Appellate Court also observed that the respondent had separated from her assailant, did not have warning of his assault and obtained help as soon as possible.27

So why did they reverse the trial court? Because they found that the respondent mother had neglected her daughters when she allowed her paramour to move into her home upon his release from jail three months later, despite her knowledge that her daughters were terrified of him and still emotionally traumatized by the assault.28 The children were temporarily removed from her custody. This did not occur in the City of New York.

The respondent subsequently married her assailant and petitioned the family court for custody of the children.29 The facts established, according to the family court, that the respondent was unwilling to protect her children from the threat presented by her paramour and that she neglected the children by allowing him to return to the home, concluding that, viewed objectively, a reason-

24. See id. at 959.
26. See Melissa U., 538 N.Y.S.2d at 959.
27. See id.
28. See id. at 959-60.
29. See id. at 959.
able and prudent parent would not have so acted under the circumstances then existing.30

I do not have a problem with that result, but these cases are among the most difficult because, as in every child protective case, there are twin evils. On the one hand, there is the problem of the neglect, whatever it may be — in this particular instance, the abuse of the mother and the impact on the children. Everybody here has already said, and the legislative findings support, that the impact is negative and the association between domestic violence and child abuse is very high, physical abuse of children, as well as of course the harmful emotional impact on the children of witnessing the abuse, and the developmental problems in a home that is disrupted by domestic violence, even if the children are not necessarily witnesses.

On the other hand, there is the separation of the mother and the child. It seems to me that in that second step of the analysis that we could take better care.

Assemblyman Green referred to the Awake program in the Children's Hospital in Boston. When children are brought in on abuse investigations, their mothers are interviewed to determine if there is domestic violence in the home. Then, a program is put in place that addresses the abuse of the children and the mother together, leaving the child with the mother and working with them together in counseling, provided of course that they are protected from the batterer.

I do not think that anyone would dispute that if you could achieve that result, that the removal and the separation of the mother and child is not necessary. It seems to me the question is where do you get the services.

Let me suggest that if anything comes out of this conference, it could be that the needs of the child and the mother need not be in conflict, that advocates for battered women could work together with child protective agencies to allow the mother and the child to remain together by providing more shelter, counseling, monitoring the home itself to make sure that the children are protected and by providing the battered partner access to resources in the community so that she can reach out in the event that the order of protection is not immediately seen to work. Even the police department, if they have an initiative, can work on the precinct level with the domestic violence officers, in conjunction with ACS or Child Pro-

30. See id. at 960.
tective Services. Perhaps they should coordinate their efforts so that a mother of children who herself has been abused could have an immediate means of reaching out to the police department in the event that the abuser threatened her again.

I know that the criminal courts have a program where there is a bracelet, containing a button that you can push to get an immediate response. Let me suggest that there are ways in which advocates on both sides can work together to allow the children to remain in the home.

Finally, at every step of a child protective proceeding, the statute clearly states that if the children can remain in the home under an order of protection the court is obligated to issue that order of protection. Generally, the question devolves down to whether the victim of the abuse will enforce the order of protection. That is often what it comes down to. That is the distinction that was relied upon by the appellate court in the Melissa U. case.

I would also like to see more consistency between the law of child protection and custody. When a woman is brought to court under an Article 10 petition, often we treat her differently than we would if she were a respondent, or even a petitioner, in a custody case. Invariably, in the custody cases, and as the legislation that I pointed out to you makes clear, we prefer the non-abusive parent as the custodian. Although there is not a presumption, the abusers have the burden of demonstrating, in light of their abusiveness, that it is in the child’s best interest to be in their care.

I do not know why we should not at an agency level — and in the course of a child protective proceeding — take the same approach. Of course, we should leave the child in the care and the custody of the non-abusive parent, if at all possible.

Also, I think that child protection should not be a disincentive to getting help in domestic violence cases. On the other hand, domestic violence should not be an excuse for failure to protect, which is what I think Glenn G. is about. I question those people who would bring the Battered Women’s Syndrome, which was developed under the law of justification in criminal cases, wholesale into child protective cases. It applies the People v. Goetz standard of justification and says that in addition to the objective component, you look at whether the person acted reasonably through the spectrum of what their perceptions were.

Of course, if you were subject to a history of severe violence and you know that when you place a cup on the edge of a table just a certain way you subject yourself to a beating, you may act preemptively to protect yourself. That, in effect, is the Battered Women's Syndrome in the criminal context. Obviously, that person should, if they are justified, be relieved of criminal liability.

I also want to point out to you that in the recent amendment to section 240 of the Domestic Relations Law, which prevents placing custody in or providing visitation to one parent who has murdered the other, there is an affirmative defense for a victim of domestic violence. If you fall within the justification definition, there is an exception to the statute.

It does not necessarily follow, however, that the defense is going to serve to protect the child. I had the privilege of clerking for Harold Rothwax when he presided over the case of Joel Steinberg,32 and I saw Hedda Nussbaum, who was not able to care for the surviving child. She simply was not able. She looked like a prisoner of war who had been tortured and she was psychologically destroyed. She was in no shape, however sympathetic, to care for a child. Necessarily, someone had to intervene to protect the surviving child in her custody.

Having said that, of course, the objective is to return the child to the parent by giving services and counseling. Obviously, we do not intend to separate the child from the parent any longer than necessary. But the reality is that in the most severe cases, the victims of domestic violence are not capable of caring for the children.

However, let me go back to where I began, there is no per se rule. That does not mean that in every case where there is domestic violence in the home that the mother should be deemed to be a neglectful parent, and if the mother has taken the steps that, viewed objectively, a reasonable and prudent person who was the victim of such violence would have taken, then in my opinion we should work with the mother to continue caring for her children. I would imagine that the Child Protective Services would view it the same way, and if they did not, I would try to correct that when it came into my courtroom.

MS. HALPERN: I have two questions. I know you are now sitting in the Permanency Part, but when you were sitting in a regular intake part in family court and petitioners would come before you on orders of protection, were there certain fact patterns or

types of cases that came before you that you felt should be referred for a child protective investigation, and what were those facts?

As a follow-up, could you address one of the things that has bothered me over the last few years, which is the apparent equalization of blame between the batterer and the victim? When I read *Lonell J.*, one of my concerns was the fact that this was a child who was exposed to domestic violence. It was the exposure to the violence, not a physically abusive act on the child.

What I start to think concerning the exposure to domestic violence — or, perhaps, the exposure to an unhealthy home environment that might cause damage — is where do we draw the line where state intervention comes into those situations? From my perspective, that is very troubling, knowing that children must be protected, but also wondering when does the state come into individual’s home, evaluates the situation and decides whether or not the child is being harmed in some way?

JUDGE ELKINS: First of all, I think there is no question that violence in the home is harmful to children generally, whatever the level of violence. But that does not necessarily mean that in every case where you have pushing, emotional or verbal abuse that Child Protective Services should intervene. Obviously, in many divorce cases you have similar situations and the matters are referred for counseling. There is a spectrum.

If I see a person who comes into my courtroom and seeks an order of protection and I issue an order of exclusion, generally I will not order a Child Protective investigation because the woman is there doing what she needs to be doing; she is seeking protection. So generally, I will not do that.

Sometimes, however, I do order an investigation if I have the sense that there is someone there, usually a man, who is trying preemptively to get an order of protection in a situation where it appears that that person may be perpetrating the abuse. One way I might know that is checking the domestic violence registry and seeing whether that person is a defendant in a criminal case. I will probably order a Child Protective investigation then.

Or sometimes, if I have a person, generally a woman, in front of me who seeks a limited order on facts that appear to present really serious allegations and a history of violence, then I may order a Child Protective investigation because I question whether the woman, under the circumstances, is able or willing to protect the child, even though I understand that the most dangerous point is separation, and that maybe she wants to remain in the home to
protect the children. There is no guarantee, unfortunately, that she will be effective in that regard, and it may be that if she is not able to reach out, then perhaps we have to intervene. So in those circumstances I would probably also order an investigation.

MS. HALPERN: Thank you. Before we move on to the Hypothetical,33 I think maybe we should have a little discussion for the audience.

AUDIENCE: Listening this morning, it has become quite clear that it is not only a complicated problem, but it raises complexities in New York City's — or any city, but New York in particular — delivery of services, in that a large number of different systems are involved in one way or another, or should be involved, in the issue. You have ACS, some Public Assistance aspect, perhaps the City Housing Authority or another city agency involved in Section 8 housing or other housing, the Department of Homeless Services, the Emergency Assistance Unit, the New York City Police Department, the Legal Aid Society and Legal Services, all the social services agencies that may or may not be involved in providing preventive or other kinds of services and, finally, the courts, such as family court and criminal court.

The question is whether any model in a smaller place could be examined? Is there any model anywhere where somebody has put together a project that pulls together, where there is some coordination of all of these units, so that there is a design for how you bring them all to bear in cases involving abuse and domestic violence?

MS. STOCK: When I was in Washington, D.C. at the conference two weeks ago, I actually got a book. I have not had time to really go through it, but I think it is a wonderful resource. It is called Family Violence: Emerging Programs for Battered Mothers and Their Children.34 It looks at model programs throughout the country, like the Massachusetts program and the NDA Gold Models, which seem to be working well. I cannot talk right now about the programs with you, but I can tell you that you can get the book from the National Council of Juvenile and family court Judges.35

MS. HALPERN: Barbara, I am not aware of a court model that brings the two together. I was curious if you knew of one. I know

33. See Hypothetical, infra app. A.
35. To order the book, please write to P.O. Box 8970, Reno, Nevada 89507; phone number (775) 784-6012. The initial copy is free; each additional copy is $15.
there are certain models of investigation and assessment where child protective workers work alongside battered women's advocates.

MS. STOCK: I think Massachusetts has something in their hospital where they work together called the Awake program.

MS. HODES: There is also a program in Quincy, Massachusetts that does a great deal of coordination between law enforcement and courts, as well as various types of social service responses.

MS. URBAN: The Edna McConnaugh Clark Foundation is working in, I believe, five or six sites across the country on specifically the child protective issue as it concerns domestic violence. There are a few things beginning to happen across the country that attempt to combine all of these factors. But we are still at the beginning of those collaborations.

MS. HODES: Also, in the Failure to Protect Working Group's paper, which Susan mentioned earlier, we do talk about model programs in Massachusetts; Jacksonville, Florida; and Orange, Warren and Washington counties here in New York that have coordinated child protective and domestic violence responses.

MS. HALPERN: Beth reminded me that in New York City we have the Drug Treatment Court, which is a model of how the family court approaches a specific issue. I know Monica Drinane from Juvenile Rights and I have spoken about how it would be wonderful if we started thinking about a way the court could be structured in a multidisciplinary way that could address these issues as well. Of course, everyone is looking for funding.

AUDIENCE: What I think distresses me most about the model that we have is that nothing encourages batterers more than seeing their victims lose. Whether she loses by losing custody to him — and I will say the system has improved and is correcting this, by and large — or to the state. What I see is that we have shifted from one model to the other model in a way that makes the batterers think they have an even stronger trump card they can use to keep her oppressed and downtrodden. This is what really, really upsets me. Does anyone have any thoughts on this?

MS. HILL: What stood out for me after all of us gave our presentations was the absence of any discussion, except that Catherine raised this issue, of not only holding men accountable but dealing with the issues that they face as batterers. We heard comments about one case where the man dropped out of the picture, but we kept hearing about what the respondent mother needed to do and what kind of services would address her needs. As a do-
mestic violence advocate, my instinct is to say, “Well, we can send them to jail.” But we all know that sending the batterer to jail is not necessarily an answer. I have a lot of clients who have had their partner arrested. None of them have gone to jail, and I do not know if they had gone to jail that it would have addressed any needs that they may have had or would have addressed the violence that they were perpetrating.

I do not think we even have a dialogue about what to do about the men. They are not in family court. They walk away. Sometimes they are there, generally, we have not been able to figure out a way to bring them into the system in a way that really addresses the issues of violence — why men are violent and how to stop them from being violent — other than the criminal justice system. But I think now we have to think about what to do since we cannot fill the jails with all these men.

We are not talking about severe violence in all the cases. That is the other problem, as I see it, that we look at the absolute. Although we talked about the lack of a per se rule, we look at severe violence and then define the strategies for addressing service needs by looking at that as the only way that these cases come to us. They come in many different ways. There are many different patterns of violence. A lot of it is emotional abuse. We do not have a way of addressing what to do with men. We have batterers’ treatment, but that is just the beginning.

MS. HARROW: In response to what you said, it is true, and there are situations where we have to address the men. For example, there was a situation where an ACD had been worked out, the woman had the children at home, and one of the conditions of the ACD is to enforce an order of protection against the perpetrator of sexual abuse against one of her other children. He stalked her in her neighborhood, the neighborhood of the office and, recently, at a doctor’s appointment with the kids. She said, “Get away from me, get away from me.” He says, “Do not call the police because if you do, I will see that these kids are taken from you and you will never see them.” She says, “Get away from me, get away from me.” She runs to our office in the neighborhood. He follows her. We get him out, get her calmed, down, then I ask her, “What do you want to do?” She responded, “I do not want to go to the police. I do not want you to tell the ACS attorney. I do not want you to tell the JRD attorney. I do not want to go in on a violation of the order of protection.” I said, “Well, what do you want to do?” She said, “Please just leave it alone.”
We ended up agreeing that I would contact his attorney from a sex abuse case still continuing in family court. She hoped the attorney would contact his client and at least talk to him. But she was petrified to do anything that would bring her back to the attention of the system again.

On the other hand, your point is well taken, and I find this difficult to acknowledge, but it is true. Not all of these men are batterers forever, and they are the fathers of the children in these women’s lives. There are so many complex situations in the communities in which we work. Very often, we have had situations where the children are coming home to the mother on a visit from foster care with a plan for return and the father knows it, and even though he has been ordered away from them, he will be around the neighborhood just to see his kids.

What is she supposed to do? Unfortunately, she is damned if she does and damned if she does not. We have had a situation where she did nothing — she did not allow him in or allow him to have contact, but she did not report him as being in the neighborhood. And she has gotten into trouble for that.

They are very difficult issues, and I do not know that they are being addressed.

MS. HODES: I am glad that Beth said that these are the fathers. We are not just talking about batterers. We are talking about batterers who are the fathers of children or who are father figures for children. Before we can do anything about fathers who are abusers, we need to challenge the language that we are using when we talk about this issue.

I would like to do that a little bit, with all due respect, by challenging some of the phrases and sentences I have heard here to describe the issue. It is not a matter of semantics, it is a matter of analysis and developing a deeper analysis about what we mean.

I think some of that is going to force us to look at our expectations of mothers and fathers in our culture and society. We have unrealistically high expectations of mothers. We have devastatingly low expectations of fathers. We hear that it is the mother’s obligation to make the environment safe for children. We never hear that it is the abuser’s or the father’s obligation to ensure a safe environment for children.

We hear that it is up to the mother to enforce the order of protection. I thought that mothers obtained orders of protection, that abusers violate them, and that courts and law enforcers enforce orders of protection.
I am not trying to nit-pick. I become very confused about how to communicate with the women I work with about what they are facing out there when I am not speaking the same language as the other people in the system that they are going to encounter. I think that we do have to talk about language.

One of the other things that confuses me is related to mother's attempts to protect. Well, what are we talking about? I look at a mother who has done an enormous list of things that I consider protective, but they do not involve leaving; or getting an order of protection; or even going into a shelter, for a whole host of reasons.

I think that we need to look at some of our cultural meanings — our cultural expectations, our definitions — so that as we talk about what to do, we see it from a perspective that has a deeper analysis.

I believe that ACS is deeply earnest and sincere about their mission of protecting children, and I have worked closely with ACS providers, from line workers to supervisors up through commissioners. I have never felt that they did not take that mission seriously. But I think their analysis is shallow and it needs to be deepened.

One other point raised today concerned the mother’s history, her psychology, her patterns and her actions. I did not hear about the abuser’s history, psychology, patterns and actions. Why is it that these aspects of her life fall under scrutiny and not his, or not both of them, at the very least?

JUDGE ELKINS: The reason I did not address that issue is because of the way in which the question we were called upon to address here today was framed, which is: “When are battered women negligent mothers?” Obviously, I do not know how the batterer can take any solace when I am making a finding against him of neglecting his children, ordering him into programs, and instructing him to stay away from the family until he completes the programs, or else I will put him in jail, especially in severe cases where actual physical violence is occurring. How he can view that as a victory escapes me.

I do believe that we need more effective programs to try to curtail the violence, but I do not know that we have any answers to the truly abusive, violent person in the home, other than to keep him away from his victims, including the mother and the child.

MS. STOCK: I think the legislature has to step up to the plate and criminalize stalking and make it more extensive. If someone breaks the law, the penalties should be harsher. I think in many
cases when the father violates an order of protection, he might get out of jail too soon. The legislature can do something about it by making the determination that these kinds of crimes require stricter penalties for the batterer.

JUDGE ELKINS: Let me add another comment. As someone said, these men are still also the fathers of these children. The point is to coerce them into dealing with their own problem because they are not going to do it voluntarily. Ultimately, you can help them come to terms with their violent impulses. I do not know that anyone has an effective program for doing that.

MS. URBAN: The Abusive Partner Intervention Program, with the acronym APIP, is what ACS is doing with the Urban Justice Center to try to address making batterers more accountable on child protective and child welfare cases. I mentioned it briefly before. There are currently groups co-led by male and female co-facilitators running in Queens, Staten Island and Manhattan. We are training new people to do this work so we will get groups running in the other boroughs, as well as a Spanish-speaking group, possibly an Arabic-speaking group and at least one group running for teens.

What is different about this model than some of the other alternatives to violence programs or batterers programs is that each family is known to the preventive agency. So that while the abuser is going to the twenty-six-week psycho-educational course, there is somebody working with the mom and with the children, monitoring whether or not the violence is decreasing.

What we are hoping is that once these groups are really developed and running as a firm part of the child welfare system, the child protective workers, who are already referring men to these groups, will do that more, and that possibly our lawyers can even stand before the family court and ask that the judge order the man into this child welfare abusive partner initiative.

MR. HOLLANDER: I would like to address a couple of things Catherine said.

First of all, in terms of an order of protection, by “enforcement” I mean the female, who is usually the victim obtaining an order of protection, must take the steps to put some teeth into it, to call the police, then go back to court and allege any violations. Obviously, the ultimate enforcement of the order is in the hands of the court and the police. That is what I meant when I said “enforcement.”

I also am disturbed by the somewhat Orwellian idea of “let us change the language we have been using, and now we can see that
she did all these things, that she has tried to protect the child and that should be sufficient.” I think that there are not many women who want to see their children unsafe and unprotected. They may not be able to provide a sufficient measure of protection in a certain situation. That is when it is necessary for the children to be protected through other means, and we have developed, in this society primarily, government intervention through Child Protective Services.

You mentioned earlier that there was a list of things that the mother has tried in protecting her children. I assume that the point you were making is that whatever the mother has tried was not terribly effective, or at least not completely effective under the circumstances.

Finally, in terms of the role of the man vis-à-vis the children, while they may be the biological fathers, very often they are not necessarily the legal father. That makes a tremendous difference in terms of how they are viewed through the legal system. They have no rights until they are declared the legal father. They also have no rights to custody and no rights that would have to be terminated. In fact, the most effective solution was an order of protection, which can last until the child is eighteen, assuming of course that it would be enforced, if necessary.

We do not have to remove custody from this person when he is not the legal father. In fact, if he tried to establish paternity, with a history of domestic violence, I doubt that he would get custody, and I would certainly hope that he would not. The law now requires the courts to look at his history of abuse as well.

The focus has been primarily on the mother, because it is the title of this morning’s panel. That is not to say that the batterer does not exist and should not be examined, but that is not necessarily what the goal should be. Our goal and my goal is the safety of the children, hopefully with the parent in a safe place.

AUDIENCE: I have a couple of points for the Judge. Is it not true that these men do not consider loss of custody or even loss of their parenting? Many of the things that we view as punishments, fathers do not necessarily agree with them. Often for them, custody is an issue of power and control over the woman — she does not have the children and he does. Yes, if you put them in jail, I think that is another issue, but that is a rarity, and that is only possible in pretty severe cases. Incarceration is just not an option.

In addition, we tend to dehumanize a lot of these family members. We talk about “the children,” “the mother,” “the father,”
I think we need to remember to humanize people and talk about them in terms of real people. When we are talking about individual families, talk about them with names, because I think it is easier for us to remove "the children" than to take Johnny and Maria away from Mrs. Jones.

I also have a question for Mr. Hollander. You talked about the state of imminent danger and risk in terms of removing children, and the considerations weighed in determining whether they should be reunited with their families. Having worked in preventive services and foster care services for a number of years, I do not think that is a capturable standard. It may be the regarded standard, however, the line is of imminent risk or danger changes based on the politics of the moment. We know it changes. What actually constitutes enough imminent risk or danger to remove the child? Periodically that answer changes. We know that level changed three years ago.

I also would like you to respond to your feelings regarding reuniting families with their children. I have a strong belief that the level that is required to remove a child is significantly different than the level of danger or risk that will be tolerated in order to reunite a family. I have seen this in many cases. We place a family where we feel the risk level is fairly low — not gone, but fairly low — yet we feel we are not able to return them. The mother has the batterer out of the home, but there are still concerns. We do not know for certain that she is not going to get involved with another batterer. She has not proven to us what kind of relationships she will have in the future. These are just realities.

If you could perhaps talk about your feelings regarding the reunification risk, and possibly the law guardian theory that you have espoused, because that seems to us to be a large difficulty in getting children returned to their families.

MR. HOLLANDER: First of all, you said that often you have worked with families and you have gotten the situation to where you feel there is a low level of risk. Perhaps it has not disappeared completely, but it is a low level?

AUDIENCE: I have never had a case where there was no risk. There is always some risk.

MR. HOLLANDER: If you have a case like that and there is an existing court case, which I assume there would be if the children are in foster care, then the parent has every right to go back to court. Even if we did agree that the children should be returned,
sometimes we are constrained by the specific point we are at in a case and whatever court orders may exist.

Clearly, the parent should never be constrained, or almost never, in terms of going back to court and requesting a hearing to have the children returned. It depends again upon the stage of the case as to what form this would take and what the standards in the terms of proof are, such as imminent risk, best interest of the children and so forth. The parent is not without a remedy.

In my own view, it may seem that it is easier to have children removed than it is to have them returned. What I can tell you, in terms of what we are doing, is that with certain exceptions, we really hope that a permanency decision would be made internally no later than the point in time that ASFA requires it, which, generally speaking, we are looking at approximately a year after the child comes into care. That time frame will be tested in court in what is now called a permanency hearing. Regardless of the type of case that we are involved with — Article 10, voluntary, PINs or delinquency petitions — are covered by ASFA.

My point is that the issue of reunification has moved to the forefront. It should happen, or the groundwork should be laid, much more quickly if it is more appropriate than it has been in the past.

But again, when you use the word "risk" and there is a low level — and I agree with you that there is probably nothing that is totally without risk, and I would not presume to say that — the question of risk has to be assessed in a context. Children are not the personal property of the parent; they are not some inanimate object or even an animal. You do not take risks, and should not take risks, with the welfare of children other than what would be reasonable under the circumstances.

I really do not like to use the word "risk," as in "Well, I'll take a risk in sending the kid home." In fact, the Second Department, about twenty or so years ago, strongly berated a family court judge and a law guardian for using language like that. A child's welfare is not something that is gambled with, and that has to be kept in mind as well.

What constitutes an acceptable level will differ between you and me, perhaps, and between ourselves and the judge, but there is some analysis that has to be given to determine the acceptable level.

MS. STOCK: As a law guardian, my primary concern, obviously, is for the safety of my children and their emotional and physical well-being. I know, being a mother and a law guardian, that it
is best for children to be home with their mothers and families, if they can be safe. When we are assessing the risk where I have clients who are being beaten and clients who are exhibiting psychosomatic symptoms, we review whether they are capable of functioning; whether they are not going to school; and whether they are in a bad emotional state. It is these factors that pose a risk to the child’s safety at home.

JUDGE ELKINS: I understand the problem of empowerment and the purpose of the order of protection given to the mother on behalf of the children. Actually, it would be given to the children and the mother would be expected to enforce it on behalf of the children by reporting a violation of it.

The purpose would be to change the balance of power by enabling her to call upon the police, or whomever, to assist her. If there is a violation, I would incarcerate if that were the only alternative available to me and the purpose of the order would include a program to assist the batterer, if he is the parent, to come to terms with his anger management and violence. I am not convinced that imprisonment is a useless instrument. I consider it is very useful if enforced correctly, and I think “enforcement” is the proper word.

MS. HILL: I wanted to comment on something that Catherine said earlier, which digresses slightly from what we are discussing, concerning the whole cultural expectations for mothers and fathers. What I recalled is what I view as the incredible world of family court, in terms of the expectations for the women who come before it, knowing that those women are more often than not poor. Those women come from communities that we are not familiar with. They struggle with issues of housing and income. These are things that, when you talk about jumping through the number of hoops that we put in front of them, we do not seem to take into consideration.

We have almost this lily white — and I say “white” because I think about the color of people who are mainly in family court — expectation for parents that, in fact, if some of us thought about our own lives, we would not be able to live up to those expectations. Of course, we would not find ourselves in family court fighting for custody of our children either. When you add that as the other dynamic in the picture, you think about the clients who survive that system, the Herculean efforts that they must make, that none of us could honestly say that we would be able to sustain, given the circumstances under which they come to us.
I think when you have the axe of removal and you have all this danger in the air, the risk to the children, you really cut away an opportunity for dialogue. Women do not necessarily want to talk about what is really going on in their homes because the thought of removal is hanging over their heads.

I do not think that is the case in every child protective system throughout the country. I think we want to take a step back from that and try to think about ways to talk about keeping children in the home and how to accomplish that without threatening women and without being punitive or ignoring them. While the men may not be the legal fathers, they are around and they come back. We need to address ways to get around that kind of barrier, which really becomes an excuse for why we do not address the needs of these people as families.

AUDIENCE: My name is Martha Raymond, and I am with the Women’s Prison Association.

First of all, Judge Elkins, it is so wonderful what I hear about your courtroom. It makes me feel very positive about the future of family court. However, I know that this per se notion is alive and well in the family court, and certainly at ACS, the per se notion of neglect exists when there is domestic violence. I would like the panel to talk about what they consider a legislative approach to the issue. When you think about section 240 of the Domestic Relations Law, it took a long time for domestic violence to be a factor in custody determination. I am wondering whether something should be explicit in the Article 10 proceedings, such as a form of presumption in favor of the woman who has been battered. I am wondering what the panel thinks.

MS. HILL: I actually think the law is not that terrible because what we are talking about is factual information. What the Judge said is very important. Many of the stories that I hear are so compelling, but to get them before a court is often impossible. If anyone has ever tried to have a trial from beginning to end on any given day in family court, then you know what that is like. The Battered Women’s Rights Clinic has tremendous resources, and we hear compelling stories from our clients that, if we were given the opportunity to present them, we would probably prevail.

That is why I believe that the idea of having a dialogue about viewing severe domestic violence as a warning signal and limiting the removal axe would allow us to have a discussion before we even get to court.
Case workers, however, are fearful, women are fearful and judges are fearful. How do you talk when you have that kind of dialogue?

AUDIENCE: My point is that the presumption would sort of alter the attitude, not just in the family court but in society. It would not only affect how the case workers view their cases, it would also affect how things are viewed in court.

JUDGE ELKINS: I think there is something that is happening, though not legislatively, that would be helpful. That is alternative dispute resolution before the filing of petitions, where you bring in the child protective agency and the battered women's advocacy system, sit them down together, and see if you can find a way to protect the children before a petition is filed. Perhaps, if that system were required routinely, not only in these cases but in all child protective cases, we would see fewer filings. Also, we could access the resources in the community, which may make filings unnecessary.

MR. HOLLANDER: While I agree with the principle very much and would love to see something like that occur, the way New York State law is at the moment, once a removal occurs, if it occurs, we are required to file the petition on the next court day. Based on the quality and quantity of the information available to the case worker and the chain of command for that case worker at a particular moment, there may or may not be a sense that there is enough time to engage in some sort of mediation or some other outreach on the part of Child Protective Services before making the decision to remove a child.

There is one mechanism that currently exists under New York law although it is very rarely used. If the emergency removal occurred with consent, we would have what amounts to an extra forty-eight hours to file a petition. That time, hopefully, could be used very productively, perhaps to obviate the need to file the petition and to keep the children in care. But that provision is not used very often. It is under section 1021 of the Family Court Act.36

Other than that provision, it is difficult, especially if you are a case worker and you have a report that you are investigating where you look at the situation and have a concern about the children, not to act at the moment. Maybe it is the right thing not to act in terms of removing, but it also has to be viewed through that prism.

JUDGE ELKINS: What about some pre-removal services? For example, advising the woman to go to court and getting an order of

protection; advising the local precinct of the situation to put the batterer out of the home; having somebody monitor the home to make sure the order is in effect; assisting the woman in obtaining services, counseling, as a prophylactic measure?

MR. HOLLANDER: Those things certainly have been done in individual cases. What can be done depends — as it does in any system like this — on the quality of the individual case worker and that case worker’s chain of command, in terms of how they assess a case. There are no absolutes, one way or the other.

Certainly, those attempts should be tried if in fact the overarching presenting problem is some domestic violence in the home where the children themselves have not necessarily been physically harmed. Obviously, things escalate rapidly.

Also, one other point is that domestic violence may be the overarching issue in the home, but very frequently, as in the Melissa U. case and even in, I believe, Lonell J., there are other issues going on. They may stem from the domestic violence, but there are other factors to be considered as well, in terms of what services are needed right now for these children.

MS. HALPERN: For clarification, what Martha referred to concerned some legislation the Assembly introduced, attempting to set up what was called an affirmative defense for battered women, or a qualifier in the child neglect definition, which would say that a woman who was under apprehension or fear for herself or her child might be treated somewhat differently in the definitional sense of failure to protect.

What struck me the most here is that clearly what is occurring in New York, like many other things unfortunately, underscores systems not working well and not addressing the needs of both women and children. What we need to do and, hopefully, this is at the beginning of a dialogue, is move forward and think of creative, new and different solutions that might work, and not be stuck in our litigious mode as an advocate or in a counseling mode as an advocate, but bring these two efforts together.

My wish would be that very few of these cases get to court, that there are cases that could be resolved in the community, in a social work setting or in an advocacy setting, where people can network with services and where the solutions can be found.

I remember a couple of years ago during a roundtable discussion, Joan Zorza crystallized the issue for me. She said, “Here, we are unable to protect victims — usually women — from domestic
violence. We do not put our money into that; we do not put our minds into that; and we do not have the system set up to do that.”

What we do know how to do in New York — although not very well all the time — is remove their children. We know that we can go to court and that there is a vehicle to use, which is funded by the federal government basically. Unfortunately, that is where we look most of the times.

Hopefully, as we move forward, we will go out there, as advocates and as speakers from various disciplines to say, “What the women and children and men need from our state and our society are resources and programs that diminish violence in the family, that diminish violence in the community and that only those cases that we cannot resolve in the former way go to court.”

I am sure, as Judge Elkins knows, the over-burdened court system is not the best place to resolve these issues. Also, this is probably one of those areas where what would be in the best interests of the children would be in the best interests of the victim as well, to have a safe, stable home where both can thrive.

I want to thank everyone for being here and for giving their insight to these complex issues. Thank you.
Paved With Good Intentions: Mandatory Arrest and Decreasing the Threshold for Assault

MS. DOUGLASS: It is my pleasure to make the introductions of this afternoon’s panel. This morning began a very lively discussion of people’s thoughts on issues involving abuse and neglect.

This afternoon we focus on the criminal issues that have arisen as we have been thinking about where women, children and domestic violence converge. The title of this afternoon’s panel is “Paved with Good Intentions: Mandatory Arrest and Decreasing the Threshold for Assault.”

I would like to introduce Dorchen Leidholdt, who will moderate this panel. She is the director of the Center for Battered Women’s Legal Services at Sanctuary for Families in New York City. The Center provides legal representation for battered women in family law, criminal and immigration matters, and advocates for policy and legislative changes that further the rights of battered women. Ms. Leidholdt also serves as the co-executive director of the Coalition Against Trafficking in Women and has been an activist and a leader in the feminist movement against violence towards women for over twenty years. She also teaches law as an adjunct professor at both City University of New York Law School and Columbia University School of Law.

I hope you will join me in welcoming Dorchen this afternoon.

MS. LEIDHOLDT: Thank you, Cathy. The subject of this afternoon’s panel is “Mandatory Arrest: A Re-evaluation,” with a focus on the relationship between mandatory arrest and dual arrest, as well as the potential impact on the mandatory arrest policy of a lowered threshold of physical injury as an element in assault statutes.

The need for mandatory arrest policies and laws was graphically demonstrated by the landmark case of Bruno v. Codd37 in 1977. In Bruno, domestic violence victims sued New York City’s criminal justice system for abandoning battered women to the mercy of their abusive husbands. Judge Gelinoff’s decision quotes the affidavits submitted by dozens of victims who documented the shocking failure of the system to provide even a modicum of protection. I would like to read from that decision and those affidavits.

In one of the affidavits, a woman asserts that the police arrived after her husband “grabbed me by the throat and beat me and brandished a straight razor and threatened me with it and tore my

blouse off my body and gauged my face, neck, shoulders, and hands with his nails in full public view.”38 The police, she avers, advised her that “since this was a family matter, there was nothing they could do and I would have to go to family court.”39

Another battered woman’s call to the police station elicited the following advice:

There is nothing we can do. Our hands are tied. The police cannot act without an order of protection. Even if you had an order of protection, if your husband harassed you and you called the police, he would be arrested and released the next day. This would probably provoke your husband and put you in more danger.40

Another woman, going to a police station after just being treated at a hospital emergency room, said she “was advised that the police would take no action, and I was advised to go to family court on Monday morning. They said that because I was married, they could do nothing. The police officer could see my bruised and swollen face.”41

Yet another says that she was told by a police officer that I would have to go to family court and that the police could not help me. I asked if that meant that my husband would not be breaking the law by beating me. The police officer said that that was not exactly what he meant, and explained that what he meant was that I had to get an order of protection from family court before the police could help me.42

Even more disturbing are incidents alleged in the affidavits in which the responding officers are quoted as giving support to the assaulting husband. Thus, one woman whose arm had just been sprained by her husband’s attack, requested his arrest and says she was informed by a police officer that “there is nothing wrong with a husband hitting his wife if he does not use a weapon.”43

Another wife, who was slapped and struck with a knife by her husband, says she heard the officer, who refused to arrest her husband, say to her husband, “Maybe if I beat my wife she’d act right too.”44
Bruno resulted in a consent decree that the police must make arrests in certain domestic violence cases. Those cases, it turns out, were few and far between. Calls to 911 after Bruno generally resulted in police mediation of dispute resolution — that is, “Take a walk around the block and cool down.”

In 1994, the New York City Police Department (“NYCPD”) adopted a modified mandatory arrest policy. A few months later, it was succeeded by New York State’s mandatory arrest law, a key provision of the Family Protection Domestic Violence Intervention Act.\textsuperscript{45} Even before the New York State law went into effect on July 1, 1995, there was trepidation on the part of advocates. Mandatory arrest had always been controversial, even in the domestic violence advocacy community. There also were concerns that it would be wielded in a discriminatory fashion, especially in communities of color. There were concerns that batterers, adept at manipulating the system, would turn it into another weapon against victims.

In 1995, Urban Justice Center developed its Criminal Justice Help Line, and quickly began to hear from women who identified themselves as domestic violence victims and contended that they had been wrongfully arrested. Other agencies reported similar misuse of mandatory arrest.

In one case I handled, an immigrant battered woman, who spoke little English, was arrested along with her abusive husband, who spoke English fluidly. She was visibly injured; however, he was not. Seven months pregnant, she went into labor while in police custody and gave birth to a baby girl who was born with underdeveloped lungs. While she was in the hospital, her husband went to family court and obtained temporary custody of their two young sons. Two years later, he still has temporary custody.

At the same time, many advocates have acknowledged an improved police response when victims reported domestic violence crime. Police mediation of domestic violence incidents, for the most part, is a thing of the past.

In 1997, after years of lobbying by domestic violence victim advocates, New York State passed a law requiring police officers to make primary physical aggressor determinations for family offense misdemeanors (“PPA law”).\textsuperscript{46} Perhaps because the law’s success depends upon intensive police training, dual arrests, wrongful ar-

\textsuperscript{45} N.Y. Fam. Ct. Act § 812 (McKinney 1999).
\textsuperscript{46} N.Y. Crim. Proc. Law § 140.10 (McKinney 1999).
rests and retaliatory arrests of victims continued apparently unabated.

On October 1, 1998, at a speak-out on police response to domestic violence spearheaded by Jill Zakardy, who was then at Network for Women's Services, fifteen women spoke out in front of City Hall about their experiences of dual, wrongful and retaliatory arrests. Some were arrested after their abusers falsified child abuse charges.

Can mandatory arrest further justice for domestic violence victims or is it inherently flawed? Is police officer training about primary physical aggressor a way to make mandatory arrest work, and, if so, what form should that training take? What effect will lowering the threshold of physical injury — something many advocates have been lobbying for years — have on this situation?

We are at a critical moment to reach some resolution on mandatory arrest. In a little over a year and a half, New York State's mandatory arrest provision expires.

Today, we have an exceptionally distinguished panel to address these critical and complex issues. Lisa Smith is the director of Brooklyn Law School's Criminal Clinical Program, which includes the Family Violence Project. In 1996, she was appointed the Deputy District Attorney for Domestic Violence, Sexual Assault and Child Abuse in the Brooklyn District Attorney's Office, where she is responsible for its legislative agenda, community partnerships, policy analysis and project development. During her twenty-one-year career with this office, Ms. Smith has served as the Acting Bureau Chief and Deputy Bureau Chief for the Criminal Court Bureau, Senior Supervising Assistant District Attorney for the Sex Crimes Bureau and as a trial assistant.

Mary Haviland is the co-director of the Family Violence Project at the Urban Justice Center. Ms. Haviland has been involved in the issue of domestic violence since 1977, and is also the founder and former director of the Coalition for Criminal Justice Reform. From 1980 to 1987, she was the director and then the Advocacy Coordinator for Park Slope Safe Homes Project. She is the recipient of both the Susan B. Anthony Award and the Revson Fellowship on the Future of New York, and she has taken a leadership role in work on mandatory arrest and dual arrest in her capacity at Urban Justice Center.

Michelle Maxian is the Attorney-in-Charge of the Criminal Defense Division of the Legal Aid Society of New York and has been a criminal and civil rights attorney for over twenty years. She has
also supervised the Legal Aid Society’s Affirmative Litigation Unit, which brings test cases and class actions on behalf of criminal defendants. In recent years, her office has successfully challenged the constitutionality of New York’s Sex Offender Registration Act, 47 secured the right to a twenty-four-hour arraignment in New York County, required that probationers be afforded interpreters and that sentenced inmates be transferred promptly to state facilities, and overturned the loitering statutes. Ms. Maxian presently serves on the Criminal Court Committee on Domestic Violence.

Tasha Hightower is a sophomore at Brooklyn College; pursuing a career in the field of journalism and communications. She is currently a resident of Sarah Burke House, a residential facility that is part of Sanctuary for Families. A dynamic advocate for the rights of battered women, she has spoken publicly at numerous conferences on domestic violence and has participated in lobbying efforts to reform legislation and policy to further the rights of battered women and their children.

The Honorable Laura Drager was appointed to the New York City Criminal Court bench in 1987 and was designated an Acting Justice of the New York State Supreme Court in 1995. Prior to her judicial appointment, Judge Drager was the Chief of the Rackets Bureau in the Kings County District Attorney’s Office. She has chaired the New York City Criminal Court Committee on Domestic Violence since its creation in 1992. Judge Drager was the principal author of the article, The Paper Shield: Orders of Protection in the New York City Criminal Court. She has lectured on domestic violence issues to judges, doctors and bar associations. Judge Drager is also a director of the New York Women’s Bar Association.

Inspector Ed Young joined the NYCPD in 1969 and has held various positions with the NYCPD over the past thirty years. In 1998, Inspector Young was appointed as the Commanding Officer of the Domestic Violence Unit, which provides citywide oversight to seventy-six patrol precincts and nine police service areas to ensure that the NYCPD’s policies, as they relate to domestic violence, are being properly implemented on the operational level. These policies include such items as compliance with the Domestic Violence Intervention Act of 1994 mandatory arrest provision, 48 and the subsequent requirement of the police to make an assess-

47. See N.Y. Correct. Law ch. 43, art. 6-C (McKinney 1999).
ment to identify the primary physical aggressor. Inspector Young also has been teaching police administration at John Jay College since 1991.

Carol Stokinger is chief of the Family Violence and Child Abuse Bureau of the New York County District Attorney’s Office, where she has worked for over twenty years. In 1984, she was appointed the head of the Domestic Violence Unit, and later became Chief of the Child Abuse Bureau. She is also a member of numerous task forces and organizations involving domestic violence and is a frequent speaker on issues involving family violence and children.

Our first speaker is Tasha Hightower.

MS. HIGHTOWER: Good afternoon, everyone. My name is Tasha Hightower and I am twenty-six years old. I live with my daughter, Naisha, who is nine years old. We reside in a battered women’s shelter, Sanctuary for Families.

I have been in the system following a series of incidents caused by my former boyfriend of almost two years. I met Edward when I was fifteen years old and in the ninth grade. He seemed like a dream come true. I guess I should tell you that my mother was also a victim of domestic violence, and that my family was really there for me. Edward seemed like everything other boys were not—affectionate, loving and fun to be with. He was someone I thought would always be there for me. I got pregnant, had my daughter at age seventeen, and moved in with Edward when I was nineteen.

Everything was fine that first year, but after that I decided to go back to work and to school. He did not like that at all. I joined the City Volunteer Corps (“CVC”), which made him angry. At first, it was anger and name-calling. If I came in five minutes late, he would say that I was cheating on him, then came pushing, shoving, and then a slap in the face. Then he decided that since he slapped me once, he could just keep on hitting me. There are so many incidents I could tell you about, but I will just tell you about the first and the last.

CVC selected a few of the volunteers to go on an exchange program to the Soviet Union. I had never flown in a plane before or traveled out of the country. Going half-way around the world was the most exciting thing that had ever happened to me. At first, Edward seemed excited, but as I was getting ready to go, he became more and more upset. He said I was a bad mother for leav-
The night before I was supposed to leave, he tried to talk me out of going. When that did not work, he started grabbing me and hitting me and choking me. He threw me against the wall. Again and again, he wanted to hurt me so that I could not get on the plane. I told him that he was going to have to kill me if he wanted to stop me from getting on that plane. He kept me up all night long beating and punching me. Finally, he stopped and laid down. I dragged my suitcase to the front door and I slept there. When the alarm went off, I got up and got dressed and I left. My body was covered with bruises and scratches, but I was happy to be on a plane and going to Russia.

When I got back from Russia, I found that he had filled our apartment with roses, cards, gifts and plaques. He got down on his knees and he told me that he would never hit me again. He said he just did not like being without me.

The violence started up again. For the next three years, it was beatings and apologies, and then just beatings. I left him at one point and went into a battered women's shelter, but he talked me into coming back. More than anything, I wanted to keep my family together and I wanted my daughter to have a father. In spite of the violence, we became engaged.

The last incident was in June of 1997. I found out that my fiancé was engaged to another woman. When I confronted him, he denied it. He told me I was jealous and that I was insane. I told him that he had to leave so that I could get my life together. He pushed me against the wall. He pushed the ironing board against my stomach. He told me that I was not taking his daughter anywhere. I turned away from him. He grabbed me and began choking me and banging my head against the floor. He started punching me on my chest. He sat on me so that I could not breathe. As I tried to get away, he grabbed my hands and twisted my nails until he pulled two of them out. He broke all of my things. He would get tired, sit down and rest, and then get up and continue his rampage.

I ran to Naisha's room, vomiting. I grabbed her and tried to get out with her. He grabbed me. He pulled us back and I started to fall. I grabbed him to keep from falling and accidentally broke his gold chain. He said, "You popped my chain, you black bitch." He started to whip me with his chain. He lifted me up by my neck and put me in a choke hold. I started to black out. Naisha started screaming, "Stop it, stop it, you are killing Mommy." He let me go
and I fell in a daze to the ground. Naisha said, “Oh my gosh, Mommy’s dead. You killed her.” I woke up and I started vomiting. I crawled into the dining room and I lay on the floor in my vomit. I woke up hours later. I was in so much pain I could not believe it — scratches and bruises. The apartment was torn up, and the walls were splattered with blood.

The buzzer rang and it was my mother, sister and niece. They had come for my daughter’s graduation. They looked at me and the apartment and began to cry. Finally, Edward left. Edward had broken my telephone cord, but a friend from downstairs brought up her cord and attached it to my phone. I tried to call the police. I had to call 911 three times.

Half an hour after the call, the police finally came. They parked downstairs, they came upstairs, walked a few feet into the apartment and looked at me. Nonchalantly, they asked me, “Who did this to you?” I answered, “My fiancé.” They said, “it is hot in here; can we wait in the hallway?” They did not come in, so they never saw the blood all over my apartment. They kept asking, “Who did this to you?” They said, “You need to call this number to get an order of protection.” It was the number for family court. They handed me a domestic incident report. Their parting words were, “If he comes back, we’ll try to get back here faster again.” Then they left. My mother and sister took me to the hospital.

A friend told me about Sanctuary for Families and I called. I talked with a law school student named Meredith, who was nice and sensitive. I was on the phone with her for almost two hours. Then I had a meeting at Sanctuary with another law student named Jennifer. I told Jennifer my story and Jennifer told me that I could press charges if I wanted to. I said, “Yes.”

Meredith accompanied me to the Forty-Fourth Precinct and I met with a domestic violence prevention officer. She was very upset about the way the first pair of officers responded to my case and she arranged for me to meet with a detective. Meredith and I met with the detective. I told him my story. Then he said, “I need you to tell it again.” When I told it again, he said, “You had a slight discrepancy.” I was very intimidated. I felt like I was on the witness stand. After that, he said, “Okay, I am going to arrest him, but I do not do re-arrests.” He made me feel nervous and scared, but at least Meredith was there with me.

A few weeks later, Meredith and I went to family court, for the return date on my order of protection case. I waited in Victim Services. A few minutes later, Meredith came back and told me
that the detective had come into court and arrested him. I was glad that he had been arrested, but I was scared for myself and Naisha. I was also afraid that he might be hurt in jail. In spite of everything, I still had feelings for him.

That night, I broke out in hives. He stayed in jail for a week before being bailed out by his family. I was contacted by the Assistant District Attorney ("ADA"), and was told that his family was talking viciously about me and that she was worried about my safety.

His charges had been reduced from a felony to a misdemeanor. When I asked why, the ADA told me that my bruises were not visible enough to charge him with a felony. I was upset. I knew that I had been beaten badly, I had been bruised all over my head, neck, arms and torso. I felt the pain from the contusions for weeks. But because my skin is dark, the bruises were not as visible as they would have been on a light-skinned person. It did not seem like equal justice.

It will be two years in June from the day that Edward beat me up for the last time. The criminal case has been adjourned almost twenty times. I have had three different prosecutors. I am worn out from the waiting and anxiety, and I feel I cannot get on with my life. I need closure, but the criminal justice system keeps the trauma alive for both me and Naisha.

I support mandatory arrest because it is safer for women and children, but it is clear to me that many police officers are not following the mandatory arrest law. In my case, they did not even come into my apartment to see if there was enough evidence to make an arrest. They did not ask about my daughter, Naisha. As the domestic violence prevention officer later told me, the two police officers who responded to my 911 call should have turned my case over to the detectives. Instead, they closed my case and just sent me to family court.

I have heard from other women at Sanctuary for Families that sometimes the police officers arrest the victims along with the abusers. This is a big danger because batterers are often manipulative. They are actors and liars. To prevent this, the police department needs to educate, train and sensitize all police officers about the dynamics of domestic violence, the tactics of batterers, and how to investigate a domestic violence case. From my experience, the detectives need just as much training as regular police officers do.

Right now, the only charges Edward is facing are harassment and unlawful imprisonment, despite the fact that he beat me almost
to death, tore out two of my fingernails, and left me vomiting, bruised, bleeding and in extreme pain. When I saw myself in the mirror the next morning, it looked as if a gang had jumped me. I could not recognize myself. But the system decided that Edward had not injured me enough to be charged with even a misdemeanor assault. The system has to change.

I also think that the requirements for assault are racist. It is as though black women have to be injured twice as badly as white women to get justice.

In conclusion, I believe that everyone needs to be more informed about domestic violence and how it affects women and children of all races and classes. Domestic violence is everyone’s problem, and if we ignore it, it is only going to get worse. The police, judges and District Attorneys are on the front lines of the fight against domestic violence. If they do not respond swiftly, accurately and sensitively, women will stay in abusive relationships and avoid pressing charges, and the rate of domestic violence murders will continue to climb.

Thank you.

MS. LEIDHOLDT: Our next speaker is Judge Laura Drager.

JUDGE DRAGER: I am an advocate of the mandatory arrest policy. I would like to consider the issue from a systemic approach and the ultimate purpose of the criminal justice system. I know we have a number of other members of the panel who are connected to specific agencies and will be in a better position to discuss this issue from their agencies’ perspective.

I am sure that many of you will remember from some high school or college course the philosophical concept of the social contract. Theoretically, by that concept we all agree to give up some of our freedom to gain the benefits of living together in a society and what a society enables us to have. For example, each of us has the power to kill someone. We could all go out tomorrow and kill someone. Physically, we are capable of doing it, but we have agreed not to do so because we know that we will gain the benefits of living in a society if we not only do not kill someone, but know that no one is going to kill us. Thus, we agree that we will give up some of these freedoms throughout our lives to enable us to live together.

When we as a society reach an agreement on an individual freedom that we are willing to give up to gain a societal benefit, we enact a law that prohibits that conduct, and we call that prohibited
conduct a crime. The law warns us that if we all engage in that prohibited conduct, we will face prosecution.

Now, these laws evolve over time as we as a society evolve. Certain conduct that we once found criminal we no longer consider a vice. On the other hand, we as a society have awakened to the serious consequences of domestic violence. It is no longer considered a matter hidden away behind the closed doors of a family. We have concluded that domestic violence is serious, not only as it affects the individual victim or the family, but for society as a whole. We have concluded that when domestic violence occurs, the victim is harmed, children are harmed, education is disrupted, time is lost at work and medical costs are incurred. The recognition of all of these serious consequences brought on by domestic violence led us to conclude as a society that we will not tolerate domestic violence, and we have taken steps to enact criminal laws to enforce this conclusion.

Prosecutors are the officials who are charged with bringing violations of the domestic violence laws to court. It is their duty to bring a case to trial to protect the interests of society. Since the prosecution is protecting the interests of society, the prosecution brings the case in the name of the people, "The People of the State of New York," or in a federal case, the United States Government.

The prosecutor performs this job by presenting witnesses at a trial. The prosecutor may call police officers who responded to the scene and saw certain things at the scene. The prosecutor may offer the defendant's own inculpatory statements. The prosecution may present physical evidence, such as broken plates or blood samples. The prosecutor also may call civilian witnesses, such as a neighbor who may have overhead or saw something. And, of course, the prosecutor may call as a witness the victim of the domestic violence. However, in this action, the victim is just one more witness. The purpose of a criminal action is not to directly help the victim, as might be the case in a civil action where the victim would be suing for damages, or in a family court action where the victim might be seeking child support. Nor is it the victim's right to decide if the case should proceed, because what the prosecutor is doing is protecting the overall interests of our society.

Frequently, I have a defendant before me who is alleged to have violated an order of protection, and his defense attorney says to me, "But, Judge, the complainant in this case does not want the case to go forward." I ask the defense attorney, "Have you spoken to both complainants?" The defense attorney usually looks at me
like "what is she talking about now?" I say, "Well, did you talk to
the judge who issued the order of protection, who is as much a
victim in this proceeding as is the complainant, because this is a
case that is brought on behalf of our entire society, not brought by
the individual victim?"

This does not mean that prosecutors, police or the criminal
courts are unsympathetic to the needs of victims. Each of the pros-
ecutor's offices in the city has gone to great lengths to try to ad-
dress the needs of victims to the extent that they can. They work
with agencies that provide counseling services; help victims get
their locks changed; and, in some cases, help to relocate victims.
They also evaluate cases to determine whether it is necessary for a
witness to testify, or even whether a case should be transferred to
family court.

The courts, too, provide assistance in providing counseling serv-
ces and connections to victim advocates, and, through our new en-
forcement parts, which monitor sentences of defendants, also help
ensure the safety of victims. And, of course, we issue orders of
protection.

Ultimately, the criminal court and prosecutors must be primarily
concerned with the criminal action that is before the court. The
prosecutor does not represent the victim; the prosecutor represents
the people. The prosecutor is a public official who represents the
interests of society, so if an abuser is found guilty, he must be pun-
ished for two reasons: (1) because the individual defendant chose
to assert his individual freedom over society's duly enacted law;
and (2) because society, as a whole, must be reminded that this
type of conduct, domestic violence, is prohibited. In effect, the
prosecutor is charged with protecting our social contract.

It is my belief that we are at a very delicate point in the develop-
ment of societal awareness regarding domestic violence. We have
overcome the initial resistance to the concept that domestic vio-
lence even exists. Victims and advocates convinced legislators and
the courts that we needed to address the issue in a way we had not
before.

We must now move to the ultimate goal of ending domestic vio-
lence, and we must use the tools that are now available to us. We
must treat domestic violence as a crime and prosecute violations to
the fullest extent possible. This approach will not always be easy
for the individual victim of the violence.

I strongly support the view that the needs and desires of the vic-
tim should always be considered during the course of a prosecu-
tation. Plea bargaining to avoid a trial in many cases may be appropriate. However, I am willing to sacrifice the individual victim's needs to bring an abuser within the jurisdiction of the court. I understand it is not a perfect system. Mistakes are made. The wrong person is arrested at times. Sometimes there are dual arrests. It is not an easy system. We are talking about thousands upon thousands of arrests.

Certainly, Ms. Hightower's concerns are very valid and always need to be addressed. I realize that the approach I suggest sounds harsh and may have serious consequences in any particular case. But the ultimate benefit to society as a whole is simply too great. The arrest and prosecution reinforces society's interest by making abusers, individually, and the public at large, aware that domestic violence will not be tolerated.

I have often said in speeches that by the time a domestic violence case appears in criminal court, we as a society have failed because the violence has already occurred. In my opinion, the real front line at this point in the battle against domestic violence should now be in the field of education, both within the schools and in the media. We need to educate the public about domestic violence so that it will not occur in the first place.

However, to support this educational effort, the public must know that the criminal justice system will take action against abusers. In my opinion, any effort to undermine the mandatory arrest policy would remove one of our most powerful tools in the war against domestic violence.

Moreover, even if the law were to change, my guess is that the NYCPD would continue the policy of mandatory arrest. I believe it is a policy that, on the whole, has been more successful for them than what existed beforehand.

The issue has been raised that the definition of what constitutes an assault should be modified. I do not think changing the definition of assault, that is "what constitutes physical injury," is the real issue. A few weeks ago at a training program for judges — each year judges undergo training on the issue of domestic violence throughout the state — Dr. Stark raised the interesting issue that, at present, our criminal law does not address most domestic violence conduct because most domestic violence is emotional abuse, not really physical abuse.

I do not know whether we will ever be able to satisfactorily define domestic violence in the context of penal law language. Dr. Stark seems to feel that within the next decade we will have better
studies on this issue that may help us to do so. Certainly, the stalk-
ing law is an effort in that direction.

Ultimately, I do not think a change in the law on physical injury
will answer the problem. We need to address the overall emotional
issue of abuse, and I think we need to understand that there are
limitations on what type of conduct the criminal justice system can
reach.

Thank you.

MS. LEIDHOLDT: Thank you, Judge Drager. Our next
speaker is Inspector Ed Young.

MR. YOUNG: Good afternoon. I would like to approach this
issue by doing an overview of what the New York City response to
domestic violence has been over the past thirty years. From the
cop officer's perspective, you are looking at three aspects: 1) the
structure of the NYCPD and how that has changed; 2) the goals of
the NYCPD and how they have changed; and 3) how they have
impacted on the operation and response. I will then talk about
some current developments that have taken place, the results of
the mandatory arrest policy, some issues and challenges surround-
ing the primary physical aggressor aspect to the mandatory arrest,
as well as some thoughts on the thresholds for assault.

From a cop’s perspective, going back to the 1990s, the structure
and the policy of the NYCPD — actually, the policy was about two
pages on how to respond to domestic violence — was strictly to
react to the 911 call for service. From the late 1960s and 1970s,
there was a limited number of radio cars. The policy, in terms of
the goals, was to separate and mediate. Actually, the policy stated
to assist them in reaching some kind of a decision, which is even
contrary to separate.

It also sets the framework for a culture within the NYCPD — a
culture that says, “Go into a particular situation involving domestic
violence, and quickly resolve the problem. Get in, problem solve,
get out. There is another call for service coming your way any min-
ute.” Right now, we probably have four million calls for service
coming into the NYCPD on a yearly basis, and that response time
raises some issues as we move forward in history.

The operational response was that every call about a dispute was
treated as an "old family domestic violence dispute.” The disposi-
tion given back relatively quickly was that the man was sent on his
way. The occupants would state they did not call 911, and there
would be no historical requirement or documentation that the
event had taken place. If there was any historical reference, it
would be the fact that the officers responded. Given that there were only a smaller number of units then, they responded to calls for service where perhaps they had been there several times before. Nevertheless, given the current structure and the need to get in and get out, they attempted to resolve the matter as quickly as possible.

From the late 1970s to the 1990s, the NYPD started, given the legislation, to look at the family offenses. Training focused on family offenses that related to domestic violence, certainly enforcing the Family Court Act, but in addition to that, expanded the definition of what were domestic violence situations, such as common law, same-sex couples, was included in the training.

The NYPD also started putting on a political face. Certain individuals, by their very office, would be the front executive to go to various meetings, perhaps chaired by advocates or other agencies. Perhaps patrol would send a representative or a liaison, and he or she would be considered the NYPD's expert on domestic violence. Detectives perhaps would do the same thing.

There was virtually no real operational oversight from that perspective. The goal of the NYPD was a proactive arrest strategy, utilizing the concept of probable cause. This is very important from an objective standard for law enforcement as we start looking at the issues of primary aggressor later on. Probable cause certainly plays a significant role, locking up for felonies as related to family offenses, violations of the orders of protection, misdemeanors if the victim wanted that particular individual arrested, and/or a violation taking place in front of a police officer and the victim wanted the arrest. That was the process.

The operational response during this period was a recognition on the part of the responding cops that there were elements of criminality going on, that it was developing a greater awareness. The people were being arrested if they were at the location. But there were still discretionary aspects in the arrest based upon the police interaction with the victim, which leaves a lot to be desired.

There were very limited preliminary investigation requirements, given the culture of response time constraints — get in, get out — that you did not really see the gathering of evidence, building a case or having that focus in mind. The attitude was make an arrest and throw it over the wall to the district attorney who will be handling the prosecution.

Those cases that were referred to the detectives — and now we are talking about the 1980s — were not considered high priority. If
we recall back to the 1980s with all the crack wars and the shoot-em-ups that were taking place, as well as the increasing number of homicides that were going on, there was a sense that domestic violence had low priority with a limited investigatory response.

As we approached 1994, there were a number of police strategies. Certainly, there has been a focus on crime in this city. The first three strategies addressed guns, drugs and youth crime. But strategy number four had to do with breaking the cycle of domestic violence, and there was a look at the previous history, what the NYCPD had been doing as it related to domestic violence and what it was going to do differently.

From this strategy came about the creation of the Domestic Violence Unit. The person in charge of the Domestic Violence Unit, Lucia Davis Raiford, was a civilian director, an advocate, who remains in that position to this day.

The goals of the Domestic Violence Unit were to look at and develop new programs, do policy analysis, training oversight on the issues of domestic violence, operational oversight, and liaison with our partners in the domestic violence field, including criminal justice agencies, the District Attorney’s office, governmental agencies, the Administration for Children’s Services (“ACS”), Department of the Aging and numerous other partners on these issues, as well as advocate groups.

Also, within the structure of the NYCPD, the strategy created two new roles that are very significant as we move forward. These are the role of the Domestic Violence Prevention Officer in the precinct and the role of the Domestic Violence Investigators specializing in domestic violence.

It mandated the development of the Domestic Incident Report, which ultimately became the prototype for the New York State-mandated Domestic Incident Report. Also, the strategy called for a Domestic Violence Database to maintain a history and to look and discover patterns of domestic violence in the individual precincts.

The goals were enhanced once again. The policy called for mandatory arrest, prior to the legislation, of all felonies—not just family offense felonies, but all felonies occurring in the family context. It was seeking, and ultimately it brought about, the criminal contempt charge of violations of the order of protection, and there was a greater emphasis or greater focus on the misdemeanor statutes relating to domestic violence.
Also, as is dictated in the title of the Domestic Violence "Pre-
vention" Officer, we began to look at what was being done to pre-
vent domestic violence. Again, still within that context is the 
overall culture of a quick fix, the "get in, get out," that still lingers 
on. For a unit responding to a call for domestic violence, there are 
response time considerations, operational costs as it relates to 
overtime, and even as we are required to make arrests, preventing 
domestic violence addresses some operational concerns of the or-
ganization that have an impact on the operational response.

The operational response has been a greater focus on the part of 
the investigation process. Given the role development of the Do-
mestic Violence Investigator, you now have a specialist in the 
squad interested in closing out that case with an arrest. From an 
oversight perspective, we still monitor that.

Historically, when a call was dispatched to a car, it was not iden-
tified as a domestic violence call, but now there has been a proce-
dural change. Domestic violence calls for service are identified 
with subsequent prepared domestic incident reports and informa-
tion and entered into a database.

Looking at the mandatory arrest, has it had an impact? From 
1993, felony arrests have increased thirty-three percent. Under the 
misdemeanor aspect, misdemeanor arrests are up 114 percent since 
the mandatory arrest policy. Violations of orders of protection ar-
rests are up seventy-six percent.

With the issues surrounding the primary physical aggressor law, 
there are problems as a police response looks for an objective as-
sessment to make the right decision. That is where there are still 
problems lingering in predetermining who is the primary physical 
aggressor in this current incident. A lot of our training focus is on 
the historical perspective of the incident — what is the history. 
That is all well and good, but it does not take us to exactly what 
happened on this particular night, at this particular point in time. 
This is where we have some difficulty in determining who is the 
primary physical aggressor.

The culture of "get in, get out, quick response time," and the 
time that is required for an investigation in determining the pri-
mary physical aggressor, is the challenge for law enforcement right 
now.

MS. LEIDHOLDT: Thank you, Inspector Young. The next 
speaker is Assistant District Attorney Carol Stokinger.

MS. STOKINGER: I began working in the Manhattan District 
Attorney’s Office ("DAO") in 1977. Until 1977, family violence
was generally handled in family court. The change that year had nothing to do with my arrival in the DAO, but had a lot to do with the fact that criminal court was given concurrent jurisdiction over domestic violence cases. Concurrent jurisdiction, as many of you remember, did not mean that both the family court and the criminal court could handle cases at the same time; it was just that one court or the other could handle the same incident. Victims had to make a choice within seventy-two hours, frequently a time period in which they did not even know they had a right of election. So, many times they were stuck in one court or the other at the end of those seventy-two hours. Despite the changes in the law that gave criminal court jurisdiction over family violence cases, police, prosecutors and judges still believed that those cases belonged in family court.

Shortly after 1997, my boss, Mr. Morgenthau, recognized the special needs of domestic violence victims and felt that we should be handling those cases in our office and in the courts. He set up a Domestic Violence Unit in the office. Still, we had to struggle with the realities of what the NYCPD did, what the courts did, and even what people in our office did with the cases.

At that time, almost no cases that we see today were actually handled in criminal court. The numbers were few yet the injuries were severe. The cases that we actually saw were generally treated in supreme court rather than in criminal court.

In 1984, I was appointed head of the Domestic Violence Unit. It happened to be the year that the Minneapolis Domestic Violence Experiment Study\textsuperscript{50} was released. As many of you know, that study indicated that mandatory arrest was a great thing. Arrest, rather than separation or mediation, reduced recidivism rate in their study by fifty percent over a six-month period.

However, later studies, sponsored by the Department of Justice, failed to replicate their success. Nevertheless, the Minneapolis experiment became the rallying cry for many people in the domestic violence world.

We pushed for mandatory arrest, and we finally got it. Last year, we had some 6000 domestic violence arrests in Manhattan, a city in which there were 250,000 domestic incident reports. Our numbers are similar to those in the Bronx and Queens while Brooklyn had double our numbers. Despite the number of arrests, you can see that there were many domestic incidents reported to the police that

never resulted in arrest. Probably in excess of 200,000 cases failed to make it into the criminal justice system.

The question that we have to ask is: What happened to those cases? Why were there no arrests? Was it that the police did not want to make arrests? Was it that the police did not have jurisdiction to make arrests?

In many of those cases, the incidents fell within the definition of harassment, rather than assault. Unless they witnessed the incidents, the police could not make an arrest, even if they wanted to. Those statistics tell us that we have to do something about changing the definition of physical injury, changing the assault laws, as well as enacting new stalking legislation.

Some of the most terrifying cases of domestic violence actually never make it into the criminal justice system. Of our numbers, approximately one-sixth to one-fifth of our cases were felonies, many of which were contempt cases. Nearly four-fifths of our cases were misdemeanors, the majority of which never would have resulted in an arrest in 1977. In fact, many of the felony cases would not have resulted in arrest in 1977, or even in 1984.

Those cases that did come to the attention of the police would have been mediated. At worst, the officers would tell the parties to cool down, the perpetrator to walk around the block; and, at best, to tell the victim to take her or himself to 346 Broadway. Now those cases are here and we are forced by the potential expiration of the law to ask ourselves: Is this a good thing or a bad thing?

Along with the general decrease in crime, reductions in cases involving serious injury have occurred, although it is not the same dramatic way that general crime has decreased.

I am convinced that mandatory arrest is an excellent idea. I had questions about it before, but I now think that it has brought about important changes to the system and to society. It has changed the attitudes of police, prosecutors and judges, and, more importantly, it has changed the attitudes of victims, defendants and society as a whole. Along with the changes, it has brought real protection to countless victims and demonstrated to all of us that domestic violence is simply unacceptable.

Mandatory arrest can be used as an opportunity to bring victims into the mainstream and to attain the help that mainstream can provide. We can provide services to those people and help protect them and their families.

I am wholly in support of mandatory arrest where there is physical violence, but I am less certain about it for those cases in which
there have been only violations of family court orders of protection and where there has never been any physical violence. In other words, where there was no underlying physical violence and the violation does not involve physical violence, I am concerned. I think those cases need to be treated seriously, because, as Judge Drager said, those cases represent not only a violation against the victim who originally brought a case, but also against the court and against the entire criminal justice system. However, I think those cases need to be brought before the judges that issued those orders, and then they can be brought to the criminal justice system on referral by the family court judges who know them best.

I am in favor of prosecuting many of the cases that we see, even where victims do not want to prosecute. I think that has become a very important thing. One of the reasons is that many offenders re-offend, not only with the original victim, but they go on to re-offend with multiple victims. Frequently, there are other unintended victims, including children, other family members, friends and neighbors, as well as responding police officers.

To set the tone that society will not accept domestic violence, police and prosecutors have to be able to go forward with or without the victim, and I think that we cannot say that mandatory arrest should be eliminated. We have to go forward.

MS. LEIDHOLDT: The next speaker is Michelle Maxian.

MS. MAXIAN: The Legal Aid Society has attorneys in the Juvenile Rights Division where we represent children in neglect and child abuse proceedings, many of whom are the victims, or at least the witnesses, of abusive relationships among the adults who live in their home. We also have a Civil Division where we represent women who are battered and who are involved in divorce cases.

I am the head of the Criminal Defense Division, where we represent women who are accused of drug use or prostitution, many of whom are the victims of domestic violence throughout their lives. We also represent batterers, which is the reason I am here. We represent mostly men, the people who batter women.

As lawyers, we see the whole cycle of violence. The children we represent in family court grow up to become our clients in criminal court. It is the result of the very dangers that were discussed this morning when they talked about removing children from those homes. Every day, I see those dangers come to fruition in criminal court.

I also started in 1977 in Manhattan Criminal Court. Bruno had also been decided in that year. Where we have reached in domes-
tic violence has paralleled our careers here in the criminal justice system.

When I started, even though people were being arrested at that point, it was enough to say, "Your Honor, this is a domestic violence case," to have the case dismissed or ACD'ed. There was virtually no factual distinction made between cases. It was simply enough for me as a defense lawyer to point out that the victim and the accused were known to each other or lived together, and that was a victory for me.

In 1999, as someone said earlier, police mediation is a thing of the past, so all of these cases are coming here. We have Domestic Violence Court, where a judge has the obligation to decide individual cases, but also, as we can see by panels like this and by the presence of judges on domestic violence cases, has a perceived obligation imposed to stop domestic violence.

To a certain extent, I think we all evaluate the success of how our judges and our courts and our prosecutors do by the prevalence of domestic violence. As a defense attorney, that scares me. It scares me for a couple of reasons. First of all, I think that the criminal court is a very blunt instrument. Many things that we say, that people here have talked about and Tasha in particular, is the failure of the system, or the limitations of that system.

We have a social contract, but we still require individualized proof. That means that there are going to be lawyers there, and there are going to be lawyers like me there, who have as their primary purpose to get someone off, to get the batterer off. It means that we are going to confront witnesses; it means the woman is going to be confronted about her story; and it means that at least there should be an unbiased fact finder. That means that the women who come into that system, who are still in many instances operating within the relationship that is an abusive one and have shifting feelings, are going to result in feeling like the system is battering them again. They are going to come up against me. They are going to have a court continue protective orders that say the batterer cannot come home again, even though they would wish that to happen, even though they are experiencing economic problems, even though the children in the family might want the batterer home, even though they might in their shifting feelings and in their difficulty dealing with this issue, want the batterer home, and now all of a sudden they are told that cannot happen, no matter how much they want that.
Also, I have heard stories that I believe to be true that a prosecutor will tell them that if they wish to drop charges, the prosecutor will refer their case to ACS and that they will be in danger of losing their children, and they will be subject to that kind of pressure to continue the case.

It concerns me because I know the significance of the social concern for abusive relationships, because almost all my clients are its victims. It is not that I do not understand how significant the issue is. It is probably because I do understand that I worry that it will eradicate constitutional concerns that exist in the court and that I hold equally dear as a defense attorney.

I sometimes wonder: Does the presumption of innocence even exist in Domestic Violence Court? It is a real question. Certainly, everything we've said here today should give all of us pause about whether that is still true. When you walk in to that court, what assumptions do you make about the woman standing on one side of the table and the man standing at the other table, and does that have anything to do with how you were brought up about the Constitution?

The other thing that worries me is that each of us knows in our own lives that it is best if government does not treat you individually. From any experience we have had as mature adults in society, we know that if we run up against the IRS, the Social Security or the Motor Vehicles Department, we are in trouble, our life is going to be miserable. You should not expect the family court or the criminal justice system to be any more effective or efficient in dealing with individuals. People who get involved in this system often regret it. It is our only alternative in cases of real violence, but it is, as I say again, a very blunt instrument. It destroys people's lives as well as saves them.

We go there because that is where the money is, and that is really the truth. Since Reagan, the social supports that have existed outside the criminal justice system have totally disappeared. If you want treatment for drugs, you better get arrested, because that is where the money is. In youth violence, the money is going into the courts. In domestic violence, the money is going into the courts. So yes, arrest brings victims into the mainstream as Carol said, and that is true because that is where the money is; that is where we have to bring people because that is where government is now putting money, into the criminal justice system. Money outside that system is drying up — well, gone, I guess, and blowing away as I speak.
I do not know what my recommendations are. I think as far as mandatory arrest we should either revoke it or apply it across the board. I think it is very difficult to set vague standards, such as primary aggressor. Our standards would have to be much more specific for officers to enact.

I think the problem that you spoke about is when we really think primary aggressor, we are thinking what is the history; that is what we really mean. We do not mean you are going into a home and deciding who is hurt more in this instance. We are really thinking: What is the history here? But that is very difficult for the police to enforce, because does it mean that, once battered, you now have a license? If you make the rush to the courthouse first and you get that first order of protection, what does that mean if the police come in on a second incident? Are they still permitted to make an individualized determination? Is that not difficult for police? And maybe, if we are going to have mandatory arrest, at that point we should just say, “Arrest them all and let Judge Drager figure it out somewhere down the road.”

The other thing I think we need is a treatment module for batterers. I do not mean that you should turn your attention from the very serious problems facing women. Nor do I mean to say that we should turn away from the real issues of women and their social needs and take that money and give it to batterers. What I am saying is if you want to break the cycle of violence, then you need to address those issues, that no one will be jailed long enough to never come out again.

There will continue to be children, as long as we have a situation where people continue to fall in love not so well; choose not so wisely; and find themselves in relationships from children with people that were themselves perhaps victims of battering or have just continually been so closed out of the social contract they are not making good decisions. Unless we address issues like violence, drugs and mental illness, and how they are all involved in this battering, then we will be here for the next twenty years and we will not be any step further along than we are today.

I also think that, to the extent that many of the women that we do represent, and even some of the men who were battered as children or were abused as children, this group of advocates should also turn some attention to the effects of domestic violence for other defendants and should ask prosecutors and courts to look at that when they evaluate women who are accused of selling drugs, or who are prostitutes or are charged with drug possession. A lot
of that is self-medication. We all know that. I think it should be part of your job as prosecutors and courts to talk about that, so, at least as to them, the system could be more ameliorative rather than punitive.

Thank you.

MS. LEIDHOLDT: Thank you. Our next speaker is Mary Haviland.

MS. HAVILAND: I am going to try to give a quick indication of a small study that we did on our criminal justice help line at the Urban Justice Center, and I am going to try not to give too many opinions in my talk, although I will make some recommendations at the end.

The Family Violence Project of the Urban Justice Center set up a help line in 1995 to assist victims of domestic violence in the wake of the passage of the Family Protection Domestic Violence Intervention Act. I was well aware from my activities before that time of the effects of mandatory arrest in other jurisdictions. I was aware of the possibility of victims’ arrests, the influx of victims of domestic violence into the criminal justice system who may not necessarily want to be there, and the possibility that more arrests are made in communities of color rather than other communities. I wanted New York City to have the capacity to deal with some of these potential problems in the aftermath of the implementation of mandatory arrest.

In 1997, we received funding from the Center on Crime Communities and Culture to computerize our help line and to study the incoming phone calls. We teamed up with epidemiologist Dr. Susan Wilt at the Department of Health and Victoria Fry to look at some of our incoming calls. I want to give a brief summary of this study, and I am going to talk mainly about victims who were arrested by police because I think that is my little niche here on the panel. I also think that real hard information and data about the numbers of women who are getting arrested or the kinds of experiences they have are few and far between, so I am going to dedicate my talk to that.

We receive almost 500 phone calls a year on our hotline. In 1998, we received 468 calls, 274 of which were new clients and 103 were presenting problems regarding the police response to their household. We received a lot of calls about other problems, such

51. 1999 N.Y. Laws ch. 222.
as family court, criminal court, ACS, parole and probation — though I will not go into any of those details.

Before I describe the arrest of victims that we experienced on our hotline, I want to clarify that over the years we have developed definitions or seen patterns in the kinds of arrests that have taken place in New York City of domestic violence victims, and I want to be clear about what our definitions are and how many cases fit into that definition and how many did not.

First of all, we saw quite a few dual arrests. We call “dual arrests” those which occur on the scene or shortly thereafter that emanate from the same incident of violence. Both the victim and the perpetrator are arrested in this event.

The second group of arrests that we have been seeing increasingly on our hotline are victim arrests, usually in the wake of an exaggerated or false complaint by an abuser. Often, these arrests follow some measure the victim has taken to protect herself. We call these retaliatory arrests.

Some of our cases involve the threat of arrest and the arrest has not been executed. I have lumped those cases together, and you will see as I present some of the statistics what happens to them.

We only had one call that really fell outside of this categorization of arrest, and that was a woman who had seriously inflicted injuries on her boyfriend and was looking to turn herself into a precinct and needed representation. She had used a knife. Other than that, the rest of our arrested victims fell into these two classifications.

Now, I realize that the language that I am using becomes difficult here, because I am using the language of victim and perpetrator, and sometimes it is difficult to say exactly what is going on in the household at any given time. I hope that by the end of my talk you will be convinced that I am using the right language, but I will leave that to you.

I am not going to have time to discuss other kinds of problems, which I think are really important in this kind of discussion on mandatory arrest, one of the major ones being: What is happening to women who do not want to go through the criminal justice system and what do they think of that intervention two, three or four years down the road? I would love to have a further conversation about that.

The police issues that we encountered on our help line were: 1) non-arrest when the police policy indicated that an arrest probably should have been made; 2) arrests that were made when the victim did not want such an arrest made; 3) dual arrests; 4) retaliatory
arrests; 5) lack of information about police policy; 6) police refusing to assist a victim recover belongings; 7) no response after calling; and 8) service of order of protection problems. That is a snapshot of the kinds of problems that were coming into the hotline.

In our dual arrest cases, we had seventeen callers, three who were threatened with dual arrest and fourteen who were actually arrested. The seventeen cases were quite evenly distributed throughout the city, with seven in Manhattan, six in Brooklyn, three in the Bronx and one in Queens.

We looked at five different variables and had information on those variables for thirteen cases. We looked at whether there was a prior history of domestic violence and whether it was documented, whether there were extant orders of protection at the time of the incident, whether the situation fell under the primary physical aggressor law, what the injuries of the parties were and what the outcome of the cases were.

In our dual arrest cases, twelve out of thirteen cases that we had information on had a prior history of domestic violence, though four of these cases were undocumented histories. Only four, or thirty percent, of our dual arrest callers possessed orders of protection at the time of the incidents, and none of the perpetrators did.

Eleven out of the thirteen cases fell under the rubric of the PPA law; in other words, I combed through them to see whether they were felonies, whether they were family offenses, whether they were family members, and only two were knocked out of the box by the requirements of the PPA law.

Of the thirteen, nine of our callers were injured by the incident, and, in five of the thirteen cases, the perpetrators claimed injuries. With one exception, all of the injuries were scratches and one was a bite. In four out of five of these injuries, our caller admitted to having scratched or bit in self-defense. The fifth injury on the perpetrator side was a self-inflicted wound, according to our caller.

The outcome of these cases was as follows: in eleven cases, the charges were dismissed or the arrest was not made against our caller; in six cases, we were missing that information. The charges against the perpetrator were dismissed in five cases; the arrest or charges were pursued in another four cases; a parole officer took action in one case; and in seven cases, we had no information.

Based on the facts of these cases, I want to just make a couple of recommendations that I think come out of this.
First, I think in dual arrest cases, police officers really have to separate the parties to talk to each person at the scene. What I mean by “really” is out of earshot and out of eyeshot.

In eleven of the thirteen cases, our caller satisfied at least one of the PPA factors enumerated by the PPA law as described to us over the phone. If the parties are separated, you can get at these factors more effectively. For example, responding officers are often instructed by the statute to assess comparative injuries, which are not always evident at the scene but can be described; whether threats were made; whether the injuries were defensive or not; and whether a party has a history of domestic violence.

Second, police training should address the issue of undocumented versus documented history of domestic violence. Four of our cases were undocumented histories. I think that police training could address this issue so that police officers could be more effective in soliciting that information.

I also think that the police officers could be trained to communicate between precincts. One of our cases involved a precinct that would not arrest at the scene, and then the perpetrator went to another precinct and that precinct made the arrest.

Another issue, which is related, is one of timing, which a couple of people have mentioned. The first person to the precinct is not necessarily the victim. In one of our cases, the victim was at the hospital when the perpetrator was at the precinct filing the complaint.

Next, I would urge some changes to the PPA law. I would urge the adoption of an expanded definition of domestic violence so that it is clear that it applies to same-sex couples and couples who have formerly resided together. I would not limit the primary physical aggressor determination to only family offenses, as long as the definition of family was met. There were a couple of cases in which family offenses were not committed.

I would broaden the primary physical aggressor to apply to situations where victims grab weapons to defend themselves and the injuries are minor. Often, an Assault Two charge results from a situation like this.

Finally, we had twenty-one callers who were arrested on complaints filed at the precinct in this same time period in 1998 (with a total of thirty-eight victims of domestic violence arrested and calling our hotline). As with the dual arrest cases, these cases were pretty evenly distributed throughout the city, with five from Manhattan, nine from the Bronx, four from Queens, two from Staten
Island and one from Westchester. Interestingly, three callers were wives of police officers.

In nineteen cases, we had complete information on eight different variables. All nineteen callers reported a prior history of domestic violence. Sixteen of these callers had a documented history. In three cases, the perpetrator had a documented history as well. Twelve of our callers, or sixty-three percent, had orders of protection at the time the complaint was filed. We were quite astounded actually at the number of orders of protection that our callers held when they were calling about an arrest, as opposed to our callers who were calling about a dual arrest.

In twelve cases, the primary aggressor law would have applied if it had been a dual arrest situation. There were five claims of injuries by perpetrators out of twenty-one cases. In two of these cases, our callers claimed they used the violence in self-defense. The other injuries claimed were scratches.

Eight of the nineteen complaints filed were allegations of harassing phone calls or personal threats. There were no tapes obtained of these allegations in any of the cases.

In thirteen of the nineteen cases, the caller mentioned an event that led to the allegations. Service of an order of protection telling him that she was ending the relationship or a violation of an order of protection in family court were some examples of the events that led to these arrests.

The outcomes on the cases were that eight of these cases were dismissed or acquitted, two arrests were voided, and two cases were ACD'ed with an order of protection against her, and on seven cases we have no information. Subsequent to this arrest, however, three perpetrators were able to get orders of protection.

Also, of these twenty-one, thirteen of these women were held in pens, several for more than eight hours. One woman was eight and a half months pregnant and was held in a pen for ten hours. Three women were given Desk Appearance Tickets ("DAT"), which I think is a very interesting sort of solution on the police officer’s part, since DATs are not allowed in domestic violence situations. The issuance of a DAT indicates a feeling of sympathy on the part of the police officers for the arrested victim since a DAT gives notice of the first court date without detaining the arrestee for booking or arraignment. Despite current policies, DATs were issued in three cases. In two cases, the arrest was voided, and in one case the arrest was never executed.
I want to draw your attention for a moment to the fact that we had actually more retaliatory arrests being called into our hotline than we did dual arrests, which suggests, I think, that we should try to come up with a legislative solution to retaliatory arrests. I think that many of the issues are the same and that primary physical aggressor rubric or analysis could be applied to these cases.

I also think it is extremely important that this time around when we look at this legislative session, we fund services to help women who are arrested as a result of the mandatory arrest law. Several other states have done this, Connecticut included, and I think it behooves us to do that in order to make the mandatory arrest legislation fair.

I also think that we should be keeping track of how many dual arrests there are and of arrests by gender so that we can tell what is going on in New York State with regard to dual arrests and retaliatory arrests.

I ultimately think that mandatory arrest probably does help protect battered women, but I think there are enough problems with it that we should rethink the reenactment and include things that will help diminish the negative side effects of mandatory arrest.

Thank you.

MS. LEIDHOLDT: Thank you, Mary. Our last speaker is Assistant District Attorney Lisa Smith.

MS. SMITH: I would like to relate a story that happens to be a case on which I worked in my clinic this morning. Basically, I think it sums up the problems that we all have.

The woman and the defendant in this particular case have a child in common and have been together on and off for about eleven years. There has been a dispute recently. He thinks she is dating other people, she is not sure she wants to be with him anymore, and he is very jealous. On the night in question, he came to her apartment. I think he got in via the window. When he came in, she was in the bathroom and she was wearing sweatpants, the type with the elastic waistband. He grabbed her, dragged her by the sweatpants — she is a very slight woman — into the kitchen, took a jar of jalapeño peppers from the refrigerator, opened them and stuffed the peppers in her vagina.

She went to the hospital a few hours later, after she tried flushing it out herself, which actually made the situation worse, because it made the insertion worse. She went to the hospital. The hospital records clearly say that the doctors and the nurses fortunately ex-
tracted all of the jalapeño peppers, in pieces primarily, but they basically got everything out.

She does not want to press charges. We have spent many hours trying to reach out to her, but not only through the District Attorney’s office. In my mind, the best thing I think I have done in Brooklyn happens to be the Brooklyn Domestic Violence Task Force, which meets on the second Tuesday of every month and has at least forty organizations as members. We try to reach out to some of our advocates and our community people, hoping that she might feel more comfortable with them and that they would be more successful.

This case can clearly be tried without her. But, of course, the question we wrestle with all the time is: What is the right thing to do here? She has her own concerns, and her concern is that he does provide very well for her and her child. I raise this not for the answer, but just for the complexity of the problem.

My feeling about mandatory arrest is when we all go out there and advocate for mandatory arrest, we should advocate for the resources we need to put the teeth in mandatory arrest. The system is set up so that the police at least in Brooklyn, took 7500 cases that were prosecuted in 1996; 12,000 in 1997; and 12,500 in 1998. The police take all these cases. They have to work on them. But you know what we expect of the police? We expect them — and I am sure Ed would agree with me — to work on these as quickly as is humanly possible. We do not say to them, “Take your time and really investigate.” We say, “The goal here is speed.”

We really say the same thing to prosecutors who are in-taking 200 and 250 cases a week. We want them to concentrate on the cases. But how hard can you concentrate when you are taking in 250 cases a week?

Believe me, we say the same things to the courts. My heart goes out to the judges who are sitting here. I have been to countless meetings where they have one hundred cases on their calendar. This applies to the felony judges, to the misdemeanor judges, in the domestic violence parts and in other parts, and where they are constantly told, “Speed the cases along. You have to work more quickly.”

People will say to you, “it is better for the case,” but the reality is that speed is not good for most of these cases because they are very complicated and they require hours and hours of work. I cannot even begin to describe the amount of time we have spent on the case that we are talking about this morning. We must have the
resources attached to the mandatory arrest law. Everybody has to come to realize that these cases are very difficult and very time-consuming and they are labor-intensive. You will not attain what you want, you will not accomplish your goals, whatever those are in the individual cases, if you do not accord them with the resources and the time that they really need.

My one suggestion on mandatory arrest is we get together and really talk about that as an issue. Although mandatory arrest has increased the arrests dramatically — and you can see from my statistics that they have — I cannot say the same thing about convictions in the criminal court, because arrest does not equal convictions.

Now, I want to step back and say that I do not necessarily think that a conviction is the goal in all of these cases. Sometimes your priority is just the process, that the process was appropriate; and sometimes your priority is just the safety of the victim; and sometimes your priority is one particular type of outcome. But there are some cases where the conviction is your priority. In those cases, the problem is that physical injury, as defined currently in New York by the case law, does not include for A misdemeanor assault purposes most of the injuries our victims of domestic violence suffer. It does not include the slaps, the kicks, the bruises, the bloody noses and the swollen eyes.

If you think it does not matter, you are wrong. It matters a lot when you get to the very first stage of the plea bargaining process, where all defendants know that they may have come in charged with that “A” misdemeanor of assault, but that the most they are really looking at is a violation or harassment. So the point is that if you go in there as the prosecutor and you say, “I want this, this and this,” they know that that is just what is going to happen to them, and the ball is clearly in their court.

So I think redefining physical injury in some way will make a difference for those cases where conviction of a misdemeanor is the outcome that you would like to see. There are three possible ways of doing that:

The first possibility is a general redefinition of physical injury in the penal law. Some people are not in favor of that because it would mean that bar fights are also redefined, and people fear it would bring many more defendants into the system at a higher level of charge. So that is one problem, although redefining physical injury would cover everybody.
The second possibility is to simply include a domestic assault in the penal law, where the definition of physical injury is altered for victims of domestic violence. So it would mean that in a domestic violence case, the penal law would specifically say that physical injury means bleeding and bruises and bloody noses and all of those things.

What is the problem with that? What is a domestic assault? Who is domestic? I do not have to begin to say here what kinds of problems the legislature is going to have around the definition of who would be protected if we had domestic assault. And if we went with domestic assault instead of just a redefinition of physical injury, do we not want to protect the people that the legislature might not want to protect?

The last possibility is elevating sentences for repeat offenders in domestic violence. But the problem with that, and something I would also like to see us concentrate on, is that unfortunately, many defendants in domestic violence cases end up with dismissals, ACDs, and violations, and those do not appear on their rap sheets a year later when they are rearrested.

It is very hard for prosecutors and judges to have any kind of realistic view of the defendant as a recidivist in domestic violence. In fact, it is impossible unless the victim of domestic violence can give you a very accurate portrayal of prior arrests. I have seen numerous cases where a defendant has had six and seven dockets that have ended up as dismissals and come into you with an absolutely blank arrest record. So I think that is an issue that we ought to really talk about also. Thank you.

MS. LEIDHOLDT: Thank you, Lisa. Please join me in thanking all of our panelists. It has been fantastic.

We have time now for questions, answers, comments and discussion for our panelists. Who would like to speak?

AUDIENCE: Hi. My name is Sarah Bennett. I am an attorney at the Legal Aid Society. My question is really for the District Attorneys.

I represent a lot of battered women who have killed their abusers, where the District Attorney's offices tend to prosecute those cases to the utmost. What I do not tend to see is a cross-over of understanding. In arresting the abuser, there is a lot of understanding about what the victim has gone through, but when it gets turned around and the woman kills her abuser — and clearly she would have been dead had she not fought back — there does not seem to be any kind of understanding or negotiation. I should not
say across the board, but in my experience, and I have represented about fifteen battered women at the appellate level, and I have not seen that much movement in the District Attorney's office in terms of understanding what led the woman to take the action she did. The cases tend to be indicted as murder cases, and when they are prosecuted as murder cases, the woman is convicted of murder.

When she has an advocate or a battered women's expert come in and testify that being a battered woman and caused her to act in this way, the District Attorneys that try the cases when talking about sentencing say, "Oh, she says she was a battered woman, but she was not a battered woman." Then, even though she has no criminal background and has led an upstanding life for the forty or fifty or sixty years before she killed this abuser, she ends up getting sentenced often for more than the maximum sentence. And when she is in the criminal justice system in that way she is basically being battered over and over again — first by her abuser, then by the District Attorney's office, then by the court, and ultimately by the cruel system.

MS. LEIDHOLDT: Who would like to take that? Lisa?

MS. SMITH: It is a little hard to answer that question. I do not see that many cases in a year. There are cases where even though there is a death they can be dismissed at the arrest stage by quickly looking through some prior arrests and cases. Then after investigation, the case is either presented or not presented.

I think most of the District Attorneys' offices now, at least in 1999, are very conscious of this issue, and thus tend to do a lot of investigation in these cases before they are actually prosecuted. In all honesty, on an individual basis, there might be cases in which they do not think that the defense is the truth.

But you are saying you see it as a systemic problem and I do not see that many of them, so it is hard for me to agree or disagree.

MS. STOKINGER: I think my response also is that we have not seen very many of them. They certainly have not come across my desk, so I cannot speak to those specific cases.

JUDGE DRAGER: I do not deal with this at all, but apparently you have become an expert on this. You are probably seeing a great number of those cases because that is where they get sent to relative to the number. I mean, that may be the most that are in the system, or almost as many as there are in the system at this point.

That is not to say that those should not be considered, but I think the offices are now aware of the issue. And, of course, if you are
dealing with them at the Appellate level, you are probably seeing them.

AUDIENCE: Within the last year I was having a negotiation with the Brooklyn District Attorney’s office, and I felt like the people I was dealing with, who are on a very high level, just believed it was nothing. “So she had an order of protection, so he dangled her out the window.” They just dismiss it. And, I understand that office is supposed to be good on domestic violence.

MS. SMITH: Afterwards you can tell me about the case and I will look at it.

AUDIENCE: But we still do read in the paper often about a battered woman going on trial for killing her abuser. I know there is one going on in Kings County right now. I do not know the facts of the case, just what I read in the newspaper. I do see though, that an expert is going to testify that the person was battered, and I know that experts in general do not testify that a woman is battered if she is not — or at least this expert, Julie Brackman, with whom I have dealt on many occasions. Sometimes she finds that somebody has been battered and sometimes not.

You still see those prosecutions going on though. It just makes me wonder, are we failing battered women who are in the criminal justice system? They are the ones who are really victimized. They are coming in at the point at which they have killed their abuser. The violence they may have experienced is just unbelievable, and usually the kind of bruising that they are coming in with the night of that incident is just incredible. And yet, once they have killed their abuser, it seems to me that the system has really let them down.

MS. LEIDHOLDT: Yes, Kim?

AUDIENCE: I think maybe it would help — and I certainly want to follow up on her point — to just switch the analogy around, and maybe talk about the violations. Women have been arrested when there are cross cases, and it might be easier in terms of the numbers to talk about those kinds of cases because those are happening more frequently, where women may be prosecuted if there are cross cases on violations. There is a similar sort of a lack of understanding about what it was that she had gone through as a victim, but in a less severe case.

And then also, as a follow-up to what was mentioned earlier this morning, about not prosecuting or not having mandatory arrest on violations where there was no physical injury, much of the litera-
ture says that those cases — the pushing, the shoving, just a violation that does not —

MS. STOKINGER: I consider that physical violence. A case where there was no physical violence, for instance —

AUDIENCE: Well, even if there were a threat or something, that could be seen as an escalation. So if you prosecuted or arrested on a violation, even if there was no physical violence, some would argue that would be preventative.

MS. STOKINGER: I would like to address that point first. What I am saying is that we should have mandatory arrest. I think there are cases in which there should be an arrest and there should be a prosecution, even where victims come to us and say, “I do not want this.” However, there are cases in which someone has gone to family court and gotten an order for protection where there has not been any physical violence whatsoever. There may have been a harassing telephone call — not necessarily a threat — just a harassing telephone call. There is an order of protection and then there is another telephone call.

My feeling is that once there is an arrest, the criminal justice system is a very blunt instrument. Michelle is right. Once one party has been arrested by the other, I think the repair of any relationship is almost impossible. I think there are cases in which we should be looking at those cases and saying, “Do we want to damage that; to break into that relationship and damage it, even when we have not been asked to?” But there is mandatory arrest for violations of orders of protection.

It seems to me that, even when the victim may say, “Please do not arrest,” in those instances we need to be looking at it. And maybe the family court judge says, “You know something? This is deserving of a criminal punishment.” Maybe it should go to the criminal justice system.

But we are stepping in and making an arrest when someone has asked us not to and where there has been no physical violence. As I said, I do not consider pushing, kicking and slapping not to be physical violence. That is physical violence. It is physical contact. I am talking about something that is just not physical, something that is not in our traditional sense violence. Those are the cases I am concerned about, and I think those are the cases that are now coming into the criminal justice system. Those cases tend not to be prosecuted, and yet we are stepping in and interfering with relationships that we may irreparably damage when there might have been some hope over in family court for them.
AUDIENCE: I am Lisa Frisch. I am with the New York State Office for the Prevention of Domestic Violence.

I think we have to continue to be aware that it is the person who is being controlling and abusive that is damaging the relationship. I do not think it is the criminal justice system that is doing it. If somebody has an order of protection issued, they should know clearly that if you violate it, these are the consequences, and we have to be really clear and consistent with those consequences.

MS. STOKINGER: But sometimes people have gotten orders of protection and asked for them and they did not understand what the consequences were. I think we do not make clear to people what the consequences are.

AUDIENCE: That is a problem.

MS. STOKINGER: I think that the judges, the courts, the prosecutors and whoever else is dealing with them have to say, "No contact means you cannot pick up the phone. That means no contact." You do not just write it on an order. There has to be a lecture given. And then, if someone violates it, I do not feel bad for them.

AUDIENCE: I agree with you. I think we need to provide that information. Just one other quick comment about the question of lowering the threshold of physical injury. What is the relationship, from your perspectives, on the problem of dual arrest? Do you think that could potentially contribute to that problem, and what suggestions would you have about crafting language? Lisa gave some suggestions as to possible ways of doing that, but what about crafting language that may avert contributing to that problem?

MS. HAVILAND: I do think that lowering the threshold of physical injury in New York State will contribute to more arrests being made of victims of domestic violence. I do not have any immediate solutions off the top of my head, but I do think that we have to take the law that we have now and make a bigger effort to train and to educate women in the community about what their rights are with regard to the primary physical aggressor.

One of the things on our hotline that I did not talk about at all is that probably a quarter of the calls that we get around police problems are just merely women asking, "Oh, I got a DRI last night; what does that mean? I got a DRI but no complaint; what does that mean? I got a DRI and a complaint; what does that mean?" I think there is a tremendous lack of information out there about what women can or cannot do and expect in terms of police response.
I also think the NYCPD policy on primary physical aggressor is not very well written so that it is unclear how the officers are supposed to intervene. It says that you have to evaluate these factors, but then it says two or three times over that you can make an arrest of both parties anyway basically. It does very little to flesh out how the factors should be interpreted. It does nothing to flesh out how the factors can be ascertained, for example, whether a history of domestic violence has to be documented or not documented. For instance, in looking at defensive wounds, we had callers to our hotline where the differential in size was amazing. We had a caller who was 5'5" and weighed 120 pounds and he was 6'3" and weighed 210 pounds. Well, that kind of thing has to be looked at when you are looking at whether an injury is defensive.

I think there is room for a lot of fleshing out of the primary physical aggressor law. We do entrust our police officers to make decisions about probable cause. I do not think that the primary physical aggressor is a lot more complex than that. I think we have to do a better job of getting the police officers educated about that law.

JUDGE DRAGER: I think the difficulty with how to expand on the language of physical injury is because it would be very difficult to do that. That is kind of what I was alluding to in my comments. If we think about moving away from the stalking statute, we are going more in the direction of what is really happening in domestic violence cases. It is the emotional abuse that is much more telling, that we have not quite come up with the right language, if you will, or to turn that into a criminal statute. That kind of abuse is much more prevalent, and I think that somehow or another we have to begin to grasp onto how we address that kind of activity.

I also just wanted to comment on the issues of orders of protection just to give you an example of some of the difficulties that are created. I must tell you, I love getting contempt cases because they are easy. I do not have to worry about whether she wants to prosecute or not. I mean, I have the order of protection, and it has been violated. It is an easy case. And of course, now that it is a felony level prosecution, there are real substantial penalties that are involved.

To give you an example of some of the difficulties we face in the criminal justice system, somebody is arrested on a violation of an order of protection and the defense attorney says, "But, Judge, she moved back in with him," or "She asked him to come and live with her." While we all know that is not what the order says, we all
know that he is still violating the order, it does make the case a more difficult prosecution.

I think it is very important to remember that when we talk about a prosecution, ultimately what we are talking about is presenting a case to a jury that is going to hear the evidence and where the standard of proof is proof beyond a reasonable doubt. This is a very high standard, it should be a high standard, and it is a jury decision. There is no telling what ultimately happens at a trial, as everyone knows.

AUDIENCE: I do a lot of criminal defense, and a lot of times what I see is the woman — usually it is a woman — using the order as something to try to keep her husband or boyfriend in line. Many times I have seen it being totally abused by the woman.

I tell my clients when they are in jail, “I do not care if your girlfriend comes to you through the front door of your home naked, you are not to have any contact with her.” Yet, usually, the girlfriend will call and they will go. I had one case where they went to a tanning salon together for lunch, the boyfriend got up to leave, and she called the police and had him arrested because she said, “I do not want you to go.” It happens quite often that way, quite often.

MS. LEIDHOLDT: Yes?

AUDIENCE: I am from Sanctuary for Families, Center for Battered Women’s Legal Services. In the early 1990s, it used to be that my primary assistance to my clients was helping them convince the police to arrest the men who had abused them. I find myself now in the position of spending most of my time helping my clients not get arrested on retaliatory charges made by their abuser. I find that the mandatory arrest law is being used as a tool by abusers against women.

Inspector Young noted that mandatory arrests are up 144 percent. I asked him during the break if he had a breakdown by gender, but he did not have that information available. I have been trying to get that information from the NYCPD for some time and I have not been able to. I do not think he has it. The Office of Public Information has not given it out.

Anecdotally, I know that arrests of women on these retaliatory charges are increasing. I wonder if anecdotally anyone on the panel had comments about this misuse of mandatory arrest as a tool for an abuser, and I would ask the panel how they approach these cases and how assessments are made when women are arrested, whether there is even assessment, whether she is previously
a complainant in a domestic violence case, whether or not the arrest complaint is a valid complaint, and how assessments are made?

MS. SMITH: Actually, one of the great things about this conference is that a lot of the conversation from last year prompted some of the work that has been done in the interim in this area. The NYCPD has been doing special training in Brooklyn on primary aggressor with the police officers. I am actually seeing a drop in cross-complaints in the courts, so much so that the judges actually independently mentioned to me one day that they had noticed that the cross-complaints were dropping dramatically.

The cross-complaints or the dual arrest numbers are so much smaller than our overall arrest numbers. We have set up a system in our complaint room where we have one person who looks at them as they come in. I think they are the perfect example of cases that actually have to be treated on an individual basis and should have if we cannot get an advocate involved in the intake stage, which I guess is problematic because we do not know if the woman who is arrested has an advocate, at least as soon as the advocate is involved, they should reach out to the District Attorney.

We have been trying to address it at the intake stage so it does not go any further. We have been having actually quite a bit of success, just judging from the numbers that are actually pending in the Brooklyn Criminal Court.

So I think maybe on a training and then really an aggressive complaint room approach, you can actually make a dent in it. That is at least what our criminal court judges are telling us.

MS. STOKINGER: What we are seeing with dual arrests is, I think, that they are down since the primary aggressor law. We have had a policy since before last year when there is a dual arrest to bring both parties into the complaint room, if the police have not already straightened it out. If we can, we straighten it out then and there, so we know whether or not to draft a complaint against both, one, or none. It is important to do that.

However, I think one of the big impediments to the police doing their job and to the District Attorney's office doing their job is just the dynamics of a situation. Sometimes it is hard to find out, even after weeks, that we have a problem. But there is an agreement, there is actually another consent decree, that there is twenty-four hours from arrest to arraignment time. The police have two hours of that twenty-four hours to process an arrest. What happens in dual arrest cases is they just cannot apply the primary aggressor
law in that two hours; it is almost impossible. So that is a huge impediment.

If we could somehow get an exception for domestic violence cases to that two-hour rule, it would be wonderful.

AUDIENCE: I am not just talking about primary aggressor. I am actually talking about cases where the woman is the only one arrested.

MS. STOKINGER: The retaliatory cases I think are actually even more difficult. It is, frankly, in intense relationships where there are retaliatory complaints made in many different contexts. We see it in child abuse cases and domestic violence cases; we see it in the situation where one person has had the other one arrested and then that person has the other one arrested; we see it where there is a matrimonial action going on and all of a sudden there is an allegation of child sex abuse. We see it a lot:

But even when we see it a lot, it is still not uncommon. We do see it too much. It is the misuse of the system. But it is a small number compared to the overall numbers that we see.

They are very difficult cases to flesh out, and the retaliatory arrests are very difficult because it does not obviously present itself to either the police officer or to the District Attorney's office at that moment that there is a situation where we have got to sort out which one it was. But that is something where I cannot insist that a defendant speak to me. So if a woman gets arrested, I cannot say, "You must talk to me and tell me what happened and I can figure it out." I am dependent upon her lawyer to come to me and say, "Please look into this situation."

I would be very unhappy to hear if there was a case in which a lawyer brought a case to us and said, "Please investigate this," but someone did not do it in my office.

AUDIENCE: I want to ask Mary if you know of any other studies that have been done in other states looking at similar kinds of issues, or whether other states which have lower definitions of physical injury have greater rates of dual arrest or retaliatory arrests?

MS. HAVILAND: No. It is a fascinating question. I have never really studied it systematically. There are some states that have much lower thresholds — California is one of them — in domestic violence crimes, and there are others that have adopted primary physical aggressor law, Wisconsin and Connecticut being two that I know of. But I do not know about the interaction between the
two. I would love to look at it at some point and see what the interaction is.

It becomes very hard. I looked at other jurisdiction stuff when I was director of the Coalition for Criminal Justice Reform for Battered Women. It becomes very difficult to compare because there are so many different possible intervening characteristics of a jurisdiction.

But I do know that the mandatory arrest statute that we all have emulated, which comes from Duluth, Minnesota, is a statute that is based on visible injuries — not anything less than that, just visible injuries. They have been able to keep their dual arrest and their retaliatory arrests low. But that is because it is a small town. For each household where there is an arrest made, an advocate is sent out to that household. It is a very intensive and different model than we can replicate in an urban environment.

So that is a very good question that I think people do not really have the answer to.

MR. YOUNG: If I could respond from the police perspective, I guess what has been mentioned is just in terms of the training on primary physical aggressor. Without going through the whole training, one of the points that we are trying to get out as a result of the training is that we want the officers not to jump to conclusions, but to conduct an investigation to learn the facts. We do encourage that the parties be interviewed separately and privately to learn the nature and cause of the incident; check both parties for injuries and determine if they are consistent with the stories that they are telling; distinguish between offensive and defensive wounds; consider the threats of future harm and past incidents of domestic violence; and consider if one person acted in self-defense.

Having said all those things, independent of comparing probable cause versus primary physical aggressor, I do, from an operational perspective, see a significant difference in probable cause and primary physical aggressor for the officer on the scene being asked to make a decision in a quick period of time.

But the structures in the Department, with the creation of the Domestic Violence Prevention Officer, allows other aspects of the system to interview, go back to the Domestic Violence Officer and ask for documentation on previous histories to assist in the quality assessment of the case as it moves through the system, to allow justice to ultimately prevail. It is just very difficult in that snapshot, very focused period of time to make a decision with the outcome that you may desire.
AUDIENCE: I would like to address the blunt instruments issue. I work a lot in family court. I also do a lot of divorces. Often, I think about what one of my law school professors said to me, "You will never be a client," and this issue of depending on bureaucracies or large organizations to necessarily come to the correct conclusion in a particular case. My experience in family court is basically that there is the presumption that you are guilty when you come in, and it is up to you to prove that you are innocent. Because they are used to dealing with neglect and abuse, they are used to dealing with certain types of things, and they assume that it is up to you to establish that you are not the norm. That is your attorney's job — to establish that it was not you.

Doing a lot of divorces, I also find that orders of protection are often used as a ploy. They are used to get a man out of the house because otherwise they will have to live together for a long time uncomfortably.

I find in family court that you get a fair number of people who manipulate the orders of protection. Sometimes it is the man, sometimes it is the woman. These are the realities of practicing in any court, that you get a gamut of motivations — which is not to say that there are not more women abused than men, but I have also dealt with cases where there have been men who were physically abused by women. After awhile I get a little tired of hearing that it is only the woman who is the victim, because that is not necessarily the case. What I am trying to say is I do not know what kind of training judges are getting, because we get some judges who will always put a man in jail, and some judges who will say, "Well, she married him."

MS. LEIDHOLDT: I would like to let just one more person ask a question or make a comment.

AUDIENCE: I would just like to applaud Ms. Tasha Hightower for sharing her personal story.

There are other areas in the law in which it is being said that pigment is not addressed and people get a different form of justice or it manifests itself in different ways. Perhaps another day, another time, we can delve into that, but thank you for sharing your story.

MS. LEIDHOLDT: I think before we close, Tasha has just one or two comments that she would like to make.

MS. HIGHTOWER: Yes. I just wanted to say quickly that the system has not just been a foe to me, it has also been a friend, but I had to stick to the topic at hand. I would like to address two peo-
ple very quickly. One is my attorney, Mr. Ronald Fischer, from Victim Services, who helped me in family court. I was really skeptical at first because he was a male and I had just finished dealing with a male, but, Mr. Fischer, thank you.

And then, the biggest surprise is my Assistant District Attorney is here, Sashay Taylor. She has been incredible. She has been so supportive to my daughter and I. She is just incredible. And this is great, because when we talk on the phone about the updates of the case, we rarely get to talk, and for me to actually see her — I just feel so loved from everybody in the room. Assistant District Attorney Taylor, you are great.

MS. LEIDHOLDT: Thank you very much, everybody.
IN THE TRENCHES AWARDS:
FIRST ANNUAL PRESENTATION TO AN OUTSTANDING JUDGE
AND EXCEPTIONAL ADVOCATE

MS. LEIDHOLDT: We are now going to start the award ceremony. Could the awardees please come to the front of the room?

MS. DOUGLASS: It is my great pleasure to begin the remarks. In planning for this year’s annual forum, the Planning Committee got together and discussed what the content of the panel discussions should be and just generally where this conference would be going.

One of the conference planners, Rose Pierre Louis, from Network for Women’s Services, said, “You know, it is about time that we gave out awards to some people that have done tremendous work. We should really institutionalize an awards ceremony, since we have institutionalized this conference here at Fordham, and notice those people that perhaps deserve special mention specifically for their work around domestic violence issues.”

We did not want to have formal awards or formal titles or formal anything be the basis for these awards. We wanted it to be really those people who had devoted themselves, their real thought process, to trying to make a difference in the arena of domestic violence. Those people, starting this year and going forward, who have had the courage to take unpopular positions within the system that they actually operate in, to speak out in places where the subject of domestic violence might not have been welcome at the time that they spoke out, to be a thorn in people’s sides and, to try to make change where change is worth making.

Without further comment about the awards themselves, I would like to introduce you to the first judge who is going to be receiving the “In the Trenches Award” from the Lawyers Committee Against Domestic Violence, Judge Betty Weinberg Ellerin, on my right.

Many of you probably have seen Judge Ellerin introduced as a woman of firsts. Perhaps the most recent of these is that she is the first woman to be the presiding judge of the Appellate Division, First Department, which came about earlier this year. I think we should all applaud that.

Without dwelling on all of those firsts, some are the first woman to be appointed to the Appellate Division, First Department in 1985, the first woman to be the Deputy Chief Administrative Judge of the State of New York, the first woman to win the Harlan Fiske Stone Award presented by the Association of Trial Lawyers of the
City of New York, which are all major achievements. If you look at Judge Ellerin’s record, you can see that for a long time she has also been concerned with what is happening with women.

Judge Ellerin is now the chair of the New York State Judicial Committee on Women in the Courts. She is the Past President of the National Association of Women Judges; the past chair of the National Task Force on Gender Bias in the Courts; the past president of the New York Women’s Bar Association; and, a founder and director since its inception of the Women’s Bar of the State of New York. She has received awards from the ABA Commission on Women in the Profession, the very prestigious Margaret Brent Women Lawyers of Achievement Award, as possibly the shining achievement among those many awards that she has gotten for work on behalf of women.

There was no one else who came to mind when we decided to award a judge. It was Judge Ellerin who should get this award.

What makes her tick? Well, we found her to be a woman of empathy and understanding. She really seems to connect with people, one on one. But she is also a woman who loves the court and loves the law and does not want them to do anything but be a force for good. So she brings these two interests together in a very unique way.

She also sees herself as a problem solver. She rolls up her sleeves, listens to all the good ideas in the room, and then says, “Let’s get started, let’s do something about this.” She is sociable and warm. She is a mentor to everyone who comes along. There are three examples I want to tell you about, and then I want to give her what we hope will be an award that she can remember along with the other important ones of her life.

First example: A little less than two years ago, after thinking about the forum that was coming up last year, we thought we would have Judge Ellerin, who chaired the New York State Judicial Committee on Women in the Courts and who was going to be co-sponsoring that event, come and talk to us about what she thought should happen with that event and, in general, what issues were important to bring up at the conference. We invited her to come to one of the regular meetings of the Lawyers Committee Against Domestic Violence. No important people were planning to be there, no press, nothing. It was just another event that she needed to fit into her schedule, which is packed every single minute.

Not only did she come and spend an enormous amount of time with us talking and listening, but before that, she said, “Cathy, I
want to meet you out in the hall. I have something I need to talk over with you. Come out before I come into that meeting.” So I came out ten minutes early. What I found was a very difficult case for a battered woman that had come to the Appellate Division. The woman had no lawyer, and was never going to receive a hearing on her case that merited consideration without a lawyer. Judge Ellerin would simply not let this person go without figuring out collectively with the people who were in that room some way to find counsel for that woman. And you know that this is happening day in and day out behind the scenes.

Second example: Last year at our conference, we decided for the first time to have a judges’ panel. We wanted to attract people on the bench to talk to advocates and establish a dialogue. We asked Judge Ellerin if she would be willing to moderate that panel. Not only did she welcome the opportunity, but she welcomed the opportunity to ask the hard questions and to admit to problems not yet being solved, and to work all the people on the panel very hard to acknowledge where the failures still were and where we had yet to go. This is not an easy thing to do, and it was a very good start to our judges’ panel precedent. We are actually hoping to follow the awards ceremony with the second of those.

Third example: In her role as the chair of the New York State Judicial Committee on Women in the Courts, she linked that organization up with the City Bar’s Task Force on Domestic Violence because there was such a natural link between the concerns that were being raised in that Task Force and by her commission. Because of that link, there is a movement to try to solve problems in a very systemic way that will perhaps make a real difference to those victims that may not have gotten representation before.

These examples are just the ones that I know of. All of you who have been dealing with Judge Ellerin in many contexts could come up with your own examples.

At this point it is my great pleasure to show you the award and to read it to you. It says: “The Lawyers Committee Against Domestic Violence presents the ‘In The Trenches Award’ to the Honorable Betty Weinberg Ellerin for bringing indomitable courage, vision, and dedication to ending violence against women. April 26, 1999.”

JUDGE ELLERIN: Thank you so much, Cathy. That was such a beautiful introduction.

I must tell you this award means more to me than I can say, because I think it says that maybe I have made some small contri-
butions to effecting a scourge that has been with us since, unfortunately, time immemorial.

I am not sure that I really am the one who deserves it because there are so many out there, judges and others, not the least of whom is Cathy Douglass, who happens to be my own sort of favorite saint in waiting, but who really do work day-by-day to try to make things better.

I will be honest and say that for the first thirty of the fifty years that I have been aggressively involved in seeking to make things better for women, it was primarily in seeking to help women advance within the professions and within society generally. We sometimes would talk about domestic violence — but remember, that it was an issue that was in the closet for a long time.

And then, when I became a judge and I sat in the criminal court, a little over twenty years ago, I had first-hand experience with domestic violence cases and I got a taste of (1) what a difficult problem it is, and (2) that it was not being taken very seriously by those who should have been taking it seriously, whether it was judges or court personnel or what have you.

While things have really improved markedly in many areas, the one area where we have not really made much progress at all, I hate to say, is in domestic violence. The one way that we have forged ahead is that at least it is now out of the closet, it is recognized as a wrong and as a problem that we must address. Hopefully, all people of goodwill and right thinking feel that way. Just listening to some of your speakers here has been very inspiring to me.

But there is still so much more to do. It is still very prevalent. It still is not being addressed in a very effective way in many areas.

Cathy made some mention about my new position. Well, I have been working with the Council of the Association of the Bar on Domestic Violence. The chair of that Council, Judge Michael Nadel, is here today. He happens to be a member of my committee, the New York Committee on Women in the Courts. He brought to us the report of the committee that it is essential in a case where a domestic violence victim is bringing a case in the family court that counsel be assigned immediately. Of course, our committee also adopted that position. I thought “Oh, this is easy. After all, the law says that counsel is supposed to be assigned, right? We are going to be able to do this in a snap.” Well, that was two and a half years ago, and it still has not happened.
As things would have it, I am now in a little different position, and that is the one thing I am committed to doing. I want to make sure that when the victim of domestic violence comes into court to file that petition, she has counsel. And yes, there are occasionally men victims, but, to be honest, the overwhelming number are women victims. Having counsel assigned at that stage permits that victim to know all of the options that are available and to be able to proceed with the case in an appropriate fashion. Statistics have demonstrated that when counsel is early assigned, the return rate to prosecute to conclusion is thirty to forty percent higher than when that is not the case.

I am committed to that, and I want to tell you, they are going to hear from me between now and the end of the year. If I can accomplish that, I really will feel (1) that I deserve the award that you have given me, and (2) that I really have accomplished something in this new position.

I want to thank you all again very, very much. I admire all of you so very much because you really are in the trenches day by day fighting the good fight.

MS. DOMONKOS: Now it is my pleasure to give the Advocates In the Trenches Award.

When the Lawyers Committee Against Domestic Violence decided to give one of its first In the Trenches awards to Maria Imperial, I grabbed the chance to be the one to present it to her today.

For over ten years, Maria Imperial has been a leader and an innovator in the effort to find legal approaches to address the epidemic of domestic violence. In her ten years as General Counsel and Associate director of Victim Services, where she learned from the experiences of the 75,000 domestic violence victims who came to the organization for help each year, Maria looked beyond the conventional wisdom of the domestic violence movement and the stereotyping assumptions of the justice system to get to the heart of the true needs of these very real and very diverse women and their children.

Early on, Maria identified the dearth of specialized legal services for domestic violence victims and knew that this was an issue of essential justice, personal safety and integrity, and economic freedom for women and their children. With Legal Services' money scant and getting scantier, she found a way to establish, and then to grow, Victim Services Domestic Violence Law Project.

Maria has always focused on the issue of economic dependency and how it creates a trap for women with abusive partners. The
implications of welfare reform for battered women were immediately obvious to her, and she set out to make sure that the Family Violence Option, which would exempt battered women from many of the new rules and restrictions regarding the now-tattered "safety net," would not apply to them. Maria worked tirelessly in New York City and in Albany and was instrumental in getting the Family Violence Option passed in New York State.

She now serves on the New York State Task Force to Implement the Family Violence Option. She also developed and chaired the Women Welfare and Abuse Task Force, which, among other things, has sought to ensure appropriate and fair application of the Family Violence Option in New York City.

She has written a number of articles, including "Self-sufficiency and Safety: Welfare Reform for Victims of Domestic Violence," published in the Georgetown Journal on Fighting Poverty.

Maria was also in the forefront of the examination of domestic violence in the workplace. In 1995, she was invited by the Office of the President of the United States to talk on the topic of "Domestic Violence as a Workplace Issue" at a conference celebrating the Women's Bureau.

She has helped develop policies and training materials for employers. She is also a member of the New York State Task Force on Domestic Violence Workplace Issues, which has developed a model policy on domestic violence for all New York State counties to apply to their employees and which is being adapted to serve as a model policy for private employers.

Maria's work is never just theory. At Victim Services, she developed Project Rise, a job-training program for domestic violence victims.

Maria now serves as executive director of the Association of the Bar of the City of New York Fund, Inc. The City Bar Fund, the 501(c)(3) affiliate of the Association, provides legal services to those who cannot afford such assistance through direct representation, advice and referral, and self-help clinics.

I know that Maria will continue her dedication to helping domestic violence victims at the City Bar Fund. She had barely gotten on the payroll over there when she called to tell me about her idea for a new legal clinic for battered women who need advocacy to access benefits.

A few final and more personal words about Maria before I give her the award. I had the joy of working for her for almost six years, and I learned from her everyday. I learned about how to treat clients with dignity, respect and the utmost professionalism. I learned about how to try always to remember that our own perspective cannot substitute for that of the client, who may come from a different ethnic, cultural, racial, socio-economic or philosophical viewpoint.

Maria embodies one of the truest characteristics of someone who really cares about women’s issues, and that is a heartfelt desire to support, encourage and mentor the women professionals who work for her. In my book, that makes her a feminist in the very best sense and she will always be a mentor, role model and friend to me.

So it is with great gratitude and delight that I present the Lawyers Committee Against Domestic Violence In the Trenches Award to Maria Imperial, who lives her professional life in the trenches, shoulder-to-shoulder with domestic violence victims and with her colleagues.

MS. IMPERIAL: Thank you so much for the In the Trenches Award, although I feel, like Judge Ellerin, that I am not as deserving of this award as much as other people in the audience are as well.

It is especially gratifying for me to receive this award from Julie Domonkos, who is a colleague that I respect so much and admire. I also would like to thank all of my new friends at the City Bar Fund and also friends from Victim Services for coming here today to see me receive this award.

Some years back, Donna Shallaleigh commented that “in this country domestic violence is just about as common as giving birth, about four million instances of each.” Think about that — hopelessness and hope equally weighted in our society, and all too often intermingled in the same woman’s life.

I often use that quote when I talk about domestic violence because I actually saw my role as an advocate on domestic violence issues as giving women hope. Although there are many legal things that I needed to do, I also felt that I needed to create programs or develop policies to give people hope.

Over the past ten years, I have seen a number of changes — there has been the Violence Against Women Act and on the state level there has been criminal and family justice reform — but there still is so much that needs to be done. I actually was sitting at the conference with a friend who taught me about domestic violence
on a plane over ten years ago, and we both commented that although a lot of things have changed, a lot of things still stay the same as well.

I find it somewhat ironic to be honored as an advocate because I went to law school knowing that I did not want to be a litigator. Being an advocate, if you know my personality, is not the first word that would come to your mind. But the reason I share that with you is because I would like to give the law students in the audience hope that although you might not aspire to be a litigator, that there are ways that you can definitely make a difference in other people’s lives.

I feel extremely privileged to have worked with domestic violence victims over the years. I also feel privileged to have worked with the colleagues that are in this room over the past years. I have learned so much from the women. I have learned so much from Tasha today.

My final remark is that I just would like to thank all of you so much. Thank you very much.
JUDGES PANEL: HOW EFFECTIVELY DO THE COURTS AND ADVOCATES ADDRESS THE SAFETY OF WOMEN AND CHILDREN?

MS. DOUGLASS: It is now my privilege and pleasure to introduce the moderator of the Judges’ Panel. He will introduce the rest of the panel and begin the discussion.

The Honorable Michael Nadel is Judge of the New York State Court of Claims; but for the purpose of this panel, his important position is that he is the chair of the Domestic Violence Task Force of the Association of the Bar of the City of New York. He was a criminal court Judge, and from 1981 to 1985 he served as the Deputy Chief Administrator of the New York State court system. He is also, as Judge Ellerin said earlier, a member of the New York State Judicial Committee on Women in the Courts.

It is with great pleasure that I turn over the Judges’ Panel to Judge Nadel.

JUDGE NADEL: I want to introduce our panel.

Judge Esther Morgenstern was elected to the Civil Court of the City of New York in 1995 and was assigned to the Criminal Court of Kings County in April of 1996. In March of 1997, Judge Morgenstern was appointed to preside over the newly created Kings County Domestic Violence Part that handles domestic violence misdemeanors from the first date after arraignment through the final disposition or trial. Prior to taking the bench, Judge Morgenstern was law secretary to Justice Herbert Kramer of the Kings County Supreme Court, and before that she practiced law at a firm specializing in international commercial litigation. Judge Morgenstern sits on numerous committees and task forces addressing the issue of domestic violence. She received her Juris Doctor from Cardozo School of Law in 1984.

Judge William Rigler was a practicing attorney from 1951 to 1970, when he was appointed to the civil court, and to the family court in 1971, where he served until December, 1977. At that time, he was elected to the Supreme Court of Kings County, where he presently serves. Judge Rigler has been a lecturer at judicial seminars and various bar associations on matrimonial law.

Judge Gayle Roberts was appointed to the bench in 1997. Since that time, she has been presiding over the Bronx Family Court. Prior to her appointment to the bench, Judge Roberts was an Assistant District Attorney in Bronx County. She is involved in numerous professional and civic organizations. She is the co-chair of the Bronx County Bar Association’s Pro Bono Committee and a
member of the New York State Bar Association's President's Committee on Access to Justice. Judge Roberts graduated from Tulane University School of Law and the University of Pittsburgh.

Judge Joseph Lauria has been practicing law since 1972, when he was appointed Assistant District Attorney in Kings County. He served in that capacity and attained status as senior homicide trial attorney. Later, as an Assistant District Attorney in Queens County, he was Chief of the criminal court and family court bureaus. He was also in charge of training for that office. Thereafter, Judge Lauria practiced family and criminal law in the private sector from 1980 until 1989, when he was appointed to the family court bench. He presided in Queens County for nine years over some notorious cases. Since July, 1998, he has been a Supervising Judge of the Family Court of Kings and Richmond Counties. He has been a lecturer and panelist at various bar associations and governmental and law enforcement agencies.

Judge Judith Gische is an Acting Supreme Court Justice presently presiding in the dedicated Matrimonial Part in the Bronx. She is a member of the Peace Advisory Board and of the Matrimonial Committee of the Association of the Bar of the City of New York. Judge Gische previously served in the Civil Court of the City of New York and in housing court. She was also a practitioner in private practice for many years.

To begin, the court system in New York does not deal with the issues presented by the Hypothetical that you have been dealing with during the day in a coherent fashion. We know that three separate courts are regularly called upon to address the circumstance of domestic violence and the well-being of a child. We see in the Hypothetical matters pending in family court and criminal court. The same facts could be presented to a supreme court justice presiding over a matrimonial action.

We have assembled a group of judges from each of the three courts to explain from their perspective what happens when situations of domestic violence involving the well-being of a child are presented to them, and to explore whether the issues of custody, visitation, support, violent behavior and the issuance of orders of protection are handled differently depending upon which court it is.

54. Judge Lauria was appointed Administrative Judge of New York City Family Court in October, 1999.
55. See Hypothetical, infra app. A.
How do the responsibilities of the three courts differ? Is information upon which decisions are made different depending upon the court; and, if so, is that because different information is necessary, or is it because of a difference as to what is available?

When more than one court is involved with the same people at the same time, how much does each court know about what the other is doing? Do they need to know? Should they try to find out more?

What we hope will emerge from this discussion and from your questions is a sense of whether the overlapping jurisdiction of courts inhibits or enhances the effectiveness of how the courts address the problem.

To begin our presentation, one judge from each of the three courts will examine the issues presented by the Hypothetical from the perspective of her court. We will start with Judge Morgenstern of Brooklyn Criminal Court. As you look at the Hypothetical, what are the issues that you have to decide, what do you need to know to decide them, and how much do you consider what is or should be going on in family court?

JUDGE MORGENSTERN: Thank you.

Domestic violence is the only crime where most often the victim and the batterer do not believe that the acts committed are actually crimes. The creation of the Domestic Violence Court sends the message and makes it clear that we as a society will have zero tolerance for domestic violence.

In Brooklyn Criminal Court, we arraign over 100,000 cases every year. One out of every five cases is a domestic violence case. Four million women are physically abused by their male partners each year in the United States. Again, there is domestic violence against men, but it is very different from cases where women are the victims.

In New York City, in 1997, there were over 250,000 Domestic Incident Reports ("DIR") filed. In 1998, we had almost 300,000 DIRs. Not all of these resulted in arrest and prosecution.

In Brooklyn Criminal Court, we have two designated domestic violence parts. Each of us is an Individual Assignment Part – handling cases from arraignments to final dispositions. We carry over 1200 cases apiece. The Brooklyn District Attorney’s office has designated domestic violence district attorneys, as well as social workers, that deal with the special victims.

Most determinations that are made in criminal court occur before there is a determination of guilt. There are very important
constitutional issues raised when I arraign a defendant and issue a full stay-away order of protection. Based upon an uncorroborated complaint, the District Attorney has very little information within those first twenty-four hours, and we are depriving defendants of their liberty if bail is set, and of their property if we issue full stay away orders of protection. However, the court’s first concern is the alleged victim’s safety and the safety of the family.

Now, in our Hypothetical, Juliette had several things working against her, which is what makes it a very interesting Hypothetical for our panel today. She entered into an arranged marriage and was clearly being controlled by Neil from the outset. He would not give her money for anything but food, he insisted on going everywhere with her, he would not allow her to attend classes or job training and verbally abused her, telling her that she would never hold a job. He also held her immigration status over her head. These are classic domestic violence control warning signals.

When the verbal abuse escalated and Neil punched Juliette in the face and knocked out her tooth, had she called the police today, a domestic violence officer assigned to each precinct would have arrived at the home, Neil would have been arrested and charged with felony assault, mening and harassment; if Amy, the child, was present, they would have charged him with endangering the welfare of a child.9

Now, it is very likely that had this been the first incident of this magnitude, Juliette would have declined to testify in the Grand Jury and the case would have been reduced to a misdemeanor assault. It is also likely that Juliette would not have signed the supporting deposition against Neil, and the result would have been an ACD (adjournment contemplating dismissal) with a limited order of protection or an outright CPL § 30.30 dismissal.

In 1997, we compiled the following statistics: 82.7 percent of all the domestic violence cases filed in the domestic violence parts in Brooklyn were disposed of without a criminal conviction. In thirty-five to forty percent of the felonies where the victim testified in the Grand Jury, she later recanted and testified for the defendant.

56. See N.Y. Penal Law §§ 120.05, 120.10 (McKinney 1999).
57. See id. §§ 120.13-120.15.
58. See id. § 240.25.
59. See id. § 260.10.
Juliette could also have opted to file a summons in the criminal court against Neil pursuant to CPL § 130.10.\(^{61}\) She would then avoid having Neil arrested, Juliette would obtain an order of protection, an officer would have served the order on Neil, and he would have been summoned to appear in criminal court for arraignment. Pursuant to CPL § 530.11, Juliette could have also elected to proceed in the family court, where the courts now have concurrent jurisdiction.\(^{62}\)

Back to our Hypothetical, when the violence escalated and Neil punched Juliette in the stomach while pregnant and threatened her with a knife, Juliette could have called the police. If this occurred today, a domestic violence officer would have appeared at the home, would have taken photos to preserve the evidence, and the officer would have interviewed the neighbors and made a further investigation. Once arrested, Neil would have been processed through the criminal court and at the arraignment charged with felony assault,\(^{63}\) menacing with a knife,\(^{64}\) harassment\(^{65}\) and endangering the welfare of a child.\(^{66}\) And, certainly, a full stay-away order of protection would have been issued requiring Neil to find a place to live during the case.

Had Juliette come to court for the arraignment and spoken with the Victim Services representative or with the District Attorney’s office and indicated she wanted him home, a limited order of protection probably would have been granted by the court and the case would have proceeded requiring the defendant to appear before a judge and his behavior would be monitored.

Had Juliette gone forward with each case and prosecuted them, a Domestic Violence Registry entry would have been created and the courts at arraignment would see that, although it may appear that Neil had never been arrested before and no criminal history existed, the Registry evidenced that prior orders of protection against Neil did exist in Juliette’s favor — from family, criminal or supreme court. Judges now receive, in addition to the defendants’ rap sheets, the Domestic Violence Registry on every defendant at the arraignment on the criminal court complaint. And, with the new legislation passed, states are giving full faith and credit to all

\(^{61}\) See id. § 130.10.
\(^{62}\) See id. § 530.11.
\(^{63}\) See N.Y. PENAL LAW §§ 120.05, 120.10 (McKinney 1999).
\(^{64}\) See id. §§ 120.13-120.15.
\(^{65}\) See id. § 240.25.
\(^{66}\) See id. § 260.10.
orders of protection from other states, and we are now starting to see orders of protection from other states at the time of arraignment as well.

Had Juliette kept records of the abuse — the hospital records, the police reports, the photos — these could later have been used to prosecute Neil. Studies have shown that the best predictor of more violence is violence. So often after the victim has refused to go forward the first or second time the violence escalates. The violence further escalated in our case — Neil pushed Juliette to the ground while holding the baby, broke her nose and bruised the child.

When the domestic violence officers would show up at that point, they would now have to make an assessment as to who was the primary initial aggressor in the situation. This could avoid the horrific outcomes that we talked about earlier today requiring the Administration for Children’s Services (“ACS”) to get involved, possibly remove the children and arrest the victim.

When cross-complaints are filed in court, the District Attorney’s hands are tied because both parties want to end the matter in court, albeit for very different reasons. The District Attorneys cannot communicate with either party without their attorneys and the cases are labeled “ACD” (adjourned in contemplation of dismissal) with limited orders or dismissed outright.

Since the passage of the primary aggressor legislation, the cross-complaints in Brooklyn have gone down significantly. Of my 1200 cases pending and the total 2400 pending in Brooklyn, about five percent are cross-complaints, and that is two and a half years into the domestic violence parts existence. So the numbers have gone down significantly.

In every case in my Domestic Violence Part, if the victim is in the courtroom, I will second call the case and send the victim down to speak with Victim Services. Victim Services is not an arm of the court or of the District Attorney’s office. Victim Services is there to speak with the victims and they have a better chance of reaching the victims.

Once a victim has decided to go forward, the court has more options in dealing with the case. The court can move the case to trial, get a defendant who is guilty to plead guilty, mandate programs such as Alternative to Violence to help behavior modification and mandate alcohol and drug treatment through probation or through further monitoring by the courts.

The concept of "one family, one judge," which Judge Lauria will address later, is an innovative concept because domestic violence cases, like our Hypothetical, cry out for one judge to address the family's problems.

JUDGE NADEL: Thank you, Judge.

We will now turn to Judge Roberts of Bronx Family Court for her view on the Hypothetical and the extent to which any of it differs from criminal court, as Judge Morgenstern has just described it.

JUDGE ROBERTS: It seems to me that there are two main objectives as an advocate that you would have with this Hypothetical. First, you need to get the father charged as a respondent in the neglect case also. You need to do a detailed investigation so you can try to persuade ACS that they were incorrect in only charging the mother and that the father, Neil, should be a respondent too.

It is a tricky situation, because if you do too good of a job, you might be just strengthening ACS's case against the mother. So, while working to prove to ACS that a neglect should be filed, you also need to have the mother working with the ACS; have the mother speaking to the case worker regularly, and getting involved with a domestic violence program. Whatever referrals ACS is asking the mother to do, you need to make sure that she is doing it and she is showing ACS that she is cooperating, so maybe down the road you can get an adjournment in contemplation of dismissal or an outright dismissal against the mother.

In addition, you need to be preparing for a 1028 hearing because you are going to be asking a judge to return this child to the mother in three days. Have enough information ready to persuade a judge that there definitely was domestic violence in the home, that Juliette stayed in the home for awhile and that she can really protect herself and this child if the judge decides to give the child back to her.

You need to be talking to everybody possible. For example, you need to try to reach out to the neighbor who is a witness to some of

the domestic violence, at the very least, the incident when the police were called. That neighbor may be able to give you more information. Who knows what kinds of things she heard that may persuade a judge or ACS that the father should be charged with neglect?

In addition, you need to go to the hospital where she went after she was arrested, get those hospital records, and see what statements were made. You also need to go and speak to the special job training program that she is in. Maybe the people there know something; maybe they had interactions with Neil, and maybe they can corroborate that he was dominating or that domestic violence occurred at that location.

In addition, you need to try to get all of the police reports that are involved with this case. If you are unable to persuade ACS that Neil should be charged with neglect, you need to be able to go to court and ask the judge to order ACS to file a neglect action against Neil. In order to do that, you have to investigate and be able to give the judge a coherent, persuasive set of facts so a neglect petition will be filed.

The balance of power between Neil and Juliette is really off-kilter, especially if you cannot convince the judge that Neil needs to be charged with the neglect also. As Neil could conceivably be a resource for the child to be discharged to him, if you do not convince a judge that he is involved in and initiating domestic violence, then you really have a problem. Juliette will just be defending herself against the neglect case; she will have no chance of her getting the child.

In addition, speak to the child's doctor to try to find out if he or she has had interactions with Neil and Juliette. The doctor might be another person that can provide more information about what has been going on with the family and convince either ACS or a judge that Neil should definitely be charged with neglect.

At the 1028 hearing, try to show that ACS did not really provide this family with any services — that Juliette was a victim of domestic violence. Had ACS been involved in terms of providing her with a domestic violence program, or other services, perhaps this neglect would not have been filed against her, or certainly the child would not have been removed from the home.

The Hypothetical addresses asking for temporary support, which could be important. But before you can get support, you have to get the child back in Juliette's custody because no judge is going to
give a temporary order of support if she is in foster care or in non-kinship, or even with a relative.

JUDGE NADEL: Now Judge Gische from Bronx Supreme Court, from your perspective, including the extent to which your responsibilities may differ from the two courts that we have heard from so far.

JUDGE GISCHE: In most of these types of cases the supreme court is the last court that the litigants will go to. The supreme court is the only place where Juliette can get a divorce. Although she may be a victim of domestic violence and she may have seen the need to get orders of protection, it is a very different thing for her to come to terms with the fact that she wants some kind of permanent resolution and that she really wants to divorce Neil and go on with her life separately.

I think one of the interesting things about this Hypothetical is the undercurrent of cultural and financial problems that Juliette faces in terms of making a decision to divorce Neil. Let us assume in this Hypothetical that, at the end, she has made the decision to divorce Neil. After all the events in the Hypothetical have occurred, she will have her first initiation with the supreme court, and will have her advocate file a divorce proceeding, probably based on cruel and inhumane treatment.

One of the things an advocate has to do at the beginning of the case is to strategize. The advocate needs to consider: what Juliette needs in the short term to live; what she needs to do to make permanent arrangements to live a life apart from Neil; and whether Juliette would be best served if all of the separately commenced proceedings were coordinated in one court. More than the other courts, many issues can be coordinated in the supreme court.

One of the things that should be apparent in domestic violence cases is the extensive history that exists by the time they get to the supreme court. The court needs to learn about this history to make its own adjudication on the issues in front of it.

The first step that advocates need to take is to bring a pendente lite motion, which may be brought simultaneously with starting the divorce action. There is certainly some evidence to suggest that in households where there is a history of domestic violence, bringing a divorce action can itself be a triggering event for additional

domestic violence. Oftentimes in these hard-core domestic violence cases, I will see an order to show cause brought simultaneously with the commencement of the action. The advocate is going to be looking for an order of protection, even if there already are orders of protection from other courts. They are going to be seeking temporary exclusive possession of the marital residence; custody, although, as Judge Roberts pointed out, this particular Hypothetical presents some custody problems that are not always present in every other case; and, usually temporary child support.

After you determine which parts of the dispute should be resolved at the same time as the divorce proceeding, you are also going to ask for removal of those proceedings from the court in which they are pending to the supreme court.

In this case, I would envision that the custody dispute might be something that you would want to bring up to the supreme court so that it can be determined at the same time as the divorce and the support issues. The complicating factor here is that there is the neglect and the child protective proceeding. That is not typically brought up to the supreme court; the supreme court has jurisdiction over it but it is just not done. It would also be hard convincing ACS to come to the supreme court. Therefore, the neglect and child protective proceeding would have to be dealt with first, and then you would be looking for a resolution of the custody proceeding into the divorce proceeding.

Whether you are entitled to this relief that I say you should ask for is really based on the particular facts of the case. I will give you an idea of the kinds of things that I look for when I make decisions on the types of issues raised in the Hypothetical.

Because this case is a hard-core domestic violence case, on initial presentation of the Order to Show Cause, when I am only hearing one side, I will issue an order of protection. There are two reasons: (1) I probably will not know at that time the full extent of the orders of protection that have been issued by other courts, and I will be concerned about whether in the short haul there is protection; and (2) I will be concerned about whether the pending orders of protection — many of which are in their infancy, and have not

been adjudicated — should be removed to the supreme court and adjudicated in the context of the divorce action, because so many of the facts and issues are overlapping.

Again, a complicating factor in this particular case is that there is a criminal court component, and I am not going to typically remove the criminal court case.

If, however, there is a pending family court order of protection and a permanent adjudication has not been made, nor does it look like there will be an imminent adjudication, I will likely remove that family court proceeding into the supreme court and adjudicate it with the divorce action.

With respect to seeking temporary exclusive possession of the marital residence during the divorce action, there is a lesser showing necessary for the relief than there is for getting an order of protection. The standard is domestic strife. That is very important to know and to keep in mind when you are seeking that in the divorce action.

Here I would note that in the Hypothetical, even though there is this history of violence, the parties are still living together. That raises a lot of red lights for me that this is a really dangerous situation.

Money is important for Juliette to maintain a life apart from Neil. Until she gets child custody, she is not going to get temporary child support. Maintenance might be a viable option in this case. There are no numbers in the Hypothetical, but clearly one of the underlying factors that is really important is the extent to which her financial dependency on him may play into her decision to leave him. It is important for advocates to see what can be done to make her financially viable by herself. It becomes hard if she cannot get child support. So, temporary maintenance might be appropriate in this case for many reasons: her immigration status, her financial dependence on him, her lack of job skills and his responsibility in her having no job skills. Before awarding maintenance, even on a temporary basis, I would need to look at whether or not the numbers make any sense, that is whether or not he can afford to give her some maintenance, so that she can be supported in a separate household from him.

One of the ultimate issues that you really ought to consider also is in terms of permanent relief: What are you looking for? You are going to be seeking permanent custody for her, and possibly a permanent maintenance award. With the latter, I do not mean that she gets it forever. Instead, this case is a good example of the need
for rehabilitative maintenance, some kind of money to get her skills so that she can support herself. Otherwise she may have a real problem in divorcing or separating from him.

If she ultimately gets the child, she would absolutely be entitled to child support, though. Also, she may or may not want to continue in the marital residence as an exclusive resident until the children are older.

JUDGE NADEL: Before we get back to criminal and family courts, I would just like to ask Judge Rigler perhaps to comment on some of what Judge Gische just said. If you were confronted with this kind of a situation, with proceedings having taken place and some still pending in family and criminal court, what effect does that have on what you have to do and the desirability of trying to bring those matters before you?

JUDGE RIGLER: I could go along with most of the answers already given on the Hypothetical. As the last judge indicated, though, it really does not impact too much on what we do in matrimonial except for those issues that she stretched a little bit to make them fit into this Hypothetical.

First of all, you never get as much information as in the Hypothetical. You often have nothing about anything that he has done to her and the reports will probably only indicate what she has done. You would not have the hospital records of any of those other things that are necessary for you to make an intelligent decision.

In terms of orders of protection during my seven years in the family court, I became very familiar with the process. It is a lot easier to get an order of protection in family court than it is in supreme court.

When I was in family court, you did not know anything. People would come in front of you and tell a story. Attorneys give me papers on a pendente lite motion which indicate that they want an order of protection along with the laundry list of everything else that Judge Gische mentioned. I look very closely at what they want in an order of protection, and what the background is. We make a check to see if there are any family court orders of protection.

The problem is it is a tool that is used in the matrimonial, more so than in the family court. In the family court, usually if they go in, there is some sort of a basis for it. Sometimes they wait too long to go into the family court. But in the matrimonial, some lawyer is
going to say, "You want to get this guy out of the house? This is what we will do."

It is very strange that all of these things happened and they never went into family court, that they have to come before me maybe three or four months after the incidents happened.\footnote{1} Very recently, I had a matter where they made five different applications for an order of protection and I did not give it. They wanted to get this man out of the house. He was a prominent doctor with a prominent lawyer. I will not mention his name, but he is on the television all the time. They kept complaining that this man has done this and that, and then they did an end-run and went into the family court and got some sort of an order of protection, but not an exclusion order.

Then they came back to me again, but this time they made a mistake. They indicated that this was a case before Judge Duffman and things of that nature. They wanted me to look at the situation and think, "Do I need my name on the front page of the News or the Post?" Assuming my answer would be no, they thought I would just grant it. I did not grant it though. I said, "You do not want to do this here? Fine. I am going to hold a hearing on it on Monday morning." This was the middle of the week before.

Monday morning they came in, and wanted an adjournment. But I wanted to hear it. We heard testimony from both sides, and again I did not grant the order of protection.

Not only that, but I took back the $5000 fee that I had given to this prominent lawyer because it had not been paid yet. I felt aggrieved because they were using the court system to push the judge into a position where he is going to go ahead and do something that he should not be doing. If I am making a decision, I want to know it is an intelligent decision and that I am doing it from what I have in front of me, not from somebody pushing me into it.

I look at orders of protection very loosely because I know that the first thing the victims do is go running home. Then the guy comes home from work and says, "Here I am, darling," and the police are there, and they are going to take him away, and he will have to spend time in jail. I have that in mind, too.

I think it is a good tool to have. I have used it. I have thrown people in jail for disobeying it, but I do not think that it should be handed out like confetti just because somebody comes in and requests it.

Judge Lauria, Judge Morgenstern and myself are on a committee in Brooklyn where we are trying to get all of these things in one
court. I know that there are probably a whole bunch of statutes that we will have to step on to do it, but we are trying to get it so that people will not do an end-run like the case I just mentioned and run into the family court to get an order of protection. They would have to do it all in front of me. I think that is probably the direction we are heading.

Not only that, even what Judge Morgenstern is doing, they want to refer it all, if it has an underlying matrimonial attached to it, to put it into one court. I think in that particular way, there are not that many.

JUDGE MORGENSTERN: We did a study. There are eleven out of the 2400 matrimonial cases pending in criminal court.

JUDGE RIGLER: So it is not a great deal. But there are a lot of different areas that we have to overcome, like the CPLR and the domestic relations law and things like that.

It happens, but it is not that prevalent. It is mostly used as a tool in some particular case to get an advantage for the wife's sake.

JUDGE NADEL: That is not the way it is in family court, correct, Judge Lauria?

JUDGE LAURIA: No.

JUDGE NADEL: Did you ever have a hearing on an order of protection?

JUDGE LAURIA: Yes, of course, we have lots of them.

Each of the family court judges handles about 6000 individual cases a year. In Brooklyn, we had about 8000 original family offense petitions filed and almost 4000 supplemental petitions. It is truly in this area that I recognize so many of your faces, as well as having committed your telephone numbers, faxes and e-mails to my memory. It is a very intimate group and it is a very important give-and-take on these issues.

Clearly, the area of domestic violence is the most inspiring because of the wide ramifications that these issues have, and I think the family court certainly is sensitive to those issues because we all know that it cuts across the board. Issues of domestic violence impact on custody, visitation and support.

The difficulty with the family court judges is that on any given day you may do forty to fifty of these cases, and they have to be very careful not to prejudge a party before them. Judges learn by experience how to get what they need in a very brief, even ex parte, appearance — again, without prejudging it — but really what we do is based upon relevant and competent information. In
family court, there are many self-represented parties. We get information from the lawyers and from the support agencies too.

The only point that I disagree with Judge Rigler on is that concurrent cases pose difficulties. Certainly we know what goes on in other courts what the other judges do and what their jurisdiction is, but we cannot know what is happening in a particular case with a particular family unless we communicate with one another. That is what we have begun to do.

In Brooklyn, we found that while the courts are literally across the street from each other, there was no consistent communication between the Brooklyn Family Court and the Brooklyn Treatment Court, the Brooklyn Family Court and the Criminal Court, the Brooklyn Family Court and Supreme Court or Criminal Court or Surrogates Court. It was such a simple process to develop court-to-court. We do not really have the difficulties with confidentiality or ex parte communications. The judges now do not have to issue an order saying, "Subject to whatever the order is somewhere else."

We can say to the parties that are in front of us — because I think they look to us to make sound decisions with respect to their families — that we are knowledgeable about what is going on in their families. For judges to ask questions about what is going on in their lives must be astounding to them, especially of self-represented litigants.

Now we have started to solve that problem. When you come before any of our judges — family, criminal, supreme; or juvenile offender judges in the Supreme in Brooklyn — he or she should have a copy of the corresponding or concurrent court’s order, and should therefore know what the status is and whether there is an order of visitation, or any violations, or simply know when the next adjourn date is in family or criminal court.

This is a much more informed and positive way to get involved with these families, and I think it gives a little confidence back to the parties that they are not in this huge void that is called the court system or shuttling back and forth across the street where the judges do not even pick up the phone or use a fax machine to get each other’s orders.

That is where we are in Brooklyn now. It is the initial stages of it, but I think it is a much more informed approach. I see a certain confidence building in the self-represented litigants that appear before us that they are not the only source of our information, that we have concrete copies and provide them with copies of orders
from other courts that they still may not even have. So I am pleased with it so far.

JUDGE NADEL: How does that affect what you do in the case that you have. In addition to having the information, is there any way to affect the other case that is pending?

JUDGE LAURIA: In particular, with respect to violations, it has now been mandated for the Police Department, I believe since October, to make arrests on violations of any order of protection, temporary or final. And, whether it is criminal, family, or supreme — particularly in the Brooklyn Family Court — all of those cases where a complaint has been made to the Police Department, there is a summary arrest. That is what triggers the communication between criminal and family court.

We get it now from the District Attorneys in the ECABs (Early Case Assessment Bureaus) as well as each of the two judges sitting in criminal court in the dedicated Domestic Violence parts, Judge Morgenstern and Judge Nunez. We get the violation from a complaint charging contempt or aggravated harassment or other charges. It is faxed to me directly and I distribute it to the judge that is presiding over that particular case. If it is a closed case, they will pull the case and see whether or not there is any action the court should initiate, although that is a little difficult sui sponte for a court to resurrect the case and initiate an action.

More importantly, on the temporary orders of protection, it is essential for a family court judge to know that there is an intervening prosecution in criminal court that we would not know about unless we either ask the self-represented litigant. A situation where the only information we have is that a person was arrested and taken down to the police station, but then released.

So it does impact, because now when the judge receives a copy of this fax from the criminal court, the judge has an adjourn date on the case and can do many things — advance the case, if it is a serious enough violation to issue a warrant on the case that is before that particular judge; or at least, when the parties do appear, hoping it is not a very long date, ask the parties about the pending case in criminal court. I think this really shows that the court is involved.

Again, we are supposed to be neutral and objective arbiters of the parties, but in order to be responsive, we need this kind of information to show how involved we are in this area.

JUDGE NADEL: Judge Morgenstern, when there is a violation of a family court order of protection that is being prosecuted, what
happens in criminal court and how does that relate to what is still going on in family court?

JUDGE MORGENSTERN: These cases are now being processed as contempt cases. They are basically reduced to misdemeanor contempt. Defendants face a year in jail. In every one of my 1200 cases, there is an order of protection. I can maybe think of five cases where I did not order it out of all those cases before me. In criminal court, there are orders of protection in every case, and we take them seriously.

The contempt charges are no different from our other cases. Somebody mentioned earlier that you need corroboration to go forward on the criminal case. In the contempt charge, you need the underlying order and proof of service of that underlying order in order to have that misdemeanor go forward. Very often, our contempt cases go the same way the regular domestic violence cases go; they get 30.30'ed\textsuperscript{73} out because they cannot bring in proof of service; the underlying family court order was never served, and so there really is no provable contempt charge. If we do have the underlying order and proof of service we can try to get the defendant to plead guilty and mandate that he enter a program so we can monitor behavior.

We also have that very important tool — the Domestic Violence Registry. I use it every day. I can tell if someone has had five orders of protection from family court, whether there were different complaining witnesses, whether this is a new relationship. All this goes into trying to put the defendant into some kind of program that we can monitor.

But again, with the realistic numbers that we have in Brooklyn Criminal Court, in eighty-seven percent of our cases the complainants do not want to go forward, so the cases get disposed of by either ACDs or conditional discharges. That is the reality.

In every case I ask the question, "Is there a Matrimonial pending? Is there a family court action pending?" And if there are children in common, I instruct every defendant to go to the family court to arrange for visitation. So the defendants see that we are monitoring, and that we are noticing when there are family court cases pending. We look at the dates, and see the family court case is not on again for another three months, so we will bring a defendant before the criminal court more frequently and ask the District Attorney to investigate and see if additional violence has occurred.

\textsuperscript{73} See N.Y. Crim. Proc. Law § 30.30 (McKinney 1999).
In that respect, I believe this exchange of information is very beneficial. The outcome of the criminal court case is not necessarily going to be a conviction, but I think looking at these cases and focusing on them is making a difference.

JUDGE RIGLER: Judge Lauria mentioned the fact that most of the times they bring on a motion, they are getting ready in the family court to make a determination, and they will suddenly ask me to take it up to the supreme court at that particular time.

JUDGE MORGENSTERN: When it is not going their way.

JUDGE RIGLER: When it is not going their way, and they figure they will get another bite of the apple. Many times we have called up to find out what the status is. If we find out that three-quarters of the case is already completed we will ask them if they want us to take it over to let them finish, and usually they want to finish whatever they have had on it. If it is something just starting though, then I think it all should be under one roof.

JUDGE NADEL: Judge Roberts, is your experience in the Bronx different in terms of the information that is exchanged between criminal and family court?

JUDGE ROBERTS: It is a little different. I do not think we have an organized mechanism of exchanging the contempt orders with the criminal court, so I do not routinely get copies of the contempt orders. When I have a violation of an order of protection, I have to try to contact the judge and find out what is going on or have my court attorney look into it.

We do not get very many violations of the orders of protection because people come before me on the pending underlying family offense case, saying, "He got arrested last week and there is a case in criminal court." So I know it is pending but, unfortunately I do not really know the details of the case.

The only time I really get involved with the criminal court judges is when an order says that the defendant is supposed to stay away from the woman and the children but there is nothing on the order saying "except for modification by the family court." That means that I do not know if something really, really horrible happened in criminal court with respect to the children and the judge intentionally did not put anything in the order allowing the family court to modify the order. That means I actually have to speak to the criminal court judge because I want to know details before I take a chance of allowing someone to visit with the child.
So my experience is, on a case-by-case basis, I really have to call the judge. This sounds like a really good idea and I hope it is moving to the Bronx.

JUDGE NADEL: What is “it” that needs to move from Brooklyn to the Bronx?

JUDGE MORGENSTERN: It is the program that Brooklyn is starting.

JUDGE NADEL: But this is not your “one family, one judge?”

JUDGE MORGENSTERN: Yes.

JUDGE LAURIA: Well, it is partly that. It should be clear that it is the exchange of information. I get a copy of a criminal contempt or other case where there is a family court order that is reflected in the body of the criminal court complaint, from either Judge Morgenstern or Judge Nunez, or I get the list of arraignments on a weekly basis from the two supreme court dedicated parts — Judge D’Emic’s part and Judge Levanthal’s part in Brooklyn. Then, I have the files pulled and fax them any current family court orders — custody, visitation — so that they have that before them. It is just a simple exchange of information.

I think we realized, at least when we started doing the numbers, fortunately for all concerned, that it amounts to two or three cases a day, sometimes less; sometimes a day goes by with none. It is really not just an onerous procedure to fax it over, get it to the right judge and have the family court orders copied and faxed back to the judge who is presiding.

JUDGE NADEL: And this is above and beyond the Domestic Violence Registry?

JUDGE LAURIA: Yes. This is our own Domestic Violence Registry.

JUDGE MORGENSTERN: And we are doing it the first time the case is on in the criminal court part. I will look at the Registry and see that there is an order of protection issued by a family court judge, so if I am not getting the information from the attorneys, I can see as well there is a family court case pending and I will fax those cases over.

JUDGE ROBERTS: I guess the lesson to be learned for people who are representing women is that you, as their representative, need to get as much information to give the court as possible, because you cannot assume that everything is working in Brooklyn, where everyone is getting orders. With me, if you do not tell me, I often do not know. Therefore, it is very important when you are representing people to make that extra effort to tell them to make
sure that they bring all the paperwork, all the police reports they have, all the orders of protection from whatever court they have been to, and not to just assume that the courts already have the information.

JUDGE NADEL: I think that is critical. Obviously, the responsibility, as Judge Lauria indicated, should be with the court, and the courts look terrible when they do not know or appear not to know what is going on with respect to the same people or persons. But if you are representing somebody, it is critical to make sure that whatever judge you are before knows everything you want that judge to know, and do not assume that judge knows what has gone on before.

I think we are probably at the point where we should give the judges from Brooklyn an opportunity to explain this "one family, one judge."

JUDGE NADEL: Juliette's plight in this Hypothetical is a monument to why you need "one family, one judge." It is a mini-version of Chief Judge Kaye's Family Division contained in her Family Court Initiatives and Family Justice Plan. It really slices across the tier section. Every single one of the issues raised in that Hypothetical can be heard before one judge, either a supreme court judge, a family court judge or a criminal court judge, acting supreme.

Many of these issues would have been heard in at least two, if not three, different courts. It really is not necessary.

The vision right now, in terms of "one family, one judge," is probably under the umbrella of the matrimonial case — again, either presided over by the justice that is presiding over the matrimonial or by an acting supreme. Within that matrimonial case includes family offense, custody and visitation, and support. At least in Brooklyn, almost a full ten percent of our calendar are cases where there are concurrent cases pending in criminal, family and supreme court. It really is not necessary, it is confusing to the parties, certainly to the self-representing litigants. It is duplication of effort, and a waste of judicial efforts.

We see "one person — one judge" as a way to open the door to avoid parties jockeying for position before different judges, using different proceedings as an abuse of process to wear someone down in one court or another or using it as a tactical advantage to

---

raising an issue in another forum, in another set of facts and issues, when someone is losing on another set of facts, such as going in on a visitation petition that really has no merit when it is a father who has a family offense case or a support case now pending against him.

We see it as the starting ground. Now we are just in the initial stages of examining the jurisdictional and resource problems, and whether there has to be interdisciplinary training of the lawyers and the parties involved. We do not see any real obstacle, though. There seems to be a lot of cooperation, and there is no reason if that goes well not to extend it into areas like the misdemeanor criminal cases, enrolling them under the supreme court or acting supreme court judge's authority, since most of those cases are adjourned for a while. With the continuing orders, they could be carried with the consent of the parties until all of the issues are resolved, and then into Article 10 proceedings. Where abuse and neglect raise their ugly head in parties that have matrimonial cases, either truthful or false accusations concerning abuse and neglect, they would also be heard before the same judge, this “super judge,” whoever it is that we are going to pick.

There is a lot of interest in it, there is a lot of excitement about it, and we are in the initial stages of it.

JUDGE NADEL: Are there any questions?

AUDIENCE: I am very much in favor of the court restructuring plan, but I do worry in the situation that you are describing that litigants who would be eligible for appointed counsel in family court are not going to receive counsel in this super-judge's supreme court, and there are many litigants who cannot afford counsel who need it. Is that an issue you are going to address?

JUDGE LAURIA: I do not think that would be the case. And also, I think in any of the work that begins with domestic violence analysis and dealing with parties you realize the ramifications of all those issues. I think we are sensitive to that. It has been brought to our attention in all the workshops that we have and all the meetings that we have, that coercive efforts are undertaken in so many different areas, once there is a domestic violence case. The parties come back at each other in different ways — they withhold support and financially and emotionally intimidate.

Certainly a party who would be represented by assigned counsel in family court would be represented before this judge. I do not think anybody is going to be deprived of counsel. What will be removed is the blindness between different judges presiding over
the important issues in that family. You would now have it before one judge, which will eliminate a lot of the jockeying.

JUDGE RIGLER: You could have different attorneys, too, in different courts.

JUDGE MORGENSTERN: We are going to try to cross-train.

JUDGE LAURIA: That is another thing, interdisciplinary counseling.

JUDGE NADEL: Let me ask you a question. At what point would this begin? At what point in the process would a case go to this "super-court"?

JUDGE LAURIA: I think what we are really planning on is upon filing — maybe there is an immediate appearance before another judge. We have not really gotten into that. It would be crucial if we could get the parties to appear before this one judge immediately so that judge is aware of what the issues are with the family, what the history is, or any other pending cases.

Of course, right now we have such an accumulation of those cases — as I say, some ten percent of the calendar cases could be transferred to one judge and there would be now custody, visitation and support. What we are pushing for is not only newly filed or pending cases, but post-judgment cases because we get many of the cases in family court that arrive are before the ink is dry on the divorce judgment. We have someone coming in trying to have us define for them what “reasonable” or “liberal” means. I have done it enough already. I would like to not have to do that anymore.

And issues of support — our hearing examiners are overloaded with cases that are modifications of judgments of divorce that could properly be heard back before a justice of the supreme court to modify.

AUDIENCE: I have a number of problems with that. I represent private clients. When a client comes to me and there is an issue of domestic violence, but she clearly also wants a divorce, my hands are tied to a certain extent. If I say to them, “I will go into the supreme court because you are coming to me for a divorce action,” I have to worry about whether my order of protection may or may not be granted — and I am talking about a valid reason for an order of protection. So the first thing that I tell them is, “Go into the family court on your own and take out a petition for an order of protection.” If I am also dealing with a person who needs an immediate support situation, I know that they can at the same time take out a petition in family court for support.
But really, what she is coming to me for is a divorce, and my hands are tied to a certain extent if I am really concerned about her protection. I have got to get her into family court for that order of protection, but then now I am playing around with the two forums. I really do not want to be there. I really want to be in the matrimonial court.

JUDGE GISCHE: Why do you think you cannot get an order of protection in the supreme court? I can understand it if what happened is that, before she came to you, your client had an emergency situation, and the family court certainly is more user-friendly to people who do not have advocates. On the other hand, once your client has an advocate, I am a little bewildered why you would not bring an order to show cause before the supreme court judge. You can get a hearing there on an order of protection, you can commence it simultaneously, as I have discussed.

So I think part of the problem that you are articulating — and I do not deny that that is what people do — is that a culture has grown up around the courts where it is, by habit or practice, that people will go to the family court in the first instance to get an order of protection, even when they know that they are going to file a divorce action.

JUDGE RIGLER: I can see if it is an emergency and something has happened, that you may want to go into the family court that day and get an order immediately, rather than to have to file a motion in front of me, which even if I put it down as the shortest possible time, is going to take three or four days, and usually they come in on a Friday or something like that. So if she can go into the family court, she can get that order immediately.

JUDGE GISCHE: But it is the same TRO whether they get it in front of you or not.

JUDGE RIGLER: But they have to make an application in front of me. There they can walk in, go into intake and be upstairs.

JUDGE MORGENSTERN: It is cheaper.

JUDGE GISCHE: But that is a different issue in terms of it being more user-friendly for people who do not have advocates. There is no reason really why we cannot have those kinds of petitions in the supreme court. There really is no reason.

JUDGE LAURIA: However, if it is filed in a family court, that is precisely the type of case that the temporary relief could be given in family court and adjourned to the justice for the matrimonial.
JUDGE RIGLER: That is exactly what you should be doing. We are trying now to initiate something in the Brooklyn Supreme Court where we are going to have some special clerk there to fill out papers for a pro se type of an application. But you still have to serve the other party and things of that nature, where here you can get it immediately.

JUDGE GISCHE: But it is the same thing.

AUDIENCE: I just want to point out that as an advocate, I get cases where the exact same thing happens. I imagine in the private context there are huge financial and time considerations to prepare that type of immediate application for an order to show cause for a TRO or support, to commence the divorce, get an index number, you have got to buy the RJI, you have got to send someone over to do it. There are a lot of considerations. So there is that resources question.

But Judge Rigler said in his comments — and this has been my experience — that when you commence a divorce action, part of it asking for an immediate order of protection, it tends to get lost in the shuffle. There is a laundry list of things. I find when I go to court on something like that that all of a sudden we are talking about, “She wants custody, that’s why she’s asking for the order of protection, and she wants this.” All of a sudden the issue of domestic violence is viewed as a bargaining chip in the divorce. I think that there is that piece also.

My preference is always to have the order of protection case alone in family court, being viewed totally separate, because it is violence.

JUDGE GISCHE: But that is a strategic decision that you make as an advocate and not really an access to court problem.

AUDIENCE: You said there is no excuse when you are an advocate for not just starting it in supreme court with everything.

JUDGE GISCHE: I said you could do it.

AUDIENCE: You could do it, and your likelihood of getting the attention to the domestic violence, which is generally your primary concern, is decreased much more because of all the issues.

JUDGE LAURIA: But it is never really isolated. The issue of family violence, even if it is handled in family court, is not isolated from the issues that you are describing in supreme court.

AUDIENCE: They may well be. If she wants his pension and she is getting beaten up, I guarantee you they are going to be talked about in the same conversation.

JUDGE LAURIA: You would think so.
AUDIENCE: "I'll consent to the order of protection if she gives up my pension."

JUDGE GISCHE: You do not have to agree. You should be able to get a hearing in the supreme court. You can make a strategic decision as an attorney, and I think I said that at the beginning. You have to strategize your case. But in terms of the relief that is available, there is no question that the same relief is available in the supreme court.

In terms of access to the court, we can make it easier in terms of the petitioning and the cost, there is no question about that. The obstacles that you raise are not insurmountable.

AUDIENCE: I want to just make one other point, which is the point of the form — and I think this is getting better, and I know it, at least in Brooklyn it is. When you get a temporary order of protection in supreme court, it looks different, and it is much harder to get the police to serve it, if it is contained within the relief and the order to show cause.

JUDGE GISCHE: You can use the same form for orders of protection in each court.

AUDIENCE: And there is the supreme court form, which the police are not quite familiar with yet, and so there are a lot of issues along those lines also. It sounds like Brooklyn is on its way towards adjusting it and has identified a lot of them, but even with an advocate going into supreme court at the first instance raises a lot of problems.

JUDGE NADEL: Yes?

AUDIENCE: I just wanted to mention that what you are talking about, throwing everything into the supreme court, would be wonderful, except that so many things would have to be changed. The bottom line with all of my clients, middle class on down, is they cannot afford to have me do everything in supreme court. It is absolutely impossible.

And, in addition to that, if this gets started, there is going to have to be a major revolution, as somebody already mentioned, in assigning counsel in supreme court cases. I have represented a couple of supreme court litigants pro bono. But then, for example, I took a case where I should have gotten a fee, the judge told both parties that the husband was going to have to pay the fee, at the end of the case my fee was denied. It was $20,000 worth of work. I will never take another case of that sort without getting specifically assigned and without getting previous authorization, a previous order to the husband to pay my fees, because you are just not going
to get women represented. Women do not have the money. That is the bottom line.

JUDGE RIGLER: One of the things that my committee is looking at is the services and the extra monies that we would need to implement such a plan. I think that is a very important aspect of it, because there are a lot of other things that you are going to need other than just in a matrimonial, especially when you have a lot of people who cannot afford that particular end of it. So that is something we are looking into. We realize that it is going to take a lot of extra monies.

AUDIENCE: I just want to say that I only represent low-income people, mostly women, on a sliding scale according to income, and the scale is very low usually, always at the bottom somehow. But I think litigants are served best and most cost-efficiently, as Judge Gische suggested, if there is a divorce. Obviously, if the parties are not married, that is a whole other situation. I have found that I serve my litigants best, my clients best, by bringing everything — orders of protection, support, custody — into supreme court. It is the most expeditious, relief possible, and generally brings a resolution to their cases very swiftly at very little money, as opposed to an action here in the family court for an order of protection, which hamstrings the matrimonial judge in terms somewhat of custody and visitation, and then if further there is an action in the family court for child support, you have now got three judges, or two judges and a hearing examiner, for one family. That cannot save these litigants money. It costs them money, if only in time.

And I have found the supreme court justices, when they give the TRO on an ex parte application, usually make the return date swift, within three days, and then they order the advocate to be back within that week. So if a mistake was made, the other side has a very quick response to be able to come back into the court and say, “Hey, I never did any of this.”

I strongly support bringing for the benefit of the client, if you can, all of this before one judge, one court.

AUDIENCE: I would just like to get the judges' views on something I see more and more, which was discussed a little bit this morning, especially the idea of bringing things in one court. It is where my clients, who are most often women, are more and more being charged criminally as well as with an Article 10 proceeding.75

75. See supra note 12 (discussing Article 10 proceedings).
an abuse or neglect proceeding, in family court, because they are victims of domestic violence and in family court we have something called “failure to protect.” There are not many people who are married, but obviously they are in relationships or getting out of relationships with abusers.

How might that affect things where a divorce is not needed but just support or protection is? How might things look from the bench, when a woman is coming into court as a defendant in a criminal action? Her alleged abuser is saying, “Hold it, I should get custody of the kids, I am the father, I am the resource.” There is no money generally on either side. How, from a judicial perspective, would you be dealing with those cases, if any of you were super-judge, or whether you see getting rid of those questionable criminal charges against the women?

JUDGE LAURIA: It is a very delicate issue that requires a really careful analysis. It is very difficult in dealing with someone who has finally had the courage, through support or whatever, to come forward to family court and then have to submit to an ACS investigation because the court does not know anything about the family yet, except the action that has been brought, to see what has been going on.

But it is not, I can assure you, a calloused determination by the court. I think the cases are somewhat viewed together. If there is a family offense case, usually it is initiated and then there is an Article 10 case. You look very carefully at what those charges are.

I think in many of the cases involving women that have unfortunately also had family offense cases pending who were then charged with Article 10 proceedings, there are many, more allegations other than just the fact that there may have been domestic violence in the home.

I think what we have found in many of those cases is substance abuse. The point you raise is interesting because again, in terms of communication, when we for the first time coordinated with the Brooklyn Treatment Court, the first batch they sent us was all of the pending defendants that were undergoing treatment. They gave us approximately 150 names that we had to run through our computer. We found that about thirty of those were mothers whose cases had been done by inquest, where our information was that they could not be located, yet they were attending regularly across the street, involved in a program, doing well, and we took the initiative to involve them in the family court proceeding.
So I do not think it is punitive. I think it just requires a very careful analysis and dissection of what the family dynamics are, and if there is a culprit, who that culprit is, and for the protection of the children. It is not one answer for all these cases.

And to the judges’ credit, they do look at them that way. We now have specialization, which for the most part is a very good idea in family court because it brings all of the cases regarding that family before one judge. Whichever case is commenced, whether it is the Article 10 case or whether it is the custody and visitation case or whether it is the family offense case, all of the other cases will be before one judge, so we will have our own mini-version of “one family, one judge” in family court already.

I think it helps to avoid penalizing someone that has had the courage to come forward to confront domestic violence. That is what we do in family court.

JUDGE ROBERTS: I want to add that I think it is very important to understand that, as the judge, a lot of times I do not feel like I have a lot of information. So you, as the advocate, have to give me whatever information you have to affect the fact that she should not be charged with an Article 10, but she was a victim of domestic violence. I find I am operating in the dark because I just have a case worker who spoke with the woman for fifteen minutes and really did not understand what was going on; in my mind the case worker did not ask the relevant questions.

If I had someone representing the woman who was able to give me more documentation of what is going on with this family, it would be very helpful. I find that I do not often get that.

JUDGE NADEL: On behalf of the organizers of the event, I extend their thanks to the judges.
MS. DOUGLASS: I would like to welcome everyone to the second day of “Women, Children and Domestic Violence.” So far, we have had an incredible array of speakers, discussions, and informal meetings in the Atrium, and we expect fully for this to continue today.

Now, Leah.

MS. HILL: Thank you. I am especially delighted to welcome you here to Fordham, which is my home. I have been asked to make welcoming remarks. My theme today is looking at the progress we have made.

Yesterday, I reflected a little bit about my experiences as a domestic violence advocate when I started out about ten years ago. I want to reflect a little bit more, and take another look at the world as it existed when I started doing this work in 1987, because it was a very different world than what we see today. I think that is important for us to reflect upon.

I began my career in 1987 as an advocate for women and their families. There was no public discourse on the issue of domestic violence at that time. There were many, many advocates out there working tirelessly, but they were basically working without a public discourse, at least as far as I could tell. I had graduated from law school in 1985, and I had never heard the term “domestic violence” in my three years at law school. I had taken women and law, I had taken family law, but did not hear it in criminal law. It was not discussed.

So when I came out of law school, I was clearly aware of the issue. As an African-American woman, I was aware of the issue of violence, but as I said, there was no discussion about it. The legal world was just beginning to contend with this issue of domestic violence, and that was only because of the tireless efforts of advocates for many, many years in forcing people to take a look at this issue.

Here is a glimpse of what the world looked like when I started to do this work. The policy of the New York City Police Department was mandatory arrest. As I said, it was a policy, it was not the law, which, as many of you can imagine, and it was discussed yesterday, it is hard to conceive of why you would need a policy to arrest people for crimes. But that in fact was the policy of the New York City Police Department, and that policy came about only as the
result of a lawsuit by the name of *Bruno v. Codd*, a case that was started by battered women who had contended that they were not being treated the same as other victims of crime when they claimed that the perpetrators were their husbands and boyfriends. As a result of that lawsuit, a settlement was reached under which the New York City Police Department agreed to have a policy of mandatory arrest.

When women decided to seek protection from their perpetrators in courts, they had to choose whether or not they would go to family court or criminal court, and they had seventy-two hours to make that choice. Imagine what that must have been like for a woman who was a victim of domestic violence and had to gain the strength to come to court, only to be told that she had to decide within three days whether or no she would pursue her remedies in family court or criminal court.

As a practical matter, it was difficult, at best, to obtain an exclusion order. For pro se clients, it was almost impossible. I remember in my days at South Brooklyn Legal Services, when we had a client who was living with her batterer, we would practically have to spend days preparing the facts of her case before going into court if we wanted to get an exclusion order. They just were not granted.

And it was not unusual for battered women to lose custody of their children in family court. There was no discussion of the impact of domestic violence on children, and there certainly was no requirement that courts consider domestic violence as a factor in custody proceedings.

I also talked yesterday about the hostility that was felt towards women in the court system, hostility from the Police Department, just to name an example.

While there was no public discourse on domestic violence, I remember connecting with advocates throughout the city for help on my cases. But I also remember knowing these advocates by name. I cannot say that that is the case today, but just a few names that come to my mind, Ellen Yaroshevsky was someone I talked to in those days; Maria Arias, Marjorie Fields. I do not think that any of us can call out the names of the advocates throughout this city in that way today.

I also remember attending my first Lawyers Committee meeting. There were five of us in the room. We were in a cramped room. I
do not even remember where the office was, but I remember it was hard to get to. It was Cathy Douglass, Julie Domonkos, myself, Rose Pierre Louis, and Florence Roberts. Most of those meetings had about four or five people in them. Now those meetings are being held in one of the top law firms in New York City, they are often filled to capacity. Judges, Assistant District Attorneys and criminal defense attorneys all attend those meetings on a regular basis.

Law schools across the country now have domestic violence clinics, one of which is here at Fordham, educating our future lawyers on the issue of domestic violence and how to provide quality representation on cases. Law students have organized countless student-run domestic violence advocacy centers, like the one here at Fordham. Here at Fordham, the student-run domestic violence advocacy center is responsible for my job. Students demanded a clinic that would address the issue of representation of battered women.

Battered women no longer have to choose between family court and criminal court. They can pursue their remedies in both courts. Mandatory arrest is the law, as it should be. We also have primary aggressor legislation, as you heard yesterday a lively discussion on that issue.

The New York City Police Department has a Domestic Violence Unit at One Police Plaza, and there are domestic violence offices in every precinct. Domestic violence parts have been created in Family and criminal court and in supreme court.

I will not go through all of the things that have changed and that are different today, but I wanted to point out the progress we have made. It is so hard to do this work on a daily basis and to hear the stories of women and not feel a sense of hopelessness. Those of us and those of you who have laid the groundwork — I am no fool, I know that this progress did not happen in the ten years that I have been doing this. I know that there are people before me who fought tirelessly. In a way, I feel like this is my way of saying thank you to those people.

But, of course, my story does not end there. We have a long way to go. As we saw yesterday, there was a very lively discussion on the issue of failure to protect. This is really the beginning of that kind of discussion, and we need to have more of those.

Far too many women continue to be battered and killed. My clients get younger and younger, and I do not know if that is because I am getting older, but I do not think so. I look at this phe-
nomenon in two ways. On the one hand, because there is a public discourse on this issue of domestic violence — and that is because of the work that we have done — I think women feel more free to come forward with their stories, and that is why we see so many young women coming forward. But I also think that the batterers are getting younger and younger, and that is scary, and the violence is more and more severe in these younger men.

Yes, the Police Department has gotten better, and the domestic violence officers that I have dealt with have mostly been helpful. But I still hear too many stories of women being met with indifference by the Police Department and failure to act, and make arrests on contempt cases, and that is just not acceptable.

The courts remain overburdened, and in fact seem more overburdened now than they were when I started out, and they are unable to adequately hear the cases involving battered women. Delay is the order of the day. What this means for battered women is many of them end up giving up; they just do not have the strength to continue to come back and forth to court. Some of them have jobs and they cannot keep taking days off.

Another problem is that the New York system continues to be fragmented. You have domestic violence advocates over here, you have criminal defense attorneys over here, you have Assistant District Attorney’s, criminal court, family court. No one seems to know what the other side is doing. And then you have the child protective system. Again, there is not a lot of communication across these systems, and battered women and their children end up being hurt as a result.

There is a lot of work to be done. I have not gone through all of it. I am sure many of you are thinking of more and more things that need to change in this system.

But I see this conference as a unique opportunity to inspire those of us who do this work and to sign on some new recruits. Also, I see it as an opportunity to build bridges with those with whom we have fought in the past. Yesterday we saw an example of people from all different sides coming together to talk about issues that impact on the lives of battered women and their families. That is what we need, and we need that conversation to continue.

I was happy to hear Cathy this morning say that someone had suggested that we start an Interagency Task Force to look at this issue of failure to protect and to continue this discussion. That is the kind of thing that we need to continue to do.
Hopefully, these discussions will not end here and we will take these discussions back to our work places and continue to reflect. As I said, as a clinical teacher, that is what I am best at. But I also think that it is an important way of moving forward, and that is exactly what we need to do.

Thanks again, all of you, and I hope today's discussion will be inspiring.

MS. DOUGLASS: Thank you, Professor Leah Hill.
KEYNOTE ADDRESS,  
APRIL 27, 1999

MS. DOUGLASS: It is my privilege to welcome and give an introduction to City Council Member Ronnie Eldridge, who will be our keynote speaker this morning. Ms. Eldridge has been on the City Council since 1989, and in that time she has been a leader in efforts to improve protections for victims of domestic violence.

My first personal exposure to that leadership was in 1993, the very first year of Network for Women’s Services. Ms. Eldridge and Ruth Messinger were the co-sponsors of a two-day conference at the Association of the Bar of the City of New York. It was not a lecture setting, but rather it was working group sessions on issues of housing for battered women, on issues of shelter, welfare, health care, and a whole array of topics. From that conference came a book, which many of you probably have seen. The title of the conference and the title of the book was *Behind Closed Doors.*

You can still see some recommendations there that need implementation, as well as others that have come about as a result of the last six years of work.

Ronnie Eldridge also took leadership in requiring the police to keep records of domestic violence incidents, the DIR that we all know of now. She has been the prime sponsor of other significant action, including the Automatic Teller Safety bill, the All-Civilian Complaint Review Board legislation, and she has been the prime sponsor of the Clinic Access Law, requiring safety for women who are trying to access reproductive health care and safety for those people who are the health care providers. She currently serves as the chair of the Women’s Issues Committee of the City Council.

Before I turn the speaker over to her, I would like to mention some past achievements in Ms. Eldridge’s life before she joined the City Council because I think they provide a window to view where she has spent her efforts. She served as a Special Assistant to


78. See N.Y. S. Bill 4596, 222d Reg. Sess. (N.Y. 1999) ("An act to amend the general business law and the penal law, in relation to theft or criminal possession of automatic teller machine cards.").

79. See N.Y. S. Bill 2208, 222d Reg. Sess. (N.Y. 1999) ("An act to create a temporary state commission to examine and assess the use of excessive force.").

Mayor John Lindsay in the early 1970s. She was the director of Community and Government Affairs at the Port Authority of New York and New Jersey. She served on Governor Cuomo’s Cabinet as the director of the Division for Women, where she proposed programs and legislation and acted as an advocate for women’s needs. She also was the director of Special Projects at Ms. magazine, and was the executive director of the Ms. Foundation for Women. And finally, she was the executive Producer of a feminist series on Network Public Television.

With all this as background, I am delighted to welcome Ronnie Eldridge to speak to us this morning.

MS. ELDRIDGE: Thank you. I encourage everybody to join in politics and political life of the city. During these years I have been privileged to witness and participate in many activities that were part of the campaign against violence, and I have a few stories to tell and some observations to make.

I will tell from my perspective a little bit about the struggle. It has been a long and hard struggle to place domestic violence on the public agenda. It was not easy to convince public officials that it should be an issue of concern to them. We were sometimes happy to just get a proclamation issued mentioning it.

But women’s groups and advocates in New York persisted and, sometime in the 1970s, Governor Carey appointed a Task Force on Domestic Violence. Governor Cuomo elevated the Task Force to a Commission, but even with a Commission, most public officials continued to view domestic violence as a women’s issue and treated it as such. No male Commissioner discussed it as part of an agency program. No units of appropriations appeared in agency budgets. The only times we heard domestic violence seriously discussed were when women convened meetings or when candidates wanted our votes.

We realized we needed dramatic examples to further our cause, and so in 1985 we turned to the area of criminal justice to demonstrate a truly awful result of violence in the home. One day in the summer of 1985, some of us met with members of the Inmate Liaison Committee at Bedford Hills Correctional Facility, a maximum security prison for women. The women were hoping to find a project that would bring them into contact with the outside world. We discussed life suspension when in prison, missing children, wanting visitors, looking for something meaningful to do.

One of the women suggested running a hotline for the prison for battered women. That seemed complicated, but we continued the
discussion, and the tone of the meeting changed immediately. The women became more animated, then excited, as they realized that many of them had similar stories of abuse to tell.

We realized we had our project. These women and their abusers were extreme victims of domestic violence. Their abusers were dead and the women, many of them separated from their children, were incarcerated.

The State Coalition Against Domestic Violence, the Governor’s Commission, lawyers from Prisoners’ Legal Services and the Division’s Counsel met together to plan this project. We decided first to survey the inmates by questionnaire. Out of 540 inmates, 320 responded and revealed that an overwhelming number of them had been abused as children and then later as adults.

Next came a public hearing sponsored by the Division for Women and the Governor’s Commission on Domestic Violence, whose chairs at the time were Karen Burstein and Marjorie Fields. The hearing panel included the Governor’s Criminal Justice Coordinator, Commissioners from the Departments of Social Services, Corrections and Youth Probation, as well as some key state legislators.

It was a stunning event, held in the gymnasium at Bedford Hills, and attended by interested inmates, people who ran battered women’s programs, women who had been battered, lawyers, social workers, public officials and the press. Twelve women told their stories, reciting circumstances that are so familiar: They grew up in homes that were violent and they thought that abuse was part of life. They depended on their abusers for support. Many of the batterers were substance abusers. Many of the women thought they were responsible for the attacks because they did something wrong. They were isolated from their families and friends, or their families did not want to hear about their troubles. Some of them called the police and the police talked to their abusers and did no more. They lay in emergency rooms out of fear. They suffered, and finally they killed.

Some of them had never heard the term “domestic violence” or “battered women” or “Battered Women’s Syndrome,” nor, unfortunately, had their lawyers. Some of the women pled to manslaughter and were serving sentences of eight to fifteen years, while others were convicted and sentenced to longer terms.

The hearing did not bring any miracles — though actually one of the women was granted clemency and another later won her appeal — but it did raise the state of consciousness of many officials and it
forced them to see there is no line between domestic violence and
criminal violence. It added a few dollars to the Department of
Corrections' budget, and they were able to add new programming
at Bedford Hills.

It also encouraged another group to form a Committee on Do-

cument Domestic Violence and Incarcerated Women. Although three excel-

rent reports had been issued in the previous two years that
addressed causes and manifestations of domestic violence, as well
as the treatment of victims by the policy, family and criminal
courts, this group addressed new issues raised at the hearing. They
issued a report called *Battered Women and Criminal Justice*,81 in
June of 1987. It made recommendations for changes to law en-
forcement agencies, the courts, bar associations, and correctional
facilities. Some of the recommendations were implemented soon
after, but others languished.

One of the things we wanted very much was to have all the cases
involving domestic violence reviewed for clemency. They did that
in Ohio and several other states and released many women from
prison, but each year that goal seems to be more and more
impossible.

Meanwhile, we continued to watch for other opportunities to
dramatize our issues. One came right after the report was issued,
when a young woman named Karen Straw went on trial for second-
degree murder. Karen Straw was a battered young woman who
had followed every step that the system said she should. She
moved away from her husband, out of their apartment, with her
two children; she got an order of protection from the courts; she
even called the police to her home six times before she killed. We
knew about her because the Victim Services Agency had started a
pilot program that year that placed domestic violence counselors in
a few police precincts, and one of those counselors was a friend
who worked in a precinct in Queens and who called me just before
Christmas of 1986 to tell me that this young woman, who had
called her six times for help, had finally killed her batterer. Even
with the order of protection, her husband of course had still come
to her apartment, high on crack, raped her in front of her children,
and continued his attack when she picked up a knife in self-defense
and stabbed him.

81. *See Committee on Domestic Violence and Incarcerated Women, Bat-
We quickly formed another committee, the Battered Women's Defense Committee. We worked with her lawyer, Mike Dowd, to raise money, and attended her hearings and her trial. By this time, Karen was living with her two children in a welfare hotel, the Lincoln Motor Inn, on the Van Wyck Expressway as you go to Kennedy Airport. Ten to twenty of us were present per day in the courtroom and in the media.

One day during her trial — mind you, this was a trial for second-degree murder — she told me she could not come the next day because she had to go to the welfare office to pick up her rent check to pay the welfare hotel. She was quickly acquitted. Sadly, though, her problems stayed with her. She had no money, no home and two children.

The Committee found an apartment and bought furniture. She got pregnant, un-pregnant, and then had a baby. She had a drug problem, but could not get into a treatment program. So, we got her into a treatment program, but she dropped out. Her sisters cared for her children. She disappeared and we have not been able to find her since. She showed us, unfortunately, how difficult it can all be and how many services are needed to help. She was so smart, but she was so vulnerable, and our village community was not enough to sustain her.

When Lisa Steinberg died, the Committee rallied to Hedda Nussbaum's defense and urged the District Attorney not to indict her. This success spawned a long series of discussions of the relationship of domestic violence and child abuse and the final evolution of an organization called the Coalition of Battered Women's Advocates.

In 1991, the New York City Child Fatality Review Panel found that in seventy-one percent of the cases where a child died in a homicide, the mother was also abused. This encouraged us to again look in a very public way at family violence and the way the City and the State agencies respond to domestic violence and child abuse.

At the urging of advocates, Borough President Ruth Messinger and I, as chair of the City Council's Subcommittee on Women, convened an outstanding Task Force on Family Violence. After four months of investigation and research, involving more than one hundred interviews with City officials, service providers, and the
victims of family violence, the Task Force released its report, *Behind Closed Doors.* 82

This report concluded that there was no coordinated response to the problem of family violence, that government agencies have so far failed to develop procedures and protocols that recognize the linkage between women battering and child abuse, and that battered women and children are often ignored by the system designed to help them, or help feebly, or in some cases harm the women.

Ironically, this report played an important role in the 1993 mayoralty campaign. Giuliani often referred to it as evidence of the poor response of the previous democratic administration to the problem that many women face. His own administration's response to domestic violence has been more difficult to assess because his administration is not generous with its information, though it is expansive with its rhetoric.

There is now a twenty-four-hour hotline in operation, which receives over 70,000 calls annually. The Coalition for Battered Women's Advocates notes, however, that in 1996 approximately one percent of the battered women requesting shelter actually received the assistance they need. Comptroller Alan Hevesi's office reported in 1997 that of the fifty-seven callers who got through to the hotline operator, only four were referred to a shelter. Of the fifty-seven calls, thirty-six, or sixty-three percent, were not successfully referred and received no shelter assignment. The remaining seventeen callers, thirty percent, were referred to the City's Emergency Assistance Unit.

Also during the Giuliani years, very few shelter beds have actually been added, alternative-to-shelter programs have been slow getting started, as have non-residential domestic violence programs, and an ACS program to train child care workers to look for domestic violence has been stalled.

The quality of police enhancements is still questionable. Domestic Violence Officers exist in each precinct, but battered women's experiences vary widely. Domestic Violence Incident Reports are not always completed, and arrests are not always made. Dual arrests or threats of dual arrest jeopardize battered women and deter some of them from seeking further police assistance.

The Police Commissioner testified that the recent increase in homicides was due to an increase in domestic violence incidents,

82. *See Messinger & Eldridge, supra note 77.*
that several of the women had orders of protection and some of them had the police pendants and cellular phones that they provided. This is the same Police Commissioner who asked me in a hearing last week if the question I asked him was, "Am I still beating my wife?"

There is an extensive public education campaign that the administration is carrying on. Posters and domestic violence programs are very visible on MTA buses and subways, and there is now a city-wide campaign to stop relationship abuse among young people. But there is no way to assess the campaign's effectiveness other than noting the hotline calls.

Yet, even as the numbers of women calling the hotline increase and the recognition of domestic violence grows, another challenge appears. We know that domestic violence can happen anywhere and to anyone, but now we are able to see that the social welfare policies of the 1990s are bringing new violence to poor families. We see families seeking shelter because of violent situations being turned away by the shelter system on an average of three times before they are finally accepted in a shelter. Families are forced to live doubled and tripled up in housing designed to accommodate single families in very stressful situations, often unwanted and abused.

It is interesting to note that at the same time the Police Commissioner says that homicides have increased because of domestic violence incidents, the Commissioner of Human Resources Agency, Jason Turner, has warned that women may be feigning domestic violence in order to get housing. We are not talking about sending a family to the Waldorf-Astoria Hotel. Rather, if the family is not lucky enough to get a domestic violence shelter bed from the domestic violence hotline — and that is an average of three beds per victim because we work on an average of two children and the mother — the family has to go to an Emergency Assistance Unit. Until now, they slept on the floor or on chairs, sometimes for several days. We have just passed a bill that prohibits the EAUs from not providing sleeping facilities when the family goes to the Emergency Assistance Unit and we are waiting for the Mayor's signature.83

The families are interviewed by a NOVA (National Organization for Victim Assistance) worker — that is a specialist in domestic violence — and again, if they are lucky, they are assigned to a do-

domestic violence shelter, but more likely they will be sent to an assessment shelter for thirty days and then to a regular shelter that has no programs for battered women and their children, and often the stay lasts for more than a year.

The Council's General Welfare Committee recently held a hearing in Harlem on foster care. The stories from the hearings support the recent figures that show the number of children in foster care has increased. But what the figures do not show is that the majority of children are in foster care because of neglect charges rather than abuse charges, and the neglect can sometimes mean a missing baby sitter or a falling ceiling in their home. In one case, the ceiling that fell down was in an apartment that was maintained by the city. Mothers and grandmothers testified about their nightmare experiences in the family court and the difficulties in getting their children out of foster care.

Of course, sometimes foster care is necessary, and even beneficial, but I remember well when Rose Washington, then the Commissioner of Juvenile Justice, testified that the profile of a typical youngster in the juvenile justice system included at least one foster care placement. Bear in mind that the average foster care placement lasts several years. Children are placed quickly in foster care out of fear of disaster, but also because the Giuliani Administration rejected the policy of family preservation and eliminated the very support services that policy brought.

An experienced homemaker could remedy many of these neglect situations at much less financial cost, and certainly without the traumatic impact foster care has on a family.

Rent subsidies to help parents find acceptable homes for their children exiting foster care are disappearing, as are payments to prevent eviction and homelessness. But still, the Agency for Children's Services requires that a child has his or her own room before that child is allowed to leave foster care.

Recently, we have heard of two tragic infant deaths because the young nursing mothers lacked Medicaid cards for the baby and adequate after-health care. The cards arrived after the babies died. The mothers were denied service because they did not have the cards, even though the infants are supposed to be automatically covered by their mother's Medicaid card. One of the mothers, Tabitha Waldron, is now on trial in the Bronx for criminally negligent homicide, while the other young woman, Tatiana Weeks, struggles to regain custody of her three-year-old son.
These are only a few examples of the difficulties that poor women and their families face. At a recent meeting in my community, a ninety-two-year-old man reprimanded me for sounding so hopeless. And, of course, he is right. We cannot give up. But it is difficult.

When we look back, we do note that we have made great strides in the public recognition that domestic violence is criminal violence, and we have seen improvements in the government's response.

But we have to go beyond just responding to the violence each year by trying to add more shelter beds and increase programs for victims. I think we have to recognize the relationship today between poverty and violence and we have to change the public policies that drive that poverty to try to prevent the violence.

- There has to be more decent, affordable housing and more protection of existing housing and existing rents. We must stop looking at child care as an accessory service.
- Universal non-sexist quality education would provide a strong foundation for families, teaching early equality and dispute resolution, as well as giving the children the advantages Headstart programs have long demonstrated.
- Poor people must have adequate legal representation if we are to have a just society.
- Everyone should have good health care and ample educational opportunities.
- We must acknowledge and adapt to the changing demographics of our city and of our country.
- And finally, of course, people should work, and I believe they want to work but punitive systems that trick people and trap them will not succeed.

We must reexamine how we treat the poor. I am not really talking in the rhetoric that Giuliani likes to say is "left-wing rhetoric." I believe it is just common sense and compassion. Poverty and welfare reform in its present form disrupts family life and diminishes our opportunities to bring tranquility to our families.

Those of you who represent these women and children have an enormous task and an awesome responsibility, but the rewards are indescribable when you have helped one family find peace and a future.

Thank you.
TRENDS AND TACTICS ON THE FEDERAL FRONT

MS. DOMONKOS: It is my pleasure to introduce our moderator, Andrea Williams, a Staff Attorney at the NOW Legal Defense and Education Fund, where she works on issues related to violence and poverty. She is the co-chair of the National Task Force to End Violence Against Women, which is a vast national coalition of organizations focusing currently on the passage of the federal Violence Against Women Act 1999.84

Andrea also works on implementation and monitoring of the Family Violence Option, which exempts battered women from some of the restrictions of welfare form. She also provides technical assistance to lawyers and battered women on domestic violence and child custody.

Prior to joining NOW Legal Defense, she was a Staff Attorney at the Bergen County Legal Services in New Jersey, where she worked in the areas of housing, family and unemployment law. She is a graduate of the Rutgers School of Law in Newark, has a Bachelor of Arts in political science from Boston University, a Master of Arts in African American studies from Atlanta University, and has taught women’s studies.

MS. WILLIAMS: Thank you very much.

In terms of the order of presenters, we will start with Juley Fulcher from the National Coalition Against Domestic Violence, and then we will follow up with Suzanne Goldberg from Lambda Legal Defense. We will then have Joan Zorza, who is the Editor of Domestic Violence Report and a legal advocate, followed by Leslye Orloff from Ayuda, and then Marcellene Hearn who is with NOW Legal Defense and Education Fund. We will end with Linda Garder.

The purpose of this panel is to give a sense of the laws and other resources that are available on the national level to assist battered women and children. It is also to assist practitioners as they handle cases involving domestic violence, and particularly the inner section of domestic violence and child custody.

Let's start with Juley Fulcher. Juley is going to talk about the Violence Against Women Act and some of its provisions that are important avenues for battered women and children.

MS. FULCHER: Thank you, Andrea.

My name is Juley Fulcher. I am the Public Policy director of the National Coalition Against Domestic Violence. I work primarily at

---

the federal level, drafting and lobbying legislation that will be of assistance to victims of domestic violence and their children. One of our primary focuses for the past couple of years has been the children, simply because we really have been letting them slip through the cracks in a lot of ways.

I am going to talk to you about what little there is out there on the federal level that addresses children and the custody issues in the domestic violence context, and also talk more specifically about some of the proposals that currently exist. These are pieces of legislation that are in front of Congress right now that we are trying to get passed but are not yet law. So I am switching back and forth between the two, and will try to be clear.

When we are talking about domestic violence and we are talking about child custody in the context of domestic violence, most of the laws that we are dealing with are going to be state laws. Custody and family law issues are within the purview of the state to make decisions about how the state is going to treat these cases.

However, we do an awful lot of things at the federal level that can have a tremendous impact on the lives of battered women and their children. A lot of that comes from funding sources. The Federal Government, of course, gives out a lot of money to the states, to non-profits, and all sorts of folks throughout the country that can provide the kind of essential assistance that is needed in order to get women and children to safety. The Federal Government often will earmark that funding in such a way that it is only available under certain circumstances. This earmarking can actually encourage or coerce states into changing their laws in ways that the Federal Government would like to see.

So we have a lot of opportunity at the federal level to have an impact of the lives of women and children in the custody context and in a domestic violence situation, even where this is not usually what we think of as a federal law-making area. And then, of course, there is the interstate context and jurisdiction conflict and all those other things that are typically decided at the federal level that we are also addressing.

What I am going to try to do is go through a section of what is called the Violence Against Women Act of 1999. This is an omnibus package. It is a huge bill, almost 400 pages long. The package has everything but the kitchen sink to try to address domestic violence, sexual assault, stalking and generally all forms of violence against women.
To give you a little bit of history, the original Violence Against Women Act passed in 1994 ("VAWA") was something that was in front of Congress, more or less, for four years as a package. What finally passed was not the full proposal by any means, but did do a lot of good things and sent a lot of money out to the states to address domestic violence. There was not much in there that was specifically addressing children, although certainly some of those funds that helped women get out of a bad domestic violence relationship also helped in the protection of the children.

This new package is designed to do two primary things. The first one is to keep all of those programs running that were initiated under the original VAWA. Quite literally, funding authorization runs out for those programs in fiscal year 2000; actually, a number of the programs have already run out. So to the extent that the programs that already exist have done good things, we need to make sure we maintain those programs. One piece of this bill does that.

The rest of the bill, which is the bigger part of the bill, is a group of new proposals that address domestic violence. Actually, some of the proposals have been floating around since before the first bill passed.

Title II of the eight-titled bill is called "Limiting the Effects of Violence on Children." Included within this title is a whole set of subtitles, each of which is an independent piece of legislation with its own set of sponsors, that is designed to address a different piece of the puzzle. I will just go through them in the order they are listed in the bill.

The first one that is listed under title II, subtitle A is called "Safe Havens for Children." Every one of us, no matter where we live, has read newspaper articles or heard on the news about a woman and/or her children who are injured or killed during visitation exchange. These kinds of cases have, unfortunately, happened in every corner of our country. It seems, from my perspective, that it is happening on almost a weekly basis.

Of course, anybody who is out there litigating these cases and who is trying to set up a reasonable visitation schedule and is used to dealing with it in the context of domestic violence, knows that that can be a very dangerous time for your client. The visitation is a time that is often used by a batterer to threaten the victim, to harass her, to sometimes threaten or injure the children, and, in a
way, just to generally manipulate the situation and maintain some sense of control in a relationship that otherwise is pretty much being severed both by these people and through the court system.

So it is a time that you work very hard to try to come up with something, to craft something that will protect your client. But, very often, there is no choice but to have the victim of domestic violence in the same room or in the same place with her batterer on a regular basis — maybe once a week, twice a week, who knows — for visitation exchange. So essentially, she is being forced back into that relationship, even under those temporary circumstances, on a regular basis.

Now, we often try to do it at a public place: at a police station, if your police station is cooperative with those kinds of things; McDonald’s, one of the more popular points where we do this exchange; or, lots of other places. We sometimes try to get intermediaries involved, a third-party exchange perhaps; but, of course, we have to rely on both of these people being able to agree on an individual that they both feel comfortable entrusting their children to, and that is willing to come in contact with both people. That is not always an easy task either.

So visitation is a very, very difficult problem. The last thing we want to have happen is forcing people into a situation where violence could erupt and people could get hurt. The idea behind “Safe Havens for Children” is to provide federal funding that would be available in grants to create supervised visitation centers in local communities. The supervised visitation center could be used in two ways:

- One is for actual visitation exchange only. The children are not really being visited at the center; instead, it is just a nice, secure, safe location where there are trained personnel there to make sure that there is no violence and the children can be exchanged.
- The other way in which such a center can be used is that you actually have trained personnel who can supervise the visitation in cases where there has been a history of child abuse or child sexual abuse.

There are some communities that have managed to scrape up enough money to get some of these centers going. But for the most part, most of our communities cannot afford it or cannot afford to do it on as broad a scale as is needed for the community. That is the idea behind the “Safe Havens for Children” proposal.
A second proposal that is listed in this Title tries to directly address the problem of domestic violence and violence against women in an education/prevention mode. We all know that adult women find themselves in domestic violence relationships at numbers far higher than any of us would ever feel comfortable with. But what we fail to think about sometimes is that you do not just all of a sudden become an adult one day and then find yourself in a violent relationship without any history whatsoever to back that up. We have children who are growing up in violent households, who are witnessing violence on a daily basis, and this is essentially their model of what a relationship is. In fact, children of homes of domestic violence are far more likely to grow up to be either a batterer or a victim of domestic violence themselves, not to mention the host of other problems that may come along with growing up in a violent home that way.

Under the original VAWA, Congress recognized that we need to start an education prevention level at a young age. In fact, it gave some grants for folks to develop some education programs that could be specifically targeted to children of different ages.

Those programs were developed. There were programs developed for the elementary school level, the middle or junior high school level, as well as the high school level. Unfortunately, they only put forth the money to develop the model, and the models have not yet been implemented. So what we would like to do is implement those models and make those models broadly available to school systems, to non-profits, domestic violence programs and sexual assault programs in communities. We want to try to go into the school systems, adapt these models to wherever people are living, and to try to educate the children at those younger ages. This is a very important piece of the puzzle to make sure that we are going in and teaching the children about the problem, about the potential dangers, and about ways in which they can avoid becoming either a batterer or a victim of domestic violence. These programs also address sexual assault as an issue.

Another approach is to try to help the schools develop policies for dealing with the violence in the lives of the children who attend those schools. Anybody who has ever gone into a classroom and tried to teach about any subject as a means of public education knows that you end up with at least one or two students coming up to you afterwards saying, "You know, that happens in my life," or

87. See id. § 221.
"a friend of mine has that problem." And that is the point. We know it is out there, we know it is widespread; that is why we wanted to do the education in the first place. But we have got to make sure that those schools are prepared to deal with the children who then come forth and say, "That's me, that's my home, I need help." So we very much want to deal with that.

One other big piece of this is that we are not just talking about children who are witnessing the violence between their parents. We are talking about teen-agers who are experiencing violence in their own relationships as well. With teen dating violence, we do not have statistics as good as we would like, but the early studies are showing anywhere from ten to forty percent of teen-agers stating that they themselves have been in a violent dating relationship. That is a little bit frightening to think about, but we may be actually addressing the people who are in these violent relationships, especially at the high school level, in those education programs.

There is a piece of the bill that specifically addresses the federal law on parental kidnapping, the Parental Kidnapping and Prevention Act ("PKPA"). The PKPA is already in place. It is primarily designed to keep one parent from kidnapping the children and running to another state with the kids, but does a lot of talking about jurisdiction, specifically which states have jurisdiction to decide custody. I am going to briefly state a couple of things that would be amended in the PKPA through the Violence Against Women Act of 1999.

One change would allow an affirmative defense to people charged with parental kidnapping if they left the state with the children in order to escape domestic violence or abuse of the child or children. So, if a parent who does not have legal custody or visitation rights that are being violated at the time, specifically took the kids in violation of the order to escape domestic violence or child abuse, then that would be a defense to the criminal charge.

Also, it would amend the civil portions of the PKPA with respect to determining jurisdiction over a custody case. Lots of times when we are setting up that list of factors we are not thinking of the dynamics of the domestic violence relationship. The bill would amend the statute so that a judge could take into account things like domestic violence, child abuse, stalking and child sexual abuse, in determining which state gets jurisdiction over the matter.

89. See H.R. 357, 106th Cong. § 233.
90. See id. § 234.
The last piece addresses bringing the federal law more in line with the Uniform Child Custody Jurisdiction Enforcement Act, which Joan Zorza is going to be talking more about later, so I will just leave that for her.

There is also a piece of the bill that is a "Sense of Congress" about domestic violence in the context of custody cases. 91 It is essentially saying that it is in the children’s best interests to not be given in custody to a batterer, so that the batterer is not the preferred custodial parent.

Now, senses of Congress like that already exist, in the sense that Congress calls to states to reform their laws in such a way that they conform with that ideal. It does not really have any authoritative impact, but it can be very influential in getting legislative changes on the state level, so it is an important piece.

There is also a piece of the bill that provides funding to train child welfare workers, individual people who are working with child protective services. 92 These are people whose job it is to maintain the welfare and safety of our children. They do an important job, but they do not always have the background that they need to understand what is going on in domestic violence households. We want to make sure that all of those child protective service workers are adequately trained to deal with the job that they have, and we want to arm them with the tools that they need to do that job effectively and make sure that children are kept safe.

The last piece I will mention is child abuse accountability. 93 We all know that you can split up someone’s retirement benefits in a divorce settlement. Generally we cannot get at your retirement benefits in any other way but through divorce, family law matters. There is always that precedent.

This piece would help a victim of child abuse who, as an adult, sues their abuser and wins but who cannot collect in any way, to attach the retirement pension benefits of their abuser. Essentially it provides another way through family law that an abuser’s pension benefits could be attached.

So that is the bill’s proposal in terms of addressing children, and the effects of violence upon them.

MS. WILLIAMS: Thank you, Juley. Let us take maybe three to five minutes now if anyone has questions or comments for Juley.

---

91. See id. § 241.
92. See id. § 251.
93. See id. §§ 261-264.
AUDIENCE: I was interested in your statements talking about the abuser not being preferred as the custodial parent. What is the future view of that, or what is your opinion about using that in the future? I deal with a lot of custody issues, and there are a lot of times when we have a parent who claims to have been abused by the person who is asking for custody. Obviously the other party denies it, and it becomes an issue of fact. I would like to know where this is going.

MS. FULCHER: There are already state laws that address this. What we are usually talking about in those state laws that are addressing it is that there is a finding of fact that one person has committed domestic violence against the other, and then once that finding of fact is made, there is some sort of taking into account of the fact of domestic violence in determination of custody.

There are different ways that happens state by state, so it may be one in a laundry list of things you consider when you are determining best interests of the child. Sometimes it is stronger than that. Maybe you do not give custody to a batterer unless there are some extenuating circumstances.

But the idea on the federal level is just a sense of Congress that says, "You should be addressing this in your state laws very directly, and there should be a preference for not giving custody to a batterer." Although they are not saying "never, never, never," they are saying some sort of preferential system that once there has been a finding of fact of domestic violence, that it is taken into account and that there be a preference for not giving the kids to the batterer.

AUDIENCE: I wonder if we do not beg the point when we talk about custody, because "custody" is a legal term and it implies a shift of custody from one parent to the other. But whenever we are addressing visitation, for example, if it is for a week-end or a week or overnight, we are essentially putting the child in that parent's custody during that period of time. All of the laws that I have seen talk about a preference being given or taking this into consideration in a custody determination, but by far the most common case that comes into court is a visitation case where you are putting the child in the other parent's custody, but it is not "custody." I wonder if there is anything that is being done to also include visitation in that.

MS. FULCHER: I guess I am misspeaking a little bit, because it does talk about custody and visitation as a package.

AUDIENCE: But not in New York.
MS. FULCHER: But yes, it does differ from state to state, and there are states that actually also determine their visitation provisions based on the same issues. One example is the District of Columbia. If there is a finding of fact of domestic violence, it is the burden of the batterer to show the court that visitation can take place and keep the children and the victim of domestic violence safe through that process. So there are states that are addressing it. But you are right, it is an important piece.

MS. ORLOFF: Just something else to know about that is that the National Council of Juvenile and family court Judges several years ago issued a Model Code, which is a model state statutory code that they are trying to encourage states to pass. In that, they basically recommend that there only be supervised visitation when there has been a finding of abuse. But very few states have followed that, I believe.

MS. ZORZA: About thirteen states have that, but it is very complicated because a lot of states have put much stronger factors in it than New York has. New York has a consideration, that judges must consider the domestic violence, but it does not say what weight or what protection needs to be given.

AUDIENCE: You mentioned that a woman who has been the subject of domestic violence might have a claim to her husband's pension. I am representing a woman in an uncontested divorce whose husband has a pension. She had a restraining order against him, but it has lapsed, and there is no formal judicial procedure. I am wondering what level must she have gone to have a claim to her husband’s pension?

MS. FULCHER: The specific piece that I was mentioning had to do with child abuse actually, not domestic violence. It is a proposal that if you later sue your parent for committing child abuse against you when you were a child and you win damages, that you could then attach your parent's pension or retirement benefits in order to settle that claim. When I referred to adults, I was referring to just the standard within a divorce that you have the ability to attach part of the retirement benefits of your spouse.

MS. WILLIAMS: Thank you very much.

Suzanne Goldberg from Lambda Legal Defense is now going to talk about lesbians and domestic violence and child custody.

MS. GOLDBERG: Thanks. Hi. I am pleased to be here. My name is Suzanne Goldberg. I am a Senior Staff Attorney with Lambda Legal Defense and Education Fund.
For those of you who are not familiar with Lambda, we are a twenty-six year old national organization. We work to secure and protect the rights of lesbians, gay men and people with HIV.

When Andrea first asked me to speak on the panel, particularly because it was a federal issues panel, I wondered what I could add. It is not that lesbians and lesbian parents do not have struggles with domestic violence. Certainly we do, both lesbians who are in a heterosexual relationship or leaving a spouse, and lesbians who are in a same-sex relationship as well. And just to pick up on the point we were just discussing, this also includes lesbian youth in high schools and young women who are in same-sex relationships where there is battering, where there is a whole host of issues.

Even though to the extent that programs exist today, some sorts of social support programs, how minimal those are when you think about how those programs address the particular needs of the lesbians. We are really talking about very, very minimal attention. So I was thinking that makes this job a little bit difficult this morning.

In addition, at the federal level, the government has actually passed a law, the Defense of Marriage Act,\footnote{94. Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1997); 28 U.S.C. §1738c (1997)).} that explicitly refuses to recognize same-sex couples' marriages, at the federal level, and permits states not to recognize same-sex couples' marriages. So we are not talking about a friendly federal environment for lesbians or gay men, or lesbian or gay parents. We do not even have protections against employment discrimination based on sexual orientation. So we do have a very long road to go at the federal level.

But I do think it is quite hopeful — or I hope it is helpful at least — to sketch out the landscape that is faced by lesbians who are in domestic violence situations and have children, and highlight some of the particular issues that arise when the battered parent is a lesbian.

What I want to do, first of all, is offer a thumbnail sketch of the standards that are typically applied when a lesbian is seeking custody of her children, just to get us all on the same page; second, talk about how some courts have handled cases when lesbian parents have been the victims of domestic violence, or when domestic violence has been an issue in a custody battle; and third, offer some practical or practice issues for people who are representing lesbians.

Has anybody here represented a woman in a custody battle who is a lesbian where domestic violence is an issue? A couple of peo-
ple in the room. So even in a room of approximately one hundred people, five people.

What is often hard to figure out, even when you are representing somebody who you presume is heterosexual, is whether they in fact are a lesbian and are not comfortable, for whatever reason, in disclosing that information. And certainly, when a male spouse finds out that his wife is lesbian or is engaged in an extramarital affair with another woman, that is very frequently a trigger for domestic violence.

So here is the basic background on custody disputes involving lesbian parents, to lay the groundwork for some more specific issues. You could also re-title this section "In Many States, Lesbian and Gay Parents Have a Very Tough Struggle."

The states basically break down in three ways.

- One, there are states where being a lesbian is a per se negative factor in a custody determination. So if there is a divorce proceeding from a marriage, a parent is shown to be a lesbian or gay, that parent is typically denied custody and often faces very severe restrictions on visitation, including a requirement of supervised visitation, no overnight visitation, or no visitation in the presence of another same-sex adult who is not a relative. These are not uncommon. We are dealing with these kinds of matters all the time at Lambda.
- Then there is a set of other states that do not have the explicit negative — it is not even a negative presumption, just sort of an explicit per se "a lesbian parent is a bad parent" rule — but they still find ways to deny lesbian parents custody and/or restrict visitation with their children anyway, by saying, for example, "Your state has a sodomy law." Twelve of the seventeen states that still have sodomy laws prohibit oral and anal sex to everybody in the state, not just to same-sex couples. But the court will say, "Well, you are a lesbian, and therefore you must be violating the sodomy law," even if the ex-husband is violating the law as well. But that never comes up. So courts find a way, in other words, to punish the lesbian parent.
- Then there are other states, including New York, New Jersey, and most of the states immediately around us, where sexual orientation is not treated as a relevant factor unless the other parent shows that it is.

I want to move now to cases in which courts have addressed domestic violence issues in the context of a lesbian or gay custody battle. The bottom line in many of these cases, regardless of where
they are from, is that the lesbian parent will still be seen as the worst parent in the court’s eyes, even if the heterosexual father is a batterer, has battered his ex-wife, has battered his children. Now I am talking about lesbians who are leaving heterosexual relationships.

In other words, the courts take the position that the influence of a lesbian mother on her child is going to be far worse than the influence of a violent father on his child. I think the best way to illustrate this is through a couple of examples.

There is a case that was recently decided, actually about two months ago, by the Mississippi Supreme Court. It is called Wei-gand v. Houghton. In this case, a gay father was actually seeking custody of his child because the child’s heterosexual mother had gotten into a relationship in which the stepfather was abusing her and threatening to kill the child.

The majority of the Mississippi Supreme Court looked at this situation. It went through extensive balancing, but called the incidents of domestic violence “isolated,” even though the defense pointed out that these incidents led to the family being evicted from their home because of the repeated episodes of domestic violence and explained that the son witnessed the incidents.

There were two justices who dissented. When I read this dissent, I thought it was interesting because it acknowledged the effect of domestic violence. There are clearly other issues which this court also appeared to have, including economic bias toward the father because he appeared to have more money than the mother. But the dissent said:

The Chancellor and majority believe a minor is best served by living in an explosive environment in which the unemployed stepfather is a convicted felon, drinker, drug-taker, adulterer, wife-beater, and child-threatener, and in which the mother has been transitory, works two jobs, and has limited time with the child.

As Ronnie Eldridge said before, we can have a whole other discussion about that last part of the Justices’ comments about the mother working two jobs and having less time with the child. But as far as the first part is concerned, clearly what the court is pointing out here is that the fact that the father who is seeking custody is gay is so bad as to outweigh the potential damage to the child

95. 730 So. 2d 581 (Miss. 1999).
96. Id. at 588.
caused by living with the violent stepfather. Thus, while the child could be living with his father in a safe and stable home with every material and educational opportunity, again there is a little bias here.

[T]oday’s decision affirms the Chancellor’s finding that he should remain with his mother and her present husband, an adulterer and a convicted felon, who has beaten Machelle and threatened Paul’s life. No child should be subjected to such a potential for short- and long-term psychological and physical abuse just because the Chancellor thinks little of homosexuals.97

So when you have a lesbian or gay parent who is in a domestic violence situation, even where domestic violence might be considered a negative factor on the other parent’s side, the lesbian or gay parent still faces significant barriers to being treated as an equal in court.

Another interesting case is Ward v. Ward,98 an Appellate Court case in Florida, where a lesbian mother lost custody of her child, even though the child had not spent any significant time with the father. One of the issues that arose in the case, although it was not exactly presented to the court because of procedural reasons, was the fact that the father had served time in a Florida prison for murdering his first wife. There is a statute in Florida that creates a rebuttable presumption that shared parental responsibility by a parent who has been convicted of a felony of the second degree or higher involving domestic violence will be detrimental to the child.99

But the court goes on to say, “[T]he considerable evidence in the record concerning [the father’s] conduct, and record since being convicted and imprisoned, would seem to support a conclusion that the presumption would be rebutted in [this] case.”100

Even though the child in this case never really saw the father, he was able to obtain a shift in custody because he had remarried and presented himself as being in a stable relationship.

Another way this issue comes up is where the lesbian parent is involved with another person — the lesbian parent has a same-sex partner. In Bottoms v. Bottoms,101 one of the factors that the court considered in taking a child away from the mother and transferring

---

97. Id.
custody to the grandmother was that the mother's same-sex partner had disciplined the child by hitting him on his bottom.

There was no evidence in this case — there were not even allegations — of physical or sexual abuse of the three-year-old or four-year-old boy. But the parental discipline of the child was being treated differently because the parent in question was a lesbian. You can imagine what would happen if a court actually took custody away from a parent anytime a parent were to hit the child on the bottom for disciplinary purposes.

Not all cases turn out this way, but there is a definite trend in this direction. I want to recognize here that neither side of these cases has perfect analyses, but what is important to note is that when domestic violence is occurring, the sexual orientation of the lesbian or gay parent is often treated as at least as negative a factor as the other parent's violent behavior.

Third, from a practical standpoint, I just want to highlight that access to courts for protection against domestic violence can be different for lesbian and gay parents than for heterosexual parents. This is for a couple of reasons.

In most states — I believe this is true in most states, including New York but someone please jump up and correct me if I am wrong — people can only go into family court, as opposed to criminal court, to seek an order of protection if they are either married to the batterer or have a child in common with the batterer.

MS. WILLIAMS: Or a family relationship.

MS. GOLDBERG: So same household is enough? I do not believe it is actually.

MS. WILLIAMS: No.

MS. GOLDBERG: In New York State, since lesbian couples cannot marry under law, if a lesbian is experiencing domestic violence from her partner, she has to go to criminal court to seek protection for herself and her kids.

When we think about how poorly funded and supported some of the programs are, even in family court, and how insensitive even some trained family court judges are, most of the people here know that in criminal court it is an even less pleasant experience, certainly, for a parent and for kids.

In addition, same-sex couples face an entirely different legal regime regarding child custody and visitation issues. Again, I just want to mention the existence of the Defense of Marriage Act on the federal level, which discusses the event that some state ultimately recognizes same-sex couples' marriages — which may or
may not happen within the next six months in Hawaii or Vermont. The Federal Government felt it was necessary to just act in advance and protect itself against the possible onslaught of same-sex couples’ marriages, apparently. If a state does recognize same-sex couples’ marriages, the Federal Government has already decided that it will not.

To the extent that there are federal laws developed that will protect a woman from her spouse in the context of same-sex violence, it is unlikely that those laws are going to be beneficial to a same-sex couple who is able to marry, if same-sex couples are able to marry.

When crafting those laws, it is very important to think not only about people who are either escaping violence from a legal spouse or escaping violence from the biological parent of their child, but also about people who have a relationship that is not legally recognized but that still puts them in great danger.

In New York State, for example, unless both parents have a legal relationship with the child, the non-biological or non-adoptive parent is treated as a legal stranger to the child. In New York, a case called Matter of Dana102 made it possible for a parent to do a second-parent adoption, so that both parents could establish a legal relationship with a child.

A few years earlier, a case decided in 1990, called Alison D. v. Virginia M.,103 involved a lesbian seeking visitation with her child. The two parents had planned to have the child together, they had raised the child together, they had split up, and the biological mother decided to deny visitation to the non-biological mom in that case.

The non-biological mom went in and sought standing to seek visitation with the child, not custody. The court said that the non-biological mother was a legal stranger to the child and she had no ability to enter court and seek to maintain any connection with the child who she has helped to raise from birth.

So even where violence is occurring by the biological parent or the adoptive parent, the other parent, who may not have a legal relationship with the child, has absolutely no standing to go into court and seek protection. This is regardless of the fact that they planned the conception, the birth, and cared for the child together from early on.

Also, what happens sometimes in same-sex relationship cases is that a biological mother will accuse the non-biological mother of domestic violence or of abuse toward the children as a way of justifying to courts and to herself that she should deny the other parent any access to the child whatsoever.

There was a recent California case, called *Kathleen C. v. Lisa W.* at the Appellate level, which upheld this idea that a parent who has been standing *in loco parentis,* and who has functionally been parenting a child, does not have a legal relationship with the child. What the court specifically said is that this woman — who had again planned the conception, raised the child from birth, gave the child her last name as his middle name — could not see the child anymore and that he was no longer her child, after the couple broke up.

The court noted that in early 1996, appellant visited with the children surreptitiously on several occasions. There was another previous child who she was also parenting. There were no allegations of domestic violence or harm to the kids. She was just trying to see her children.

Respondent, the biological parent, learned of these visits and sought a restraining order under the Domestic Violence Prevention Act. This is just an example of a different perspective on how domestic violence laws are sometimes used in battles between same-sex parents to actually prevent another parent who has not been a violent parent from gaining custody or visitation to their child.

The upshot of all of this is that if you are representing a lesbian, or you are thinking about representing lesbian or gay parents in custody battles, there are some different issues to be aware of that lesbian parents face.

(1) Being a lesbian alone is often a negative factor in custody and visitation determinations, and the heterosexual parent’s violence may be treated as balancing out the negativity of the other parent’s lesbian or gay sexual orientation.

(2) Lesbian parents often do not even have access to court to seek the kind of remedies that are necessary for parents who are facing domestic violence.

There is a whole range of issues that are helpful to consider. I think we are making some small progress on the road, but obviously we have a very long road ahead as well.

---

104. 84 Cal. Rptr. 2d 48 (Ct. App. 1999).
MS. WILLIAMS: Let us take some questions for either Suzanne or Juley.

AUDIENCE: Suzanne, could you explain a little bit more about the federal and state laws regarding marriage mentioned in the last part.

MS. GOLDBERG: Currently, no state in the United States recognizes the marriages of same-sex couples. People have relationships, wedding ceremonies or commitment ceremonies, but they are not legally recognized in any state as being married. So all of the rights and obligations that come along with the marriage are not available to lesbian and gay couples, including the rights and obligations that grow out of having a child together in a marriage.

At the federal level, prompted by the possibility that there could be a same-sex marriage, like the one in an ongoing Hawaii lawsuit that may lead to the recognition of same-sex couples’ marriages in that state, the Defense of Marriage Act was passed by Congress and then signed by Clinton.

The Defense of Marriage Act ("DOMA") has two central provisions. One is that the Federal Government will not recognize validly contracted same-sex couples’ marriages from any state. So in no part of federal law, whether we are talking about tax issues, Social Security issues, immigration issues or anything else, will same-sex couples’ marriages be recognized.

Secondly, DOMA provides that states do not have to recognize another state's same-sex couple's marriage. For example if Vermont or Hawaii, where lawsuits are currently pending seeking the freedom for same-sex couples to marry, actually decide to recognize same-sex couples’ marriages, through the DOMA, New York does not have to recognize those marriages, nor does Connecticut or any other state.

Obviously, that raises serious problems with, among other things, the Full Faith and Credit Clause of the Constitution, which seems to require that marriages in one state should be recognized in another. That is a whole other discussion, but that is essentially what I was saying.

MS. WILLIAMS: Other questions?

AUDIENCE: Suzanne, since I started teaching at law school in 1975, it has become apparent that groups representing lesbian and gay individuals or couples are in an extremely difficult position be-

cause in almost every instance when you are taking a public policy stand that would help gay and lesbian couples and individuals, you are getting into a very difficult situation where a change in a law could be extremely detrimental to women. And if you really look at these situations, you realize that until homosexual individuals can get married, we are always going to have that battle at each policy front.

For example, the big issue in New York involving the case that we are talking about — if a lesbian partner gets visitation rights, then does that mean that a boyfriend could get visitation rights? And the boyfriend is often a scary individual because the boyfriend is often involved in domestic violence with the mother. So what it really comes down to is until we get approval of gay and lesbian marriages, we are going to have this eternal problem on our hands. It is an extremely difficult problem.

I also wanted to address one comment to the NOW Legal Defense Fund, which was brought up by Suzanne. We really need a federal law that requires states to pass laws that would prohibit the courts from considering the wealth or lack of wealth of a parent in a custody or visitation matter. That happens all the time, and it obviously hurts women.

MS. GOLDBERG: May I just offer a quick response? You have absolutely pointed out one of the real tensions that surfaced in Allison D. v. Virginia M., which was the case in which a lesbian co-parent sought standing to seek visitation with the child she had helped raise.

Certainly, I think marriage is one solution. I do not know that it should be the only solution to the problem, although certainly same-sex couples should have the same legal right to marry as heterosexual couples.

One of the ways I think that tension was resolved or addressed in the Allison D. case is that it was very clear that the standard we were suggesting to the court for a parent to have access to court to seek standing was one in which the biological parent or the child’s legal parent had consented to the other parent being a parent to the child, which is a difficult standard to craft, but it is not as difficult as you might think. You can craft a standard.

One of the standards that was suggested through some of the amici briefs — which is not a perfect standard from anybody’s standpoint, but I think it addresses this kind of situation — is where the two parents planned the conception of a child, planned
to raise a child together, and did so up until a certain point when the parents split up.

If that is the case, our argument is that that parent who does not have the biological relationship should absolutely be able to seek standing. That co-parent should absolutely have standing to seek visitation and/or custody, which was not an issue in that case. And then, if there is an issue of domestic violence or any other problematic issues, those are for the courts to resolve. But the question is, should the person who has been a parent to the child from birth and deliberately created and shared the child's life with the other parent be barred from even getting into court because they do not have a legal or biological relationship?

Certainly, if there is a boyfriend in the household who then leaves the household, if the child is his biologically, he does have standing to go into court and seek custody.

AUDIENCE: I am not talking about them. I am talking about the other boyfriends.

MS. GOLDBERG: Right, the other boyfriends who come into a child's life later. Again, that was not the situation in Allison D., where the two parents planned to have the child together, and that does make for a more complicated situation.

Again, I think that we can develop ways to craft that. I do not think offering standing to everybody who claims a parental relationship with a child is a perfect solution, because that means that the child's legal parent, let us say in this case the mom, is dragged into court by somebody who has a claim at least for standing.

We also have to remember that even if a person does have standing, it does not mean that they are entitled to visitation. The mom can still show that this person who has standing is actually a threat to the child and that maintaining the relationship would be harmful.

MS. WILLIAMS: Our next speaker will be Joan Zorza, who is Editor of The Domestic Violence Report. She will be followed by Leslye Orloff from AYUDA.

MS. ZORZA: I am going to talk about a very complicated subject — the new interstate custody laws. They deal with when a state can hear a custody case at all — i.e., when it has jurisdiction, particularly, when two or more states are involved; and, when a state must honor and enforce another state’s custody decree.

Why do we even have these laws? Basically, the U.S. Supreme Court, starting in 1947, went through a series of cases in which they said, “We will not give full faith and credit to custody orders.” The
result was to encourage parents who lose custody to kidnap their child. Every order was considered a temporary one, subject to modification upon a change in circumstances, and crossing a state line was always a change in circumstances. Most of the abductors were fathers at that point.

The Uniform Child Custody Jurisdiction Act ("UCCJA")\textsuperscript{109} was conceived of as a solution by the National Conference of Commissioners who had originally drafted the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"). It was far from perfect. They certainly never looked at domestic violence, but, in fairness, they did this in 1968, before there was much understanding nationally of domestic violence.

States were very slow to adopt the UCCJA. New York, for example, took ten years.\textsuperscript{110} States also adopted it with many changes, and that gave other states an excuse to squabble over whether to honor and enforce another state's custody decree when they did not always comply with each other's terms.

Congress got tired of the situation, and basically in 1980 they came up with their own solution, the PKPA. As federal law, it applies to every state, and it also preempts state laws where they are inconsistent. The biggest difference that the PKPA has over the UCCJA is that it prioritized home state jurisdiction over "significant connection" jurisdiction. Under the UCCJA, they were considered equal, but now the PKPA changed that. The PKPA also gave a state that issued a custody order exclusive continuing jurisdiction to modify it unless none of the parties or the child still lived in the state. Congress also did not consider domestic violence.

The UCCJEA is the second look-around that the National Conference of Commissioners of Uniform State Laws did in examining the whole system. They realized they had to take another look because the PKPA was no longer consistent with it. They also had to look at whether the full faith and credit provisions of VAWA complied with it, and make sure it was consistent with the many other issues that came up in the interim.

They also were aware that custodial parents had a great deal of trouble enforcing custody decrees.

Again, when they started, they had absolutely no intention of looking at domestic violence, which is pretty shameful at this point in time. Several domestic violence advocates at the eleventh hour of basically forced them to do so, particularly Leslye Orloff of

\textsuperscript{109} N.Y. Dom. Rel. Law § 75-d (McKinney 1999).
\textsuperscript{110} See id. art. 5-A.
AYUDA and a small group, myself included, working through Roberta Valente of the American Bar Association’s Commission on Domestic Violence.

The result is far from perfect. What they did is they made many good concessions, basically helpful to battered women, but there are still some major, major problems in areas where they failed to protect battered women.

One of the better provisions is any order that is entitled to full faith and credit under VAWA is considered *res judicata*. Note that this makes consensual orders for orders of protection in New York *res judicata*, which is a real change from how people look at them. Obviously, the respondent has to have been notified of the domestic violence action or to appear for there to be *res judicata*. Obviously the respondent does have notice when orders are consensual.

Let us take a look at some of the provisions as to how the UCCJEA actually acts.

How do courts determine jurisdiction? There are now four types of jurisdiction, and they are prioritized. By that, I mean you start at the first one and are forced to stay there unless it does not apply or the state has declined jurisdiction, in which case you can move on to the next one, and so on. Again, home state jurisdiction is before “significant connection” jurisdiction, as before.

The third type is a new one, called “a more appropriate forum.” The idea is basically the same. And, as before, there is a situation to cover when there is no state that otherwise fits. That is sometimes called “vacuum jurisdiction.”

Once a state has made an initial custody determination, it has exclusive continuing jurisdiction, and no other state is allowed to modify its order, unless there is temporary emergency jurisdiction, or everyone has left the state and no substantial evidence still exists in the state regarding the child’s care. This is consistent with the PKPA.

Emergency jurisdiction is a fifth type of jurisdiction, and it is really one of the first places the National Conference of Commissioners are taking domestic violence into account. It is only, however, for extraordinary circumstances and only for short-term orders. For the first time, it can be used not just when the child is being subjected to or threatened with abuse, but when a sibling or a parent is endangered. So domestic violence clearly comes into this. This is a very, very helpful change.

What is not so helpful is that the word “sibling” is never defined. I have talked to a number of the Commissioners. I guess they are
so middle class, not one of them ever thought about the fact that families might include other people, like step-children and half-siblings and so on, or that a grandchild could live in the same family. Unless "sibling" is defined more broadly under state law, there will be situations where temporary emergency jurisdiction will not protect those at risk.

Once the court gives such an order, the idea is it is only for a temporary period to get the child returned, somehow, in safety to the other court. Courts are encouraged to include terms that will provide for safety, and also set a reasonable timeframe for the child to be safely returned.

An order of protection is meant to be, and often can be, the vehicle for a court of another state to take emergency jurisdiction. Once two states are involved, once again, as under the UCCJA, they have to communicate with each other. If they resolve the emergency, they also have to figure out how to protect the abused person and how long that order needs to remain in effect. The court can include a provision that once the child has lived in the emergency state, that state becomes the new home state. However, if the respondent files for litigation in the original state with six months of when the child left, then that state "wins," so further litigation must take place in the prior state.

There are very helpful provisions, for the first time, in the UCCJEA governing whether and when jurisdiction should be declined. As before, there are two grounds: inconvenient forum, and when there is misconduct. In looking at inconvenient forum, the court must consider if there has been domestic violence if it is likely to continue, and which state would do a better job of protecting the parties and the child.

Notice there are a couple of other helpful criteria which we suggested:

- The relative finances of the parties. Many of us know battered women usually have less finances.
- The health of the parties, which is often relevant to badly abused victims.
- Child support, which is a complicated thing, because often in changing jurisdiction you lose the ability to collect it. While some battered women will want to pursue it, others do not for fear it will escalate the violence.
- The whole notion that courts, for the first time, are somewhat encouraged to hear the cases of all of the children in the family together.
Declining jurisdiction because of conduct. Once again, except in emergency circumstances, the court has to decline jurisdiction if the person came to court with unclean hands, unless certain circumstances are met. However, they are very clear: domestic violence is not to be considered misconduct. So if someone has fled to escape abuse, that is different from a normal abduction.

Unfortunately, New York’s proposed version inserts its usual contempt standard — unless required in an emergency to protect the child, sibling or parent — which is a pity, because the usual standard should be whether the flight was justified in the event of an emergency.

The UCCJEA has optional provisions for address confidentiality. Again, these are very ambiguous and ambivalent. They urge states to have a way of impounding or keeping addresses confidential. The problem is, they also contain a provision for going to court so that law enforcement and various others can get that information.111

There is another very dangerous provision for battered women on registering decrees that practically force anyone who wants to enforce their order, if they are going to stay in the state more than thirty days, to register the decree. Unlike with the Violence Against Women Act orders, these orders require giving notice to the other side. This is a very, very big problem for battered women, because once the abuser is notified he is able to find her. At a minimum he can find her at the court hearing on registering the order.

One of the very best things the UCCJEA allows is it creates an interstate network of prosecutors that can enforce orders, if the state decides to do this. It is somewhat of a mixed bag. It is modeled on California’s system, which has been very, very good. But, often batterers are very skilled at manipulating the system and turning everyone against the victim. This leaves her even more vulnerable and dis-empowered, and puts the children at great risk.

I want to mention that the PKPA has been amended on October 12, 1998 with no discussion,112 I believe, within Congress. It was just tacked onto an appropriations bill. The amendment did two things:

(1) The first is relatively innocuous. It said that the definition of custody includes visitation and whenever the word “custody” ap-

111. See UCCJEA § 209.
pears, "and visitation" automatically follows. That has always effectively been the case, so it is really not a change.

(2) The second change appears to require grandparents to be notified and be made parties in every custody case. Can you imagine doing a paternity case with all of the grandparents present? Who is a grandparent? How is Grandma going to feel if, fifty years later, some old boyfriend comes into court saying, "Hey, you know, I think I am the grandfather of that child because did we not have a kid together, Grandma?" I do not think anyone has looked at the cost, how much this is going to slow down court cases, what it is going to cost states. Do you have to give attorneys to every grandparent, at least to every incompetent grandparent? What does it mean if everyone has left the state except for, say, one grandparent who has Alzheimer's, and cannot even recognize anyone? Since these grandparents are technically contestants, what are we going to do?

It is a crazy law. As Julie said, VAWA will hopefully correct this. It is a very serious blunder, particularly for battered women. Batterers are often notorious in involving their families in the litigation against their victim. Most divorces with grandparents intervening, unfortunately, involve grandparents who may sexually abuse the child, or who cover up or even encourage their son's abusiveness of their daughters-in-law.

MS. WILLIAMS: Thank you very much.

MS. ORLOFF: Good morning.

My name is Leslye Orloff. I currently run the Immigrant Women Program at NOW Legal Defense and Education Fund and was formally with AYUDA in Washington, D.C. I am going to very briefly talk about two things that normally could take me a day: the immigration provisions of the Violence Against Women Act and the implications for family lawyers in custody cases and divorce cases of those laws, and I will also discuss our recommendation that anybody who is working with an immigrant client makes sure that action in the family court case does not cut off eligibility or harm the ability of a battered immigrant victim of domestic violence to get relief in the immigration case.

One of the things I want to start with is that you should be routinely screening any case that comes into your office, for two things:

(1) Domestic violence is the first. One of the biggest problems we encounter with the cases of immigrant battered women is the failure to identify eligibility for VAWA relief. A family court case
goes forward, or a battered immigrant is sent to court to get a protection order on her own, without the assistance of the family lawyer who is representing her in the family case. Problems arise. Immigration women end up with orders that do not work, or are cut off from VAWA immigration relief. Alternatively, the opportunity to obtain evidence you need in the immigration case is missed because the family lawyer moved forward without coordinating and collaborating with the domestic violence advocates that are working with her and with immigration experts on this issue.

Essentially, the immigration provisions of the VAWA are available to help three categories of people: battered immigrant women married to U.S. citizens or lawful permanent residents, abused immigrant children who are abused by their U.S. citizen or lawful permanent resident parent; and the category we often forget about, mothers who are not abused themselves or non-abusive, but are parents of an immigrant child who is being abused.

One of the important things, particularly since I am talking to people who I assume are mostly doing family law cases, is that the definition of "child" in the immigration law is different than in family laws in every state, in that it includes step-children. So if an immigration mother marries a U.S. citizen who abuses her child from a previous marriage, but does not abuse her, she can file for immigration papers under VAWA so that she is free to cooperate in protecting her abused child — either getting a protection order, calling the police, or cooperating in prosecution.

To win a VAWA immigration case there are many factors one must prove. For instance, you have to prove that you are married to a U.S. citizen or lawful permanent resident or that you are the child of a U.S. citizen or lawful permanent resident, or the mother of a child who is being abused by the mothers' U.S. citizen or lawful permanent resident spouse. You have to prove that you reside in the U.S. and that you have resided at some point with your abuser. You must show that you were battered or subject to extreme cruelty. This is a definition of domestic violence much closer to the international human rights laws definition of domestic violence than to the definition contained in state protection order laws. It includes forms of emotional abuse that your statute in New York and most state protection order statutes do not cover.

So, one of the first questions we often get asked is, "How do you prove extreme cruelty?" We have trained INS to look to the power control wheel for guidance in determining when extreme cruelty exists together with or in addition to battering. This is why those of
you that are family law lawyers working on causes of battered immigrants cases need to partner with domestic violence advocates, because they know how to identify this kind of evidence. We encourage you to not only get a complete history of the violence, but get a complete history of how the abuser exerts power and control in the relationship.

From an evidentiary perspective, it is important to note in VAWA immigration cases all of the evidence is presented to INS in writing or other forms of paper documentation. This may include copies of protection orders, police reports, medical records and affidavits from battered women service providers or advocates, and affidavits from witnesses who are too terrified to go to court and testify in front of the abuser. INS actually prefers information provided in affidavits from battered women’s advocates, over the psychologist the victim may have paid a fortune to. Why? Because the battered women’s advocates are the real experts. When a battered women’s advocate writes the affidavit, the expertise and the level of detail that INS needs to see is there. When you pay a psychologist to do an analysis, maybe three or four lines saying “I find they have Post Traumatic Stress Disorder,” this is nice and helpful, but not as helpful as the affidavit of the battered women’s advocate who has significant experience working with the battered immigrant. If you plan to use a psychologist it is best to use one who has a relationship with the victim beyond the evaluation.

The other thing that is really important is that there are federal confidentiality provisions here that preclude INS from disclosing any information to the abuser, so you can get an affidavit from that witness and the abuser can never find out that they helped or cooperated.

Another factor you have to prove is good moral character, which essentially means that the battered immigrant has no criminal conviction. This is where collaboration between advocates, family lawyers and criminal defense attorneys is critical, because any battered immigrant woman who pleads guilty to just about any crime risks being deported, even if she has her Green Card. So in advising women who get caught up because of dual arrest or self defense or violation of mutual protection orders or violation of their own protection orders or whatever other crime it is very important that they have a criminal defense attorney and that their criminal defense attorney consults with an immigration expert. There are people available who are real experts in immigration implications of
criminal cases who must be consulted as this law is an area of the law that is complicated and constantly changing.

So I urge all of you, if you have any of these cases, to call The Immigrant Women Program at NOW LDEF, and particularly call the National Immigration Project of the National Lawyers’ Guild that specializes in criminal issues and make sure somebody has talked to a real expert on this.

Finally, you might think it was enough if she proved that she has a valid marriage and she has been abused and she is a person of good moral character, that that should be enough to get her Green Card based on the marriage. Well, unfortunately, VAWA’s immigration legislation, also required proof of one additional factor — that she or her children would suffer extreme hardship if they are required to leave the country.

The INS VAWA regulations contain lists of factors that you may move to demonstrate extreme hardship. Usually it is best to provide evidence regarding multiple factors. These factors include the nature and consequences and the extent of physical and psychological abuse and the impact of loss of access to the U.S. court systems.

One of the best ways for a battered immigrant woman to prove the impact of lost access to the courts to INS is to have as many court orders as possible involving her and her children: protection orders, custody, visitation, child support. These orders represent a connection between her and this country’s legal system for protection that INS has to cut if they want to deport her.

And so, we need the help of attorneys in family law cases to try to get these orders, to get her not only the protection she needs, but to enhance her ability to win her immigration case.

It is the same thing with domestic violence shelters and services. The more she is involved in the support group, that her kids are getting counseling, that she is getting counseling, that she is involved in a job training program or other supportive service offered by a domestic violence program, the more things you can get her involved in, the harder it will be for INS to deport her.

Other factors useful to move extreme hardship include the effect of abuse on children. Documenting this can be extremely helpful as INS is often sympathetic to these issues. One of the hardest extreme hardship factors to prove are the conditions in her home country. How do the laws and the protections that she is receiving here differ from what she will be able to get when she goes home? What is her abuser’s connection to that country? In many cases, he
may come from the same country, and if he is an American citizen or a lawful permanent resident, he certainly has the ability to travel to that country.

There are also traditional extreme hardship factors. All I want to say about this list is that for those of you who do work in immigration cases or know immigration attorneys, most immigration attorneys who have not been trained in VAWA will turn first to this list of traditional extreme hardship factors. This list should be used primarily as a backup. INS has a specialized unit that adjudicates VAWA immigration cases. If adjudicators see a case emphasizing traditional factors rather than VAWA factors first, the adjudicator may think that the victim has no significant evidence to prove extreme hardship, so we recommend focusing on VAWA extreme hardship factors first and if in fact you are going to use these traditional factors, you will need to look at them emphasizing the domestic violence issues involved.

For instance, you need to look at age, number and language ability of children. If the children have witnessed abuse and they are going to be sent back to a country where they cannot communicate effectively, then that is the way to present that issue, instead of saying that they do not speak Spanish, or whatever other language, adequately.

Now I will focus on how VAWA immigration issues play out in family court cases. First, a divorce is an absolute bar to self-petitioning. If in fact there is a divorce pending, the battered immigrant has to file her self-petition with INS before the divorce becomes final. Worse yet, if the case is denied, then she cannot refile the self-petition. So our recommendation is that the divorce not become final until her case is approved by INS, which, depending on the quality of the representation she has in the immigration case, can take as fast as three weeks or as long as six months.

Most cases with good advocacy, either by domestic violence advocates who have been trained to assist her or by immigration attorneys, can be resolved within three months. But our advice is to try to make sure that she has received an approval of her self-petition before the divorce becomes final.

When a divorce case is pending, what we recommend to immigration advocates that are working in this field is that the self-petition be filed as soon as possible. Consider filing what we call a "skeletal application," which just includes the basics, without all the documentation other than her affidavit. The point is to get the case filed and get the process moving before the divorce becomes
final. Do not file a fee waiver. And again delay the divorce until approval.

Further, the family law court provides a good opportunity for use of discovery when there is a VAWA immigration case. First, it can delay the case. More importantly, battered immigrant women need access to information to prove their immigration case that the abuser often controls, particularly if she has fled the residence without taking information she will need with her.

The following list was written for advocates working with battered immigrants doing safety planning of the kinds of things you want to try to get in discovery:

- Copies of her or his work permits, Green Cards, visa applications, because sometimes he has a Green Card and has filed the application for her.
- Birth certificates, adoption records.
- Divorce certificates for herself or her spouse.
- Xeroxes of his or her passport information.
- Other forms of identification.
- Proof of a valid marriage. This is something that for those of you who do not know immigration law might seem unusual. Photos of the couple at their wedding, or on vacation together and family events photos are good.
- Love letters. INS loves love letters, because it presumes all marriages are fraudulent unless you prove otherwise. So if a battered immigrant woman comes to you before she leaves her spouse, you want to get copies of the love letters. If the abuser works outside the house it is often safest to gather these and other documents like copies of the abuser's passport or Green Card while the abuser is at work.

I want to end on very briefly talking about protection orders. Most states have a variety of relief available in protection orders. New York and almost every state, has a catch-all provision in their protection order statute that can be used for creative relief. I want to review several kinds of creative relief that are very useful in battered immigrant women's cases, both from an immigration perspective and also to deter international child snatching.

For example, to obtain needed documentation in a case where the victim fled the home but has left needed papers and documentation at the house, our first choice of remedy is use the protective order to get the papers. A second choice is to keep her in the house if she has not left and to evict the abuser if she can safely remain. This way she has access to the evidence she needs and she and the children are not displaced. A third choice is if she has left,
then use either the divorce, custody, discovery, or protection orders to get these materials in the protective order:

- We ask that he be ordered to give her copies.
- If he filed an immigration application for her, that he be ordered not to withdraw it as part of the protection order proceeding.
- That he be ordered not to contact INS or the counselor to do anything that would undermine an existing petition he has already filed.
- That he take all action necessary to ensure that a petition that he has filed on her behalf is granted. For example, a lot of abusers will tell the victim, "I am not going to show up at the last interview." The court in the protection order case can actually require that he attend the interview and cooperate using its contempt proceedings, to coerce that compliance.
- That he relinquish possession of various documents or provide copies of documents that would be helpful to her immigration case that either belong to him or belong to her.

I have written a chapter for a training manual for advocates on "Creative Use of Protective Orders for Battered Immigrants" that we can get to anybody who is interested. That contains detailed lists of how protection orders can be used to better assist battered immigrants.

Creative use of protection orders can also be quite effective in deterring international child kidnapping. In cases of battered immigrants, an abuser threatens to take the children and go home to El Salvador, or Haiti, or wherever, this can be very serious. What we have tried to do is get provisions included in protection orders that require the abuser to sign a statement, along with the judge, and the victim who is the children's mother. It instructs the consulate that would have to issue a visa to U.S. citizen children not to issue a visa absent this judge's court order. In many cases, we have been able to deter the issuance of the visa and cut off his ability to take the children out of the United States to his home country.

The other thing you can do is get the children's passports turned over to the court, held in the court record. You can also take a copy of this order and submit it to the Passport Office so that they do not reissue passports to the children. These are things that can all be done to try to head off the child snatching problem.

In her VAWA immigration case, she has to prove that the abuser is a lawful permanent resident or a citizen. Sometimes the only record of his legal, immigration status is in INS's files. The abuser can be ordered as part of the protection order proceeding to sign a
statement that is an official INS form for a Freedom of Information Act request. He can be ordered to sign this request for information that specifically authorizes INS to search its records and report the information to the victim or the victim's attorney.

In closing, the final thing I want to say is that there are a few things that you absolutely should not do if you are getting a protection order for a battered immigrant woman:

(1) First, do not send her to court by herself because she will not get the relief she needs. If you are a family lawyer and you are doing the divorce case, you should also be assisting your client in the protection order case. Your representation at this early stage can make a tremendous difference down the road as you proceed with the other aspects of the case.

(2) Second, do not ever agree to a mutual protection order and contest any protection order case brought against her by her abuser. For battered immigrant women having a protection order against them can be devastating, because if the battered immigrants violate that order it is a crime and they become deportable. So mutual orders or orders brought against her need to be contested as if it were a criminal case for assault or murder and she is going to go to jail. Failure to litigate these cases and acceptance of pleas can often lead to the deportation of only non-citizen battered immigrants.

(3) Third, never agree to a consent order where it says on the face of the order "No finding has been made and the abuser did not admit anything." They are dangerous; it enhances the danger because the abuser has not taken responsibility for his violence. The orders may undermine gun control laws. For battered immigrants especially, such orders unnecessarily complicate her VAWA immigration case and may be worthless from an INS perspective. It is really important that you not agree to a consent protection order that says "No Finding Made." You must litigate those cases. This is why battered immigrants should go with a lawyer to court and why she should be prepared to put on evidence.

In my experience, after sixteen years of doing protection order work, if you go to court with a witness and one additional piece of evidence — whether it is the medical record, the police report, a witness affidavit, or a photograph — generally you are going to win a protection order trial. So do not settle if he wants something on the order that says "No finding," because if she is an immigrant woman, you are going to undermine her ability to get immigration relief.
MS. WILLIAMS: Thank you very much. Let us take a few minutes for questions.

AUDIENCE: For Leslye. I have a case right now where the divorce has commenced already and we are in family court on the order of protection. But it seems like she does not have much INS documentation. All that is missing is the final interview, but she has no real papers concerning what her current status is. How do you get information about her status if she does not have it?

MS. ORLOFF: Well, chances are what he has done is filed a spouse-based petition for her, which is called an I-130. What I would do in a case like that is I would go ahead and file the VAWA case and get it approved, because once you have done that, INS is cut off from communicating with him. The confidentiality provisions do not only say that everything has to be kept from him, it precludes INS from solely relying on information that he provides to deny the application. So if in fact you order him to go to this interview and he says it is a sham marriage, they cannot rely on that absent independent proof to find that. So such an order can help the I-130 case.

But also, if he is a citizen, you might be able to get the INS to give her a Green Card based on the approved self-petition at that same interview if he does not show up in the end. So there are some creative ways of approaching the case.

AUDIENCE: Leslye, I was very struck by what you said about the dual arrest and retaliatory arrest situations and the implications for those women if they take a plea. We know that they are pushed, sometimes by the prosecutors and sometimes by defense counsel who do not understand the ramifications, to take a plea and agree to an adjournment in contemplation of dismissal. The idea is they sell it to her by saying, “Look, at the end of six months or a year, your case will be sealed.” I am curious whether INS has access to those proceedings and can pierce the seal and use those convictions to make her deportable and unqualifed for the self-petition.

MS. ORLOFF: It is actually worse than that because there was just a decision that came out from the Bureau of Immigration Appeals, two weeks ago that said expurgations of orders on vacations of orders for reasons other then the fact that they were legally defective at the state level are irrelevant from the immigration perspective. So it is really bad.

For years, the history of immigration law had been that if you could get it expunged or vacated, the immigration ramifications of
that proceeding would not effect the immigration proceedings. We now have a decision that reverses this position, so battered immigrants must avoid convictions altogether. They must have the case dismissed or continue it without a finding or admission and have it dismissed after a certain amount of time has passed.

One of the things that we are doing in the new VAWA, that we have actually been able to get some significant Republican support for in the Senate, and hopefully, support from INS to change the definitions of "good moral character" and create some waivers for battered immigrants who may have had criminal convictions. For battered immigrant women, the goal is to allow INS or the immigration judge to independently determine if the battered immigrant was acting in self-defense or that the crime she was convicted of was related to her ability to survive the abuse.

MS. WILLIAMS: We have time for one more quick question.

AUDIENCE: I have also heard from the New York immigration groups and the Bar Association that a consent order was considered as good.

MS. ORLOFF: As long as the consent order just says "The court has jurisdiction and these are the remedies." But if the consent order says, "I am entering a consent order, but I am making no finding as to the abuse or the abuser has not admitted domestic violence," then it is a problem.

The court has to find that it had jurisdiction, and they can find that based on her uncontested affidavit. Even though the consent order may affect the custody case down the road, the key issue is that for immigration purposes, battered immigrants need protection orders issued that do no waive findings. The subject matter jurisdiction can be based on the victim's uncontested affidavit and the consent order can be issued.

AUDIENCE: What if it just says "On consent."

MS. ORLOFF: That is fine. Consent is not the problem. The problem is that there are states, like Iowa and Hawaii, where somebody has rewritten court forms and you cannot consent without a statement that no findings have been made.

AUDIENCE: But the meaning of our consent order is there is no admission.

MS. ORLOFF: Right, but the order can be based jurisdictionally on her uncontested affidavit, despite no admission by the abuser. INS is only having problems when the face of the order says "No finding."
MS. WILLIAMS: Our final two speakers will be Linda Garder, who is going to talk about international child custody and the Hague Convention, and Marcellene Hearn, who is going to talk about some of the welfare provisions and protections that are available to battered women.

MS. GARDER: Good morning.

Let me give you a little bit of a framework. The Hague Convention on the Civil Aspects of International Child Abduction is a treaty between about forty-seven Member Countries in which the focus of the Treaty is to return children to what is termed the “habitual residence.”

Now, the ironic thing about that is the habitual residence is never described, nor defined, in any of the information on the statute or the implementing legislation, and it only comes out of the case law that we have some idea of what habitual residence is.

A habitual residence tends to be that place where both parents were with the child beforehand or where the child and one of the parents was living before any proceedings take place or before the child was taken or retained in another country. So the focus is on returning the children. It is not on the underlying issues, including domestic violence or issues of custody, who is the better parent, grandparents, or any of those issues. So it is very, very difficult to have an order that prevents a child from being returned under the Hague Convention because of domestic violence. I bring that to your attention because it has a tremendous backlash as well in some of the case law.

The whole goal is to send the child back and let that other country decide what is going to happen — who is going to be the better parent, whether it is a best interest test, or whatever it is, and never to get into the issues of the best parent.

As a result, as an attorney, when I go in to litigate a Hague Convention case and the other side starts rattling the cages about “Your client is a terrible mother, she let the kids run in the street,” and then I have to get my client up, who says, “I did not do that; he was beating me.” You need to stay away from that. So one of the important things in the Hague Convention proceeding is to make sure that you do not get into that because it undermines the whole issue of domestic violence, and I will get to that as an exception under the Hague Convention.

One of the other difficult parts about the Hague Convention that you will see as you look through it is that the United States took
what is called a "reservation" under the Hague Convention. That reservation has devastating effects for women and violence.

Let us say, you and your spouse or the father of the child were living in the United Kingdom and that child is brought here by the father because you went in and made allegations of abuse, he got petrified, picked the child up, and came to the United States. Even if you are a U.S. citizen, it does not matter whether you are a U.S. citizen who was living in Britain or whether you are a foreign person that has a child brought here. You are not entitled to any free legal services, end of story. What happens is that you must depend on pro bono attorneys or people that will help you with minimal payment in order to get your child back.

That reservation under the Hague Convention is an embarrassment, as far as I see it, for the United States, because if my child is taken to Britain, Britain provides me with free legal services, regardless of my financial condition, to help me return that child to the United States. So it is an extremely difficult part of the way that the United States has enacted its legislation.

The Hague Convention is different from the current UCCJA because of the defenses to the return. In the United States, there are two major defenses used to return. The primary one is the showing of any grave harm to the child. That is the one that we would like to put issues of domestic violence into, but the case law in the United States is very emphatic that that will not be sufficient, so you do need the resources and other situations, as in the battered immigrant women, to provide another safe haven.

What happens under Article 13(b) in the Hague Convention is that if you can show that there is grave harm to the child, and that the child would be in either physical or psychological harm if the child is returned, then that is a defense to return even though the taking was wrongful or bringing the child into the country was wrongful.

What has happened in the case law in the United States — and particularly you will see it in a Sixth Circuit case called Friedrich v. Friedrich — is that the court has said we are not looking at issues of whether it would be harmful to return the child to that parent; we are looking at the country — is there war and famine? It is going to be those kinds of issues, and there have to be really, really compelling situations to not return. For example, I cannot imagine that today if there was a case of a child being returned to Yugosla-
via, that the United States would agree to take the child to Yugo-
slavia now.

However, that does not mean that that is the protection for the
child or for the battered person at all, because what happens is if in
fact — let us take the case of the United Kingdom again — the
parent brings the child here and you want to take the child back to
the U.K., you can be successful in arguing that the child was wrong-
fully brought here, the child ought to be returned; but the other
parent will come in and say, “There is grave harm, because that is
the parent who hurt this child. She let him walk in the street —
forget the whole issue of violence because she let him play outside
unattended.”

What the courts will now do, and the United States is becoming
more involved in it, is to issue what are called “undertakings.” Un-
dertakings are agreements that the child will be returned, but there
will be some kind of safe harbor provisions for the child to be re-
turned to that country until a custody order can be entered.

That has even further eliminated the issue of domestic violence,
because even if there is domestic violence and they both go back
and both live in the same house, the court quite likely is going to
return the child and have the child met at the airport by social ser-
vice people or whatever, and have the child taken into custody un-
til that issue can be addressed.

One of the issues that has occurred with these cases also is the
issue of passports. We talked about that with the immigrant wo-
men. I would urge you in any of your custody cases to see whether
people could have two passports, and I say “could” because they
will deny to the end that they have that second passport, but you
will find quite often that a middle eastern country, which could
care less how many passports they issue for the same person, will
have issued a second and a third passport to that person, and may
have even issued a passport for the child of that person. The same
standards are not in place as they might be here for the United
States to get a child’s passport.

There is a provision with the State Department to file your or-
ders and have the passport not issued to another parent, so you can
do that through the State Department. I do it in a lot of my cus-
tody cases. The other parent gets very irate and says, “I am not
going to flee.” I say to them, “So then it does not matter, does it?
Turn the passport in.”

Always ask the court to hold the passport. Do not put yourself
in the position of holding this passport. I had an adverse counsel in
a case recently who swore up and down at the custody conference he was not going to release the guy's passport. He did not but his secretary did. So what happens is you do not have those kinds of safeguards that you would have requiring a court order to release a passport.

That is not your only protection, because what will happen is some of these people can get other passports. So you must be in touch with embassies, other kinds of organizations that will help you in restricting passport applications.

The "grave risk" defense, under Article 13(b) of the Convention, requires that the person who opposes the return proves by "clear and convincing evidence" that it would be harmful to the child to be returned. That is a very, very difficult issue to raise and to defend in Hague abduction cases.

If you are in federal court on an abduction case, federal courts do not want to hear about custody issues. That may very well sound like those issues, and so if you are trying to raise a defense to returning a child because of the potential for abuse, you will find it very difficult.

The other thing that I have seen happen a lot lately can be seen in a case called *Lops v. Lops*.\(^{114}\) It is an Eleventh Circuit case, Court of Appeals in Atlanta, and certiorari was just denied at the U.S. Supreme Court on that case. That happens to be my case.

The situation is that the Mom and Dad were living in Germany. Mom was being abused by Dad. She took the children and went across the country line, stayed for about four months, but she informed the attorneys and the custody proceeding started. She brought the kids back for the custody proceedings in Germany, and Dad, of course, was as nice as pie at this time and denied, denied, denied. He had brought his Mom and his stepfather from Georgia over to visit with him and help with these proceedings and assured the court that he was a wonderful and caring father and certainly had not beaten his wife and would not do anything to the kids.

They eventually reached an agreement and Dad was allowed to have the kids for a couple of hours to get an ice cream cone. Of course, after that Dad would not let Mom near the kids again, claiming that while the Mom had the children she had had an affair and the children had watched sexual acts in place in front of the mother. So it was almost, as I see it, a defensive reaction "She is

\(^{114}\) 140 F.3d 927 (11th Cir. 1998).
going to claim abuse, so I am going to find something wrong with her.”

In effect, what happened in that case was while Mom was not sleeping at the house, Dad was sleeping at the house with the kids, Dad takes off and the kids disappear. Two and a half years later, the children were located in Georgia at the grandmother’s house. This is a very important issue for you to consider with grandparents, and if you ever do a Hague Convention case and you have a suspicion that the grandparent was involved, name them as a defendant. I am telling you that because it was very, very effective in this case. It sort of happened accidentally. We thought that the grandmother had helped to take the kids, and in a lot of cases they do.

As a result, what happened was we got a judgment against the grandmother and the father, because the grandmother was the one who had the deep pockets and we have a judgment pending on that right now, but we had to hire an attorney to collect. What happens is that if you can get a judgment against them, that is your only way of collecting fees under the Hague Convention.

Under ICARA, there is a provision for attorney’s fees. If a child is ordered returned, the other side pays fees. It is mandatory. How much the fees are is certainly discretionary, but it is a mandatory order for fees. Sometimes it is difficult to get them if the person does not have any money, which is why I tell you about the grandparents issue.

There is one case in the United States that has dealt extensively with the issue of abuse that the court did not order the return. Actually, there are two. There is Severina in Texas and Brown v. Brown in North Dakota.

All of the Hague Convention cases are available on a Web site called www.hiltonhouse.com. You will find unreported cases in there, and first-level court cases in there that you would not find published anywhere else. It is an extremely good resource. You can get into it and search on all the issues, and if you search on Article 13(b), you will find some of these cases where the defense to return has been raised.

You will also find in there the Friedreich case, which is very important, and Zimmerman v. Zimmerman. In Zimmerman, there were allegations of abuse, and what happened was the court took

116. 600 N.W.2d 869 (N.D. 1999).
117. 569 N.W.2d 277 (N.D. 1997).
these undertakings into place so that the children could be returned.

One of the frustrating things about the Hague Convention is that, while under the UCCJA you get judges talking back and forth, it appears to me that the matter of an ocean makes a big difference in these cases, and judges are very, very hesitant to pick up the phone and call a judge in Germany, or elsewhere. Even though I quite often will say, “I will get you an interpreter, I will work out the time changes, I will set it up,” they are very reluctant to do that. Some of these cases could be resolved quite easily if that had happened.

I think one of the issues is: can the courts in another country ensure that people are protected? So if you have allegations of abuse and the child is still returned, I think everybody has a fear that the child will still not be protected. What happens is judges are very fearful of saying, “Well, I do not think a judge in the U.K. is going to be able to protect this child as well as I could,” and quite often judges are glad to get rid of these cases, so they will do whatever they have to do to get it off of their dockets.

I think it is very difficult to determine that a child is going to be protected. There are agencies in each of the other countries. There is International Social Services, which has an office here in New York, that will assist in these cases to ensure that the children are protected when they arrive, because if both parents are in one country and you are sending them all back to the other country, you have to do some preparation before they go.

I think that the backlash that comes out of this is that if people claim abuse and the courts do not see it on your Article 13 defense, if they just do not see it, you could get a return where the court might be willing to make a return under another circumstance. If the child stayed more than a year in the other country before the parent filed under the Hague and the parent can show that the child is well settled in their new environment, the court can also determine at its discretion not to return children. So that is one of the other provisions in the Hague that allows you to ride piggy-back on some of the things.

If the parent has been in the country for a year, as long as they are not hiding you are going to be in trouble because there is an issue of filing right away to get the child returned. If they are hiding, if you wait and do not know where the child is, that is fine. What the Lops case will tell you is that if you file your Hague Convention petition in the other country but you cannot bring a cause
of action in a court because you do not know where to file, you are not going to be barred from still getting the child back. However, if you know where the child is and you do not do anything for a year, you could be barred from getting the child returned.

There are various state statutes that apply. People always say to me, “Well, you have to have custody order, do not you?” I always say, “No.” Under the Hague Convention, this is particularly true. You do not have to have a court order. It is certainly helpful; we all know that, but it is not mandatory. You can have returns based on a right to custody that arises by operation of law, by a particular statute.

I have written affidavits for use in other countries that have cited the laws in a particular state that say, “Look, we have got a right to custody in this state that arises because you are a parent to that child.” It does not have to be there because you have gotten custody order.

One of the things that I would caution you about as well as when working with clients who are making allegations of sexual abuse that are going to be difficult to prove, and that is, that the first thing people say is, “Well, if there is no custody order, you can just pick that child up and take them anywhere you want.” That may be true under your state statute, but I will remind you that the International Parental Kidnapping Act\(^\text{118}\) counsels against that, because what you will find is that you can be dragged back to this country or to another country because you have taken a child to another country.

I am involved in a case right now where we are extraditing a parent from the U.K. back to the U.S. for having abducted a child. So, more and more, some of the district attorneys are taking steps to do that.

Under the International Parental Kidnapping Act, though, there is a defense for fleeing domestic violence. I would urge you that if you are counseling a client about that, that their proof ought to be extremely good. It will not work otherwise.

I have a case that involved Poland, where Mom had been emotionally abused by the father of the child. She could not stand it anymore, she had put up with a lot, and she picked up and took the child to Poland. She got the Polish courts to let her keep the child there in a custody order she had there. The father filed a Hague Convention application to return the child to the U.S. The Polish

denied it because they said that the father's activities in going to a nudist camp on week-ends, his continual activities with other women in the presence of the child, would make the situation harmful under Article 13(b), denied the return, the father appealed.

While it was on appeal and the child was still in Poland, Dad snatched the child back. Dad shows back up in Pennsylvania, but he had gotten a custody order while Mom and the child were away. I go in to litigate this in front of the judge and I say, "But, Your Honor, Poland said we should not send this child back to the U.S., it would be harmful." The judge looks at me and says, "I do not really care. He's got a Pennsylvania custody order." So the judge would not return under the Hague Convention; he was just going to ignore it. You do run across that.

One thing I would recommend to you is that you try to work with your district attorneys, your judges, to get more information. The ABA has a publication out for judges on abduction cases and the UCCJA.119 It is a very, very good publication.

The other thing I would lobby for is to get programs put on your state bar association agendas, at conferences, and specifically those for judges as well, on issues of abduction so that they become informed. There is nothing more frustrating than being in front of a judge who just does not want to listen to anything about these treaties or federal statutes — all he wants to do is take care of what is on his docket.

Those are some of the issues. There are all kinds of resources with the State Department on the World Wide Web that you can get. The National Center for Missing and Exploited Children has a number of wonderful publications and information available.

Thank you.

MS. HEARN: Hi. My name is Marcellene Hearn. I am a Staff Attorney at the NOW Legal Defense and Education Fund here in New York City.

A good part of what I do is part of a project called the Battered Women Employed Project. It is a new project that we are doing. It is a joint project with the Legal Aid Society of San Francisco, also known as the Employment Law Center, and us. We are doing direct services, training for attorneys, and training for domestic violence advocates on the issues of battered women's employment rights.

119. See Hoff, supra note 111.
Today I am going to focus on one particular remedy that is available for battered women who are receiving Public Assistance. It is called the Family Violence Option. It enables women to be exempted from certain welfare program requirements. I am going to talk both about how that has come into effect in New York law, and also what the new regulations at the federal level are.

As most of you may know, many women who are victims of domestic violence receive welfare as a way to help them make the transition, as a means of economic support when they are trying to escape a battering situation.

What are we talking about here in New York City? There really are no numbers about how many women actually in New York City who are on Public Assistance are also victims of domestic violence. However, various studies that have been done in other places show that between fifteen and fifty-six percent of women who are currently receiving Public Assistance were victims of domestic abuse within the last twelve months.

What does that mean in New York? As of March 1999, in New York City there were approximately 579,000 people on welfare. That includes children, so if you subtract the children out, there are 198,000 adults in New York City receiving Public Assistance. If you take those same percentages, that means that anywhere between 30,000 and 110,000 of current adult welfare recipients in New York City could have been victims of domestic violence within the last twelve months. So it is a lot of people.

As you know, in 1996, under welfare reform, there were major changes at the federal level in the way welfare programs were going to be implemented. The most radical change was that states have been given a block grant to operate their welfare systems. There are no longer entitlements to welfare benefits and the program is no longer called AFDC. It is called Temporary Assistance to Needy Families ("TANF"). Here in New York it is known as Family Assistance.

Two of the main parts of the TANF statute are that a certain percentage of each state's welfare population needs to be participating in a work activity for a certain number of hours per week. Secondly, that there is a five-year lifetime limit on receiving welfare benefits. Each state is allowed to have twenty percent of its population receiving welfare for more than five years under what is called the "hardship" exemption.

121. See N.Y. SOC. SERV. LAW § 111-g (McKinney 1999).
New York is actually meeting the work participation rates — we are far exceeding them — because another part of the welfare statute was that there would be a reduction in your work participation rate if the number of people on welfare also went down. We have had huge reductions in the number of people receiving welfare, so therefore our work participation rate is very low at this point.

Nevertheless, New York City has announced that it would like to have universal participation in work activities. In New York, what that means is the City would like to have everybody participating in thirty-five hours of something. If you have children under six, you are only supposed to be doing twenty hours of a work activity and the other part of your thirty-five hours will be made up with things like job search, job training, GED programs and other programs.

Why this is a problem for battered women is that if you are not going to your work activity for some reason, you get a sanction, and that sanction in New York is a pro rata sanction. What that means is that if there are three people on the welfare case, your case is reduced by one-third, if the mother is being sanctioned for not participating in her work activity. If there are two people on the budget, that means the budget is reduced by one-half. The benefits are not very high to start, and when you have these sanctions it can create serious problems for the family.

Welfare-to-work activities, or WEP as it is called in New York, also known as the Work Experience Program — if you are not someone who works with welfare recipients on a regular basis, you may have seen articles in *The New York Times* about WEP workers. What they are doing is they are working for Sanitation; there was an announcement yesterday that the MTA is going to take 1000 WEP workers to clean subway trains; they are working in parks. So we have this program where in New York we have an ever-growing number of victims of domestic violence who are going to be participating in work activities.

I am sure you all know about what problems domestic violence victims have when they are working. I do not need to tell you that women are often harassed at work: they may be assaulted by the

---

batterer; the batterer may call them repeatedly; and, it may cause
the woman to be late or to miss days of work, either because the
batterer is sabotaging her actually going to work, or she has to miss
time to deal with child custody issues or getting her orders of pro-
tection. This is a real problem if you are going to be sanctioned for
missing a day of your welfare work activity. And if you are not
able to defend yourself in a fair hearing, that sanction is going to
mean half of your budget being cut off.

Because of these issues, Congress enacted the Family Violence
Option.\textsuperscript{123} It was part of the welfare statute. It enables states to
opt into this program where they are able to waive domestic vio-
lence victims from certain welfare program requirements, including
the work requirements, and also including mandatory child support
enforcement, which can also be a problem in domestic violence
cases.

In New York, there is what they are calling the “partial child
support waiver.” This is where the state will pursue child support
but the woman does not actually have to go to court. And then,
there is the full child support waiver, a New York regulation, where
the state will not pursue child support at all in the case.

Specifically in New York, every applicant for welfare and every-
one who recertifies — that is after being on welfare for a certain
period of time, now about a year in New York — has to go back in
and reprove all the reasons why they are on welfare, and why they
are still eligible for welfare. Every person who is recertifying or
applying should be screened for domestic violence.

There is a universal screening from. It has about five or six ques-
tions on it. If a woman answers “Yes” to the screening questions,
she should be referred to the Domestic Violence Liaison. There
are currently in New York City twelve Domestic Violence Liaisons.
There are plans to hire more so that there will be one at every
welfare center. Currently it is about one liaison per three centers.
So often a woman will have to come back and go see the liaison
several days later at a different center than the center where she
gets her benefits.

The liaison has three jobs. They screen the woman to determine
her credibility; they can refer her to services; and finally, they eval-
uate whether a waiver is appropriate in her case.

The standard in New York is whether the program requirement
that the person is seeking to have waived — be it the work require-

ment or the child support enforcement requirement — would place the victim or her children at a greater risk of abuse or would make it more difficult for her to leave to escape the domestic violence situation.

The final point that I would like to note is when the woman does not raise the issue at the point of the application or recertification — for example, she does not really know that she needs a waiver until she goes to begin, which is the part of welfare that falls under the Office of Health and Human Services that does the assessment for work. If she does not realize that her domestic violence situation is going to be an issue and she does not come forward, she is able to do it at that point or at any point, and she should request to see the Domestic Violence Liaison whenever it is an issue or a problem.

And then, I would finally like to talk about the new TANF regulations. Those are the regulations that have come down from Health and Human Services that affect what New York has done. The TANF regulations added some requirements to the Family Violence Option that did not exist in the initial statute, and they may come back to be an issue in New York.

The regulations themselves are fairly good. The initial proposal for the regulations were not particularly good, and a lot of domestic violence advocates, and probably some people here in this room, made comments on the initial regulations.

Apparently, in the Preamble to the regulations HHS said the single issue that they heard the most comments on in the TANF regulations was the Family Violence Option. I will quickly go over a few things that are in the regulations.

One thing that the states were very concerned about, was that states that granted Family Violence Option waivers would be penalized when they did not meet their work requirement rates or if they were having more than twenty percent of their population who were receiving benefits for more than five years. They were worried, you know, “What if we miss our work participation rate by the 100 or 1,000 Domestic Violence Option waivers we gave out?”

So the regulations clarify that if the reason that the state fails to meet its work participation rate, or the reason that more than twenty percent of their population is receiving welfare for more than sixty months is because they gave Family Violence Option waivers, that those waivers will not count against them.
However, in order to count in that category the waivers have to be what is called a "federally recognized good cause waiver." Now, what is a federally recognized good cause waiver? It has several requirements:

- First, the waivers need to be reviewed every six months. In New York, ours are reviewed every four months, so it is unclear how that is going to work out. But initially, HHS has proposed that the waivers would be limited to six months, period, that they would not be any longer than that. As a result of comments, now they need to be reviewed very six months but can be for as long as necessary. And as we know, sometimes six months is not long enough for someone to work out their domestic violence situation and be ready to work.

- Another requirement of the federally recognized good cause waiver is that the evaluation of whether a waiver should be granted must be done by someone who is trained in domestic violence. That is probably not a problem in New York because the Domestic Violence Liaisons are supposed to be, and are being, trained in domestic violence.

- A new requirement is that the waiver needs to be accompanied by what is called an "appropriate service plan." This is new. It is not in the federal statute. It is only in the regulations. This service plan needs to be designed to lead to work. This raised a lot of concerns when people commented on the regulations because they were worried that this would cause state welfare agencies to send people to work when it was not appropriate. However, they added some additional descriptions of the service plan that may prevent that: it has to be developed by someone who is trained in domestic violence; it should not emphasize work over safety; and it must include an individualized assessment. New York does not have a service plan provision in its regulation because our regulation was enacted before the TANF regulations came out two weeks ago.

- The other thing is that the state must have adopted the Family Violence Option. We have adopted it, so that is not an issue, but in other states, like California, where it is up to a county whether they are going to adopt the Family Violence Option or not, the state will not be able to count those waivers in those counties because the whole state has not adopted the Family Violence Option.

- And finally, the states are required to report the numbers of waivers they have given out to HHS.

MS. WILLIAMS: Thank you very much. Are there any questions for any of the panelists?
AUDIENCE: On the Family Violence Option, if the state has the federally recognized good cause waiver and let us say they provide extensions or exemptions to the duration limit to thirty percent of their population, of their case load, and ten percent were due to the Domestic Violence Options, does that mean that they will be held harmless for that whole ten percent?

MS. HEARN: Can I clarify your question? Your question is if they have given waivers for some other reason for thirty percent of their population?

AUDIENCE: Right, for disability, for age, for whatever.

MS. HEARN: Okay. It means that they are held harmless for the ten percent.

AUDIENCE: They would be held harmless for the full amount of the Domestic Violence Waivers; is that correct, or is there a ratio?

MS. HEARN: No. It is for the full amount — there is a more elaborate mathematical formula, but it is sort of like the domestic violence people just do not count. They drop out of both the numerator and the denominator.

MS. WILLIAMS: Other questions on any of the areas?

AUDIENCE: Would you address the issue of Medicaid eligibility as well as welfare ability, especially with domestic violence clients? Specifically, I understand that there is a problem in New York City with respect to the regulations indicating that they should be processed the first time around, and very often what happens is the clients are not given enough information and are told to come back. Any further update on that?

MS. ORLOFF: I only can report with respect to battered immigrant women. We are seeing nationally a big problem because TANF workers, and workers processing Medicaid, public housing or a number of other benefits, do not have any full understanding of battered immigrant women's legal rights to access benefits. After the Violence Against Women Act was passed in 1994 we were able to get welfare access for battered immigrants who have filed prima facie VAWA applications with INS. After filing a self-petition, INS will issue a prima facie determination, usually within two weeks. This grants battered immigrants permission to apply for benefits.

The problem is that people are getting turned away from benefits offices. These are however undocumented battered women who do not have legal status other than the prima facie determination. They are getting turned away despite the fact that they are
legally entitled to benefits. What we are seeing — I am not hearing stories from New York, but from other places — is a lot of race discrimination and anti-immigrant sentiment, workers denying benefits based on language capacity or because the applicant has a Spanish or Asian surname. The Attorney General guidance makes it clear that this is discrimination. The Justice Department may look into such issues for enforcement actions.

But battered immigrant women who qualify for VAWA or who are lawful permanent residents are eligible for Medicaid. Everybody, regardless of immigration status, is eligible for emergency Medicaid. Full Medicaid is available to anybody who would qualify as a qualified alien under federal law which includes battered immigrant women who have pending applications before INS and can show where there is a substantial connection between the need for the benefit and the abuse.

AUDIENCE: This is for Joan Zorza. Has the UCCJEA been adopted anywhere yet?

MS. ZORZA: Yes, at least two states have adopted it, Alaska and Oklahoma, and it is pending before a whole slew of other states. This time it looks as if it will move faster than happened before, where New York, for example, took ten full years before they even moved at all, and finally did adopt it.

AUDIENCE: Is it currently before the legislature?

MS. ZORZA: It is currently before the legislature. OCA put in the bill.

AUDIENCE: Is it likely to pass this year, do you think?

MS. ZORZA: It is unclear whether it will actually move that quickly. It might make sense to take a look at it. There are a few points that have been changed. As battered women's advocates, we may want to put in our little two cents to make it a much stronger, better statute.

The other problem that has come up, that would be wonderful if the PKPA would look at, is this whole problem of notification for registering orders. It is totally unnecessary. For example, we could use our Order of Protection Registry and never have to give notice, or if a decree is registered, there is soon going to be a National Order of Protection Registry, which would be a very good way to register the order in the original state where issued and therefore automatically get it into the national system and not have to go around registering it court by court.

So this is just crying out for a federal solution. I think it is just a very poor way of dealing with it, and ultimately a waste of local
courts' time to have to deal with it and to require that people give notice, because most people who need to register these orders — I should not say most; a large number — need it because they need protection for themselves or their children. To have to alert the abuser that they are in the state where it has to be registered is ridiculous.

MS. WILLIAMS: Other questions?

AUDIENCE: Juley, is anything being done to address the grandparent provision that was passed without notice to anyone?

MS. FULCHER: Yes. The piece that I mentioned briefly about addressing the PKPA does address that and tries to fix that problem, as well as some others. It generally brings the PKPA full faith and credit requirements in line with what the new UCCJEA full faith and credit requirements are, just because in the past the PKPA lined up very neatly with the UCCJA, so the requirements that applied in most states were the same exact requirements that were applying on the federal level. We are trying to do that with the new UCCJEA, and part of that is bringing along this problem with the grandparents issue and solving that as well in the same part.

MS. ZORZA: Can I say one other thing about that? If one is lucky enough to abduct your child out of the country and it is to flee an incident or a pattern of domestic violence, there is a total defense. One reason the PKPA has the amendment to add the domestic violence defense is to bring it in parity with international abduction. So it is a ridiculous situation. If you are stopped within the country, you have no official defense, although you might be able it on justification grounds.

But the federal law is not dealing with this notice requirement problem for custody decrees.

MR. WILLIAMS: Are there other questions?

AUDIENCE: I have a question for Ms. Fulcher. It has to do with the retirement benefit provision of that federal law that is proposed. It was the one provision that you discussed that troubled me. I have two related questions.

First, does the proposed law, that a child could attach a parent's retirement fund if they have been abused, apply only to federal retirement funds; and, if not, why is it appropriate for the federal government, in your view, to be dealing with that type of policy issue? It does not strike me as something that uniformity among the states for enforcement, and it strikes me as something that would be peculiarly appropriate for individual state resolution.
MS. FULCHER: Yes. I guess the first answer to your question is that it is set up in such a way that it does address federal pensions and government pensions, but not private pensions, as you might expect. The only reason why they have done it that way is because that is what the Federal Government can do. They cannot create the laws that address the private ones, which, you are right, the states would have to do that if they so chose to do so.

AUDIENCE: I have a question about VAWA '99. When is it actually before the Congress, and is this something that we should know how our individual state legislators are leaning in terms of lobbying efforts?

MS. FULCHER: Absolutely. It is very hard to describe in some ways because, as I explained, VAWA '99 is an omnibus package, and in many instances pieces move. That was the whole design of it, that we have one package that we can talk about very easily, but the expectation is that we break it apart and different pieces are moving at different rates.

VAWA '99, as you described it, and you have in your materials the summary, is a House bill. It has currently more than 160 co-sponsors in the House, so it is a good-sized group, but still a long way to go. There were 233 co-sponsors of the original VAWA when it finally passed, so we have got a ways to go on getting sponsorship.

There is a second bill that is in the House, called the Reauthorization Bill. It was just introduced a few weeks ago with the idea that reauthorization is the thing that we are most in need of happening right away. There is a lot of energy around it. It is only a few weeks in introduction and we are already up over sixty co-sponsors of that bill as well, so there is a lot of movement on reauthorization.

There are also a lot of pieces that are going individually. There is going to be an immigration piece introduced soon. The Housing piece has been introduced individually, and there was already some movement about trying to attach that onto a bankruptcy bill. There are all sorts of little things like that that are happening.

On the Senate side, there are a couple of bills out there that address reauthorization and some of the pieces that I discussed here, but not all. There is also new legislation that is probably going to be introduced in the coming month on those as well.

---

So it is hard to give in a nutshell, but we keep in our offices the list of who is supporting the different pieces of legislation and what they all do. People are welcome to call. Actually, on the summary that is in your materials it has our office phone number, and we can always let you know up-to-date where sponsorship is, where movement is, so you can follow that.

MS. ORLOFF: As to the battered immigrant women’s provisions, we have support from both sides of the aisle, Republicans and Democrats, in the Senate, so I think, we may not need help in the Senate, but we will need help in the House. Independent pieces of legislation will be introduced in both houses that are, if all goes well, substantially identical.

MS. WILLIAMS: In addition, NCA domestic violence, AYUDA, NOW Legal Defense, and other organizations have information on the Violence Against Women Act, so you can contact any of us for informational sheets, facts sheets, and copies of the provisions.

I would like to thank all of our panelists for participating with us today, and special thanks to the Lawyer Committee and Julie Domonkos for inviting us here. I hope that you found this helpful. Thank you.
THE ROLE OF ADVOCATES, GUARDIANS AND FORENSIC EXPERTS IN CUSTODY AND VISITATION CASES

MS. DOMONKOS: It is my pleasure to introduce the Moderator of this afternoon's panel, Justice Silbermann. Justice Jacqueline Winter Silbermann was elected to the civil court in November 1983, where she sat from January, 1984 through December, 1985. In January 1986 she was designated as an Acting Supreme Court Justice. A year later, Justice Silbermann was appointed Supervising Judge of the Civil Court, New York County, and was assigned as an Acting Supreme Court Justice to an IAS Part, handling primarily matrimonial matters. In March of 1989, Justice Silbermann was appointed the Administrative Judge of the Civil Court of the City of New York, the first woman to hold that position. Justice Silbermann held that position until January, 1997, at which time she became the Administrative Judge for Matrimonial Matters statewide.

Justice Silbermann is an active member of many bar associations, including the Association of the Bar of the City of New York, the New York Women’s Bar Association, the Metropolitan Women’s Bar Association and the New York State Bar Association. Of special note today, she is a Board Member of Fordham University School of Law and she is also an alum.

Justice Silbermann has lectured extensively in the field of matrimonial law and landlord-tenant law. Today we are very delighted and grateful that she is here to moderate our panel.

JUDGE SILBERMANN: It is truly a delight to be here and to be speaking on this very important topic. As you probably know from the forum, and it is no news to any of us, the laws were amended in 1996 to give judges the power to consider domestic violence when they make a determination in custody and child support.¹²⁶

But what have the courts done with this? That will be the focus of this afternoon's discussion. It will be on the role of the attorneys, the law guardians and the forensic experts in making this important factor one that the court can fully understand and be able to assess its impact on the family, and therefore meaningfully use it in making the difficult determinations relating to children.

The panelists will be focusing on domestic violence as it affects the ability of the parent to parent and the effects on the child. To

date, there have only been a handful of cases discussing domestic violence in relationship to the court’s decision involving children.

Unfortunately, as I see it and as I read these cases, they focus only on physical abuse and appear to be Draconian in their requirement for hard evidence in the nature of injury, photos, police reports, hospitalizations, et al. The cases all seem to focus, as I say, on this physical abuse and not emotional or verbal abuse — not anything about that kind of verbal battering.

Before I turn the microphone over to Professor Evan Start, who will discuss new research in the field of domestic violence and provide us with an overview of this field and the role of the forensics, I just want to highlight a few of the decisions of interest in the field. *In re Smith* 127 granted the father sole custody of the parties’ three children, saying there was “[N]o credible evidence of domestic violence.” 128 Justice Sondra Miller dissented, saying the father admitted he was the subject of an order of protection and that he had been ordered to enter a batterers’ program. 129

*Benzon v. Sosa* 130 is the most interesting of the lot. The Third Department held that extraordinary circumstances existed sufficient to deprive the biological father of custody. 131 The mother had died in a car crash; the father had nothing to do with it. 132 The father had been involved in an extremely violent relationship which had exposed the children to verbal altercations and physical violence on a routine basis. 133 A temporary order of protection had been issued. 134 The father had a twenty-six-year history of alcohol and cocaine abuse, impulse control problems, and depression. 135 All of this was substantiated by the testimony of the clinical social worker who had talked about the exposure of the children and their fright, and that the children had been actually exposed to it. 136 So this is a case where they gave custody to the grandparents. 137 That is the most exceptional of the cases.

128.  Id. at 890.
129.  See id. (Miller, J., dissenting).
131.  See id. at 940.
132.  See id. at 939.
133.  See id.
134.  See id.
135.  See id.
136.  See id. at 940.
137.  See id.
The next case is *Burnham v. Basta.* The court concluded that relocation was not in the best interests of the child, and they added, "Nor can we entirely discount the petitioner’s allegation of domestic violence between respondent and her husband. Respondent’s denials notwithstanding, the substance and detail of petitioner’s testimony, along with the observations of the court-appointed evaluator, suggest that his concerns may not be entirely unfounded."

*Perez v. Perez* held that the transfer of physical custody from wife to husband was in the child’s best interest in light of the wife’s interference with the child’s relationship with her father. The court also held that it was not an abuse of discretion to limit the introduction of the evidence of domestic violence during the parties’ marriage and post-divorce custody proceedings.

*Irwin v. Schmidt* is also an interesting decision. The Second Department held that the best interests of the children in this case would be served by granting custody to the wife in light of the evidence that the husband had been charged with assaulting his current wife. The court held, "[This conduct] demonstrated that [the husband] possesses a character which is ill suited to the difficult task of providing . . . children with moral and intellectual guidance."

In *Karcher v. Byrnes,* the Third Department held that the family court’s decision to dismiss the Family Offense Petition and grant the father’s application for custody of both children was justified based on credibility findings and on the evidence presented. They said,

There was insufficient, credible evidence to support findings [that] petitioner had ever physically abused either of the children, [ ] the children would be at risk if placed with petitioner in unsupervised setting, [ ] that the respondent had overcome her abuse of marijuana, alcohol, and cocaine, or could adequately provide for the children.

---

139. *Id.* at 947.
141. *See id.* at 643.
142. *See id.* at 644.
144. *See id.* at 628-29.
145. *Id.* at 630.
147. *Id.* at 485.
The Third Department also found in *Quick v. Quick*\(^{148}\) that the alteration of the established custody arrangement was supported by contradicted evidence that the children were either subjected to or permitted to witness explicit sexual activity on numerous occasions while at the mother’s home, and indeed were physically as well beaten.\(^{149}\)

Finally, in *Joseph v. Joseph*,\(^{150}\) the Second Department held that repeated incidents of domestic violence in the marital residence justified a grant of exclusive occupancy to the wife.\(^{151}\)

I could go on. I think the cases illustrate that the courts are only focusing on physical abuse. They are looking for clear and convincing evidence. I do not think at this stage that the courts are sufficiently aware, and I am concerned.

I am going to let Professor Stark address whether the courts, the law guardians and the forensic experts in the field are sufficiently familiar with the meaning and importance of domestic violence as a factor, and what the true issue is that we have been directed to consider in making our decisions.

Each of the panelists has extraordinary résumés. To the extent that they feel that it is important to tell you a little about themselves, each will introduce themselves. I will just introduce them by name.

Is it not true that domestic violence is more than battering and that just as we learned that rape is not a crime of violence, that domestic abuse is a crime or an issue that concerns more than violence, it may concern power and control?

MR. STARK: Yes, it is true. I want to start. I will take off really from the Judge’s question.

JUDGE SILBERMANN: You can answer my question.

MR. STARK: The dilemmas that I face as a forensic expert, and those faced by guardians, judges and attorneys, I believe, have something to do with what Judge Silbermann was saying about the narrow window. That is not the right metaphor, but the small window, shall we say, that the domestic violence law and the concept of woman battering as domestic violence gives us to understand a victim’s experience, and therefore the experience of her children.

By extension, I think the second point that Judge Silbermann made is also correct. Namely, that we are ill-served to use what I

---


\(^{149}\) See id.


\(^{151}\) See id.
call a "calculus of harms," particularly physical harms, to assess a battered woman's situation and its severity, for example, the custodial issues involved, or the child's best interest in the case. I want to illustrate that today and reiterate this point in a variety of ways.

I do not know how many of you know Linda Gordon's marvelous book, Heroes of Their Own Lives. She is a historian at the University of Wisconsin. One of the things that Dr. Gordon shows is that approximately one hundred years ago, we routinely saw child abuse, child sexual abuse and domestic violence as part of a piece emanating from a single power center in the family. Because of the prejudices that prevailed at the time, the source of the problems was identified as an "immigrant brute." Nevertheless, there was a clear understanding that a dominant male in these families was responsible and should be removed for the problems to stop.

Dr. Gordon also shows how this insight was "forgotten." Over time, child sexual abuse, child abuse and domestic violence, each went their own way. In her book, she traces a shift in focus starting in the 1920's from blaming the male to blaming the mother. First, poor mothers were blamed, then the "neurotic mother" was added and then the "emotionally needful mother," and so forth.

Through a process she describes as the "pathologizing of abuse," making abuse a sickness rather than a crime, what essentially happened is we were able to transform the culprit — the accountable agent for these problems — in a way that left us in the 1950s really not seeing domestic violence at all.

By the 1950s, and certainly by the time that Kempe so-called "discovered" child abuse in the early 1960s, child abuse had been transformed largely into a mother's crime.

When we started asking women in the early 1960s about their rape experiences, many told incredible stories about their being abused by their fathers and about domestic violence. To understand their experiences, we began to put some of these things together again.

And then, of course, in the battered women's movement we began to hear similar stories on a much larger scale. It was really profoundly new to us, though it should not have been. It was new not only to the women's movement, to us as individuals, but also to the larger social question that began to listen.

If you read the consciousness-raising newsletters that came out in the early- and mid-1960s, there is no talk about domestic violence at all. And where there is discussion of rape, for example, it is primarily stranger rape.

So the first point I want to make is that we had forgotten something we knew. We had to reconstruct the links between the victimization of women and children by listening to women’s voices in a way that we had not for many years, and giving names to things that women themselves could not at that point. This was a tremendous victory for us as professionals and as human beings.

We have unquestionably come a long way. The fact that my daughter has grown up thinking that a boyfriend who hits her is not expressing his love but is instead doing something wrong is a major change, even more profound than our legal or medical accomplishments in this area.

When we started out our own research, my wife and I, some years ago, and discovered that domestic violence was the leading cause of injury for which women sought medical attention; this was also a tremendous victory. And when we opened the battered women’s shelters, that was a tremendous victory as it was to pass the mandatory arrest laws or to push the House Judiciary Committee to recommend — and now, in the new domestic violence law, if it passes, to actually statutorily require — that evidence of domestic violence be sufficient to establish a presumption of custody. Those are all tremendous victories.

But despite these tremendous gains, the domestic violence revolution has, in some sense, stalled. Part of the problem, I think, as Judge Silbermann was emphasizing, stems from the same dramatic image behind our success — namely, the emphasis on violence and the automatic revulsion evoked when we see the black eye or the broken nose or the picture on the Marshal’s poster or on “ER.”

The evidence that we have stalled is all around us. We have arrested over a million men for domestic violence crimes; yet, almost none of them, surely fewer than 590, have gone to jail. Our batterers’ programs proliferate, we have several thousand now in the United States. Yet, there is no compelling evidence that these programs are successful. One of the most impressive studies we have, from the Urban Institute, shows that men who do not go to these
programs actually do somewhat better than men who do, in terms of their recidivism rates.  

Our shelters themselves — I helped start one of the first shelters in the United States and I am a great devotee of the battered women’s shelters — have become increasingly like second-rate social services. They have lost a lot of the vision of empowerment and radical change we began with. The early days of the battered women’s movement, we said we had succeeded when a woman left our office, and we knew she was going to do the wrong thing, but did not stop her. Because we valued her empowerment, we took pride in respecting her ability to do the wrong thing without getting punished — as she had by her abuser — more than being “right.”

Today’s advocates are experts in violence equal to any group of professionals. But political change through the empowerment of women no longer drives the battered women’s movement.

We have lots of data on domestic violence. We now know that domestic violence is typically repeated, for example, often several times a week. That is a tremendous victory. But, there is a million miles between thinking of domestic violence as something that re-occurs and understanding that for the battered woman battering is an ongoing experience, that the moments between hits are as a much part of the totality of her experience as the hitting itself.

We have come a long way, but we are in trouble. One reason we are in trouble is because we have developed a sort of “crisis calculus of physical harms” mentality around this narrow issue — I believe relatively narrow issue — of physical abuse.

The reason we know physical abuse is only part of the story is because we are confronting a number of dilemmas that cannot be explained by a physical abuse model. One of these is the dilemma I just mentioned — the difference between a model based on episodic violence and women’s reports of battering as an ongoing experience of terror that is profoundly disabling.

Other evidence of the dilemma — and we do not have time to go into all of it — came from our own research. We found that battered women were many times more likely to attempt suicide than non-battered women, nine times more likely to abuse drugs, fifteen times more likely to abuse alcohol and many times more likely to abuse or neglect their own children than non-battered women.  

---


Even though they are many times more likely to abuse their own children, only 0.5 percent of battered women abuse their own children, whereas something like fifty-five percent of batterers abuse their children. So we have this whole array of problems that battered women evidence disproportionately as compared to non-battered women.

There was no obvious explanation for why this was so. Why should somebody, because they are hit up side the head, and maybe hit three or four times, and maybe even by the person they love, suddenly develop this profound array of problems? We also found that battered women developed the problems disproportionately only after the onset of the abuse. Prior to the onset of abuse, battered women do not look any differently than any other women. So we know that these problems develop in the context of physical violence, but we do not have any real explanation for why.

I do not have time to critique at length, but we could look at the dominant explanations — that they are severely traumatized or they suffer this terrible Battered Women's Syndrome that Lenore Walker described in pioneering works in the early 1970s and is very frequently cited by forensic experts in this field. In fact, eighty to ninety percent of the battered women you are going to meet are not going to have Battered Women's Syndrome, nor are they going to be severely traumatized by their experience. They are not going to be basket cases and they are not going to have "learned helplessness." They are going to come out of their experiences wounded yet tough, though they may be drinking or drugging and doing other things that jeopardize their health or the well-being of their children.

The dilemma is, bottom line, that conventional explanations based on the personality of victims did not account for why otherwise psychologically normal women would develop an incredible array of problems that creates enormous dilemmas for law guardians or anybody else who works in this area.

It turned out that the solution to this mystery was that it was not physical trauma that was creating these problems, but a pattern of coercion and control that went far beyond physical abuse — which is not severe and life-threatening in the typical case. In fact, most physical abuse that we see involves pushing, shoving, grabbing, holding, belly bopping, stepping on, grabbing wrists and things like that — minor events that are relatively trivial from a medical or

---

criminal justice standpoint. Yet, cumulatively and when combined with patterns of intimidation, control and isolation, these events are as devastating as the most fundamental violations of human rights and hostage-taking, and may have even more profound effects on their children. We will not have time to get into that now, but we will get into that later.

I hope to go into this aspect of coercive control in the discussion. Suffice it to say now that as terrible as the effects of physical abuse or being exposed to physical abuse of one's mother may be for a child in terms of short-term or long-term psychological effects or in terms of modeling this behavior as an adult, it may turn out that when coercive control is the context in which domestic violence occurs, the effects are even more devastating.

I hope I have at least stimulated some questions in your minds: what does shifting to an understanding of woman battering as coercive control mean in terms of re-framing our evaluations of women and kids in our practice? What kinds of questions does it mean we should be asking? What kinds of recommendations does it imply? And how do we present to a court whose prism is a calculus of physical harms the more profound understanding of the threats posed to women and children when an offending partner violates their most fundamental rights and liberties as well as their physical integrity?

JUDGE SILBERMANN: I promise you, Professor, that we are going to get back to the issue of coercion and control specifically, not only in addressing custody but in framing appropriate visitation orders, are our children at risk, even if they have not observed any elements of physical violence — maybe there has not been any physical violence, or maybe there has — but if there is this coercion and control element, what happens in a visitation order? So we will be thinking about it. I leave that.

Our next speaker is Harriet Weinberger, who is the Law Guardian 18B Head at the Second Department. I hope she will talk a little bit about what is being done or should be done about training law guardians to address this issue; or maybe Katherine Law, who is her colleague in the First Department in the Law Guardian Panel, who will follow her, will be addressing a little bit about the education of law guardians to focus the court's attention outside this prism and to expand the prism of domestic violence.

MS. WEINBERGER: Good afternoon. I am delighted to have been asked to speak to you today.
As Justice Silbermann said, I actually wear two hats in the Second Department. I am the law guardian director for the Second Department, which includes ten counties: Kings, Queens and Richmond counties in the Second and Eleventh Judicial Districts; Nassau and Suffolk counties, which comprise the Tenth Judicial District; and the Ninth, which consists of, Westchester, Dutchess, Orange, Rockland and Putnam counties.

In New York City, because of the volume of cases that come into our family courts requiring appointment of attorneys from the Assigned Counsel Panel and the Law Guardian Panel, we do not allow these lawyers simply to be law guardians or just assigned counsel.

Eighteen B, for those of you who are New York City practitioners, does not refer to lawyers who represent children; 18B is Article 18B of the County Law that provides for representation for indigent adults law guardians are separate entities. In New York City, as I know, having practiced myself as a law guardian with the Juvenile Rights Division of Legal Aid for many years, when they wanted a lawyer to represent a child, they said, “Get me an 18B.” It is slang that does not exist outside of New York City.

The same lawyers in Kings, Queens and Richmond who appear on the Law Guardian Panel, are also on the 18B Panel in family court. So those lawyers may be the law guardians on custody and visitation cases involving domestic violence, and those same attorneys at different times can be representing the petitioner, the victim of the domestic violence, or of course could also be representing the respondent who is the alleged batterer.

One of the components of our program in the Second Department is the training of our lawyers. Training for law guardians and Assigned Counsel Panel lawyers in the Second Department is mandatory. You cannot remain on the panel unless you attend training. I have been Law Guardian Director for the past ten years, and that has been the rule in our department for those ten years.

Our training sessions include a fundamentals program for every new law guardian and assigned counsel lawyer. It is a seventeen-hour training program. It covers every aspect of the law and the types of cases that lawyers are called upon to be knowledgeable about whether they are appearing as law guardians or as attorneys for the adults.

One of the topics on which we lecture is domestic violence. It is mandatory. You may not get on the panel in the Second Department until you have completed that training.

The focus of our domestic violence training has been particularly on interviewing techniques for law guardians; the traumatic and psychological impact of domestic violence, particularly on children; the dynamics of domestic violence and what is meant by "coercive control." A program we sponsored this past fall in Nassau County concentrated very heavily on the battered women's shelter and community resources.

In our department, we have books that my office has prepared and distributed that list community resources for one of the ten counties, including facilities and resources that are available. Whatever hat an attorney is wearing, whomever you are representing, whether it be the victim or the children, there are facilities and telephone numbers you can call and get assistance.

Before I focus on the role of the law guardian in custody disputes involving allegations of domestic violence, I would like to make some general remarks as to the role of the law guardian. There is some confusion as to that role. As many of you know, the Family Court Act specifically delineates those cases in which law guardians must be assigned.

In custody and visitation cases, it is not mandatory to assign a law guardian, which is defined as the attorney for a child. It is discretionary with the court. There has been a lot of dispute as to whether or not this is necessary. A lot of matrimonial practitioners think it is not. My experience is they are usually the practitioners with whom the law guardian has not agreed. Nevertheless, it is discretionary, and there are certain cases, where the children are very little, and there is some thought that perhaps some courts have had knee-jerk reactions and have assigned law guardians just because there are children in the picture.

Assuming that the court has put some thought into it and the law guardian has been appropriately assigned, the law guardian serves a tremendously important function. The law guardian is there to advocate for the child's wishes and also has to safeguard the child's best interests.

It is a very difficult role for a law guardian. It is very difficult to advocate something someone wants that may not, in your perspective and your feeling, be in their best interests. I know Katy is going to speak about that specifically, so I will not deal with that issue extensively.
I would like to relate a story about a case that occurred in one of our counties. It was a divorce matter that lasted several years. The parties were very affluent. The father was an alcoholic. He had a very abusive relationship with his spouse and his children, both physically and psychologically. There were three children. One of the children became school-phobic. He had been an honor student. His condition deteriorated so much that he would get to the steps of the schoolhouse and retch and was unable to enter. The child was subsequently institutionalized for about one year. A law guardian was assigned at the beginning, when the case first came before the court. This case lasted about four years before it was finally resolved.

The law guardian was the only constant in this case. There were five judges from beginning to end, and several attorneys each for the mother and the father. The law guardian was the attorney for all three children, and spent a lot of time particularly with this young man.

Well, after four years, it appeared that the matter was finally getting resolved. What happened was, of course, there were big money issues to be determined. The mother and her lawyer or the mother just got beaten down. The father controlled the finances. She was an at-home mom. She had been a homemaker. He was not paying the mortgage regularly, nor was he paying his child support. She had two other children in addition to this one.

What the father wanted was overnight week-end visitation with the children, particularly with the eldest child, the one who had spent a year in the hospital. The child did not want to have overnight visitation with his father. There was a supervised visitation arrangement that had been worked out by the law guardian. The in-hospital therapist and the doctors attending the child had indicated that overnight unsupervised visitation was contra-indicated. The therapist the child was now seeing at home had also indicated it would be ill-advised.

The next thing the law guardian knew was that a proposed judgment of divorce was drafted. The law guardian was never notified, never saw it and never received a copy of it. And, of course, the proposed judgment provided for overnight week-end visitation.

The law guardian, when she finally got a copy of it, moved to vacate the judgment of divorce, and moved for a hearing on the issue of visitation. I will tell you that the judgment of divorce was changed to provide for only supervised visitation after a hearing, but only after a lot of hard work.
What I found most astonishing about all of what had transpired was the correspondence from the father's attorney that the law guardian sent to my office for me to see. It was vicious. It said, "What's your problem? If you need to mother somebody, go home and mother your own children. How dare you interfere with this family relationship? You had no business being involved in this. This is none of your business. We were going to resolve it. The mother and the father were going to resolve this. We worked out an arrangement and you interfered. Really, go home and raise your own kids." It was horrible.

That harmful visitation arrangement was almost allowed to happen. I am not sure what the court understood at that time, whether the court even realized that the law guardian had not been made aware of the proposed judgment. This was a happy ending, which is why I chose that story. I think it really underscores just how important and how essential the law guardian was. At the end of the case, the mother did call the law guardian and thanked her profusely, saying, "I had no more energy. I could not do it anymore. I could not wind up on the street, and I was hoping that with therapy, things would work out and he would not be too scarred. I just could not handle it anymore."

Particularly in cases involving domestic violence, the parties are not on an equal footing. I am not suggesting that the law guardian is to advocate for one of the parties, because he/she should not. The law guardian should be there to advocate for the child.

There is one more item I would like to address before Katy takes over, please, if any of you are under the impression that the law guardian walks in as neutral or is in some way a neutral magistrate or a neutral, impartial person, please disabuse yourself of that thought right now. That is the court; that is the judge who is to be a neutral magistrate. The law guardian is a lawyer. He or she is there to represent the child. He is not a guardian ad litem. A guardian ad litem is someone who gets appointed to represent somebody with some sort of disability. A guardian ad litem need not even be a lawyer.

A law guardian would be an advocate. We stress that. We try to stress that to our lawyers in training. But for all of you, particularly matrimonial practitioners, really, it must be understood, and the court must understand, that the attorneys are not there as the — right arm of the court — they are not there just to assist in settlement. If that helps, that is wonderful. And certainly, if a law guardian's presence can facilitate a settlement, that is terrific. They are
not arbitrators. They are not there for any purpose other than to advocate the wishes and the interests of the child.

I think I will be talking with you later. I would like to introduce Katherine Law. I represent the Second Department and I went first today, which rarely happens and I thank you for that opportunity. I would like you to meet Katherine Law. She is the law guardian director in the First Department.

Thank you.

MS. LAW: Thank you, Harriet.

I am here today as a fraud. I have had my job for four months, and prior to my coming to be the Law Guardian in the First Department, I spent twenty-five years of practice in the criminal area. I started my professional career as an Assistant District Attorney in New York County.

I think it is fair to say that anybody who is over forty years old has seen domestic violence, if not in one’s own family, then certainly in society. You may not recognize it when you see it, but the older you get, the more likely it is that you have seen it up close and personal.

I had a great-uncle who was a battered spouse. My grandmother's brother was just absolutely beaten down by a shrew of woman. What can I tell you? Everybody in the family knew it. His role was to provide the money, and after that Aunt Frances took over and ruled the roost. I have seen instances in which this man, who was in his vigorous early seventies, was bruised inexplicably, he had inexplicable broken limbs. It was an amazing experience. I never recognized, until I got to be a teen-ager, exactly what was going on there.

I have seen it certainly among my friends after I grew up. It does not matter whether or not you are rich or poor. I do not know if anybody besides me saw an article in the New York Times, the gravamen of which was that a Manhattan investment manager was beaten by her fifty-two-year-old husband and the police were called by her fifteen-year-old daughter, and three of the family's six children were in the house during the assault, and here is a woman who managed a portfolio of $12 billion.\textsuperscript{158} She was hospitalized in Lenox Hill, and there is a criminal prosecution in process now.

Certainly, when I went to the Manhattan District Attorney's office in 1976, I was introduced to domestic violence cases. That was, as you may remember, the height of the women's movement. I was

\textsuperscript{158} Husband Faces Charges In Beating of His Wife, N.Y. TIMES, Apr. 24, 1999, at B6.
enthusiastic and ready to prosecute to the full extent of my limited powers as an Assistant District Attorney. Mr. Morgenthau was behind everybody who was doing this type of work. At that point, there was not a special Domestic Violence Unit in the organization, but Leslie Crocker-Snyder was working to get the rape laws changed so that you would not have to have corroboration to prosecute a rape case.

I had a case while I was assigned to the criminal court in which a woman had been battered on a regular basis and she finally agreed to have the defendant arrested. She came to court time after time. She had an order of protection. We came right down to trial. The Saturday before the trial was to be started on Tuesday, she came to my office and I prepared her. On Tuesday morning, she came in and said, "I want to drop the case." I said, "May I inquire why?" She said, "Well, on Sunday he painted the living room and I just do not want to do it anymore." So I said, "Okay. You recognize that the next time you call the police, there will be somebody in the precinct who remembers this." She said, "Yes, I realize that."

That was an overwhelming experience for me. All my idealistic principles were threatened by that response. But I came to understand on a visceral level exactly how powerful this is.

I subsequently handled a homicide case in the District Attorney's office in which, after an extremely busy day I was assigned to pick up four different homicides, I was called about 2:00 o'clock in the morning to the Sixth Homicide Zone. You know how long it has been since this happened. There was a woman there who was bruised all over her head and she was under arrest for having stabbed her husband to death. I said, "You have the right to remain silent, you have the right to a lawyer, you do not have to say anything, but if you do say something it can be held against you. Having given you your rights, would you like to tell me what happened?" She said, "I do not know why I stabbed him. He done it to me thousands of times before. Why did I do it now?"

I saw this lady the next day in arraignment. She was represented by Brian Bookbinder of the Legal Aid Society, who was an attorney with whom I had a good professional relationship. I said, "Brian, would you consider putting this woman in the Grand Jury?" He said, "Let's see what her medical records show."

Her records from the hospital showed over a period of ten years, that she fell off a bus and broke her arm, tripped over the carpet and had a concussion, and fell on the ice and knocked two teeth
out. Repeatedly, this woman had been battered over a period of, as I say, ten years. There was, I will tell you, one stab wound.

The story that this woman told in the Grand Jury was that her husband, who was drunk, and a mean drunk, was at home and she wanted to go to church. She said he told her, “Fix me a meal.” So she did. She took her hat off, she put the supper in the pot, and she said, “It is ready. Do you want to eat? I’d like to go to church.” He said, “I do not want to eat now.” So she goes off to church, and when she comes back, he says, “All right, woman, fix me a meal.” It was already fixed and in a pot on the stove. She tells him to wait a minute and goes to wash her hands before she starts to pick it up. He comes in the kitchen, he picks up the hot pot off the stove, and starts at her with the pot. He beat her about three or four times with this hot pot, and she instinctively backed up and grabbed a paring knife that had been on the table and stabbed him once in the chest.

The medical examiner told the Grand Jury that this was not a life-threatening wound, except that he bled out before the ambulance could get there. So what can I tell you, except that the Grand Jury concluded that this was justifiable and she was not indicted? It is one of the things that made me feel as if my life had a purpose, because if it had not been for the fact that I had seen her that night, if it had been a different Assistant District Attorney in that Homicide Zone, and if I had not had a good professional relationship with her defense attorney, it would not have happened that way.

His family was so upset, they were absolutely furious, and I was able to say, “The Grand Jury heard it; what can I tell you?” In any event, that is one good purpose.

Having spent twenty-five years in criminal practice, I was asked last December if I would be interested in being the law guardian director. I asked, quite reasonably, what a law guardian director does. The bottom line is in the First Department we do what Harriet does in the Second Department, in terms of certifying our attorneys to practice in family court.

We hope that the judges in supreme court, when they are choosing law guardians for the children in custody and visitation cases, would use certified law guardians. There are many people — I do not know how many, but there are some people certainly — who are competent to act as law guardians in custody and visitation cases who are not actually on the family court panel.

Law guardians must play a totally ambiguous role. On one day they are defending juvenile delinquents, or they are representing
children in PINS cases. Does everybody here know what a Person In Need of Supervision is? It is where basically there is no act for which the child is charged at this particular point, but their parents think that life is so unbearable with this child that they actually bring them to family court.

On the other hand, they represent them in these custody and visitation cases. These lawyers also have to do a variety of other tasks not having to do with representing children. So you have to be well versed in the Family Court Act, you have to be well versed in the domestic relations law, you have to be well versed in the criminal law, the constitutional law of search and seizure in Fourth and Fifth Amendment cases.

It is an incredibly complex law. We have difficulty in attracting law guardians. If any of you would like to be law guardians and you are not already, may I encourage you to write to me at 60 Madison Avenue, New York, New York 10010, and ask for an application. If you do not know how to do it, we will train you.

The only problem is that, as I am sure you recognize because you are in this room today, it is incredibly poorly paid. We pay our lawyers $40.00 an hour for in-court and $25.00 an hour for out-of-court time. This is absolutely a manifestation of what this society, and the legislature in Albany in particular, thinks of children. The fact that we pay these lawyers $40.00 and $25.00 for out-of-court time to represent children is a state disgrace. If any of you know people that I could talk to, or if you know people in Albany, please tell them that their reluctance to increase the rates for criminal defendants is killing the practice of law for children and women in family court.

Thank you very much.

JUDGE SILBERMANN: Our next speaker will be Mary Elizabeth Bartholomew from the Sanctuary for Families Center and Battered Women's Legal Services. She is going to talk about preparing your client to see the forensics and preparing your client to see the law guardian.

MS. BARTHOLOMEW: Thank you.

We cannot talk enough about domestic violence. It is too common a problem. Whatever statistics you hear — we all understand that it is prevalent, it is frequent and it is everywhere, if any of these statistics are to be believed — and yet, even here, yesterday and today, there has been talk about the use of an order of protection and the underlying allegations of abuse as a strategic weapon
in matrimonial cases, particularly in exclusive possession of the marital home and also custody and visitation cases.

It is as if somehow the existence of an underlying matrimonial case makes the allegations of domestic violence less important or less believable, when in fact divorce is the natural consequence of domestic violence, it is the natural consequence of physical violence and sexual abuse.

If there is a lot of domestic violence — and we all in this room believe that there is — then we are going to hear about it in a lot of cases. Judges and lawyers who have no problem understanding this or accepting the fact that there is a lot of domestic violence in our world and understand that it is pervasive have a lot of trouble accepting that it could be true in specific instances. We should be troubled by that.

I am here to talk about preparing women clients to meet with forensics and law guardians, the two persons who are absolutely key to the final decision in their custody and visitation cases.

I represent indigent women, often immigrant and undocumented immigrant women. But, whoever the client is, she needs to first understand who the people are — what is a law guardian, what is a forensic evaluator.

Part of your job in preparing your client is explaining the law, the legal system and the social service system that underlie this decision-making process. Very often women, but especially battered women, have ideas about their legal rights and about what is the right thing to do that have come directly from their abusers, and these ideas, naturally enough, serve the interests of the abusers.

We are all formed by the law. It tells us who it is that we are; it tells us who it is that we can be. In other legal cultures, women have to leave their home and their children, if their abuser husbands tell them that they have to leave. Too often, our clients learn that they did not have to leave the home, that they did not have to leave their children, when it is too late, when they are already in a shelter, or the first time they get this information is when they see their attorney or when they seek out help from an immigrant advocacy group, like SAQUI or some of the other organizations that do such important and good work. By then, her legal case is compromised, as is the well-being of her children. And then, her interview and her meetings with the law guardian and the forensic experts become every more important and critical.

The isolation that is often a part of the battered women’s experience serves the interests of the abuser. It is our job to explain her
legal and social rights, and her responsibilities, and to help her make appropriate and effective choices about her life and the life of her children.

Probably all of us in the domestic violence world would like to see domestic violence be the lens through which law guardians and forensic evaluators see our clients. This is, however, not the practice. It may be the best practice, but it is not yet the practice.

It is our job to prepare women clients to see the law guardians and the forensic evaluators on their cases. They often have to tell these people about the domestic violence, the effect of the domestic violence on them, their conduct, their behavior throughout the marriage or the relationship, and it is their job ultimately, and our job, to prepare them to make the domestic violence real, to make it important, and to make it credible.

This means preparing your client not to be defensive and angry, when she is probably, and justifiably, both defensive and angry. She may have already seen hostility to her statements and to her proofs in the courts or by the husband's attorney, and certainly by her husband himself. She may have minimized or forgotten some of the parts of the abuse as a way of dealing or coping with her everyday life. This is especially true if your client lives in the same household with her abuser or if she has lived with domestic violence for a very long time.

By the time a forensic evaluator and/or a law guardian have been appointed, she is likely, but not certain, to have been in court, probably a number of times. She may have already heard the husband or his attorney, and the court, insist that it never happened — that she is lying, that there is no finding of abuse, that the order of protection that may be there is something that the husband pled to or consented to because he could not afford to do anything other than that.

She may have heard that the fact that there are no hospital records or that there are no police reports may be actual evidence of her fabrication of the abuse. And she may have heard, and she may have even said to the hospital personnel, that she did fall down the stairs or off the bus or those sorts of things. She has to explain that. She has to make it clear.

None of us want domestic violence to be ignored by the law guardians and by the forensic evaluator, but just helping your client appear not defensive and not angry at events that would anger anyone is a bit of a project. It takes a great deal of time.
Family law practitioners often say, “I feel like a social worker. I feel like I am talking to my client, not about the law, but this is very social work kind of stuff.” And it may be.

My clients often see social workers. I am delighted to have a lot of social workers down the hall. I encourage my clients, as well as their children, to see social workers, to talk about that kind of stuff with the social workers. But a social worker cannot really prepare your client to see a forensic evaluator and/or a law guardian. They are not lawyers. They do not know what to expect.

First of all, your client has to understand that these two characters, the forensic evaluator and the law guardian, are absolutely critical. Cases often settle on the basis of a forensic report, or even in some cases on the recommendation of a law guardian.

If it is a good report, if it is an attentive and very good law guardian, it should be. It is often the right thing for a case to settle on a forensic report. But not all forensic evaluators and law guardians are as sensitive as we in this room would hope that they would be to domestic violence. They do not understand it.

The new law directs that the courts think about what it is and take seriously the allegations of domestic violence, but they do not always do that. Your client has to be prepared, should she not be asked about the abuse, that she can bring it up, and do it in a way that is not defensive or that makes her appear that she is obsessing about it. It is up to your client to make that domestic violence real. She may have forgotten the dates, the exact details, especially if it is for a long period of time, she may have minimized it, and these things may make her appear incredible to these two important persons. Memories dim and bruises fade, but she has to be able to articulate this and talk about it, and only you can help her do that.

No attorney here would think of having their client go into a court without preparing them, and yet there are those who believe that it is not proper for a lawyer to prepare their client to see a law guardian or a forensic. Even if you were just having your client go to court when she is going to hear oral argument, let alone take testimony, none of us would allow her to go in or would think of having her go in without proper preparation. She needs to understand what is going on, what kind of questions are likely to be asked of her.

I want to give one small caveat, even though they are not likely to be happening in the cases that we generally see, and that is, some lawyers have their clients prepared to see a forensic evaluator by another forensic evaluator. This is generally seen as a re-
ally bad thing by the courts. The courts feel that it sort of muddies the water. The court is really relying on the forensic evaluation to give some expertise, to give the court some help about what it is exactly that is going on. The preparation by another forensic is just going to make it more complicated for the judge.

If you have any reason to believe in your cases that the other side has been prepared by a forensic, be sure, should this case go to trial, that you find out from the other side, that you ask that person if, with whom and how the other side has prepared before they saw the forensic evaluator.

Obviously, in preparing your clients you start by telling them that they have to tell the truth, that you will review the dates and the incidents. Your client has to know that she does not have to recall every single fact, every single ugly detail, and if she does, she may appear to be over-prepared, to be fabricating or to be obsessing with the domestic violence part of her case.

She does need to understand who the players are, how they figure into the decision-making process, and overall what needs to be proved. She needs to explain and tell how the domestic violence figures into her being a better parent, into how domestic violence may have compromised her ability to parent, what steps she has taken and what steps she will take to be the better parent.

Before she sees a law guardian or forensic evaluator, she has to think about ways to facilitate visitation, pick-up, drop-off, transfer the children, decide what relatives and friends, if any, are willing to help or be part of the transfer of the children or could supervise visitation, should that be indicated or should that be necessary, desired even.

She must understand the theory of the “friendly parent.” This may be a very big project.

The court’s understanding of insistence that there is a level playing field in some way is something that she is going to have to be very familiar with. She cannot be thinking about all of these things for the first time when she is talking to the forensic or the law guardian. You have to explore with her who are the people that can help her, who could possibly supervise visitation, who could possibly help with the transfer of the child back and forth.

You should review with your client all of the questions that are likely to be asked so that she does not hear them for the first time out of the mouths of these important key people — from the date of the marriage, to the date of birth of the children, to family members with whom the children has a relationship. Your client may be
very nervous. I have had clients get mixed up on dates of birth and basic pedigree information when they are in court, in inquest and in intake. They cannot remember lots of numbers, lots of dates, just because they are so nervous.

Repetition will help them, if you go over it a number of times. And, as I said, it takes a great deal of time. It is a big commitment to representing a battered woman in a custody case. It is a big commitment in terms of time.

You have to go over with her the questions that are likely to be asked, and go over them lots of different ways. Anticipate with her those questions that may be asked. What is the worst thing that the other side, her husband, her abuser — “What is he going to say about you that is the worst thing that he could say?” — and you have to find out if it is true, and how she can explain it if is true; how she can explain it if it is not true.

If she keeps a journal or a calendar — she should be encouraged to be keeping a journal or a calendar — ask her to bring it with her to her meetings with you. She may or may not want to bring those kinds of things with her to meet with the forensic or law guardian, but certainly you need to take a look at them.

Just getting her talking about some of the really ugly things that have happened to her will make her more comfortable talking about it. She may think that it is improper, or even wrong, to speak negatively about her husband, and she may be very uncomfortable speaking about sex, including forced sex. She may not even understand that forced sex is a crime or that there is something wrong there.

For your client, nervous as she is, knowing that many women are victims of abuse and that the forensic evaluator and the law guardian have heard it all before may make her more comfortable. That is an important thing for her to know, that it is not just something that she caused.

There are lots of reasons for why victims of domestic violence feel defensive. She has been told by her abuser that she is a bad mother, that everything in their marriage that is wrong is her fault, especially that domestic violence is her fault. She has to understand that is just not true. She should be able to explain her religion or her culture or her individual experience or the personal relationship that she had with the abuser that caused her to make certain kinds of decisions, like why she stayed with him, why she went back to him.
We all think that it is right to leave an abuser, but she may think that it was the wrong thing to do. That is something that has to be explained so that the forensic evaluator or law guardian takes it seriously and understands it. It is essential for these key people to understand that.

The court needs to know the facts and the why of the facts, but they need to know it in a focused kind of way. The court needs to know the specific form and kind of abuse, the patterns of abuse as well as the history of it. Not all individuals are the same and the effects of the abuse on the abused and the children are not the same. That has to be made clear. And, as complicated as it may be, you want it to be explained in a focused way so that your client does not just appear to be incredible, which is often the case.

She needs to understand that the jealousy, the controlling behavior, the threats and the isolation are common ways of controlling. And, the behavior is common to many abusive men. It is not something that is just particular to her situation. She has to know the facts and that domestic violence is a systemic problem.

She has to know that it is not her fault, and she has to have insight into her situation so that she knows that it is not normal. And importantly, she has to be able to communicate that. The fact pattern that we have here is a very interesting one because the woman has a communication problem. As much as she knows about her own situation, she has trouble articulating, she is unintelligible, and it is going to be a very difficult project for her to get the forensic and the law guardian to really understand what it is that has gone on or for the jury to pay attention or to listen.

The courts, the law guardians and the forensic experts, they are there in a way to predict the future, so her insight into the situation is terribly important.

I have talked so far about law guardians and forensics as if they are the same. They certainly are not. In some ways you prepare them in the same way. In other ways they are tremendously different. Generally, getting women to talk about these things, so that she is comfortable telling some pretty personal and awful stuff to a virtual stranger is going to help her. The focusing will help her.

To make her do this in a way that she does not sound defensive, that she does not sound bitter, that she does not sound angry, hostile, or obsessive — repetition can only do that. There are differences between the way you prepare somebody to see a law guardian and a forensic evaluator. For example, the law guardian is an attorney. You can attend any conference, any meeting that
your client has with the law guardian. You have a right to be there. You certainly should be there. That person is an attorney for the child. Some attorneys always go; some attorneys never go. There is thinking that is all over the board. It may be a specific case. There are attorneys that have said that they think it makes their client look bad. In many cases, you may want to go just because you can explain and talk about the language; she may have trouble remembering to make the points that she needs to make about the incidents and the effects on the children. You have the right to be there with the law guardian.

You do not have a right to be there when your client is interviewed by the forensic. The most important thing that your client could possibly learn from you about the forensic evaluation is that this person is there to make determinations to help the court. The forensic evaluator may want to talk to her own therapist, the children’s therapist, lots of other people. Anything she has said to her own therapist will come out and be given to the forensic expert, and also it will be given to the court. Any idea that she might have had before about confidentiality, she has to rethink that with you. There may be some things that she feels uncomfortable about other people knowing about — suicide ideations, suicide attempts, drugs, alcohol, all kinds of things.

Not that they are there in every case, but there is always something that the client sees as really some horrible secret that she has. However minor you might think of it as being, it is something that is going to make her nervous and may make her appear incredible. For example, a woman told me the other day, after knowing her for a year, that she shoplifted once when she was a kid. She was so nervous about that, it was just totally unjustified. But that may very well compromise her ability to be straightforward with someone else.

She has to know that she has to rely on herself, only herself, to discuss these things, to bring up the domestic violence to the forensic, because no one is going to be there to tell her.

She may want to bring in pictures or she may want to bring her notes or her journal or whatever, and she may want to direct the attention of the forensic evaluation to somebody else, to a neighbor or a teacher, somebody who knows her and her children very well. Then the forensic, of course, has the discretion to go forward and interview that person or not.

You want to teach her — this is a teaching project — to focus on the questions and make the points that she needs to make to get
from here to there without losing sight of what it is she needs to say, not to get distracted, to make her points.

She has to understand the reasons for her behavior. Especially in cases where there is cultural difference, that has to really be explained. She is the one who has to explain about why she did not leave, why one thing or another happened. You should only speak with her about this to make her appear not confused, disoriented or scattered. You do not want your client to appear flaky because she is uncomfortable talking about these things.

As a practical matter, when preparing a client to see anybody, to go to court or do anything, you have to talk to them about the usual things — how to dress, what to wear. Not that every battered woman needs that type of information, but some people do. I always talk to my clients about looking the forensic evaluator or the law guardian in the eye. She may come from a culture where that is disrespectful. If she is having so much trouble looking people in the eye and talking to somebody, you may want to just have her explain to the forensic evaluator that it is disrespectful in her culture to do certain things. If she can explain her culture or what reasons she has for doing things that are different from the way that the rest of us do things here, then you have gone a long way towards helping her be prepared.

What we want to do ultimately is see that domestic violence is not seen as mental illness. That is something that she may very well be facing.

And if you get a report back that looks to you nothing like the client you have, nothing like the woman that you know, then you have to think about going to trial, taking it to trial. A good forensic report should reflect who it is that you know to be your client. If somehow they did not meet, then you have to think about going to trial.

JUDGE SILBERMANN: What a wonderful primer that was.

Now we have Betty Levinson of Levinson & Kaplan, a very fine practitioner in the field of matrimonial law as well as many other fields.

MS. LEVINSON: Thank you.

I thought it would be helpful to start with a little bit of historical background concerning my work as it has been interwoven, in a very small way, with what has happened in New York courts regarding domestic violence over the last three decades.

When I started practicing, it was the 1970s. As Katy mentioned, it was the height of the Women’s Movement. There was a case
being litigated at the time, called *Bruno v. Codd.* Mr. Codd was the Police Commissioner of the City of New York. There were those of us who were representing petitioners in the family court, particularly abused women, who felt that family court, of all places, was a very inhospitable environment into which to bring those kinds of concerns.

The old family court was populated with very cranky, officious court officers, petition clerks who very often — in an effort to make their work easier — would only take one or two factual allegations from the petitioner. When the petitioner found herself before the judge, swearing to the facts and wanting to get on the witness stand and tell her story, she would be limited to only the two facts that the petition clerk had permitted her to allege. It was only after a long period of time that we practitioners figured out that we could go into the courthouse and basically purloin the court forms. This was before everything was computerized and we used to take the quadruplicate forms, with white-out for each of the lawyers, and we would actually prepare these petitions in our offices and then go into the court, basically bypassing the petition clerk. That was the only way that you could get past the "guard dog."

And then, when you finally got to see a judge — this was in 1976 and 1977 — you might be told that an order of protection was not going to be granted because your client had decided if she was going to begin a divorce action. If she was not willing to divorce this beast, about whom she was making these complaints, then he could not be that bad, and she was not entitled to an order of protection.

There were lots of things about going to the family court in those days that made life very difficult. When *Bruno v. Codd* began, with Carmen Bruno was the lead plaintiff in a class action, we sued the family court, the probation department, and the police department, in an effort to create an environment that would be more hospitable to battered women. The case was ultimately settled with a consent decree and thus began our consciousness, in the legal community, about domestic violence.

As Evan pointed out, the book that marked the beginning of the women's movement, *The Feminine Mystique* by Betty Friedan, if you look in the index, makes no mention of domestic violence. It does not come up in the book even once. So on that level the pro-

---

gress we have made since then is thrilling. It gives me goose bumps just to think about how far things have come.

Over the years my work with victims of domestic violence brought me to a variety of courts. I started out as a criminal defense lawyer. In fact, Katy's story about having a homicide defendant testify in a Grand Jury is something that I actually did in the 1980s, but with a twist. I brought a social psychologist into the Grand Jury and asked the Grand Jurors to listen to her testimony, which also ended in voting "No bill."

Of more recent vintage is my representation of many women in matrimonial proceedings. I continue to do some criminal work and I have done some tort work as well. In fact, one of the tort cases that I have been dealing with over the last ten years is the case in which Hedda Nussbaum sued Joel Steinberg for tort. We have a lower court decision tolling the statute of limitations. As you all may know, there is a one-year tort statute of limitations for intentional torts in New York. That is now on appeal.

But returning to the question of matrimonial cases and domestic violence, I have to tell the truth. In spite of the enormous progress with training programs, public education and the receipt into our language of the term "domestic violence," I think we are still in deep, deep trouble.

I want to speak a little bit about litigation from the vantage point of supreme court practice at the current moment. One of the things that Mary Elizabeth would agree with me about, I think, in terms of preparing your case, is the importance of knowing who is going to be hearing your case, who your law guardian is, and who your forensic evaluator is. I will try to illustrate this by using some of my own cases as examples, and relating back to some of the things which have been talked about today. First, we need to address the problem of communicating the reality of domestic violence. After people hear about it so much on the radio, see it on posters in the subway, the shock rubs off and the immediacy disappears. What we thought we were getting, in terms of a sympathetic judicial ear, or an appropriately trained forensic evaluator is very often not the case. In fact, the reason that it took so long for us to learn about domestic violence is that so much of it is profoundly counter-intuitive. Unless you really pay attention, and hear the individual victim's voice, and allow yourself to become part of, in your mind's

eye at least, the home where these events are taking place, you are really not going to get it. Anybody who is working with you in a case, either collaboratively or in some other capacity, is also going to have a great deal of trouble getting it.

The first time I tried to get an order of protection in supreme court, I was appearing in what used to be called “Special Term, Part Five.” It was in room 300 of the supreme court. That is where all the matrimonial cases were heard. Lawyers actually used to argue motions. It was very exciting, and it was also a bit of a show, because everybody would get up and watch the other attorneys do their stuff. As a young lawyer, I appreciated the opportunity to see varied styles and approaches. On the case I am referring to, I made an application for an order of protection. The judge denied my request because, he said, we had not given notice to the police department. Since this was an order that would have to be enforced by the police department he refused to give me an order.

Today, although we do practice in a more enlightened era, it is kind of shocking that judges need a statute to tell them to consider domestic violence when making custody decisions. I thought they always had to. I thought Friederwitzer163 said “best interests of the child.”164 Maybe I was wrong — how foolish of me.

But the fact remains that you just do not know what you are getting until you have it. I agree 1000 percent with what Mary Elizabeth said before: if there is a disjunctive quality between the forensics report and your experience of your client, bells should ring.

One of the most serious problems that we have in our courts — which is a reflection of the general issue of not having enough money — is that each of the matrimonial judges in New York County were just assigned an additional hundred cases. Judges and cases are being shuffled again. When this happens it is clear that OCA chooses to use its money on women and children last, and that the folks in Albany just do not see these cases as a priority.

The establishment of “standards and goals” — I hope you have all heard that phrase — is the result of an administrative decision that says that cases have to go “clippity-clop.” Not every case ought to go “clippity-clop,” particularly those that require really serious investigation.

From an administrative point of view, there is a real tension between investigation, forensic involvement and having a client in a

164. Id. at 769.
position in which she is able to testify. Do you have any idea how hard that is for somebody who has been living in a situation where every minute of her day is spent, her energy is consumed every second, trying to avoid a conflagration, trying to protect her kids from an abusive spouse? Enervating does not even begin to describe it. To get a client to the point to which Mary Elizabeth described is difficult for any happily married, stand-up kind of person. But is incredibly difficult for someone suffering from these kinds of experiences. Thus, the speed with which some cases are now being shoved through the system, I believe, is inconsistent with the needs of battered women.

Let us talk about the forensic evaluators. Who are they? Where do they come from? What do they know? And, except for Evan, are they any good?

Not too long ago I came into a case where the forensic examination had already been completed. I was making a decision as to whether or not I wanted to take the case because another lawyer was in it already and it was already moving along. I generally want to be there from moment one, to craft and develop the case in my way. I had all the papers delivered to my office before meeting the client. I read the forensic examination of the woman. I said, to myself, “I do not think I am going to take this case. I do not like this woman at all.” But I had made an appointment to see her, and I said, “The straight-up thing to do is to have her come in and see what’s what.” And I did.

The profile that came through the forensic report was, in my judgment, extraordinarily distorted. It did all of the things that you would expect somebody who knew nothing about coercive control to do. We cannot overstate the importance of understanding what the “punch plus” is. In my office I call the “punch plus,” the fact that you do not have to have bludgeoning every day, you do not have to be physically abused every week, you do not even have to experience physical violence every month or every six months. When control is initially exerted with physical force, and you know that it could happen again, and you know that a gesture or a certain phrase or a certain look means “You better watch it,” there is no need, very often, to follow up with another physical punctuation of that control.

So what do forensic witnesses understand about women who have domestic violence issues, and should we expect such experts to raise or pursue domestic violence issues in their interviews with our clients?
The report to which I just referred was received in evidence at the custody trial, and the forensic experts testified. In this case, one of the children had reported to his therapist that he had seen his father push his mother down a flight of stairs. This statement was contained in notes that were turned over to counsel during the trial. Here is the transcript of some of the question and answers:

I asked the doctor: "You did not feel it was necessary to inquire as to whether or not the memory of his seeing his father throw his mother down the stairs was significant?"

Answer: In the context of the other things that she told me, I did not pursue that.

In addition, the following questions and answers transpired:

Q: Dr. so-and-so, you testified earlier that you did not consider yourself an expert in the area of domestic violence, is that correct?
A: Yes.
Q: Are you associated with a hospital?
A: Yes.
Q: Which hospital is that?
[He names two important hospitals here in the City.]
Q: And do either of those hospitals have domestic violence protocols?
[Objection overruled.]
A: I suspect that they do.
Q: But you have not seen those protocols yourself, have you?
A: I do not recall having seen one. I know that they have a required course and some years ago but I do not recall. I think it was on child abuse, but I am not sure of the details.
Q: Whether or not you have seen the protocols, would it be your understanding that a denial of physical abuse by someone speaking to a stranger would be unusual?
A: Would be unusual? No. But there is the context of custody disputes in which I think it is far less unusual. Yes, I am familiar, and you talked about that when you first examined me, et cetera, et cetera.

Anyway, the point of this is, that here is a guy who is being appointed by judges of the supreme court, who has never seen a protocol, does not know how to interview clients. If you go to a doctor, they take your blood pressure, they take your pulse — there are sort of basic above-and-beyond-the-pedigree stuff. There are basic questions that need to be asked in a custody case.

Also we need to consider the question of shame and the degree to which it affects people's willingness to reveal a history of domes-
tic violence. In my own experience, women who have achieved very high positions in life — lawyers, doctors, all kinds of professionals — need to be asked.

MR. STARK: There are also the women who are so rich they do not have to work.

MS. LEVINSON: They do not necessarily reveal. You have to keep on reminding yourself that this is not self-evident and that you have to ask questions. In fact, in the process of interviewing one client who exhibited a disconnection between the description in the report and the reality in the office, I learned for the first time all kinds of hideous things about her relationship with her husband which were later testified to at trial. Of course, all were met with objections by the father’s attorney, and it was only by happenstance that we had evidence to rebut his claims of recent fabrication.

That leads me to another issue. I had the extreme pleasure of having tried a very long case in front of Judge Silbermann. Fortunately that did not involve domestic violence, but I cannot tell you how rare and wonderful it is to try a case with a judge who understands the rules of evidence, because when you deal with domestic violence it is not always clear that the rules are understood.

For example, somebody — I think it was Judge Silbermann — mentioned earlier that domestic violence has an impact on children in a household even if they are not there when it happens; they do not necessarily have to be witnesses. Unfortunately, I have to tell you that there are judges sitting in New York County, and law guardians working in New York County, who do not understand this. In the record, I can show you chapter and verse of a judge in New York County saying, “If it did not happen in front of the child, you may not question the witness about it.” That is scary. It happened not so long ago.

All of the comments that I make about forensic evaluators I make about law guardians. I have never attended a law guardian training about domestic violence. However, I have had the very mixed and distressing experience of attending a training in judicial seminars regarding domestic violence, and I am upset to report to you that judges who go to these trainings are not attentive listeners. They believe that they have nothing to learn. In fact the domestic violence aspects of “Continuing Judicial Training” are generally the least well attended, and it is only when judges are dragooned in to listen that they actually come. They are disre-
spectful — they speak to each other and gossip about the next golf round. I have been there and seen it. It is really upsetting.

The same questions must be asked in regard to law guardians. I am not at all certain that Judge Kaye's directive, that every child in a custody case in the state ought to have a law guardian, is a good idea. In fact, let me be more direct. I think it is a well-intentioned, but disastrous, policy which is creating a second and third tier of authority and eviscerating the function of judicial discretion. It is creating a kind of "pink-collar ghetto" in which the kinds of issues that ought to be dealt with by a judge are delegated. By these issues, I mean disputes regarding custody, visitation, supervision and acquiring the subtle read on the personalities that is necessary to make decisions in the case. These are the things that give the judge the information, the hands-on, day-to-day knowledge that are needed in dealing with such matters. To delegate these functions to law guardians, which many of the judges do, is really unfortunate.

Let me say something else about law guardians. One of the things that I did when I first had a law guardian was to get a copy of *Law Guardian Representation Standards*. It was published in January of 1994 by the New York State Bar Association. I read this and a lot of cases. I have since had a bunch of experiences with law guardians, so I know a lot more than I did then. What I learned was not what I was getting.

In the trial of a custody and visitation case that consumed 3000 or more pages of record, the law guardian submitted an eight-and-a-half-page report without a single citation to the record or a statute or case. I had very serious questions about what benefit was being derived from such a report.

I understand that lip service to children is not going to protect children. This again is from supreme court experience. I think that the Legal Aid Society law guardians, many of them, should be beatified, if not sainted. There is just not enough money to go around to pay everybody.

Let me make a disclaimer here. I am disqualified because of a family relationship ever to be a law guardian, so there is no sour grapes here. I cannot be one, so that should be clear.

A policy that requires law guardians in the supreme court in each and every case is problematic. I am not saying they should never be appointed; in severe, difficult cases, I think they can be

---

165. COMMITTEE ON CHILDREN AND THE LAW, N.Y. ST. B. ASS'N LAW GUARDIAN REPRESENTATION STANDARDS, 2 CUSTODY CASES (1994).
great. But, my experience so far, in a number of cases, is that they are always on trial and you can never get them in the office. If they are not returning my telephone calls, imagine how difficult it is for a child to get his or her telephone calls returned. The view from the trenches, frankly, is problematic, and I look forward to reform in a way that allows us to really start focusing, particularly in the area of domestic violence, on a way that brings people who do have the background, experience and motivation, to work with these very difficult cases.

I think I will stop there.

JUDGE SILBERMANN: We have some very interesting questions to discuss. For instance, if the court knows that there is domestic violence, be it physical or not physical, if the child has never witnessed it or never been a party to it, is it still appropriate not to have supervised visitation? Let us talk about it after the break.

Rather than my asking more questions, does anyone else have questions for the panel? Or maybe I should ask a question to start with.

Let us assume there is this element of coercion and control, which I believe domestic violence is, and assume there has been no witnessing of it by the children in the sense that they were not in the home when it occurred. Let us say custody has not been contested — that physical custody, physical residence, and decision-making is going to be with the mother — but we are crafting a visitation order. Professor, would an unsupervised visitation order to the abuser father be of danger to the child? Is there something that the court should be concerned with, or can we fashion our usual weekend visitation order one week during the month?

MR. STARK: Most of the literature on this issue concentrates on the statistical frequency with which domestic violence is linked to harms to children — it describes how many kids are likely to be hit deliberately or inadvertently by batterers; how witnessing affects kids, and on modeling.

But even more important than these statistical links is trying to figure out what is going on in the situation. It is one thing to say that these problems overlap; it is another thing to understand how they overlap. The Judge’s question bears more on the second problem than the first.

We use the term “tangential spouse abuse” to describe the fact that in the typical case where there is battering and harm to the children, the harm, either deliberately or inadvertently, is introduced by the batterer as a stage in his trying to hurt or control the
mother. In other words, the children are harmed as part of coercive control. That is crucial to the question you are asking, and this dynamic can be illustrated by other elements of the assessment — a sudden interest in the child or in custodial issues the use of the child to spy on the mother, and so forth.

This situation can be complicated. For instance, if the mother figures out what is going on, she may take her anger out on the child and this issue may replace the focus on her abuse, just what the batterer wants. Remember, with the offender out of the house, it is now safe for her to be angry and anger may be one of the few emotions that keeps her sane.

I have one client who threw a shoe that hit her teen-ager in the foot. The domestic violence issues immediately got back-staged and the father got temporary custody of the teen-ager, even though her actions were a response to tangential spouse abuse. She had discovered that the child was taping her phone calls for the father. She was cleaning his drawer, found the tapes and got furious. In this situation, which parents bears the greater responsibility for hurting the child? Here the father was controlling the child to control his wire. If you can hurt mom by hurting the child, after you separate; you manipulate the child to exercise control. You can see how complex this dynamic might get.

Unless you are doing an assessment which includes isolation elements, intimidation elements and control elements, as well as physical abuse, you are not going to be able to identify how or to what extent the batterer is using visitation to manipulate the children or to hurt and control the mother. That is the first answer.

A pointer in the assessment is that the effects of battering on children are specific to their developmental age or stage, and need to be associated accordingly. Let us say you have an eighteen-month-old child whose primary life task is to maintain a sense of continuity with a trusted parent, to have a secure sense of boundaries. You may also know that even supervised visitation is going to create a sense of intimidation and threat that infringes upon that sense of continuity and trust. In this case, a good forensic evaluation would reveal that supervised visitation, even though the child may not have been physically hurt, is inappropriate, at least until the mother feels secure, perhaps because the father has gotten help.

This raises a question about Mary’s earlier point. We certainly do not want forensics to think the mother is obsessive. I have been involved in a number of cases where the forensic evaluator has
started by calling the mother delusional because she tells incredible stories about her abuse. Then, when she provides documentation that supports her version of events, she brings in the multi-volume diaries she has kept, for instance, the diagnosis is changed delusional to obsessive. We do not want her to have that kind of label.

Expressing anger or fear is an important part of a woman’s response to battering, however. I just finished working on a case with Nancy Goldhill who heads the Family Division of New Jersey Legal Services. In this case, the violence had ended some time before, but the mother was still extremely fearful of her husband. When she expressed this fear and, more importantly, when her eight-year old son also expressed fear of his father and refused to comply with visitation orders, the court appointed psychologist concluded that the child was suffering “parental alienation syndrome.” In essence, this means that the mother’s fear is exaggerated and that she is responsible for alienating the child from his father. Not only did the judge give his father extensive visitation, then temporary custody pending a final resolution. He also ordered the boy held down (by five police officers) and taken to a shelter for delinquent youth overnight. After the traumatic shelter stay, the boy complied with the visitation order convincing the judge and psychologist that they had been right.

How should the mother’s fear have been handled? Though the violence had ended, the fear was certainly real and based on subtle signs of intimidation and not so subtle threats, though these were hard to document. Moreover, the husband had sold the family residence while the mother and son were in India, had no contact with mother or child while they were away, refused to shelter them when they returned and shown not the slightest interest in the boy since was suddenly dedicated to pursuing custody, a probable sign of tangential spouse abuse. Mary is right to caution her clients about showing feelings that forensic experts may misinterpret in ways that could be detrimental to their interests or the interests of their children. But it would be far better if forensics was able to reframe these cases so that the fear because intelligible to the court.

So often, in these cases, if an attorney working with battered women will tell them not to be emotional, obsessive or fearful, and not to show their anxiety. But, then you get to court, the batterer walks in, and the woman hits the roof — she gets anxious and emotional, and so forth. And who gets angry at her? Not just the
judge. Her own attorney gets angry as well, because her own attorney does not understand what is going on.

MR. STARK: One final point. Mary and Betty said that there are some forensic reports that are out of kilter with the client you know.

When I see a forensic report that has any relationship to the client I know, I fall over in shock. That is not just because forensics is ill-equipped. It is because these are not — at least this would be my position — problems for which forensics in a traditional psychiatric sense are appropriate.

In New York, you probably know Judge Kaye is now considering, and the state is now considering, having assigned forensic clinics that will do all forensics in family cases in New York State. Some counties have that, right?

JUDGE SILBERMANN: No, that is not what we are considering. We are considering training, in other words, some sort of certification of the forensics that we have, similar to what we do for the law guardians. I know that both Harriet and Katy in their respective departments are working on it.

Do you want to say something, Ms. Levinson?

MS. LEVINSON: Yes, Judge.

On the subject of forensics and qualifications, this is my fantasy: that there would be a clearinghouse that would prevent well-known frauds from passing the threshold of the courthouse. I cannot tell you how much time I have had to spend preparing cross-examination.

Certain guys are not qualified. In fact, the last time I dealt with this particular doctor, who has a mail house degree, Judge Sax, it was a blessing from above; I could not believe he did it — he refused to qualify him.

Even if you have a lot of money, why should you have to throw away money preparing examination of somebody who you know is bogus?

Here is another idea. We should nominate people. Once they are looked into and once they are found wanting, they will not be allowed to testify in our courts, period.

JUDGE SILBERMANN: I agree.

MR. STARK: But also, what I am suggesting is that battering is not a forensic problem in the traditional sense. It is not a psychiatric problem, even if there are psychiatric issues involved. It is not a mental health problem, even broadly understood. It has a whole set of different parameters. So if you take somebody who is
trained to see a certain way and present them with a problem that does not look familiar, they will stretch the problem to fit what they know. The best ones are often the worst ones. I mean, I have seen the most experienced, skilled clinicians thrown off by these cases.

We just lost a custody case in New Haven which the head of the Clinical Social Workers Association testified on behalf of the dad. The lawyer asked her, "If you believe there was domestic violence in this case, would you reach a different conclusion?" She said, "Absolutely." But she did not have the skills to identify the domestic violence, to establish the credibility of the pattern, and the two children that she was interviewing both consistently denied that there was domestic violence in the case, even though we had a mountain of evidence that said they had been exposed to it over many, many years. They looked perfectly good on the surface. From a strictly clinical forensic standpoint, the mother was lying, the kids were doing well, everything else was fine. The only thing we knew was that there was domestic violence, they had been exposed to it repeatedly over the years, but had responded to it by doing what we call identifying with the aggressor. They had denied it, repressed it. They picked the stronger parent to identify with. In Knock v. Knock,166 we showed that the nine-year-old girl who wanted to be with the father and who was doing perfectly well in school had been exposed to extreme domestic violence over an extended period and that she had a "healthy" reaction. We won, despite the fact that several Yale psychiatrists testified that the father was not ill. So, you see how very complicated these cases can be for traditional forensics.

JUDGE SILBERMANN: You have been patient. Yes?

AUDIENCE: My question relates to this issue, and your answer is a good preface to it. This is a question for how law guardians and forensic evaluators should be questioning children in these situations in regard to the issue of recovered memory and implanted memory. My question is for Ms. Weinberger and Ms. Law, and then if Dr. Stark would comment on suggestions he would have for ways of dealing with this: What kind of training and interviewing techniques are you doing, and what would you suggest to supplement that?

MS. WEINBERGER: I will tell you what we have done in our Department. We have had various mental health experts. The

---

166. 621 A.2d 267 (Conn. 1993).
chief child psychologists at North Shore Hospital and LIJ have lectured, and we have had other experts in the City, including the head of the Mental Health Clinic of the New York City Family Court who spoke about the problems, what to look for, what does not seem to be apparent, identifying with the aggressor. These are clearly concepts that before this training none of us knew. Certainly I include myself with that as well. We sat there and heard the most amazing things.

But it is a question really of reinforcing it and doing it more often and having this training ongoing for all the departments and all the counties and all the law guardians and all the assigned counsel. As I said, our lawyers are representing these victims, not just the children, and there is just a lot that has to be done.

It is different from anything we have ever done before. We started to teach the law and then, when the law was changed in 1994 and we started to do training on it, what we did was we were training on the law, we were training on the Family Violence Protection Act of 1994.

We met with some of the groups that sponsored this program today, and they said to me, “Harriet, you are missing something. Your guys now understand the law, they now know they can come in and ask for support orders as well and orders of protection, but I do not think you really understand the functions and the dynamics of domestic violence.”

That is what we have tried to do. And certainly, we are hopeful that there will be suggestions.

MR. STARK: What Betty was saying I think was very wise. She was saying it in a nice way. She was saying, “Look, this is not about best interest; this is about justice.” That is why sometimes it is better to have a judge, even a foolish judge, make a decision than it is to bring in a law guardian who is going to be overly dependent upon a forensic report that is based on a mental health model. We are often dealing with a social dilemma to which mental health adaptations are made and sometimes it is better to keep mental health experts in the wings.

I have a client who is a softball player. She pitches for a championship team that has not lost in fifteen years. Her boyfriend comes out on the field when he is upset because she has looked at a man in the crowd or she has done something else he does not like, and he says to her, “Darling, you are cold, here’s your sweatshirt.” She breaks out in a rash and she cannot pitch after that, though normally one of the greatest pitchers in the county.
Looked at from a forensic standpoint, nothing has happened. In fact, people think he is a gentle and caring man. But in the context of the battering, when he gives her the sweatshirt he is saying to her, “You are going to need this sweatshirt to cover your arms tonight when I am finished with you.” The terror and injustice are the same whether he hits her that night or not. But forensic evaluators would have no idea what is going on in that situation, and no psychologist is going to figure that out.

I have another woman lying in Bellevue. Every time she wakes up, she says her husband is trying to take her money from her, but she lives on Park Avenue. The psychiatrist writes down that she is persevering. In other words, he looks at her as just repeating the same story again and again, so he gives her more and more medication. She keeps saying, “Just call, find out.”

What we need is a very different kind of evaluation than traditional forensics can provide. When you are dealing with power and control, you are not dealing with psychological dysfunction in the traditional sense. And if you focus on the psychological dysfunction and then try to look back through that prism to understand the much more complex situation, you will not see it.

So what we do is we do an assessment where we look at isolation and control in great detail; we look at relations to friends, how they are controlled, and stuff like that; intimidation in great detail; control — everything from money and food to coming and going, to shopping and stuff. But 99.9 percent of the time, even if we tell people these stories, they will not believe until they hear it themselves through intensive interviewing, it has taken us years of experience to understand what is going on in the microdynamics in these families.

This is what puts the kids at risk. It is not merely that the kids are screamed at or beaten, not that they are witnessing terrible violence, though they may be, but that they are living in an atmosphere of such total control that the space it takes for individuality to emerge is not available. In other words, they cannot breathe free air. And how does a traditional forensic evaluation see that?

MS. DOMONKOS: Thanks to Judge Silbermann and our wonderful panelists. This is the end of the conference. Thanks so much. We will see you next year.
Juliette is a twenty-one year old woman with an eighteen month old baby, Amy. Juliette is Serbo-Croatian and joined her family in the United States when she was nineteen. She is profoundly hard of hearing and although she is able to speak, her speech is not always intelligible. Juliette entered into an arranged marriage shortly after arriving in the U.S. She lives with her husband, Neil, who is the father of the baby. Amy was born with a congenital heart defect. She needs to see a pediatric cardiologist every three months. Neil takes them both to the doctor because he does not like to give Juliette money to pay for anything besides food. Neil constantly belittles Juliette about her disability. He does not allow her to attend special job training programs, telling her she will never be able to get a real job anyway. Although he sponsored her residency, Neil continually threatens that he will not go with her to her interview with the Immigration and Naturalization Services.

On several occasions, the verbal and emotional abuse escalated to physical violence. Once, Neil punched Juliette in the face, knocking a tooth out. In her country, women would not dare call the police. Juliette called her mother who immediately came over and helped Juliette put ice on her mouth. Her mother told her she should try to make the marriage work; her parents could not afford to take care of Juliette any longer. Her uncles who arranged the marriage would be very upset if they found out Neil was abusive.

Several months later, when Juliette was pregnant, she and Neil were fighting. Neil kicked her several times in the stomach and threatened her with a knife, saying he never wanted children, especially "immigrant deaf" children. Juliette was afraid for her unborn child – this time she called the police. Juliette had bruises on her side but the police did not take pictures. A neighbor heard Juliette screaming for Neil to stop, that he was going to hurt the baby. The police arrested Neil who was held in jail overnight and released the next day. Juliette knew she could not get a job and wanted her baby to have a father. She thought that if she pressed charges Neil would remain in prison forever; she did not want that. Neil was given an adjournment contemplating dismissal ("ACD") and Juliette was issued a one year order of protection. No statement was taken from the neighbor.
Juliette was still afraid of Neil after this incident. She also became very depressed, especially immediately after giving birth. She refused to go with Neil for several of Amy’s doctor appointments – and she never let Amy go with him alone. Recently, Neil pushed Juliette to the ground while she was holding the baby. Juliette broke her nose and Amy had a bruise under her eye. When she tried to get up he kicked her legs and pulled her hair and threw her to the ground again. Neil then grabbed the baby. Juliette rushed into the bedroom, where Neil had taken the baby, to see if the child was all right. The baby was screaming hysterically for her mama; Juliette worried about her heart. She tried to comfort Amy but Neil kept pushing her away.

While trying to get the baby, Juliette scratched Neil’s face. When Neil saw all the blood gushing from Juliette’s nose he feared she might call the police again, so he called the police first. Even though Juliette’s nose was swollen, red and still bloody, the police only spoke with Neil. Juliette was so upset all she could do was cry and hold onto Amy. The police arrested both Neil and Juliette. They were not able to get a statement from Juliette because there was no interpreter. The domestic violence police officer felt bad for Juliette and let Juliette’s mother take the baby. He explained that he would lose his job if he did not arrest Juliette even though her order of protection was still in effect from the last incident. Juliette was held in jail overnight. Neil was charged with felony contempt, attempted assault and harassment. Juliette was charged with attempted assault and harassment. At the arraignment, mutual temporary orders of protection were issued. Both parents were assigned counsel, but Juliette only had a few minutes before her case was called to meet her lawyer and was not able to communicate with her.

When her mother picked her up after the arraignment, she took Juliette to St. Luke’s Hospital. Juliette’s injuries were drawn on a body diagram as part of the hospital record. She spoke with a domestic violence social worker who noted the history of domestic violence and that Juliette had a safe place to stay. The social worker suggested Juliette go to family court.

For several days Juliette was so depressed she did not go out. About a week later she was able to go to family court to file for an order of protection and custody. When she got to court, Juliette noticed a table offering services to victims of domestic violence. She approached the Courtroom Advocates Program (“CAP”) where a law student advocate took the time to sit and listen to
Juliette. Together they filled out the information sheet for Juliette to bring into the petition room. The advocate explained the differences between family and criminal court, including the different remedies available to her in family court, like temporary child support. When she was ready to file the petition, the petition clerk informed her that Neil had already filed family offense and custody petitions. There was a temporary order of protection issued against her. This was the first Juliette heard of this.

The CAP advocate went into the courtroom with Juliette. The CAP advocate informed the Judge about Neil’s prior criminal case and the ACD, which was still in effect. The judge had no information about the criminal court case itself but the order of protection came up in the Order of Protection Registry. After reviewing Juliette’s allegations, the family court judge issued a temporary order of protection and temporary custody to Juliette. The judge also directed the Administration for Children’s Services (“ACS”) to investigate because Amy was present during the incident. Juliette never reported the injury to Amy’s eye. Juliette’s application for temporary child support was denied and she was told she would have to come back to court another day to file a separate petition for child support.

After intake, the advocate referred Juliette to one of the legal service agencies who supervise CAP so Juliette could get a lawyer as soon as possible. She also referred her to a social services program equipped with special services for the disabled. The law student advocate called her criminal court lawyer and advised her of the history of violence and that Juliette had hospital and police records. They decided it was all right for the student to call the Assistant District Attorney and provide them with the hospital records too.

Two weeks after Juliette appeared in family court, the ACS worker came to investigate. Juliette tried to tell her about the lengthy history of violence Neil perpetrated against her. The ACS worker asked a lot of questions about the scratches on Neil’s face and Juliette’s arrest. She also asked about whether Juliette was able to take care of the child’s heart condition given that she was deaf. Juliette was too afraid to tell the worker about Amy’s eye. The next day the worker came back with the police and removed the baby. A neglect petition was filed against Juliette for “engaging in domestic violence, failing to protect the child and medical neglect.”
There is now a child protective case against Juliette in family court, as well as cross family offense and custody cases, in addition to the cross complaints in criminal court.
THE ROLE OF THE LAW GUARDIAN IN A CUSTODY CASE INVOLVING DOMESTIC VIOLENCE

Nancy S. Erickson*

INTRODUCTION

A law guardian for a child has an extremely difficult job, one that arguably requires a higher degree of diligence than that of an attorney representing a competent adult. Yet, under New York law, the role of the law guardian for a child involved in a custody case is not clearly defined.

When domestic violence is involved, the law guardian's role becomes crucial. As Judge Marjory Fields stated in 1994:

A law guardian may help provide protection for the child by countering the tendency of battered women when they testify to minimize the violence committed against them. The law guardian can present the child's wishes to the court. Finally, the law guardian will have greater credibility with the court when presenting evidence of the impact of the violence on the child, and the child's fears of the violent father.¹

The role of the law guardian for the child in a custody case involving domestic violence has been expanded as a result of the enactment of chapter 85 of the 1996 Laws of New York ("Chapter 85"),² which requires that judges in child custody cases consider domestic violence when determining the best interests of the child.

This article will outline the statutes, cases and rules governing law guardians in New York and will discuss how Chapter 85 affects the law guardian's role.

* J.D. Brooklyn Law School; LL.M., Yale Law School. The author was a professor of law for many years and has written several books and many articles on family law, including child support, custody, marital property, domestic violence and adoption. She is currently a solo practitioner concentrating in matrimonial and family law and is employed as a Senior Trial Attorney by Legal Services for New York, Brooklyn Branch. The views expressed in this article are solely the views of the author and do not necessarily reflect the positions or policies of Legal Services for New York.

I. NEW YORK STATUTES, CASES AND RULES GOVERNING LAW GUARDIANS

A. Definition of “Law Guardian”

Section 241 of the Family Court Act ("FCA") declares that “minors who are the subject of family court proceedings . . . should be represented by counsel of their own choosing or by law guardians.”

Some children who appear before the family court have “counsel of their own choosing” either because their parents or others pay for the lawyer or because the attorney volunteers. This is not usually the case, however, and courts often must appoint a law guardian for the child pursuant to the provisions of the FCA.

It is clear what a law guardian is not: a law guardian is not a guardian ad litem, a forensics expert, a social worker or a finder of fact. A law guardian is an attorney for a child, but the law guardian’s role may be different from the role of an attorney for an adult.

Many attorneys, parents and even judges do not understand the role of a law guardian. There is a longer history of law guardians in the family court than in the supreme court, so it is not surprising that supreme court judges and practitioners more often misunderstand the role of a law guardian. It has even been remarked by more than one matrimonial attorney that some supreme court judges view the law guardian’s role as akin to that of an assistant to the judge. Although the law guardian can, of course, be of assistance to the judge (as can forensics experts and social workers), this is an inaccurate view of the law guardian’s role.

Recognizing the difficulty of defining the law guardian’s role, Justice Lewis R. Friedman stated in 1994 that “[t]oday law guardians are essential to the functioning of the family court and serve vital roles in all types of cases in that court and in supreme court

4. Id. § 249 Practice Commentaries at 246 (McKinney 1999).
5. A guardian ad litem (“for the case”) is a person, often but not necessarily a lawyer, appointed by the court to represent the interests of an infant or an incompetent person. For a good explanation of the differences between guardians ad litem and law guardians, see N.Y. St. B. Ass’n Comm. on Professional Ethics, Ethics Opinion 656 (1993). In a particular case, it could be necessary for a child to have both a guardian ad litem and a law guardian. For example, when a child needs to be the plaintiff (petitioner) in a case and there is no parent capable of bringing the case on the child’s behalf, a guardian ad litem — perhaps a grandparent, aunt, uncle or other relative or friend — may be needed to act in that role; additionally, a law guardian may be necessary to act as the child’s attorney.
matrimonial and custody cases. Yet, there is, and has been, no clear definition of the role of a law guardian."

Judge Friedman reviewed the history of the use of “law guardians” to represent children in various types of proceedings, pointing out that, “There is consensus in the legal community that there is an essential duality of the law guardian’s role — defense attorney [advocate for the child’s position] and guardian [to act in the best interests of the child]."

He noted that although the legislature amended the FCA in 1970, the statutory definition of the role of the law guardian is still not particularly helpful. Section 241 of the FCA merely states that the law guardian is needed as “counsel to help protect [children’s] interests and to help them express their wishes to the court.”

This statutory definition does not assist the law guardian to determine which of his/her roles should prevail — the role of advocate or the role of guardian. In other words, the law guardian needs to know whether he or she should argue for the result the child wishes or the result the law guardian believes would be in the child’s best interests.

In his Practice Commentaries on section 241 of the FCA, Douglas J. Besharov states: “The convoluted wording of this section reflects: (1) the underlying ambivalence of its drafters about the role of Law Guardians, and (2) the problems inherent in establishing guidelines for the representation of young people of varying degrees of maturity.”

As a practical matter, when a child is very young, the law guardian cannot determine the child’s wishes. Conversely, the law guardian would have a difficult time arguing against the result an older teenager would want. However, most children are “in-between” — they can articulate their wishes to a certain extent, but the law guardian may agree or disagree as to whether the child’s desired outcome would be in the child’s best interests.

To solve such problems of ambiguity, a more useful definition of the role of the law guardian is needed than the definition in section 241 of the FCA, and attempts are being made to develop such a definition. There is now a Statewide Law Guardian Advisory Committee (“LGAC”), chaired by Justice Edward O. Spain of the

7. Id. at 1015.
8. See id.
10. Id. Practice Commentaries at 218.
Appellate Division, Third Department, which was established in 1996 by the Office of Court Administration and meets periodically to deal with issues relating to law guardians. The work of the LGAC should lead to greater uniformity throughout the state with regard to law guardians. In fact, the LGAC has already made one recommendation for legislation that deals with payment of fees for law guardians.  

The LGAC has developed the following working definition of the role of the law guardian:

The law guardian is the attorney for the child. In juvenile delinquency and persons in need of supervision proceedings, it is the responsibility of the law guardian to vigorously defend the child. In other types of proceedings, it is the responsibility of the law guardian to diligently advocate the child's position in the litigation. In ascertaining that position, the law guardian must consult with and advise the child to the extent and in a manner consistent with the child's capacities. If the child is capable of knowing, voluntary and considered judgment, the law guardian should be directed by the wishes of the child, even if the law guardian believes that what the child wants is not in the child's best interests. However, when the law guardian is convinced either that the child lacks the capacity for knowing, voluntary and considered judgment or that following the child's wishes is likely to result in a risk of physical or emotional harm to the child, the law guardian would be justified in taking a position that is contrary to the child's wishes. In these circumstances, the law guardian should report the child's articulated wishes to the court if the child wants the law guardian to do so, notwithstanding the law guardian's position.

This definition of the law guardian's role expresses the inherent duality of the child's desires versus the child's best interests, but adds an additional factor that would weigh against advocating for what the child articulates as her/his desires: the likelihood that harm would result.

---

11. S. 7397, 221st Reg. Sess. (N.Y. 1998) (dealing with payment of law guardian fees by parents). The low fees paid to law guardians is a barrier to recruitment of a sufficient number of well-trained attorneys to represent children.

12. LAW GUARDIAN PROGRAM ADMINISTRATIVE HANDBOOK 2-3 (emphasis added). To contact the LGAC, write to Associate Justice Edward O. Spain, Appellate Division, Third Department, 61 State Street, Troy, New York 12180.
B. The Law Guardian’s Role In Private Custody Cases Pursuant to Statutes and Court Rules

There is a dearth of statutory and regulatory authority relating to law guardians. The courts have found it necessary to fill in the legislative and regulatory blanks by a great deal of judicial interpretation. This judicial interpretation will undoubtedly be accelerated by the declaration of Chief Justice Judith Kaye that a law guardian should be appointed in any case involving the custody of a child.\(^\text{13}\)

1. In Divorce Cases

The Domestic Relations Law does not deal with law guardians; the statutes relating to law guardians are in the FCA instead, and most are applicable in divorce and other matrimonial actions.\(^\text{14}\)

The Matrimonial Rules, however, do specifically refer to law guardians in paragraph (f) of Section 202.16 of the Uniform Rules for Trial Courts. Paragraph (f) deals with Preliminary Conferences: “At the close of the conference . . . [t]he court may appoint a law guardian for the infant children, or may direct the parties to file with the court, within 30 days of the conference, a list of suitable law guardians for selection by the court.”\(^\text{15}\) This implies that early appointment of a law guardian in a divorce case is valuable.

2. In Family Court Cases

Non-marital children,\(^\text{16}\) of course, are not affected by the Matrimonial Rules. Their parents usually go to family court to determine custody and visitation disputes.\(^\text{17}\)

Married parents can also seek judicial intervention in the family court and tend to do so in many situations. For example, when emergency relief is needed, the family court can grant such relief on the same day when application for relief is made. Additionally, because family court has no filing fees and tends to be more “user friendly” to litigants without attorneys, married parents sometimes go to family court when private counsel is unaffordable.


\(^{16}\) Non-marital children are those of parents who are not married. For further discussion, see infra note 18.

\(^{17}\) But see Allen v. Farrow, N.Y. L.J., June 8, 1993, at 1, 22 (App. Div. June 8, 1993). Woody Allen and Mia Farrow were never married, but Allen was the father of one of Farrow’s children and adopted another child of Farrow. The custody battle over their children was brought in supreme court.
Once paternity is established, the FCA makes no distinction between marital and non-marital children with regard to custody and visitation. This may mislead law guardians and others to believe that the general practices regarding marital children should be routinely and uncritically applied to non-marital children when to do so may not be in the best interests of those children.\(^\text{18}\)

The Matrimonial Rules are not applicable in family court even when the parents are married, so there is no requirement of a Preliminary Conference in family court (although many family court judges do treat the first court appearance as a preliminary conference). There is also no statute or regulation directing exactly at what point in the course of a family court proceeding a law guardian should be appointed. If early appointment is valuable for marital children, it should be equally — if not more — valuable for non-marital children.

Certain provisions concerning law guardians are contained in Part 1 of Article 2 of the FCA. Section 241 of the FCA sets forth the legislative findings and purpose;\(^\text{19}\) section 242 defines "law guardian" as "an attorney admitted to practice law in the state of New York and designated under this part to represent minors pursuant to [FCA section 249]."\(^\text{20}\) Sections 243 and 244 describe the process by which the Office of Court Administration or an Appellate Division may designate a legal aid society, an individual attorney or a panel of attorneys to act as law guardians and the duration of such designation.\(^\text{21}\) Sections 245 and 248 deal with compensation of law guardians and state appropriations therefor.\(^\text{22}\)

Section 249 specifies when appointment of a law guardian is mandatory and when it is discretionary. Law guardians must be appointed in all child protective, juvenile delinquency and person in need of supervision proceedings, among others.

---

18. For example, the non-marital child may not even know his or her father — he might be a total stranger. Then it cannot be assumed that unsupervised visitation will not be traumatic to the child. There are other concerns as well. See, e.g., Nancy S. Erickson, Custody of Non-Marital Children, 14 Women's Advoc. 1, 6-7, 11 (May 1993). With regard to domestic violence, the mother may have done the right thing — she may have acted quickly to terminate the relationship with the father when he abused her. Consequently, she may never have lived with him or may have lived with him only briefly, so she may not have enough evidence of abuse to convince the court that he might be dangerous to the child.


20. Id. § 242.

21. See id. §§ 243-244.

22. See id. §§ 245, 248.
In cases where appointment is not mandatory, including custody cases between parents, Section 249 indicates that "the court may appoint a law guardian to represent the child, when, in the opinion of the . . . judge, such representation will serve the purposes of this act, if independent legal counsel is not available to the child."23

C. The State Bar Association's Law Guardian Representation Standards

The appointment of law guardians to represent children in court proceedings was statutorily authorized in 1962. By the 1980's, the New York State Bar Association (the "NYSBA") concluded that "standards . . . are needed to guide and assist law guardians in fulfilling their essential obligations."24 In 1988, the NYSBA adopted and published law guardian standards for delinquency, PINS and child protective cases. In 1994, standards for private custody or visitation disputes were promulgated ("Standards" or "NYSBA Standards").25

These Standards have not been enacted into law or officially adopted by any Appellate Division as part of its rules; however, three out of the four Departments use the Standards informally and provide them to lawyers who take their law guardian training programs. The Fourth Department developed its own "Guidelines" prior to the NYSBA Standards.26 There are some significant differences between the Fourth Department Guidelines and the NYSBA Standards, perhaps necessitating a careful review of these documents by an appropriate body and development of uniform statewide standards for law guardians.

The NYSBA Standards should be studied by any attorney who accepts assignment as a child's law guardian and by any attorney who takes part in a court proceeding in which a law guardian has been assigned. Like the Code of Professional Responsibility,27 the Standards contain short "standards," and also more lengthy "com-

23. Id. § 249.
24. N.Y. ST. B. ASS'N, LAW GUARDIAN REPRESENTATION STANDARDS, 2 CUSTODY CASES 1 (1994) [hereinafter LAW GUARDIAN STANDARDS].
25. See id.
26. The Fourth Department used many of the same sources as the drafters of the Law Guardian Standards, and that Department uses its own standards in its law guardian training. Its standards are entitled: "Guidelines for Law Guardians in the Fourth Department" (Jan. 1987) (for Abuse and Neglect, Foster Care, Termination of Parental Rights, PINS, and J.D.S), "Guidelines for Counsel for the Child in Custody and Visitation Proceedings" (Apr. 21, 1992) and "Appeals Guidelines for Law Guardians" (Nov. 9, 1993).
27. See N.Y. CODE OF PROFESSIONAL RESPONSIBILITY (1994).
The thrust of the Standards seems to encourage law guardians to focus on the fact that their role is the role of an attorney, no matter what the judge, the parties or any agency or other person believes that law guardian's role is or should be.

For example, Standard B-6 states: "The law guardian should not submit any pre-trial report to the Court, but may submit legal papers and argue orally based on the evidence." The Commentary to Standard B-6 states, in part:

In some cases, a law guardian has been requested by the Court to submit a separate pre-trial report and recommendations, or the attorney has elected to submit such a report. . . . The preparation and submission of such a report is inconsistent with the purpose and role of an attorney. The law guardian is not a social worker or a probation investigator. . . . Further, a law guardian who submits a report and recommendation opens the possibility that he will or should be called as a witness [which is] incompatible with legal representation.

D. Caselaw Interpreting the Role of the Law Guardian

Since 1962, interpretation of the role of the law guardian has been developing in case law. Most case law deals with compensation of law guardians and various aspects of the law guardian's role as an attorney in proceedings, such as the law guardian's participation in the case and the application of attorney-client privilege.

Another issue addressed in court opinions is the weight to be given to the recommendations of both the law guardian and the forensic evaluator. In two highly publicized (and highly criticized) cases, Rentschler and Renee B., the First Department chastised the trial courts for failing to follow the recommendations of the court-ordered forensic evaluator.

However, the court may not abdicate to either the law guardian or the forensic expert the court's own responsibility for deciding the case. The court may and should decide a case contrary to the

29. Id. at Standard B-6, commentary.
30. Id.
31. The role of the law guardian has also been analyzed in various legal publications. See, e.g., Joel Brandes, Compensation of Law Guardians, N.Y. L.J., July 28, 1998, at 3 (analyzing the role of the law guardian).
34. See supra notes 32-33.
positions expressed by a law guardian or forensic expert if the evidence convinces the court that the law guardian’s position is not the position best supported by the evidence.\footnote{35}{See Chait v. Chait, 638 N.Y.S.2d 426 (App. Div. 1995).}

**E. Who Can Be a Law Guardian?**

Theoretically, any attorney could assume the role of a law guardian in a custody case. However, as a practical matter, because many parents can barely afford to pay their own attorneys’ fees, much less the fees for attorneys for their children, many children need to be assigned counsel. As discussed above, when a law guardian is assigned under such circumstances, the law guardian is paid by the State, pursuant to section 245 of the FCA.\footnote{36}{See \text{N.Y. \text{FAM. CT. ACT \$ 245 (McKinney 1999).}}}

It is unclear whether courts have the authority to direct a parent to pay the fees of a law guardian. However, since the adoption of the matrimonial rules, many more supreme court judges have been appointing law guardians in custody cases than in the past. Quite often, judges direct one or both of the parties to pay the law guardian’s fees. The law guardian in such cases usually bills her/his time by the hour, and the court directs the parents to share the fees on some pro rata basis set by the court; e.g., sixty percent by the mother and forty percent by the father, fifty/fifty or some other split.

Some experts take the position that since neither the matrimonial rules nor the Domestic Relations Law provides for the payment of the law guardian’s fees, “legislation is needed to authorize such awards.”\footnote{37}{Brandes, \textit{supra} note 31, at 3. \textit{See also supra} note 11 for a bill that would accomplish that result.} Nevertheless, judges continue to make such orders.

**F. Training of Law Guardians**

Aiding in the administrative issues inherent in the appointment process, each judicial department has a law guardian program.\footnote{38}{The directors of the four programs are as follows: Katherine Law, Esq., Appellate Division, First Department, 27 Madison Avenue, New York, New York 10010 (212-779-7880); Harriet Weinberger, Esq., Appellate Division, Second Department, 45 Monroe Pl, Brooklyn, New York 11201 (718-875-1300 x202); John E. Carter, Jr., Appellate Division, Third Department, P.O. Box 7288, Capitol Station, Albany, New York 12224 (518-486-4567); and Tracy M. Hamilton, Appellate Division, Fourth Department, 50 East Avenue, Suite 403, Rochester, New York 14604 (716-530-3170).}
Because there are very few statutes and rules governing law guardians, the director of each law guardian program has a great deal of leeway in setting up the program and administering it, within the broad guidelines of the provisions of the FCA and the applicable rules.

Law guardian training is usually done on a Departmental basis. In the more populous departments, the counties often have their own training as well. The lengths of the training programs and their contents vary significantly among departments, with the Third Department having at this time the most extensive and structured program.

Domestic violence issues are usually not covered in the basic training materials, but that subject is often handled by means of special seminars and meetings for law guardians. For example, in October 1998 the Nassau County Law Guardian Advisory Committee and the Appellate Division, Second Judicial Department, sponsored a seminar on Domestic Violence for members of the Nassau County Law Guardian Panel. Speakers addressed such topics as relevant legislation (including Chapter 85 of the Laws of 1996), the traumatic psychological impact of domestic violence on children, interviewing techniques for law guardians, the dynamics of domestic violence and coercive control, battered women’s shelters and their services for children, and other community resources.

Special seminars, however, may not be sufficient. Uniform domestic violence training is necessary in all departments. Careful review of the training materials for law guardians to assure coverage of domestic violence is called for so that law guardians understand the history, interpretation and impact of Chapter 85 and the problem of domestic violence more generally.

II. Chapter 85 of the Laws of 1996 and Its Effect on the Role of the Law Guardian

A. Chapter 85: Language, History and Purpose

New York State recently joined the overwhelming majority of states that recognize the need to protect children against spouse/partner abusers. Legislation ensuring that judges in child custody and visitation cases consider domestic violence when determining

39. “[A]t least 38 states and the District of Columbia have laws making domestic violence a relevant factor in custody decisions by the courts.” Legislative Memorandum in Support of Chapter 85 [hereinafter “MIS”]. Since that time, several other states have also required courts to consider domestic violence in custody determinations.
the best interests of a child was sponsored by Representative He-
lene Weinstein and Senator Stephen Saland and was enacted into
law as Chapter 85.\textsuperscript{40}

1. \textit{The Language of Chapter 85}

Chapter 85 amends section 240(2) of the Domestic Relations
Law by adding the following language:

Where either party to an action concerning custody of or a right
to visitation with a child alleges in a sworn petition or complaint
that the other party has committed an act of domestic violence
against the party making the allegation or a family or household
member of either party, as such family or household member is
defined in article eight of the family court act, and such allega-
tions are proven by a preponderance of the evidence, the court
must consider the effect of such domestic violence upon the best
interests of the child, together with such other facts and circum-
stances as the court deems relevant in making a direction pursu-
ant to this section.\textsuperscript{41}

Chapter 85 also amends the FCA to make this same language ap-
licable in family court custody and visitation proceedings.

2. \textit{History and Purpose of Chapter 85}

Laws enacted in many other states similar to Chapter 85 create a
presumption against custody to the batterer and require the bat-
terer to prove he is not a danger before unsupervised visitation
may be ordered. Congress, the American Bar Association and the
National Council of Juvenile and Family Court Judges have all rec-
ommended this type of law.\textsuperscript{42}

\textsuperscript{40} See 1996 N.Y. Laws ch. 85.

\textsuperscript{41} Id. (emphasis added). It should be noted that the allegations of domestic vio-

lence need to be proven only by a preponderance of the evidence. Therefore, it is not

necessary to bring a criminal charge against the abuser, and the standard used by the

family court or supreme court is simply the ordinary civil standard. This matter may

seem too rudimentary to require discussion; however, some judges seem to be looking

for a higher standard of proof — such as clear and convincing proof or even that

beyond a reasonable doubt — before they will make a finding of domestic violence.

It is not necessary for the victim to meet such a high standard, and a court cannot

properly require her to do so. It should also be noted that the perpetrators of domes-

tic violence can be female and the victims can be male. However, since the National

Institute of Justice reports that 95\% of victims are female and 95\% of perpetrators

are male, we will use "she" to refer to the victim and "he" to refer to the perpetrator.

\textsuperscript{42} See H.R. Cong. Res. 172, 101st Cong. (1990); ABA, THE IMPACT OF DOMESTIC

VIOLENCE ON CHILDREN (1994); NATIONAL COUNCIL OF JUV. & FAM. CT. JUDGES,

Although Chapter 85 is weaker than those laws, it will provide valuable guidance to judges in child custody cases, cautioning them that custody to a spouse abuser is rarely in the best interests of the child, and that limitations on visitation may be necessary to protect both the child and the abused parent.

Some judges may still look at spouse abuse in a very dangerous manner, expressing this simplistic view: “He hit her, but he never hit the kids, so the domestic violence should have nothing to do with the custody case.” Judges, attorneys (including law guardians), and even forensic evaluators may fail to recognize the many forms that domestic violence can take, apart from any physical assaults on the body of the victim.

B. The Effects of Domestic Violence

Domestic violence is a “pattern of coercive control,” which “comprises a pattern of assaultive and controlling behaviors, including physical, sexual, psychological, financial and/or emotional attacks on a member of an intimate relationship by her partner.” Thus, domestic violence may and sometimes does exist without any actual physical assaults. This is especially the case in recent years, when the general population has become more educated on the issue of domestic violence, so that abusers are aware that to avoid incarceration they must be careful not to actually hit their victims, especially in places where bruises will be obvious.

Those who would define domestic violence as limited to physical assault (or threats thereof) might conclude that if the perpetrator of domestic violence never hit the children, his violence toward his partner/victim should be ignored in a custody case. Decades of study and experience, however, strongly indicate that such ignorance is wrong. New York case law prior to Chapter 85 already indicated that domestic violence — especially when it is witnessed by the child — should be considered a significant factor in custody and visitation proceedings. Even then some judges held that

---


spousal abuse demonstrated that the abuser is "not a fit parent to whom the welfare of a child should be entrusted."  

1. *Harm to Children Who Witness Abuse or Reside in a Violent Home*

The legislative Memorandum in Support ("MIS") of the bill that became Chapter 85 of the Laws of 1996 points out:

Children who have witnessed their fathers beating their mothers have suffered from delayed development and sleep disturbances and feelings of fear, helplessness, depression, guilt and anxiety. Studies indicate that these children suffer somatic symptoms as well, with a higher incidence of colds, sore throats, hospitalizations and bedwetting than children from non-violent homes.  

Chapter 85 was intended to expand existing New York precedent "by acknowledging that children may also be harmed even when they do not actually witness the violence." The MIS indicates that the legislature based this conclusion on studies of how domestic violence affects children. "A child does not have to directly witness the attacks on a parent to suffer emotional trauma. Studies have indicated that children raised in a violent home have reactions of shock, fear and guilt. Such children also have impaired self-esteem and developmental and socialization difficulties."  

2. *Risk of Child Being Abused by the Abuser*

The legislature also recognized that children may be at increased risk of being abused themselves if custody is given to a parent who abused the other parent. Studies show that "a high correlation has been found between spouse abuse and child abuse."  

Even if there is no evidence that the spouse abuser has abused his children in the past, it is likely he will do so in the future, for at least two reasons. First, research has shown that once the victim-spouse is no longer available to the abuser, he often transfers his

---

46. MIS, supra note 39, at 3 (citations omitted).
47. Id. at 2.
48. Id. at 2-3 (citing Del Martin, Battered Wives chs. 6-7 (1976); Westra & Martin, Children of Battered Women, 10 Maternal-Child Nursing J. 41, 49 (1981)).
49. See, e.g., id. at 3 (emphasizing the spouse abuse-child abuse correlation).
50. Id. (citing Rosenbaum & O'Leary, Children: The Unintended Victims of Marital Violence, 51 Am. J. Orthopsychiatry 692 (1986); Lenore E. Walker, The Battered Woman Syndrome (1984)).
abuse to the children. Contrary to popular myth, abuse does not automatically end when the victim leaves the abuser. In fact, abuse often increases when the victim tries to escape from her abuser. Spousal abuse is not a matter of a partner suddenly getting angry and swinging; rather, an abusive partner is abusive because he wants to maintain control over the victim or victims. The abuser may use physical force and threats of physical force, but often also uses mental and emotional abuse or threats to attain the same goal.

If the victim leaves, the abuser experiences a loss of control that often triggers an attempt to regain control; most often, this leads to increased abuse. If the victim is protected from abuse, the perpetrator may transfer the abuse to the children, perhaps because they are identified with the victim.

A spouse abuser who never abused the children during the spousal abuse may abuse the children thereafter. The risk of abuse is greater for older children than for younger children. Thus, if the children are placed in the custody of the spouse abuser, every year that they get older increases the risk that they will be abused by him.

Courts must also be careful to protect children of spouse abusers even if the abuser does not get custody. The children may be endangered if the abuser has unsupervised visitation with the children.

3. Risk of Intergenerational Violence

Society at large is endangered if a battering parent is permitted to raise children. According to the MIS, "children who are raised in violent homes learn to use physical violence as an outlet for an-

51. See, e.g., Del Martin, Battered Wives 76-77 (rev. ed. 1981) (mentioning that an abuser may “strike out” at others in response to victim’s attempt to leave).
52. See id. at 76-79.
54. See id.
55. See MIS, supra note 39 (citing Hershey, Domestic Violence: Children Reared in Explosive Homes 9 (1982) (unpublished manuscript, on file with author)); see also Fields, supra note 1, at 222. According to one study, among children of battered women, 17.6% are abused in the under 3 year old age group; 37.5% were abused in the 3-5 year old group and 41.5% of children 6-11 were abused. See MIS, supra note 39, at 3.
ger and are more likely to use violence to resolve conflicts." One New York supreme court case emphasized that "a man who engages in the physical and emotional subjugation of a woman is a dangerous role model from whom children must be shielded."  

4. Manipulation of the Legal System

Abusers are usually conniving and manipulative. They can and will use any means available to them — including the legal system — in order to keep their victims in their power. Spouse abusers are also likely to be highly persuasive and even charming, as evidenced by the initial control they maintained over their spouse-victims. They will try to misuse the legal system with this charisma in an attempt to convince the judge, the law guardian, the forensics evaluator and all other court actors to look favorably upon them.

Spouse abusers are often even more effective at controlling their children than their spouses, because of the age and dependency of the children. Many children identify with the abuser and claim a preference to live with him, even though this would not be in their best interests. The children may identify with the abuser in the hope that doing so will best protect their mother, themselves or other siblings. Other times their identification stems from their internalization of the abuser's negative put-downs of their mother. In almost all of these situations, a custody award to the abuser will only further harm the child and increase the likelihood of inter-generational transmission of domestic violence.

Thus, abusers present serious difficulties to the legal system, which presumes that all persons are "innocent until proven guilty" and assumes that all litigants stand on the same footing. To mix metaphors, it is important to remember that the playing field is not

57. MIS, supra note 39, at 3 (citation omitted). Batterers themselves are likely to come from violent homes. See id. (citing Hilberman & Munson, Sixty Battered Women, 2 Victimology 460, 1337 (1978)). Furthermore, male children of violent parents are ten times more likely to beat their wives. See id. (citing Straus et al., Behind Closed Doors (1980)).


level where there has been domestic violence — the abuser is and has been the winner for a long time and the victim has been abused and intimidated.

The abuser is likely to be confident, assertive, calm and "in control." He puts on a good appearance in court. Conversely, the victim is likely to be frightened, shaken, nervous, uncertain and often depressed. Knowing that the abuser has successfully managed to manipulate others to maintain control, the victim realistically fears the abuser can also manipulate the legal system; consequently, the victim may appear paranoid when she is merely fearful that the abuser will again be successful in the manipulation of those around him. Judges, law guardians, attorneys, forensics evaluators and all other actors in the legal and social services system must be aware of this problem in order to stop the cycle of manipulation.

C. The Effects of Chapter 85 on the Law Guardian’s Role in Custody Cases

In all custody cases, whether or not domestic violence is involved, one of the functions of the law guardian, as the child’s attorney, is to investigate the facts of the case in order to determine what custody/visitation order would be in the best interests of the child. Even prior to the enactment of Chapter 85, some judges wisely urged law guardians to take a very active role in custody cases involving domestic violence. Chapter 85 emphasizes this message in order to prevent an abuser from manipulating the court into granting him custody when it would not be in the child’s best interests.

Many factors need to be taken into consideration in determining the best interests of a child. The Uniform Marriage and Divorce Act ("UMDA"), upon which many states’ laws are modeled, contains a list of factors that includes domestic violence as one of six

61. See, e.g., Saunders, supra note 53, at 53-54.
62. In Braiman v. Braiman, 407 N.Y.S.2d 449 (1978), which is well-known for its holding that joint custody is inappropriate where parents are “antagonistic and embattled,” there apparently was no law guardian for the three children. Id. at 449. The Court of Appeals, reversing and remanding for a new hearing, suggested that the trial court “may wish to consider appointing a qualified guardian ad litem for the children, who would be charged with the responsibility of close investigation and exploration of the truth on the issues and perhaps even of recommending by way of report alternative resolutions for the court to consider.” Id. at 452 (citations omitted) (emphasis added). The Court did not indicate why a guardian ad litem rather than a law guardian was being suggested. See id.
factors to be considered.64 The New York State Legislature has never before specified factors, but has left the task of deciding what is in the best interest of the child to the courts.65

In 1996, the legislature specified that there is one factor the courts must consider — domestic violence.66 If domestic violence is proven by a preponderance of the evidence, then the court must consider the effects of such domestic violence upon the best interests of the child.67

The legislative history of Chapter 85 indicates that domestic violence should be a "weighty" factor in the determination of child custody and visitation.68 The legislature did not specify exactly how much weight is to be placed on domestic violence as a factor in comparison with other factors. However, it is safe to say that the legislature considered domestic violence a very important factor, since it is the only factor specifically listed in the statute.

Chapter 85 has a profound impact on the role of the law guardian. However, the degree of impact can only be calculated when the duties of a law guardian are delineated. The most detailed description of the role and duties of the law guardian in New York State is found in Volume II of the NYSBA Standards.69 Although the Standards are not "law," they are relied upon to a great degree by each of the appellate division law guardian programs. The remainder of this article will review the duties of the law guardians as set forth in the Standards and will analyze the impact Chapter 85 may have on these duties.

The Standards are divided into four parts, dealing with the four stages of a custody case: Preliminary Stages, Pre-Trial, Trial and Post-Trial. This article will address the standards law guardians are expected to comply with at each stage.

1. Preliminary Stages

Part A of the Standards is devoted to the Preliminary Stages of the litigation and contains nine standards. Standard A-1 states,

---

64. One of the factors listed in the UMDA is "the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person, but witnessed by the child." Id.
67. See id.
68. See MIS, supra note 39, at 1.
69. See LAW GUARDIAN STANDARDS, supra note 24.
"The law guardian should obtain and examine every available relevant document."\(^{70}\)

In every case, according to the Commentary to A-1, the law guardian should obtain and examine all relevant court documents, including documents in "any prior cases involving the family."\(^{71}\) Thus, in a custody case where domestic violence is alleged, the law guardian should obtain and examine all court documents in any prior (or concurrent) family offense, divorce or paternity case, for example.

What if the only proceeding between the parties is a family offense proceeding — should a law guardian be appointed for the children? It is not yet routine for a law guardian to be appointed in a family offense proceeding. However, it should be routine, except in cases where a recent custody order to the victim already exists. If there is no custody order, or if the abuser has obtained custody, it is likely that a custody case will soon be commenced and perhaps a law guardian will be needed. The intent underlying Chapter 85, as evidenced by the legislative history, leads to the conclusion that a law guardian should be appointed for any family offense case where the family contains minor children, regardless of whether custody or visitation is an issue at that time.

Therefore, if there are concurrent family offense and custody proceedings, and a law guardian has been appointed to the latter, that law guardian should also be appointed for the family offense proceeding. If the court failed to take such action and the law guardian decided that he or she should attend or participate in any hearings in the family offense proceeding, the court should permit and encourage such involvement. Although it could be argued that the law guardian could simply await the outcome of the proceedings, or get the transcripts of the hearings, where the credibility of witnesses is concerned, there is no substitute for attending the hearings. Additionally, the law guardian's active participation could bring out facts that otherwise might not be uncovered.

Once the law guardian obtains the relevant documents, they must be carefully analyzed. Although some of the documents may be misleading, the law guardian should attempt to determine the true facts. An obvious example is a typical divorce judgment, which often indicates that the divorce was granted on a relatively

\(^{70}\) Id. at 5.
\(^{71}\) Id.
innocuous ground, such as constructive abandonment. This might lead the law guardian to assume that the divorce complaint, and counterclaims, if any, are superfluous. However, as many practicing attorneys know, domestic violence victims of severe abuse will often agree to grounds so as not to anger the abuser any further. Thus, the law guardian should look at the victim's original divorce complaint, which may often contain allegations of cruelty. These allegations are often the true facts in the case.

Standard A-2 states, "[t]he law guardian should interview and observe the child to ascertain the detailed facts relevant to custody, the child's wishes, the need for independent evaluations and the need for or appropriateness of interim judicial relief." The Commentary to Standard A-2 states, in part, as follows:

An initial client interview is of course crucial. The child's perceptions and factual descriptions concerning the role, relationship and specific activities of each parent . . . are critical to formulating a law guardian position and structuring a litigation strategy . . . . Of equal importance may be the child's knowledge and perceptions concerning intra-family relationships, such as conflicts between his or her parents[.] In truth, this standard simply compels the law guardian to perform for his/her client the same investigation that he or she would do for an adult client. Ideally, the attorneys for the parties should bring out all the facts, which would reduce the burden on the law guardian. However, perfection cannot be expected, particularly if one litigant is poor, traumatized by spousal abuse and fearful.

Standard A-3 states:

The child should be advised, in terms the child can understand, of the nature of the proceedings, the child's rights, the role and responsibilities of the law guardian, the attorney-client privilege, the court process, the possible consequences of the legal action, and how the child may contact the law guardian at any time during the course of the proceedings.

73. See Law Guardian Standards, supra note 24, at 6.
74. Id. (citation omitted) (emphasis added).
75. Id. at 8 (emphasis added).
76. Id. at 10.
The Commentary to Standard A-3 summarizes this canon by stating that: “The initial interview should not be a one-way street.”\textsuperscript{77} While the law guardian must obtain information from the child, the child must also obtain information from the law guardian. The Commentary recognizes that this may be a difficult task.\textsuperscript{78} It also stresses that the law guardian should attempt to help the child understand that the law guardian is available to the child by phone, mail or in person throughout the proceedings, which may last a long time.\textsuperscript{79}

Standard A-4 states, “The parents’ or other party’s attorneys should be advised of the role and responsibilities of the law guardian, including the law guardian’s legal standing in the proceedings, and the law guardian’s responsibilities to participate fully to protect the child’s interests and to express the child’s wishes.”\textsuperscript{80} This is an extremely important standard. Often attorneys do not understand that the law guardian, as the child’s attorney, must be served with all documents and has a right, as the Commentary to Standard A-4 indicates, to “participate in conferences, to introduce evidence, call witnesses, cross-examine other parties’ witnesses and to advocate” the position s/he deems appropriate for the particular child.\textsuperscript{81} Some attorneys view the law guardian as having a lesser role as a mere neutral observer. Others view the law guardian as assuming the role of a forensic examiner, therapist or social worker for the child, or a referee to hear and report to the judge. The Commentary indicates that the attorneys in a case must realize that the law guardian is “an attorney representing a party in interest.”\textsuperscript{82}

Attorneys sometimes find the law guardian’s role difficult to understand, especially in private custody cases, where they may assume that the best interests of the child will emerge and become apparent to the court from the advocacy of the two parents’ attorneys, and that the court will rule for one parent (sole custody with visitation to the other) or for both (some kind of joint custody). They tend to forget that the court could become convinced that neither parent is fit and recommend that charges be filed against them by child protective services.

\textsuperscript{77} Id.
\textsuperscript{78} See id.
\textsuperscript{79} See id.
\textsuperscript{80} Id. at 11.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
Similarly, the child could have wishes and needs that the parents fail to express or for which they fail to advocate. For example, as a result of being abused, a battered mother may be so depressed and frightened that she gives in to the abuser's demands for overnight visitations with the child, although the child may be expressing to the law guardian a fear of or lack of readiness for such overnight visits.

This is not to say that the child will always express his/her concerns to the law guardian. It is quite common in domestic violence cases, for example, that the child or children are so traumatized by the abuser or so much under his control that they do not feel safe speaking with anyone about their true feelings. Sometimes threats are made by the abuser that he will hurt or even kill the child, the mother or someone else who is dear to the child if the child reveals the truth to anyone. Thus, it often takes a good deal of patience, careful listening and analysis of all the available data in order for the law guardian to determine what position should be taken in order to protect the child's interests when the child may not be expressing his or her true wishes to anyone.

Standard A-5 states, "The child's present home and any proposed home should be visited by the law guardian." This standard is often ignored, especially in localities where a home visit might be inconvenient for the law guardian. Sometimes the law guardian relies on home visits by child protective services, probation or some other individual or agency worker. This reliance is unwise. The Commentary to Standard A-5 denominates the law guardian's home visit as an "important element in determining the child's interests and formulating a law guardian position," because

\[\text{the physical characteristics of the home may be ascertained and the child may be observed in his or her usual environment. Frequently, the parenting roles of the litigants may be clarified by carefully observing the home and by discussing with the child and with the parent the different aspects of the household.}\]

In a case involving domestic violence, the layout of the abuser's household may reveal the abuser's self-absorption and failure to relate to the child with respect and caring. For example, the abuser may arrange his household space in such a way that the child has very little space of his own — a bed in someone else's room, a part

83. Id. at 13.
84. Id.
85. Id.
of a closet in another room, and no space in which to do his homework or be involved in his own interests or activities. Other aspects of the household may indicate the abuser's typical need for control, such as restricting others' access to the telephone, to portions of the house and even sometimes to the refrigerator.

Standard A-6 states, "The law guardian should interview the parties and any other relevant person, including any one with relevant knowledge of the child or the parties, as well as any potential factual or expert witnesses." 86 The Commentary lists many persons who should be interviewed, in addition to the parents themselves: collateral relatives, school officials, child care personnel, mental health professionals and other potential witnesses. 87 The Commentary advises, "[i]nterviews may be of special importance in light of the limited discovery techniques customarily employed in custody cases." 88

In cases involving domestic violence, it is often surprising how many persons who might be expected to side with the abuser do not do so when contacted by a person who is concerned about the child. The abuser's parents, for example, sometimes are quite protective of their grandchildren even when to do so requires them to turn their backs on their own son. Siblings of the abuser who wish to distance themselves from him may acknowledge the violence he has demonstrated toward his wife and toward others.

On the other hand, those who wish to protect the abuser from being found out may appear truthful at first. They may simply deny the existence of any abuse or indeed of any household disputes at all. Under questioning, however, they may reveal their lack of candor in various ways, even if they continue to deny the abuse.

Standard A-7 states, "The law guardian should apply for appropriate court orders to protect the child or obtain temporary relief, determine visitation, and limit repeated or unnecessary interviews or evaluations." 89

Standard A-8 states, "The law guardian should participate whenever any party requests an interim court order which may affect the child." 90 These standards underscore the guardian's role as a "full

86. Id. at 14.
87. Id. at 15.
88. Id. at 14.
89. Id. at Standard A-7.
90. Id. at Standard A-8.
participant in the proceedings, assigned to represent the child's interests,” An example provided in the Commentary is that

[w]here child abuse is alleged in the course of a custody action, the law guardian should move quickly for independent evaluations and may need to apply to stay the custody action while the child protective service investigates abuse or neglect allegations. When appropriate, the law guardian should also determine the need for and immediately seek a protective order limiting visitation or contact between child and the alleged abuser.

A law guardian should be especially attuned to the possibility, in a case where one parent has abused the other, that the children may fear the abuser or that when the abusive parent can no longer abuse his spouse, he may transfer his abuse to the child.

Standard A-9 states, “When appropriate, independent court ordered evaluations or studies should be requested.” This Standard speaks for itself. According to the Commentary, independent evaluations could include “psychiatric, psychological, educational, medical, and social work evaluation....” Forensic evaluations in custody cases are quite often ordered by the court sua sponte. If the court does not do so, it might be appropriate for the law guardian to request evaluations.

Where domestic violence is an issue, it would be important for the law guardian to request that the evaluator have training and experience in the area of domestic violence. This would be to the benefit of both parents, because an evaluator with training and experience in domestic violence will be more capable of determining whether or not abuse took place, if so, what impact it had and will have in the future on the child, and what plans for parental contact with the child would be in the child’s best interests.

If the issue of domestic violence were ignored by the forensic evaluator, the evaluation would have little usefulness to the law guardian or to the court, and a second evaluation might be necessary. This would not be good for the child. As the Commentary to Standard A-8 states: “While evaluation may be necessary, the child should not be subjected to continuing rounds of visits with different experts. . . .” Thus, care should be taken to appoint a knowledgeable evaluator in the first instance.

91. Id. at 16.
92. Id. at 17.
93. See supra notes 47-57 and accompanying text.
95. Id. at 18.
An additional caveat is that the mental health of the victim may be damaged by the abuse, as discussed above. Therefore, the forensic evaluator and the attorneys should recognize this and should focus on her parenting abilities prior to the abuse and her potential for achieving a high level of parenting capacity after she is protected from the abusive partner.

2. Pre-Trial

Part B of the Standards deals with the pre-trial stage. The Standards emphasize the fact that the law guardian’s role is to be the child’s attorney, and that thorough preparation is as essential for the law guardian as for each of the attorneys for the two parents.

Standard B-1 states, “All available potential evidence should be obtained and analyzed, including discovery documents, financial statements, expert evaluations and witness statements.”96 This Standard is contrary to the way many law guardians now operate in terms of breadth of preparation. Many law guardians consider grounds for divorce and financial issues to be outside of their area of interest. However, both of these are relevant to the best interests of the child.

On grounds, the Commentary states:

If, for example, custody is one aspect of a divorce action based on alleged cruelty, the allegations and documents to support a fault divorce may well be relevant to the issue of parental fitness and best interests of the child (and false allegations may be as significant as valid charges).97

This Commentary is obviously very significant for cases involving domestic violence: it is likely that a batterer will be unfit for custody or at least less fit than the victimized parent. As discussed above, many states’ laws contain a presumption that custody not be awarded to a parent with a history of domestic violence, and both the American Bar Association and the Congress have recommended this type of law.98

Although New York’s law contains no such presumption, it does require the court to consider the effects of domestic violence on the best interests of the child. Thus, where domestic violence has been demonstrated by a preponderance of the evidence and the court

96. Id. at 16.
97. Id. at 19.
98. See supra note 42 and accompanying text.
nonetheless determines that custody should go to the abuser, the court would have to explain why.

Financial matters are also relevant to the custody issue. The Commentary states:

The required detailed financial statements, including the net worth statements, are crucial to determine the material needs of the child and may be important in determining a parent's motivation and sincerity.99

The Commentary's emphasis on motivation and sincerity is particularly important in domestic violence cases. Batterers' need for control often leads them to lie about, hide or obfuscate their true financial situations. One motive that often leads an abuser to try to gain custody of the children is to punish the victim of his abuse for leaving him, and he may view both depriving her of custody (and visitation, if possible) and depriving her of money (child support) as punishment that he wishes to mete out to her for her perceived sins against him.

Standard B-2 states, "The law guardian should develop a position and strategy in conjunction with the child concerning every relevant aspect of the proceedings."100

This Standard may be a surprise to many attorneys — even those who have been law guardians. Some law guardians view their role essentially as observers who will listen to both sides, will try to work out a compromise and then if settlement is not possible, will come to a conclusion as to the child's best interests at the end of the trial, at the same time as the judge.

This Standard makes it clear that the law guardian is an active participant, stating, "[T]he formulation of a comprehensive position and plan may be the paramount law guardian responsibility, for it represents the key to effective advocacy necessary to protect the youngster's interests."101

The Commentary cautions that the law guardian's position should not be set in stone at an early stage but "should be developed through an ongoing and extended attorney-client dialogue."102 Nor should the child ever "feel compelled to choose between parents."103 The child should be advised that neither the child nor the law guardian will make the ultimate decisions —

99. See Law Guardian Standards, supra note 24, at 19 (emphasis added).
100. Id. at Standard B-2.
101. Id. at 21 (emphasis added).
102. Id. at 22.
103. Id.
those decisions are for the judge, after considering all of the evidence, including the child's wishes.\textsuperscript{104}

Again the Commentary indicates that all aspects of the litigation relevant to the child (including financial) should be included in the law guardian's plan. Especially relevant to battered spouses is the Commentary's mention of possible needs for protective orders or "curtailed" visitation (e.g., supervised transfer of the child or supervised visitation).

Standard B-3 states that "[t]he law guardian should participate fully in pre-trial conferences and negotiations and should endeavor to resolve the case without the need for a trial."\textsuperscript{105} This Standard emphasizes the law guardian's active role and need to establish a plan. Although some law guardians adopt an inactive role by simply waiting for the parties to reach a settlement and then rubber-stamping an approval, this Standard clarifies that the law guardian's position as the child's attorney requires the law guardian to reject a settlement which would be deleterious to the child "even if both parties to the custody dispute agree."\textsuperscript{106} This recognizes that the parents may be so caught up in their own issues (or, in the case of a battered woman, so intimidated) that their settlement may be inappropriate for the child.

The commentaries also stress the weight that the law guardian's proposals may carry with the judge, a weight that should be justified by the work put into the case by the law guardian, not simply by the law guardian's status and position.\textsuperscript{107} For example, Standard B-4 states, "The law guardian should discuss the case periodically with the child."\textsuperscript{108} Additionally, Standard B-5 provides that, "[t]he law guardian should prepare thoroughly for trial."\textsuperscript{109}

These Standards carefully delineate the distinction between preparing a pre-trial report and advocating a position for the client:

A law guardian may of course advocate a position and discuss the relevant available evidence and facts at pre-trial conferences and negotiations . . . in making closing arguments, or in arguing a motion. . . . The law guardian, as an attorney, may also prepare and submit a post-trial memorandum summarizing and discussing the evidence in the record, making legal arguments, and advocating a disposition. . . . A post-trial memorandum, unlike a

\textsuperscript{104} See id. at 23.
\textsuperscript{105} Id. at Standard B-3.
\textsuperscript{106} Id. at 25 (emphasis added).
\textsuperscript{107} See, e.g., id. (noting that "great weight" may be accorded).
\textsuperscript{108} Id. at Standard B-4.
\textsuperscript{109} Id. at Standard B-5.
ROLE OF THE LAW GUARDIAN

pre-trial report, is based on testimony and other evidence found in the record.\textsuperscript{110}

Standards B-6 and B-7 further clarify the role of the law guardian. Standard B-6 states that “[t]he law guardian should not submit any pre-trial report to the Court, but may submit legal papers and argue orally based on the evidence.”\textsuperscript{111} Standard B-6 is an appropriate interpretation of the law guardian’s role but is a major deviation from common practice in some counties, where a law guardian is expected to submit a pre-trial report to the court. Standard B-7, which states that “[t]he law guardian should not engage in any ex parte communication with the Court,” also emphasizes the law guardian’s role as an attorney.\textsuperscript{112}

3. The Trial

Part C of the Standards deals with the trial aspect of the custody case. The Standards in Part C simply emphasize that the law guardian is an attorney, like any other attorney, with responsibilities toward his/her client.\textsuperscript{113} The only difference is that the law guardian is the attorney for a person under the legal disability of infancy. Standard C-1 is geared toward that difference.

According to Standard C-1, “[w]hen necessary, the law guardian should move for protective orders at the commencement of the trial.”\textsuperscript{114} Examples of such protective orders include a motion to protect the child from having to testify in open court and a motion to bar certain evidence of questionable relevance or validity that might be highly emotional.\textsuperscript{115}

The Commentaries also mention that “a party may be pressuring the child to take a position or to testify in a specific way; such harassment may be prohibited by a protective order.”\textsuperscript{116} This type of pressure and harassment by abusers is quite common in cases of domestic violence. It is unclear how a protective order could remedy this, especially where the abuser has temporary custody or sub-

\textsuperscript{110} Id. at 29 (citations omitted).
\textsuperscript{111} Id. at Standard B-6.
\textsuperscript{112} Id. at Standard B-7.
\textsuperscript{113} See id. at 30. Standards C-2 and C-3 will not be discussed herein. Standard C-2 states: “If appropriate, the law guardian should present a law guardian case, including independent evidence and witnesses.” Id. at Standard C-2. Standard C-3 provides: “The law guardian should be familiar with the relevant records, reports and evidence, insure that necessary witnesses testify and relevant material is subpoenaed and introduced into evidence, and cross-examine witnesses.” Id. at Standard C-3.
\textsuperscript{114} Id. at Standard C-1.
\textsuperscript{115} See id. at 30-31.
\textsuperscript{116} Id. at 31.
stantial access to the child. As is the case with spouse abuse, pressure and harassment by an abuser takes place mostly in the "privacy" (secrecy) of the home. The abuser takes great care to keep his conduct from being viewed by people who could testify against him and to isolate the child as much as possible from anyone to whom the child could — intentionally or inadvertently — reveal what occurs in the "privacy" of the home. Thus, the insistence of the Standards that the law guardian develop and maintain an ongoing, trusting relationship with the child, rather than speaking with the child once or twice, is extremely important.

Standard C-4 states that "[t]he law guardian should deliver a summation, and prepare any necessary memoranda of law." Standard C-4 and the Commentaries to C-4, like many of the other Standards, may surprise attorneys who have not previously analyzed the Standards or dealt with law guardians who take an active role in their cases.

There is sometimes an assumption that the law guardian will simply provide a general articulation of the desired outcome of the custody/visitation portion of the case, leaving it to the attorneys for the parents to go into detail and to handle the other aspects of the case. Standard C-4 and its Commentaries make it clear that the law guardian is to be actively, fully involved in all aspects of the case:

`Summation presents perhaps the best opportunity to articulate the law guardian position, as buttressed by the evidence. Every relevant issue, including custody, visitation, parental decision making, conditions for custody, and child support should be detailed so the court is apprised of the exact plan developed by the law guardian (even if fully discussed at the pre-trial level). When appropriate, the law guardian should also offer to submit a post-trial memorandum outlining the evidence, the legal issues and the law guardian's conclusions and recommendations.`

Standard C-5 states that "[i]f the Court conducts an in-camera interview with the child, the law guardian should request that it be held in chambers with only the judge, the law guardian and a court reporter present and only after the law guardian has advised the child of the purpose of the interview." This portion of the custody case differs so much from the usual conduct of a trial that the law guardian must be very careful to determine exactly how the

---

117. *Id.* at Standard C-4.
118. *Id.* at 31.
119. *Id.* at Standard C-5.
Court wishes the in-camera interview to be done and must be prepared to oppose any procedure he or she believes will be detrimental to the child. Similarly, if an in-camera interview is held, the law guardian should ensure that the child is fully prepared so that the interview can accomplish the goals it is meant to achieve.

The question that remains is what those goals are. According to the Commentary to Standard C-5, "[a] special law guardian responsibility is to protect the child against the usually intimidating and traumatic experience of testifying against his or her parent in their presence." Yet the Commentary also notes that "[i]n exceptional cases, it may be appropriate or beneficial for the older child to testify in open court." In cases where the child witnessed his or her mother being abused, was "caught in the crossfire," or suffered as the intended victim of parental abuse, the child may want no contact or only supervised contact with the abuser. In such circumstances, the law guardian may determine that testimony in open court is necessary to protect the child.

It is particularly important for children over the age of eighteen to testify in cases where the child wants no contact with the abuser. This could avoid tragedies like the Third Department case of Perez v. Perez, in which the court held that the abusive father could stop paying child support for the eighteen-year-old daughter who refused contact with the father. The child was deemed by the court to have no right to support just at the time when she needed it the most—for college. Thus, the custodial mother was left with the full obligation to put the child through college. The trial court had severely limited evidence of the domestic violence that had occurred during the marriage.

4. Post-Trial

Part D of the Standards deals with the post-trial stage. These Standards may seem particularly unusual to attorneys who view the law guardian's role as passive or see the child as a person who should be protected but not informed.

Standard D-1 states that, "[t]he law guardian should explain to the child, in terms the child can understand, the court's determination and its consequences, the rights and responsibilities of each of

---

120. Id.
121. Id.
122. 659 N.Y.S.2d 642 (App. Div. 1997). The court gave no reasons or authority for the proposition that the trial court did not abuse its discretion in limiting the introduction of evidence of domestic violence during the parties' marriage. See id. at 644.
the parties, including the child, the possible right to appeal, and the possibility of future modification." The task of conveying this information to the child is commonly left to the parents, but Standard D-1 indicates it is the responsibility of the law guardian. While many adults underestimate the abilities of children and thus would view such attempts to convey information to the child as a waste of time or even harmful, this standard assumes that the child is capable of understanding these rules.

The Standards express confidence both in the law guardian and in the child. The Commentary to D-1 states, in part, that “[i]t is of particular importance that the child understand his or her continuing relationship with each parent . . . and each parent’s continuing responsibilities to the child.” The Commentary further notes that “[i]t is also helpful to maintain communication with the child subsequent to the trial. Post-trial problems may thereby be ameliorated or appropriate legal action commenced.” The Commentary notes that the law concerning “the law guardian’s ability to file post-disposition enforcement or modification motions is not clear,” but that as an alternative, the law guardian could advise a parent to do so.

According to Standard D-2, “[t]he law guardian should examine the court order to insure that it complies with the findings and disposition.” The Commentary notes that “[i]f necessary, the law guardian should submit a counter-proposed order or amendment.”

Standard D-3 states that “[i]f the law guardian believes that the court’s determination is contrary to the child’s interests, after considering the wishes of the child, a notice of appeal should be filed and measures undertaken to assure that the appeal is perfected expeditiously.” The Commentary clarifies that “[i]f necessary, temporary appellate relief should be requested, such as a stay of the order.” The Commentary also notes that while the law guardian has standing under section 1120 of the FCA to initiate, argue and appeal from an order of the family court, standing to initiate the appeal is less clear when the case arises out of the

123. See Law Guardian Standards, supra note 24, at Standard D-1.
124. Id.
125. Id. at 34-35.
126. Id. at 35.
127. Id. at Standard D-2.
128. Id.
129. Id. at Standard D-3.
130. Id.
ROLE OF THE LAW GUARDIAN

supreme court. If a parent appeals the decision, whether from family court or supreme court, the law guardian should file a brief and participate at oral argument or request that the court appoint a new law guardian for the appeal.132

The law guardian’s initiation of or participation in an appeal would be particularly important if the trial court granted custody or inordinately liberal visitation to an abuser and the law guardian believed that this would endanger the child. Additionally, many abused spouses have few resources, both monetary and emotional, to mount an appeal, and thus the law guardian’s participation can be particularly helpful.

CONCLUSION

A law guardian in a custody case involving domestic violence must, at a minimum, investigate the case carefully and form his/her own conclusions. First, the law guardian must determine whether domestic violence took place. If the law guardian determines that domestic violence has taken place he/she must determine the effects of the domestic violence on the best interests of the child. The law guardian should include in the determination whether the child was hurt in the line of fire; witnessed the violence, although was not physically hurt; or did not witness the violence but was present in the violent home. Even if the child was born after the mother left the abusive situation and never had any contact with the abuser, the law guardian can infer from an abuser’s past acts of violence toward the mother a future propensity of similar behavior toward the mother and/or the child. Third, the law guardian must determine what kind of visitation would best protect the victim and the child. Lastly, the law guardian must determine how to give the victim the necessary support to ameliorate the effects of domestic violence on the child.

The NYSBA Standards for custody cases, promulgated in 1994, are exceedingly helpful guidelines for law guardians in cases involving domestic violence, although modifications of these guidelines may be necessary and appropriate as experience develops under Chapter 85 of the Laws of 1996.

The law guardian programs in the Appellate Divisions are in the process of training their law guardians with regard to the new law and the phenomenon of domestic violence. They should be en-

131. See id.
132. See id. at 38.
couraged to continue and improve that training, as research on do-
monic violence continues to inform us all about the effects of
domestic violence on children — effects that are much more seri-
ous and long-lasting than previously thought.
CHARGING BATTERED MOTHERS WITH 
“FAILURE TO PROTECT”: STILL 
BLAMING THE VICTIM

The “Failure to Protect” Working Group*

INTRODUCTION

Domestic violence harms children and families. In the past several years, efforts to recognize this harm 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.1 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. Increasingly in New York City, abuse and neglect proceedings are brought against battered mothers. Their children are removed from them, and the only allegation is based upon their children’s exposure to domestic violence. This approach has the result of discouraging battered mothers from seeking the services they need to escape domestic violence and often causes further harm to children and families.

Charging battered mothers with “failure to protect” implies that they are neglecting their children, because they did not prevent the violence. It places blame upon the mother, the primary target of the violence,2 for the actions of the abuser. The mother is accused of exposing her children to violence when the exposure is caused

* This Article was written by the “Failure to Protect” Working Group of Child Welfare Committee of New York City Inter-agency Task Force Against Domestic Violence, consisting of: Kim Ahearn, C.S.W., Social Worker, Domestic Violence Program, Barrier Free Living; Catherine Hodes, C.S.W., Social Worker Supervisor, Park Slope Safe Homes Project; Linda Holmes, Esq., NAPIL Fellow, Family Law Unit, South Brooklyn Legal Services; Lauren Shapiro, Esq., Director, Family Law Unit, South Brooklyn Legal Services; and Iris Witherspoon, Domestic Violence Program Coordinator, Lakeside Family & Children’s services.


by its perpetrator. Ensuring full accountability of the batterer for his actions is one of the central recommendations of this article.

This Article intends to stimulate discussion among child protective workers and domestic violence advocates to work towards a policy and practice that does not punish battered mothers for the risks to their children's safety caused by the batterer. A policy that more effectively addresses the safety needs of both victims, the child and the battered mother is suggested. We recommend that the institutional players in this system — the Administration for Children's Services ("ACS"), the Legislature, the Judiciary and the Legal Aid Society's Juvenile Rights Division — create a structure that places culpability on the batterer and ensures safe and stable environments for children and non-abusive parents.

I. BATTERED MOTHERS FOUND LIABLE FOR "EXPOSING THEIR CHILDREN TO DOMESTIC VIOLENCE"

A. State Legislature Mandates Domestic Violence Factor in Custody and Visitation Cases

In 1996, the increased acknowledgment of the effects of domestic violence on children culminated in a dramatic change in the law. The New York State Legislature enacted a law requiring courts to consider domestic violence in deciding child custody and visitation cases. The law requires the "court to consider the effect of proven allegations of domestic violence upon the best interests of the child, together with such other factors and circumstances as the court deems relevant." Prior to the passage of this law, courts were not mandated to consider domestic violence and often did not unless a child had directly witnessed the violence.

The legislative history of the law emphasized the negative impact of exposure to domestic violence, even if the children did not witness it directly:

"Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, somatic symptoms, low self-esteem and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse and child abuse ... It is well documented that family violence is cyclical and self-perpetuating. Children who live in a climate of domestic violence learn to use physical violence as an outlet for anger and are more likely to

use violence to solve problems while children and later adults
. . . . Therefore, at the time the court must make judgments re-
garding the custody and visitation of children, great considera-
tion should be given to the corrosive impact of domestic
violence and the increase danger to the family upon dissolution
and into the foreseeable future.4

Domestic violence advocates could never have foreseen that this
law, intended to assist victims of domestic violence in disputed cus-
tody cases, would provide the underpinnings for finding battered
mothers guilty of neglecting their children.

B. Statistical Definition of Neglect and Imminent Risk

The legal basis for finding battered mothers guilty of neglect is
found in Article 10 of the Family Court Act ("FCA"). Domestic
violence victims, whose children are removed because of the vio-
lence, are accused of failing to protect their children from danger
and thus fall under the FCA's definition of neglect. For a court to
find neglect, the parent must have failed to exercise a minimum
degree of care that resulted in physical, mental or emotional im-
pairment or imminent danger of impairment to the child:

in supplying the child with food, clothing, shelter, education,
medical, dental or optometrical or surgical care . . . ; or [ ] in
providing the child with proper supervision or guardianship, by
unreasonably inflicting or allowing to be inflicted harm or a sub-
stantial risk [of harm].5

In order for the court to find that a child was abused, the court
must find that the parent (1) inflicted or allowed physical injury to
be inflicted; (2) created or allowed to be created a substantial risk
of physical injury; or (3) committed or allowed a sexual offense to
be committed.6

To determine whether children should be removed from their
parents, a more restrictive legal standard is applied by the court.
In order to remove children, ACS must prove that removal is nec-
 essary to avoid "imminent risk" to the child's life or health.7

6. See id. § 1012(e)(i)-(iii).
7. Id. §§ 1022(a), 1027.
C. In re Lonell J.: A Non-Abusive Battered Mother Is Neglectful

The central decision that changed the landscape of child welfare cases involving domestic violence was In re Lonell J.,\textsuperscript{8} decided in May 1998 by the Appellate Division, First Department. The court held that the definition of neglect under the FCA was sufficiently broad enough to encompass exposure to domestic violence. The court relied on the legislative findings of the Family and Domestic Violence Intervention Act of 1994 that showed exposure to domestic violence harmed children. The appellate court found that in the abusive relationship because the mother stayed; she had “failed to exercise a minimum degree of care.”\textsuperscript{9}

Without explicitly saying so, the appellate court appeared to hold the mother “strictly” liable for the actions of her abuser.\textsuperscript{10} Although she had done nothing but suffer the abuse of her partner, her failure to leave him made her neglectful.\textsuperscript{11} The decision refers to the battering as a pattern of domestic violence between the parents and fails to recognize the significant difference between the roles of batterer and victim.\textsuperscript{12}

The Lonell J. court looked at the history of domestic violence without evaluating the reasons why the mother may have stayed in the home. Nor did the court, in assessing whether the mother endangered her children, consider the steps taken by the mother to protect her children from the batterer. In fact, the mother made repeated calls to the police, obtained an order of protection and made an attempt to leave by going to her mother’s house.

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. An

\textsuperscript{9} Id. at 116-17. For an in-depth analysis of Lonell J., see A. Stone & R. Rialk, Backlash Against the Abused Victim in Custody Disputes, 4 Domestic Violence Rep. 17, 26-27 (1998).
\textsuperscript{10} See Lonell J., 673 N.Y.S.2d at 118-19.
\textsuperscript{11} See id. at 118 (accepting “domestic violence in the child’s presence as neglect”).
\textsuperscript{12} See id. The reasoning of Lonell J. has been adopted by the Second Department in In re Deandre T., 676 N.Y.S.2d 666 (App. Div. 1998), where evidence showed that the father’s violent abuse of the mother caused impairment to mental and emotional health of the child. It has also been reaffirmed by the First Department in In re Athena M.V., 678 N.Y.S.2d 11, 12 (App. Div. 1998), finding that “evidence of acts of severe domestic violence between respondents in the presence of their children is sufficient to show ‘as a matter of common sense’ that the children were in imminent danger of harm.”
earlier case, In re Glenn G., showed the direction that the New York State Family Courts were headed in their treatment of battered women. In Glenn G., a non-abusing battered mother was found neglectful for failing to protect her children from sexual abuse by the father. In her defense, she offered evidence that she suffered from battered woman’s syndrome. The family court judge found that although she did suffer from battered women’s syndrome, she neglected her children per se since she was unable to prevent the abuse. The court concluded that the neglect statute was a strict liability statute, and the reasons for the mother’s failure to remove herself and the children from the batterer had no bearing on her culpability. As in the Lonell J. case, the court failed to consider whether the mother had taken steps to protect her children. This shift in the law in defining neglect therefore makes it easier for child protective agencies, such as ACS, to remove children and sustain charges of neglect made against non-abusing mothers.

D. Strict Liability for Battered Mothers

After five years in Alcoholics Anonymous, Nola’s boyfriend, the father of her two children, began drinking again. The more he drank, the more violent he became. He flew into jealous rages and accused her of sleeping with other men. He would repeatedly shove her, hit her and once threw her downstairs. Nola, too terrified to leave him, tried to protect her children by taking them away before his violent outbursts. She took the children to her mother’s or sister’s house when he began to drink. Nola sought family counseling and repeatedly called the police, but he was never arrested. ACS filed a neglect petition based solely on the history of domestic violence. The children were removed without any assessment of the actions she had taken to protect her children.

15. See Glenn G., 587 N.Y.S. 2d at 470 (stating that “[t]he neglect [ ] statute imposes strict liability”).
16. See id.
17. See id.
18. See id.
Nola’s story illustrates the importance of assessing the actions a battered mother takes to protect her children from exposure to domestic violence. The unfortunate results of Lonell J. are that battered mothers are automatically held responsible for the actions of the batterer and that ACS and family court judges do not conduct individualized assessments. A battered mother often knows firsthand the batterer's patterns of behavior. Armed with this knowledge, mothers like Nola may use several tactics to anticipate violent incidents and to keep the children safe. A battered mother's attempts to protect her children, to seek services or to leave her batterer are rarely considered. There are still strong prejudices against women who do not leave their batterers, and the players in the child welfare system routinely blame the victims of domestic violence for the harm to the children. These efforts by a mother, however, should be considered in evaluating whether a mother has placed her children at risk.

The neglect statute authorizes the court to make a neglect finding where the parent fails to exercise a minimum degree of care and that failure results or will result in physical, emotional or psychological impairment to the child. In domestic violence cases, by ignoring the efforts that battered mothers take to protect their children and the individual facts of their cases, the “minimum degree of care” standard has been improperly transformed into a strict liability standard.

II. BATTERED MOTHERS FACE REMOVAL OF THEIR CHILDREN AND COURT INTERVENTION

A. Trend Toward Removal Without Offering Appropriate Services

Service providers for victims of domestic violence report an increase in child protective involvement in domestic violence cases over the last several years. The removal of children from domestic violence victims is consistent with ACS’s current practice of removing children rather than providing services to prevent foster care placement.19 Although these trends preceded the recent “failure to protect” case law, such case law has the potential to prompt removal in more domestic violence cases. Additionally, as the public

---

19. This is part of an overall trend in increased child protective removals. According to the Mayors’ Management Reports for 1997 and 1998, there has been a 40% increase in the number of new children entering foster care, but no increase in the number of allegations of abuse and neglect. See Children Go to Foster Care Needlessly, Suit Charges, N.Y. TIMES, Jan. 30, 1999, at B3.
becomes more educated about the harmful effects of domestic violence on children, it is likely that there will be more reports to the State Central Registry in domestic violence cases and therefore more opportunities for removal.\(^{20}\)

When there is a report of neglect or abuse, ACS has responsibility to investigate the report to determine whether it is "indicated." If indicated, then ACS must determine whether the children are in imminent risk and should be removed from the home. In cases of domestic violence, deciding whether a report should be indicated against the victim and when the mother's inaction place the children at risk is complicated by the fact that there are no guiding standards. Since workers are not trained in how to assess domestic violence cases and what interventions are appropriate, ACS's response to domestic violence cases is inconsistent and depends on the particular worker or supervisor assigned to the case.

Children are too often removed before an effort is made to provide appropriate services to the mother. Although the law clearly requires ACS to offer services before removing children from their home,\(^{21}\) children are frequently removed in domestic violence cases without ACS first developing a safety plan for the mother and children and without offering preventive services for the family. ACS's failure to offer services and prevent removal is due to the lack of connections with domestic violence service providers, the insufficient number of preventive services programs and the bias on the part of ACS workers that battered mothers are unlikely to leave their batterers.

In some cases, ACS or the court requires mothers to obtain services, such as seeking shelter or an order of protection, which may not be safe or available options in a particular case. For example, many women are advised to go to a battered women's shelter, yet after the children are removed, it is almost impossible for a woman to leave her batterer to go to a domestic violence shelter. Without the children, they now have a much harder time accessing domestic

\(^{20}\) See, e.g., Settlement Agreement at 10, Marisol A. v. Giuliani (S.D.N.Y. 1998) (No. 95 CV 10533). The recent settlement between the plaintiffs, a class of children in foster care or at risk of foster care placement, and the State's Office of Children and Family Services provides that the State Central Registry must accept reports in domestic violence cases even when no physical harm to children is claimed.

\(^{21}\) Prior to entering an order directing the temporary removal of a child, the court must determine whether reasonable efforts were made to prevent or eliminate the need for removal. See FCA §§ 1022, 1027 (McKinney 1998).
violence shelters. Domestic violence victims are often referred to preventive programs that are not familiar with crucial interventions for battered women and their children, such as making detailed personal safety plans. In some cases, ACS files a petition stating that the mother failed to accept offered services even though the services were inappropriate or she did not have sufficient time to access them.

When ACS files neglect petitions against the mother, ACS charges that the batterer and victim are equally culpable for the harm to the children. As in Nola’s case, ACS often files petitions where the only allegation against the battered mother is that the parents have “engaged in acts of domestic violence.” These petitions do not describe how the mother failed to “exercise a minimum degree of care” as the statute requires and reflect ACS’s policy of equally treating the batterer and victim at fault for exposing the children to domestic violence.

B. Instant Response Protocol

Another disturbing development is ACS’s recent plan to increase the role of law enforcement in child protective cases. ACS’s Instant Response Protocol, initially designed to ensure a coordinated response in cases of serious sexual and physical abuse, now includes cases of domestic violence. According to a draft protocol explaining the expansion, both ACS and the police department would cross-refer cases of domestic violence where such intervention would be necessary. This is a positive step to the extent that this collaboration will lead to holding the batterer accountable for his actions.

We have strong concerns, however, about the possible increased rate of arrest of battered mothers and removal of their children from them as a result of the increased role of law enforcement in child welfare cases involving domestic violence. We are also concerned that battered mothers will be less likely to seek domestic violence intervention if there is an increased risk that they will suffer arrest and the loss of their children to foster care. The Instant Response Protocol could lead to these outcomes if there is not

22. Most domestic violence shelters prioritize families with children because there are so few available beds.
23. See supra Part I.D.
24. See Draft ACS/NYPD Domestic Violence Coordinated Response Pilot Interim Protocol, Mar. 1999 (on file with authors). According to the protocol, the project will be implemented on a pilot basis in Manhattan North. See id.
25. See id.
clear guidance about the role of law enforcement and child protective workers in these cases and adequate training of child welfare workers about how to work with law enforcement. The current protocol does not define any criteria for when ACS should refer a case to the police or when the police should refer a case to ACS. Without a clear standard for when arrest or removal of children is appropriate, both police and child protective workers may err on the side of removing children rather than the batterer.

III. REMOVAL FURTHER HARMS CHILDREN AND DISCOURAGES WOMEN FROM SEEKING SERVICES

Removing children from the non-abusive mother’s care often has severe and long-lasting effects on the family. Children who have witnessed abuse are already victimized by the feelings of helplessness from watching their mother suffer at the hands of the abuser. The children are struggling with anger, grief, anxiety and feelings of being responsible for the abuse and by removing them, they are victims again by their increased fear of abandonment.

Keeping the mother and children together as a family while addressing emotional and safety issues can reduce rather than intensify the trauma of the domestic violence to the mother and child.

Removing children from non-abusive battered mothers will discourage other battered mothers from seeking help. In Massachusetts, for example, the Department of Social Services found that its practice of identifying domestic violence as an indicator of child abuse without any corresponding training or clinical support resulted in both an increase in child abuse reports and a decrease in battered women seeking services.

When a mother mentions domestic violence to a mandated reporter, that reporter has an obligation to determine whether to file a report with the Central Registry. This policy of removing children from battered mothers can be interpreted to mean that any time a battered mother goes to a social worker, talks to her children’s teacher, goes to her doctor or calls the police to report domestic violence, she may be placing the custody of her children in jeopardy.

The chilling effect of charging battered mothers with failing to protect their children is that they will be even more reluctant to reach out to law enforcement, social services and the courts for the

help they need. Knowing that they may be investigated by child protective services, charged with neglect or lose their children to foster care, battered mothers, isolated and afraid, are more likely to remain in an abusive home so that they can remain with their children. Efforts to keep a mother and her children together while addressing emotional and safety issues will encourage mothers to come forward to seek needed services.

IV. SAFE OPTIONS AND SERVICES ARE NOT ALWAYS AVAILABLE

The many institutional players in the child welfare system lack an understanding of the realities and the difficult decisions that battered women face. The assumption of ACS caseworkers, law guardians, attorneys and family court judges is that safe options and services are available and that the battered woman should have left the relationship when the domestic violence began. There is little understanding of the fact that leaving itself is dangerous and there is a lack of social support, resources and safe options for women and children attempting to flee. Battered mothers’ attempts to protect themselves and their children are routinely minimized and dismissed. In Susan Schechter’s Women and Male Violence, she explains:

Battered women are not passive, rather, they engage in step-like, logical behavior as they attempt to stop the violence or leave. Not all of them are successful because the major variable, the violent man, is outside their realm of control. Staying, especially given the lack of resources and social supports for leaving, should never be read as accepting violence.28

A. Physical Danger

Leaving the abuser or trying to restrain his behavior often increases danger to the survivor mother and children.29 In fact, the most dangerous time for a woman and her children is after they have left the batterer. Studies reveal that it is during and after separation that the batterer is most likely to stalk, harass and even kill the mother. Battered women are well aware of the dangers of leaving due to the batterer’s continual threats. If she takes these threats seriously, and statistics show that she should, then she may

---

conclude that it is safer for her and her children in the short term to stay in the relationship.

B. Lack of Shelter Space and Permanent Housing

A woman and her children, who are able to safely leave their batterer, face the possibility of homelessness and dislocation, which can be especially difficult for children who may have to leave their classmates and friends. In New York City, the Victim Services Agency ("VSA") received 34,175 requests for domestic violence shelter during a twelve-month period in 1997-98, as well as an average of 38.2 unduplicated requests for shelter every day. During that period, the average daily availability of shelter was 10.6 spaces, meeting only one quarter of the need.\(^{30}\)

The reality is that there are few safe, affordable housing options for women fleeing abuse.

C. Lack of Financial or Other Support

Domestic violence cuts across class lines. After leaving an abusive relationship, many battered women have difficulty supporting themselves and their children.\(^{31}\) Battered women frequently report that batterers interfere with their education, training or work. As a result, abused women are heavily represented in the welfare population, at approximately fifty percent of total recipients. Welfare, however, is becoming increasingly difficult to obtain, and a woman may wait for months to find out if she is eligible. When there is a source of financial support beyond the abusive spouse, a greater percentage of battered women are likely to end the relationship.\(^{32}\)

Women can also be forced to rely upon their batterers for other necessary supports. For example, a battered immigrant woman may also be prevented from leaving an abusive relationship if she is isolated from family and friends, unable to speak English, fearful of accessing the police or unaware of her legal rights. Sometimes


\(^{31}\) One researcher, studying why battered married women returned to their husbands, found that the answer often lay in their financial dependence on their spouses. Eighty-four percent of wives in shelters who reported that their husbands were their only source of financial support planned eventually to return to their batterers. See B.E. Aguirre, Nat'l Ass'n of Social Workers, Why Do They Return? Abused Wives in Shelter 350-53 (1985).

the batterer is the only means of achieving legal immigration status in the United States.\footnote{See Ginger Thompson, Afraid of Husbands, and the Law, N.Y. TIMES, Apr. 18, 1999, at 37, 41.} These factors, combined with a lack of educational and employment options, present tremendous obstacles to a woman's safety.

D. Criminal Justice System May Not Offer Protection

Cynthia has been physically abused by her boyfriend for the last six months. He has threatened to kill her and take her child. When she called the police, they referred her to family court and did not arrest the batterer. She fled the apartment, and the batterer contacted her and told her that he was destroying everything in her apartment. She was scared to return that night, but when she did so the next day, she found her apartment ransacked. He had ripped up all her clothing, torn up the furniture, destroyed all the appliances and wrote derogatory statements about her in permanent maker all over the apartment. She decided to press charges, but the prosecutor told her that there was insufficient evidence for felony charges and the batterer would do no jail time. Cynthia decided to flee the state.

Battered women who seek protection from the batterer often find limited recourse in the criminal justice system. Despite the passage of laws requiring police to arrest perpetrators of domestic violence and to identify the primary aggressor in a domestic dispute, police response to domestic violence too often results in no arrests or dual arrests of both partners. When the batterer has left the scene before the police arrive, there is rarely any further investigation even if the police find that a crime has been committed. When the batterer is arrested, most domestic violence cases are charged as misdemeanors. Unless the crime is egregious, most batterers spend little time in jail.\footnote{See id.} Many batterers are released on bail after the arrest, and the arrest often provokes more violence. In addition, the victim may be faced with pressures from the batterer's family, or even her own, to drop the charges.

E. Family Court May Not Offer Sufficient Protection

Battered women are routinely told to obtain further orders of protection in family court to prevent the batterer from threatening, harassing and abusing them. In reality, obtaining an order of pro-
tection does not guarantee a woman's safety. Pursuing an order of protection may actually anger the batterer and provoke more violence. In one study, nearly half of the victims who obtained orders of protection were re-abused within two years.\textsuperscript{35} Knowing that an order of protection will not necessarily provide safety, some women decide not to seek one.

Legally, such orders can also exclude a batterer from the home and require him to pay child support, thereby allowing the mother and children to remain safe in their home with some means of support. Exclusion orders and temporary child support orders, however, are difficult to obtain, because unrepresented petitioners often do not know to ask for this relief. In addition, judges are reluctant to grant exclusion orders except in the most egregious cases.

Seeking orders of protection in New York City's Family Court is even more challenging, because the family court is overwhelmed and has little resources. Litigants face long waits, delays and adjournments. Battered women are thus further discouraged from obtaining orders of protection. One study found that petitioners in Brooklyn coming to the initial intake parts received just over four minutes to be heard on their first court appearance.\textsuperscript{36}

\section*{F. Batterer May Seek Unsupervised Visitation or Custody}

Genna ended her relationship with her boyfriend when he began to act violently towards her, but she allowed him to watch their two-year old while she was at school. He continued to harass her whenever they exchanged the child. ACS began investigating both parents based on allegations of domestic violence. Genna got an order of protection and ceased contacting the father. He has now filed for custody of their child and has been granted unsupervised visitation.

Sarah was charged with failure to protect her children because of their exposure to domestic violence. One of the ways her batterer had tried to exercise control over her was by constantly threatening to kidnap their children. On one occasion, he hid their daughter at his mother's house after an argument. Sarah had to call the police to get her daughter back.

\begin{flushright}

\textsuperscript{36} See The Fund For Modern Courts, The Good, the Bad, and the Ugly of the New York City Family Court 9 (1997).
\end{flushright}
Leaving the batterer often results in the batterer escalating his coercive control by filing for custody or visitation with the children. Battered mothers frequently worry about the possibility that the batterer will kidnap their children, because he has threatened to do so in the past. More than fifty percent of child abductions result from situations involving domestic violence, and most of these abductions are perpetrated by fathers and their agents. 37 Fathers who batter mothers are more than twice as likely to seek sole custody of their children than non-violent fathers. 38 Batterers may file custody proceedings against mothers or false reports to ACS as methods of continuing to harass and control their partners. 39 For battered mothers, one of the most difficult issues is how to negotiate custody and visitation issues with the abuser.

V. MODELS AROUND THE COUNTRY AND STATE HAVE SUCCESSFULLY INTEGRATED DOMESTIC VIOLENCE AND CHILD PROTECTIVE SERVICES

There are numerous models around the country and the state that ACS should follow in creating a comprehensive approach to domestic violence and child protection. The most notable of these is in Massachusetts, where a national model for collaboration between child protective services and domestic violence service providers has been established. In 1993, the Massachusetts Department of Social Services ("MDSS") created a specialized Domestic Violence Unit ("DVU") as part of its child protective services. 40 The principle of the DVU was that the safety of the battered mother cannot be separated from the best interests of the child. The DVU focuses on working with battered mothers to develop safety plans for the mothers and their children. 41

The DVU provides two kinds of services: consultation and support to caseworkers on abuse and neglect cases where there is domestic violence, and provision of direct services to battered mothers. Eleven domestic violence specialists spend three days a week in the local MDSS offices to ensure their availability to

---

37. See APA, supra note 26, at 101.
38. See id. at 40.
41. See id. at 16.
caseworkers.\textsuperscript{42} In five MDSS offices, there are interagency teams comprised of MDSS staff, police officers, battered women's advocates, batterer's intervention providers, court personnel, hospital staff, and supervised visitation providers who meet to discuss difficult cases and design effective case planning. This coordinated effort can help a family to avoid inconsistent services and case planning.\textsuperscript{43}

The specialist is also available as a liaison with the domestic violence community to discuss cases or issues that may arise. The protocol for caseworkers requires accurate identification of the perpetrator on investigation documents.\textsuperscript{44} This program has resulted in a decrease in unnecessary out-of-home placements and has helped caseworkers to identify domestic violence in their caseloads.\textsuperscript{45}

Another program aimed at protecting battered mothers and their children operates in Jacksonville, Florida as part of a community-based approach in protecting children. The Domestic Violence and Child Protection Collaboration includes the city's Department of Children and Families ("DCF"), a local domestic violence program called Hubbard House, an area shelter, local schools and neighborhood tenant associations.\textsuperscript{46}

DCF Child Protective Service ("CPS") workers, trained in conjunction with the staff at Hubbard House, are required to routinely screen for domestic violence and to intervene with the dual goals of protecting the children and the battered spouse and of holding the perpetrator responsible. Specific CPS workers are identified as domestic violence consultants and are paired with a Hubbard House staff member in order to serve as additional resources to other CPS workers.\textsuperscript{47} In addition, a "special condition" voluntary foster care placement program has been implemented. The program allows battered mothers to place their children for up to three months to avoid charges of abuse or neglect. During that three month period the mothers work with an advocate from Hubbard House to establish a safety plan for herself and her children.\textsuperscript{48}

\textsuperscript{42. See id.}
\textsuperscript{43. See id. at 17.}
\textsuperscript{44. See id. at 16.}
\textsuperscript{45. See id.}
\textsuperscript{46. See id. at 21.}
\textsuperscript{47. See id. at 22.}
\textsuperscript{48. See id. Similar innovative programs around the country include the Family Violence Outreach Program in Greater New Haven, Connecticut, the Domestic Vio-}
Closer to home, the Orange County Department of Social Services in New York State forged a collaboration with the Orange Safe Homes Project. Based on the Massachusetts model, the guiding principle of their alliance is that:

The primary focus of MDSS intervention in domestic violence cases is the ongoing assessment of the risk posed to children by the presence of domestic violence. The preferred way to protect children in most domestic violence cases is to join with mothers in safety planning and to hold offenders accountable.49

The protocol developed by the two groups emphasizes that certain alternatives must be considered before removing children. These options include: safety planning with the mother and children, preventive services, MDSS-initiated Order of Protection for the children to vacate the father from home, placement in a domestic violence shelter and assistance in obtaining an Order of Protection.50

In fact, the New York State Office of Children and Family Services ("OCFS") recently issued an informational letter recommending collaborative efforts similar to those achieved by Orange County.51 In 1996 and 1997, OCFS funded two demonstration projects to improve the provision of services to families impacted by both domestic violence and child protective services Orange County and Warren/Washington Counties.52 Representatives from each discipline met to design and implement a protocol for handling these cases.53 A domestic violence worker was stationed at local social services districts and would accompany child protective workers on investigative home visits.54 During these visits, the domestic violence worker spoke with the mother about her options and assisted the protective worker in developing a safety plan.55 There were numerous benefits to this collaboration. First, by identifying domestic violence before the crisis stage, children could
more frequently remain in their home. Second, domestic violence workers were seen as less threatening, and women viewed child protective services as more of a resource. Third, protective workers learned “to better understand why a victim is unable to leave and/or why leaving can be more dangerous than staying, and... [that by helping the battered mother] with the domestic violence issues, abuse and maltreatment of the child and the likelihood of re-incidence can be reduced.” OCFS found that by stationing a domestic violence advocate at the child protective office, even on a part-time basis, was likely to offer the greatest benefits.

VI. RECOMMENDATIONS

A. Accountability for Domestic Violence Should Be Shifted to the Batterer

Where the battered mother is named in the petition, ACS and the court should consider options that would prevent removal and place accountability on the batterer. Where “imminent risk” would be eliminated, ACS should request and the family court should issue an order of protection excluding the batterer from the home. Although no order of protection can guarantee safety, this practice would at the very least communicate a message of accountability to the batterer, and if the order is violated, the threat of incarceration may reduce the risk of violence. Further, ACS should consider referring the case to law enforcement officials or the District Attorney’s office for criminal prosecution of the batterer.

If the children are removed in limited circumstances, the batterer, not the mother, should be prevented from having unsupervised contact with the children until he has completed a batterer’s intervention program and has demonstrated to the court his ability to refrain from using violence.

Finally, family court judges should consider dismissing neglect petitions filed against battered mothers under section 1051(c) of the FCA. Under this section, a Judge may dismiss a petition, even after a finding of neglect, where its aid is not required on the rec-

56. Id.
57. See id. at 5.
58. Family court may only enter an order directing the temporary removal of a child after the court considers “whether imminent risk to the child would be eliminated by the issuance of a temporary order of protection, ... directing the removal of a person or persons from the child’s residence.” FCA § 1022(a)(iii) (McKinney 1998).
ord before it. Where the efforts of ACS and the mother since the filing of the petition have resulted in protecting the child from the batterer, the court's aid may no longer be required. Moreover, by dismissing the petition against the mother, the court sends the message that the batterer, not the victim, will be held accountable for the harm to the children.

B. Enact Legislation to Address Failure to Protect Issues

The New York State Legislature should address the way in which current child welfare law separates battered mothers and their children. One option is to legislate a "battered woman defense." In 1994, New York State Assemblyman Roger Green introduced a proposal that called for amending the definition of neglect to provide a defense that the parent had "a reasonable expectation, apprehension or fear that acting to stop or prevent such abuse would result in substantial bodily harm to parent or other person legally responsible for the care of the or to the child." The proposed amendment would also have allowed the parent to introduce expert testimony to show that the "inability to protect the child was due to a reasonable expectation, apprehension or fear that preventing or stopping the alleged abuse or neglect would result in physical injury to the subject child or respondent."

Another legislative recommendation calls for an amendment to the neglect statute to insure that appropriate services are provided in those cases where a court found abuse or neglect based on domestic violence. This legislative proposal would require a judge at the "dispositional" hearing: 1) to inquire and enter findings as to whether the respondent had been offered or had received domestic violence-specific services, and the results of the offer or receipt of services; and 2) to determine whether issuance of an order of protection would eliminate the need for placement, or would expedite the return of the child. Where placement or extension of placement is ordered, the child protective agency should be required to present its reunification plan to the court and to specifically enumerate the services it intends to provide along with a time-frame for providing services. Even without a legislative enactment,

59. See N.Y. JUD. LAW § 1051 (McKinney 1999).
60. A. 11870, 208th Sess. (N.Y. 1994). The proposal of June 7, 1994 was intended to amend the definition of an abused or neglected child and evidence of abuse in child protective proceedings. On February 11, 1999, these definitions were amended but not in accordance with this proposal. See FCA § 1012, at 39-40 (1999).
61. Id.
courts on their own initiative should make these inquiries and findings.

More recently, in the context of amending the state’s child welfare law to bring it in conformity with the federal Adoption and Safe Families Act ("ASFA"), the Victim Services Agency proposed changes to address the need for domestic-violence specific services to prevent or eliminate the need for foster care in domestic violence cases. The legislature should consider these recommendations in the current legislative session.

We commend the New York State Legislature for including in the state's ASFA implementation statute a requirement that the Office of Children and Family Services study the extent to which victims of domestic violence have their children removed due to the conduct of the perpetrator of the violence and that a report of its findings be submitted by October 31, 2000. We hope that in conjunction with the study, the judiciary and Children and Family Services Committees of the New York State Senate and Assembly will consider amending the neglect statute to ensure that local social service districts hold batterers accountable for their actions, and that victims of domestic violence and their children are provided services rather than for punishment of the perpetrator's conduct.

Although recommendations for amending the neglect statute have been made in the past, now more than ever before, such changes are needed. In New York City, the number of children placed in foster care has increased dramatically, and federal mandates require that states move more quickly to terminate parental rights. In this environment, the interrelationship of domestic violence and child welfare must be addressed immediately and directly.

C. ACS Should Build on Prior Successes by Developing a Comprehensive Domestic Violence Program

Since 1988, the Child Welfare Committee of the Inter-agency Task Force Against Domestic Violence has worked with successive city and child welfare administrations to address domestic violence

---

63. The stated purpose of the Adoption and Safe Families Act ("ASFA") is to achieve timely permanence for children in foster care. The ASFA requires states to file petitions to terminate parental rights after a child is in foster care for 15 months and allows states to suspend reasonable efforts to reunite families in certain cases. See 42 U.S.C.A. § 670 (1997).

64. See 1999 N.Y. Laws ch. 7, § 56.
and child protection issues in a meaningful way. Most recently, in January 1997, the Committee met with ACS Commissioner Nicholas Scoppetta to present recommendations for a comprehensive and coordinated ACS response to child protective cases where domestic violence is a factor. The reason for the Committee’s concern at the time was that the Commissioner’s December 1996 Reform Plan did not make any mention of domestic violence. The lack of attention to domestic violence in the Reform Plan was startling since studies show the strong relationship between domestic violence and child maltreatment, and the City’s own Child Fatality Review Panel Reports show the high correlation between child deaths and woman abuse.

This Article calls upon ACS to expand its collaboration with domestic violence advocates and to develop a comprehensive domestic violence program and timetable for implementation of the program. The current ACS administration must commit the attention, energy and resources needed to address this complex problem as other states and counties have done. This section describes the efforts ACS has undertaken thus far and makes suggestions for how to build upon these efforts.

1. Domestic Violence Coordinator

In January 1997, ACS created a domestic violence coordinator position to oversee the domestic violence work of the agency. While it is significant that there is a domestic violence coordinator, the position has not been given the resources or the authority to significantly expand programming, coordinate efforts or institute protocols. The coordinator does not work on domestic violence full time since she is also deputy director of ACS’s Office of Interagency Affairs and does not report directly to the Commissioner’s office. Without such authority, little change will be accomplished.


66. Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse, in Feminist Perspectives on Wife Abuse* 162 (Kersti Yllo & Michelle Boggard eds., 1988) (noting that child abuse is present in 70% of the homes where there is partner violence).

67. The Child Fatality Review Panel indicates that during the previous three years in 46.1% of the cases where a child had died, the mother was also abused. *See Report of Child Fatality Review Panel* (1993) (on file with authors).
2. **Pilot Projects to Assess Domestic Violence**

In 1993, the City made its first attempt to address the interrelationship between domestic violence and child welfare by creating the “Zone C” pilot project in the Manhattan Field Office. The pilot lasted six months. During this period, child protective case workers assessed every case alleging abuse or neglect that came into Zone C for domestic violence. A domestic violence protocol was developed for this purpose by the then Child Welfare Administration in consultation with the Child Welfare Committee and the Urban Justice Center. In April 1995, the Columbia School of Social Work prepared a written report evaluating the Zone C program. The report concluded that although workers and supervisors were initially resistant to the protocol, it was effectively implemented during the pilot test period. The report found that domestic violence was uncovered in more cases using the protocol than would have otherwise been discovered and that although there were identifiable obstacles to delivery, these families were referred to appropriate services. The report established the need for ongoing training of staff on the dynamics and causes of domestic violence.

In 1998, ACS planned to replicate the initial Zone C pilot project. Building upon the Massachusetts model, a domestic violence specialist was hired for Zone A, the North Manhattan Field Office. The specialist reports to the Director of the Field Office, not the domestic violence coordinator. The specialist is responsible for coordinating with child protective workers on those child protective cases where domestic violence is identified. She will also be involved in training the child protective workers in the office along with the Urban Justice Center. If a child is removed from his or her parent, however, the case is transferred within ninety days to the Office of Contract Agency Case Management (“OCACM”) and the case planning is then done by the foster care agency.

---

68. Randymagen et al., Center for the Study of Soc. Work Practice, Columbia Univ. Sch. of Soc. Work, Child Abuse and Woman Abuse in the Child Protective Service System: The Zone C Study 3 (1995). Each borough has a child protective “field office,” which is responsible for investigating allegations of child abuse or neglect. The office determines whether the report is indicated and, if so, whether the children should be removed. Field offices are then divided by zone, and each zone covers a different geographic area. Zone C covers East 57th Street, South to the bottom of Manhattan and north to West 110th Street. See id.

69. See id. at 2.

70. See id.

71. See id. at 7.

72. See id. at 9-10.
rest of the pilot project is on hold, like investigating domestic violence in each new case, but the Urban Justice Center is providing assistance to the domestic violence specialist.

3. **Training**

In 1996, the Columbia School of Social Work received one-time funding to train new child protective supervisors in domestic violence. This training has never been replicated. Domestic violence training for all caseworkers should begin at the Satterwhite Academy and continue periodically throughout their tenure. The curriculum for such training should be developed in conjunction with the domestic violence coordinator and the domestic violence advocacy community.

4. **Foster Care Agencies**

In developing a comprehensive domestic violence program, ACS must not forget the need to address domestic violence issues with foster care agencies. Such agencies monitor a large percentage of the children removed from their homes due to domestic violence. Once children are removed from their home, case planning is usually transferred within ninety days to the foster care agency. The agencies must be equipped to deal with domestic violence issues so that mothers can be provided the services they need to be reunified with their children as quickly as possible. ACS has done little to ensure that foster care agencies are meeting their responsibilities to assess, evaluate and develop a plan for services in domestic violence cases. Only one foster care agency, Lakeside Family and Children's Services, has a domestic violence services coordinator. ACS should study this program and encourage its replication when awarding new contracts to foster care agencies. ACS must also ensure that foster care workers receive training about domestic violence issues and have a domestic violence screening and assessment tool in place, as preventive services agencies do, for parents with children in foster care.

5. **Preventive Services**

Although this Article is concerned primarily with the policy of removing children from battered mothers, the availability of preventive services for domestic violence victims is also a necessary component of a comprehensive domestic violence program that en-

---

sures children are removed as a last resort. ACS has made some strides in the provisions of preventive services for domestic violence victims. The first preventive efforts took place in conjunction with the Zone C pilot project. Ruth Messinger, then Manhattan Borough President, helped fund four preventive agencies to increase domestic violence services for families identified by Zone C workers. In 1994, a preventive pilot project was started in Staten Island. The Urban Justice Center and ACS (then the Child Welfare Administration) developed a questionnaire for preventive workers to assess preventive cases for domestic violence within the first thirty days. This project, now called the Family Violence Prevention Project ("FVPP"), has grown to include twenty-seven programs out of a total of 120 preventive programs and is being expanded to fifty programs in the next year. All twenty-seven of these programs use a questionnaire that now includes an assessment tool called WEB (Women's Experience of Battering). Each of the twenty-seven groups has a domestic violence specialist who meets with an advocate at the Urban Justice Center for consultation once a month. The Urban Justice Center also provides year long training and supervision for the FVPP workers who will run twenty-six week long groups for abusive fathers of families who are clients of preventive service agencies. Three groups are running in Manhattan, Queens and Staten Island. The female partners of these men are in support groups. The family’s case workers and facilitators of both male and female groups keep in close contact with one another. APIP (Abusive Partner Intervention Program) is primarily funded by the Urban Justice Center along with some funding from the preventive agencies themselves.

Specifically, we recommend that ACS take the following actions:

- Develop a comprehensive domestic violence plan for all parts of the child welfare system with a clear and specific timetable for implementation.
- Establish a domestic violence office to coordinate preventive and protective domestic violence services for the agency and create and implement a domestic violence program that focuses on safety planning for domestic violence victims.
- Hire two domestic violence specialists for each field office.
- Mandate on-going training on domestic violence issues including safety planning for all ACS staff, including protective workers, ACS OCACM case managers, child evaluation spe-

---

74. Much of this work has been in coordination with and at the behest of the Urban Justice Center’s Family Violence Project.
cialists and foster care case planners and supervisors, including training on underserved populations, such as disabled and immigrant battered women.

- Improve assessment tools and protocol for assessing risk to children in domestic violence cases.
- Form an ongoing working group on domestic violence that meets regularly with a range of domestic violence advocates to ensure community input into the development of a comprehensive plan and a coordinated response to domestic violence.
- Continue and expand domestic violence assessment and services at preventive agencies, and require on-going training for preventive staff. Each agency should have a full-time domestic violence coordinator.
- Require foster care agencies to demonstrate how they are addressing and screening for domestic violence, and require development of linkages to domestic violence providers/advocates.
- Foster care agencies should be able to demonstrate how they will achieve early reunification with non-abusing mothers in domestic violence cases.
- Provide preventive services to families affected by domestic violence in the context of safety planning.

**Conclusion**

In the past decade, the domestic violence community has been instrumental in defining and articulating the impact of domestic violence on children. These same advocates now find themselves assisting battered mothers who are losing their children to foster care and who are being charged with abuse or neglect for failing to protect their children from witnessing domestic violence. Mothers are punished and children are traumatized by the separation while the perpetrator of the violence generally experiences few consequences. This Article calls for a multi-disciplinary approach to domestic violence. This approach must focus on protecting children by holding batterers accountable and keeping the non-abusing mother and children together and on short and long term safety options and support.

Issues of fairness are not all that is at stake here. The current policy of removing children from their mothers will have a negative impact on domestic violence survivors and may have a chilling effect on the mother’s willingness to seek assistance. As the removals of children increase, battered mothers are learning that child
protective services involvement may be a detrimental consequence of seeking help from the police, courts, hospitals or social workers.

The needs of battered mothers and their children are different but linked. We cannot address the best interests of the children without addressing the safety of battered mothers. The community, the courts and the child welfare field must enter into a partnership with battered mothers to assist them in addressing the harm done to children who have experienced the violence. We must continue to work toward holding batterers fully accountable for the violence they perpetrate.

It took until 1996, almost twenty years of education and advocacy, for the state legislature and judges to recognize the harmful effects of domestic violence. Now, child welfare and court systems have been quick to hold mothers accountable for the harm. Society has recognized and accepted the harm, but it is incumbent upon us to develop meaningful ways to assist battered mothers and not a system for separating them from their children.
WEIGHING THE DOMESTIC VIOLENCE FACTOR IN CUSTODY CASES:
TIPPING THE SCALES IN FAVOR OF PROTECTING VICTIMS AND THEIR CHILDREN

Kim Susser*

INTRODUCTION

In 1996, the New York State Legislature ("the Legislature") attempted to afford additional protection to domestic violence victims and their children involved in custody disputes by amending New York's Domestic Relations Law ("DRL") and the Family Court Act ("FCA") to mandate consideration of domestic violence when determining the best interests of the child in custody and visitation cases. Four years later, it is evident that the amendment failed to change the behavior of the courts or overcome the entrenched attitudes of many judges, attorneys and forensic evaluators regarding domestic violence.

The first Part of this Article contains a brief overview of the case law since the passage of the 1996 amendment and considers how courts applied the mandate to consider domestic violence as a factor in determining the best interests of the child. Part II addresses practical issues that arise when litigating custody cases where domestic violence is a factor. Part III uses three case studies to illustrate the failure of the amendment to create the necessary change intended by the Legislature and the need for legislative reform imposing a presumption against awarding custody to abusive parents. The final Part examines the inconsistency in the law between child

---

* B.A., Clark University, 1986; J.D., George Washington University National Law Center, 1989. The author supervises the Domestic Violence Clinical Center at the New York Legal Assistance Group and has practiced in the New York City family courts since 1990 when she began as a trial attorney in the Juvenile Rights Division of the Legal Aid Society. She is an active member of the Domestic Violence Task Force of the Association of the Bar of the City of New York and the Lawyer's Committee Against Domestic Violence. The author would like to thank Dorchen Leidholdt for her continuing inspiration in this field, David Zlotnick for his introduction to academia, Alison Sclater for her research assistance, Amy Barasch, Rhonda Panken and Jill Wade for their red pens and, finally, her mother for her endless support for whatever she chooses to do.
protective cases and custody created by the amendment and policy initiatives in the area of domestic violence and custody.

The statute states in pertinent part that where there are allegations of domestic violence in any action for custody or visitation, "and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interests of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section."\(^1\) Case law delineates additional factors to consider when applying the best interest standard.\(^2\) The best interest standard is elusive, however, and, as Justice Bernard Meyer stated in *Friederwitzer v. Friederwitzer*, "the only absolute governing custody of children is that there are no absolutes."\(^3\)

Prior to enactment of the legislation in 1996, some courts considered domestic violence in the allocation of custody and visitation rights, although there were only four reported appellate cases in New York before 1985.\(^4\) Since then, domestic violence has been considered increasingly relevant in making these determinations.\(^5\) Appellate courts, for example, have consistently held that domestic violence witnessed by a child is a significant factor in determining custody and visitation.\(^6\) Courts have also considered acts of violence in determining a parent's fitness for custody.\(^7\) Domestic violence has also been considered a factor in relocation cases.\(^8\) was

---

2. See Eschbach v. Eschbach, 436 N.E.2d 1260, 1264 (N.Y. 1982) (holding that, although the mother was not an unfit parent, the court is free to view the totality of the circumstances to determine the child's best interests); Friederwitzer v. Friederwitzer, 432 N.E.2d 765, 768 (N.Y. 1982) ("The standard ultimately to be applied remains the best interests of the child when all of the applicable factors are considered, not whether there exists one or more circumstances that can be denominated extraordinary."); Nehra v. Uhlar, 372 N.E.2d 4, 9 (N.Y. 1977) (holding that the father should be granted custody because he was awarded custody at time of divorce, he was a fit parent and the mother had obtained possession of the children by lawless self-help).
3. 432 N.E.2d at 768.
5. New York appellate courts have published 13 decisions holding that domestic violence is relevant to the issues of custody and visitation between 1985 and 1994. See id.
articulated as a basis to support supervised visitation and constituted "extraordinary circumstances" in cases where a non-biological party was seeking custody. Courts also viewed violence committed by a parent against a new partner as an important concern.

In 1996, the Legislature determined that piecemeal decision making was not a sufficient means toward justice and declared domestic violence a factor that must be considered in determining the best interests of a child. The most significant aspects of the amendment are the specific findings regarding domestic violence set forth by the Legislature:

The legislature finds and declares that there has been a growing recognition across the country that domestic violence should be a weighty consideration in custody and visitation cases.

The legislature recognizes the wealth of research demonstrating the effects of domestic violence upon children, even when the children have not been physically abused themselves or witnessed the violence. Studies indicate that children raised in a violent home experience shock, fear, and guilt and suffer anxiety, depression, low self-esteem, and developmental and socialization difficulties. Additionally, children raised by a violent parent face increased risk of abuse. A high correlation has been found between spouse abuse and child abuse.

Domestic violence does not terminate upon separation or divorce. Studies demonstrate that domestic violence frequently escalates and intensifies upon the separation of the parties. Therefore, . . . great consideration should be given to the corrosive impact of domestic violence and the increased danger to the family . . . .

These compelling findings enunciated by the Legislature call for stronger language than that in the amended statute itself. The amendment simply codifies domestic violence as a factor that must

---

13. Id. at 273-74 (emphasis added).
be considered when determining the best interests of the child. The findings call for a rebuttable presumption against the award of custody to a parent found to have committed domestic violence. As many as eighteen states have adopted such a presumption.¹⁴

Although the Legislature explicitly rejected a presumption, the new law is clearly meant to impose restrictions on visitation and custody for one parent who has been found to have committed violence against the other parent. The legislative history plainly states domestic violence "should be a weighty consideration."¹⁵ Domestic violence is the only factor specifically codified, thereby implying that courts minimizing or disregarding evidence of domestic violence are in derogation of the law.¹⁶ The problem lies in the reality that mandating judges to give a particular factor "weighty consideration" does not give much guidance. The statute has no teeth.

Although the statute’s plain language states “domestic violence” is a factor,¹⁷ it does not limit domestic violence to the definition of a “family offense” as determined by Article Eight of the FCA.¹⁸ This is not an intentional omission on the part of the Legislature, as the statute later specifically refers to Article Eight when defining “family or household member.”¹⁹ The Legislative findings also

---


¹⁸. See N.Y. FAM. CT. ACT § 812 (McKinney 1999). Section 812 of the New York Family Court Act defines a family offense as “disorderly conduct, harassment[,] aggravated harassment[,] menacing[,] reckless endangerment, assault . . . or an attempted assault,” as delineated by the relevant New York Penal Law provisions. *Id.* (amended effective Dec. 1, 1999 to include “stalking” as a family offense).

specifically refer to "physical or psychological violence."\textsuperscript{20} As discussed later,\textsuperscript{21} one Westchester Family Court case adopted an expanded definition of domestic violence, which includes more than physical acts. Therefore, the definition of domestic violence as it is applied in custody cases is broader than the definition of domestic violence applied in family offense cases.\textsuperscript{22}

Oddly, the statute limits the consideration of domestic violence to acts committed against a "family or household member," as defined in Article Eight of the FCA.\textsuperscript{23} Article Eight limits the definition of family or household member to a spouse, former spouse, those who have a child in common, or any relative, whether by blood or marriage.\textsuperscript{24} This definition, however, omits paramours, even if they live with one of the parties. Although there is nothing to prevent a court from considering violence in such a context,\textsuperscript{25} this limitation appears to be a significant oversight by the Legislature.

In 1998, the custody and visitation provisions of the DRL and FCA were further amended to prohibit courts from granting custody or visitation to any person convicted of murdering the child's parent.\textsuperscript{26} Under this statute, the court is not even permitted to order temporary visitation pending the determination of a petition of custody or visitation.\textsuperscript{27} Exceptions include situations where a child of suitable age and maturity consents to such an order and where the person convicted of the murder can prove that it was causally related to self-defense against acts of domestic violence perpetrated by the deceased.\textsuperscript{28} By requiring the court to deny visitation between parent and child, as a matter of law, the statute constitutes "a dramatic change in the law."\textsuperscript{29} In cases of murder, the Legislature willingly imposed a presumption against an award of custody,\textsuperscript{30} but specifically rejected such a presumption in other

\textsuperscript{20} Id. at 274.
\textsuperscript{21} See supra notes 33-35 and accompanying text.
\textsuperscript{22} See J.D. v. N.D., 652 N.Y.S.2d 468 (Fam. Ct. 1996).
\textsuperscript{23} N.Y. Fam. Ct. Acts § 827(vii).
\textsuperscript{24} See id. § 812.
\textsuperscript{25} See Elkinds & Fosbinder, supra note 6, at 595.
\textsuperscript{27} See id. at 1232.
\textsuperscript{28} See id.
domestic violence custody cases.\textsuperscript{31} This disparity is analogous to the criminal justice system's swift response to a domestic violence homicide, as opposed to its frequently cavalier treatment of domestic violence misdemeanors that, if treated with the same import, might serve to prevent a domestic violence homicide.

I. Post-Amendment Cases

Much of the case law since the passage of the amendment fails to address the ultimate issue: How should courts apply the statutory mandate to give domestic violence the "weighty consideration" required by the FCA.\textsuperscript{32} With the exception of two lower court cases in Westchester County,\textsuperscript{33} there has been little analysis of the statute or guidance as to the meaning of weighty consideration. One of those cases indicated that domestic violence under the statute is not limited to acts causing physical injury.\textsuperscript{34} The court held that there was an "unmistakeable pattern of power and control," and that "[e]conomic, verbal and sexual abuse, coupled with regular and frequent threats and intimidation, while more subtle in nature, are no less damaging than a physical blow."\textsuperscript{35}

The other case held against the recommendations of the court-appointed expert and the law guardian\textsuperscript{36} to find that, although neither parent presented an ideal environment, custody should remain with the mother.\textsuperscript{37} In that case, domestic violence was given the "weighty consideration" envisioned by the Legislature\textsuperscript{38} over other factors presented by the facts of the case, including the expert's opinion that the mother was "evasive, anxious and histrionic."\textsuperscript{39} This decision also holds that, when experts do not give sufficient weight to evidence of domestic violence, the court is free

\textsuperscript{31} See Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 273-74 ("Rather than imposing a presumption, the legislature hereby establishes domestic violence as a factor . . . .").

\textsuperscript{32} Id. at 273.


\textsuperscript{34} See J.D., 652 N.Y.S.2d at 468 ("[D]omestic violence is not limited to overt acts of violence which cause physical injury. The Legislature implicitly recognized that domestic violence is not a static concept . . . .")

\textsuperscript{35} Id. at 471.

\textsuperscript{36} A law guardian is defined as "an attorney who is assigned by a court to represent a child." NEW YORK STATE BAR ASSOC., REPORT OF THE TASK FORCE ON THE LAW GUARDIAN SYSTEM: THE PRIVATELY PAID LAW GUARDIAN 1 (1997).

\textsuperscript{37} See E.R., 648 N.Y.S.2d at 261.


\textsuperscript{39} See E.R., 648 N.Y.S.2d at 261.
to disregard their opinions provided it has convincing reasons to do so.\textsuperscript{40}

In an unreported decision in New York County, the court cited uncontroverted evidence of domestic violence as well as the father's failure to understand its damaging impact on the children in its award of custody to the mother.\textsuperscript{41} The court considered its legislative mandate, stating that "the stench of domestic violence permeated the trial," and credited testimony that the mother's relocation was out of her "desperate need to escape a violent relationship."\textsuperscript{42} Although no allegations of domestic violence were specifically pled, as required by the statute, the court conformed the pleadings to the proof evinced at trial.\textsuperscript{43}

In other cases that consider domestic violence, there was no examination of the legislative charge, but domestic violence was instead considered regardless of the legislative mandate. One judge recited a litany of factors that must be considered in determining a relocation case, yet never mentioned the amendment.\textsuperscript{44} In an appellate case, the court relied on two pre-amendment cases, instead of the statute, and held that the father was "ill-suited to provide moral and intellectual guidance" to his children due to his acts of violence against their mother.\textsuperscript{45} A third court cited a law review article, instead of the legislative findings in the amendment, to conclude that "young children exposed to domestic violence suffer a broad range of developmental and socialization difficulties."\textsuperscript{46}

As a practical point, it matters little whether courts rely on the statute itself or other material, rather, these decisions illustrate that even those judges inclined to give domestic violence the weighty consideration required, overlook the amendment because the language is not strong enough to warrant deliberation. The amendment was not needed for judges who appropriately exercise discretion in their contemplation of domestic violence, it was meant for those who do not. For judges who do not evaluate domestic violence, the mandate to consider it as a factor is insuffi-

\textsuperscript{40} See id.
\textsuperscript{42} Id. at *6.
\textsuperscript{43} See id.
cient. The language of weighty consideration leaves too much discretion to an individual judge or expert. For example, the Appellate Division affirmed an award of custody to a father who admitted to being the subject of an order of protection and was ordered to complete a batterer’s program.47 One dissenting justice argued that the lower court erred as the record was “replete with domestic violence.”48 The dissent further contended that the lower court failed to “admit and adequately consider evidence relevant to serious incidents of domestic violence that bear on the father’s fitness for custody.”49

In a matrimonial proceeding, another court held that several orders of protection issued on behalf of a mother were not sufficient evidence warranting consideration of the impact of domestic violence on her children.50 It was not clear whether the orders of protection the judge was referring to were issued after a hearing or on consent. The striking point in this case was that there was a trial on the grounds for divorce and sufficient evidence was found to grant the mother a judgement based on cruel and inhuman treatment of her by the father which the court failed to consider in determining the best interests of the children. The underlying facts comprising the cruel and inhuman treatment were not set forth in the decision.

Some might posit that domestic violence is sufficiently addressed in a line of joint custody cases, which predate the amendment. Although case law clearly dictates that joint custody is not condoned in situations where domestic violence is found, the routes of analysis differ.51 In joint custody cases, courts reason that parents who are “severely antagonistic and embattled” should not be awarded joint custody since joint custody by definition requires joint decision-making.52 The rationale underlying the amendment to Section 240 of the DRL is based on the wealth of research demonstrating the harm to children exposed to violence, rather than the inability of parents to cooperate.

48. Id.
49. Id.
51. See supra notes 34-50 and accompanying text.
52. Braiman v. Braiman, 378 N.E.2d 1019, 1019 (N.Y. 1978); see also Spencer v. Small, 693 N.Y.S. 727, 729 (App. Div. 1999) (“Clearly, there could not be an award of joint custody due to the violent relationship between these parties and respondent's lack of any positive effort to control his anger.” (citation omitted)).
Incidents of domestic violence must be proven by a preponderance of the evidence in order to be considered as a factor under the statute. Findings of prior family offenses in family court and criminal convictions should therefore be given a res judicata effect in a custody or visitation proceeding. If there has been no prior finding or conviction, then the violence can be proven anew during the course of the custody trial. Litigators ought to be wary of cases where the family offense is tried before a judge in family court, but the custody/visitation case is then referred to a Court Attorney Referee who must consider, but has not actually heard, the testimony regarding domestic violence. Although it is often less complicated for an attorney to prove the violence in a separate family offense proceeding and then use the finding as a tool for negotiating a settlement in the custody/visitation matter, if a settlement on the custody/visitation is not reached, the court hearing that case will not have heard the testimony about the domestic violence. In these situations, one can argue that, notwithstanding the res judicata effect, the trial court ought to hear the live testimony and have the opportunity to observe the demeanor of witnesses.

The statute and legislative history also provide material for cross examining expert witnesses who either minimize or disregard domestic violence in their custody/visitation recommendations. The American Psychological Association ("APA"), for example, has found that false reporting of family violence occurs infrequently.

53. See id. at 275.
54. See Tiffany A. v. Margaret J., 656 N.Y.S.2d 792, 795-96 (Fam. Ct. 1996) (holding that three prior determinations of parental unfitness serve as "res judicata on the question of [the mother's] fitness to parent, her right to custody and what is in the best interests of [the] children"). But cf. Friederwitzer v. Friederwitzer, 432 N.E.2d 765, 767 (N.Y. 1982) (indicating that on petition for change of custody "that no one factor, including the existence of [an] earlier decree or agreement, is determinative of whether there should, in the exercise of sound judicial discretion, be a change of custody").
56. See N.Y. FAM. CT. ACT § 439 (McKinney 1999).
57. It is common practice for the New York City family courts to appoint Referees, who are lawyers, not judges, to hear custody and visitation cases. This is due to the shortage of judges in the New York City family court system. See Catherine J. Ross, Unified Family Courts: Good Sense, Good Justice, TRIAL, Jan. 1, 1999 at 30, 31 ("In New York City . . . there are only 41 sitting judges. These judges handle over 225,000 cases a year, or approximately 5500 cases annually for each judge. A system like this one cannot be expected to yield anything more than 'assembly-line justice.'").
and that the rate of false reports in custody cases is no greater than for other crimes.\textsuperscript{58} Despite this, studies show that mental health professionals still believe that "as many as one in eight women are magnifying violence as a ploy in custody disputes."\textsuperscript{59} Judges should not give weight to expert opinions where the expert has not shown an understanding of the psycho-social literature addressing the negative impact of domestic violence on children as set forth in the legislative history of the 1996 amendment.

It is imperative to introduce a copy of the legislative history to the court in your summation when litigating custody cases where domestic violence is an issue so that the court can better understand the rationale behind the amendment and accord it the proper weight. The legislative findings can be annexed to motions and referenced during the course of a trial. As will be seen below, however, good practice is not always enough to overcome the long-standing behaviors and attitudes impacting on these cases.\textsuperscript{60}

\section*{III. Case Studies\textsuperscript{61}}

Many cases regarding custody and visitation emanate from the family court, a court in which most litigants appear \textit{pro se} or with court-appointed counsel.\textsuperscript{62} Written opinions are not issued in most cases, and many are not appealed. Therefore, it is important to examine how cases are decided from a practitioner's point of view. Case studies reveal a more detailed picture of the lower court proceedings than those usually reflected in appellate opinions. I began practicing in this area in 1994, the year before this legislation passed. Using three cases, each in different boroughs of New York City and each post-dating the amendment, I will show the necessity for the imposition of a presumption against awarding custody to


\textsuperscript{59} Joan Zorza, Protecting the Children in Custody: Disputes When One Parent Abuses the Other, 29 Clearinghouse Rev. 1113, 1120 (1996) (citing Peter G. Jaffe, Children of Battered Women 32-75 (1995)).

\textsuperscript{60} See discussion infra Part III.

\textsuperscript{61} Each case study is based upon a family court case in which the author represented the battered mother. Names, locations and key facts have been changed to protect the confidentiality of the parties. Written decisions and transcripts are on file with the author.

\textsuperscript{62} See, e.g., Russell Engler, And Justice for All – Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks, 67 Fordham L. Rev. 1987, 2047 (1999) ("The numbers of unrepresented litigants in family law cases have surged nationwide, with some reports indicating that eighty percent or more of family law cases involve at least one pro se litigant.").
The mandate to give domestic violence a weighty consideration was ineffective in each of the cases.

In each case, a family offense petition was filed by the mother requesting an order of protection. In two of the cases, the custody or visitation trial proceeded contemporaneously with the family offense trial, and in the other the custody case immediately followed the family offense trial.

A. Mr. S. v. Ms. B.

The first case is a Bronx County matter in which, during a particularly vicious assault, the respondent pulled a clump of hair out of Ms. B.'s head. The parties were never married and never lived together, but had one child in common. There was a lengthy trial on the family offense case before a judge who later referred the custody case to a referee. The referee assigned a law guardian who appeared on the custody/visitation matter.

Ms. B. initiated the family offense proceeding, seeking an order of protection. Her petition alleged several incidents of domestic violence during which the child's father seriously assaulted her. A few months after she filed her family offense petition, Mr. S. filed petitions for paternity and custody. He never filed a family offense petition against Ms. B.

The judge first heard testimony on the family offense case. Ms. B. testified on her own behalf to an incident that took place in the respondent's mother's home. His mother often cared for the baby while Ms. B. was working and attending nursing school. When Ms. B. picked up the child one afternoon, Mr. S. appeared and they began arguing about child support. Mr. S. started cursing and pushed Ms. B. onto the couch while she held the baby. He choked her and pulled her hair with such ferocity that she was left with a two to three inch bald spot on her head. Ms. B. introduced medical records and photographs of the injuries to her head and neck. The medical records, including x-rays and a CAT scan, indicated a concussion, memory loss, muscle spasm, back pain, dizziness and hair loss. Mr. S. was left with scratches on his face from Ms. B.'s attempts to break free when he was choking her. Both parties were arrested for the incident. The criminal case against the mother was dismissed by the District Attorney's office and the criminal case against the father proceeded to a jury trial. He was acquitted on all charges.

63. See discussion infra Parts III.A-C.
In addition to testifying for himself, Mr. S.'s brother, sister and current girlfriend testified on his behalf, as did the arresting police officer, Mr. S.'s roommate and his psychologist. Mr. S. denied any violence on his part and maintained that the incident at his mother's home was initiated by the petitioner who had scratched his face. He also testified that on another occasion the petitioner threw a chair at him.

Although there were no allegations pending against Ms. B., Mr. S.'s roommate was permitted to testify, over objection, as to whether he had ever seen Ms. B. attack Mr. S. The issue arose again during Mr. S.'s testimony when he was asked about threatening messages left by Ms. B. on his answering machine. The respondent's testimony concerned alleged threats to take him to court for his failure to pay child support, which, even if true, do not constitute a criminal act nor address the issues of the case. During his defense, Mr. S. and his brother, who admitted to abusing heroin during the time period about which he was testifying, stated that on a different occasion, Ms. B. once threw a chair at Mr. S. Though apparently offered as an excuse for Mr. S.'s assaults upon Ms. B., the court effectively imputed a counter-claim against Ms. B., which the court later concluded was proven.

Had the allegations against Ms. B. been properly raised, she would have been served with a petition at least five days prior to the hearing and been given the same opportunity to defend herself as Mr. S. had to defend himself.64 Armed with notice of the charges that the court considered against her, Ms. B. could have defended herself against the accusations by requesting pretrial disclosure, calling witnesses or introducing other evidence on her own behalf. Instead, she unwittingly relied on her strong documentary evidence in pursuit of an order of protection. Although she offered rebuttal witnesses to counter Mr. S.'s undocumented allegations, rebuttal testimony was not permitted.

At the conclusion of the family offense trial, the judge found that Mr. S. committed assault in the third degree, a family offense. He further found that Mr. S. had caused physical injury and that, therefore, aggravating circumstances existed. The judge issued a three year order of protection on behalf of Ms. B., the longest du-

---

64. Whether family offense charges are raised in a petition or as counter-claims, the person charged has a constitutionally based right to the notice necessary to present a defense. The FCA sets forth specific procedures for counter-claims which include service of a petition no later than five days prior to the return date. See N.Y. Fam. Ct. Act § 154(b) (McKinney 1999).
ration permissible under Article 8 of the FCA. The court found aggravating circumstances and issued an order of protection, the judge went on to state in his oral findings of fact that the violence was "mutual." Specifically, the court made the following findings:

1. I find it credible and that on the occasion in her — in his apartment... that Ms. B. did throw the chair, I find that she has acted [at] times in ways that were extremely inappropriate and — risky to the child.

2. I find that on occasion, Mr. S. also acted inappropriately in the presence of the child, and that both parents have contributed to the atmosphere of that, [sic] I think, have probably created impairment to the child.

3. I find in this case that the domestic violence was not unilateral, it was bilateral. . .

4. The court also finds both parents are involved in a violent and unhealthy relationship and each parent is equally responsible for exposing the child to domestic violence.

Following an objection to the findings of fact because there was no petition against Ms. B., the judge responded, "I can tell you that there's [sic] been a petition filed against your client. There is a very strong likelihood [that] mutual orders would have been considered, that is not before me, that is [moot]."

Time and again the court acknowledged that no allegations were pending against Ms. B. Nevertheless, the judge stated that if he could have, he would have issued a mutual order of protection. Luckily for Ms. B., the issuance of mutual orders of protection, without the filing of a petition, are illegal pursuant to section 841 of the FCA. Mutual orders of protection are "yet another weapon" by which a batterer threatens and subdues his or her victim. They send the message to the batterer that he is not responsible for his violent acts — she is. It was this message that led to legislation outlawing mutual orders of protection under these very circumstances. Nonetheless, this was the message that the court sent to Mr. S.

The impact of the decision was practically the same as if a mutual order of protection had been issued. The father and the law guardian attempted to use these findings against Ms. B. during the custody/visitation proceedings subsequently heard by a referee.

65. See id. § 842.
66. See id. § 841.
Most importantly, the unauthorized findings made it impossible to use the legitimate finding against the father effectively, in the way that the Legislature intended. How could the referee give the domestic violence the weighty consideration mandated when the proceeding was clouded by the erroneous findings against Ms. B. from the family offense case?

Ms. B. appealed the findings. She argued that, although no order of protection was issued against her, she was harmed by the findings in the subsequent custody case. She argued that since she did not receive the notice of any cross-claims to which she was entitled, the findings must be stricken. Left standing, the findings could be used against her in any subsequent modification of custody or visitation proceeding.

The Appellate Division held that “in the absence of a written cross-petition by respondent as required by the FCA to provide petitioner-appellant with notice of her alleged responsibility for incidents of domestic violence the findings of the trial court on that issue were gratuitous and unauthorized and can be of no dispositive effect in any other litigation between the parties.”68 The Appellate Division further held that the denial of the petitioner’s rebuttal witnesses was improper.69

The custody and visitation case had already settled by the time the Appellate Division issued a decision. The mother obtained full custody and the father was granted visitation on alternate weekends from Saturday until Sunday, and one evening a week. The exchange of the child was to take place at a police precinct.

Of course, at the custody trial, the mother could have tried to re-litigate the domestic violence instead of settling, but there was a clear coercive effect that the unauthorized findings had on settlement negotiations. More importantly, if there were a trial, what weight could the referee really give to a finding against the respondent clouded by “unauthorized and gratuitous” findings about the petitioner?70 The referee was prevented from giving weighty consideration to the findings against the respondent because there were findings against both parties. If there were a presumption imposed then the referee would have had no choice but to shift the

---

69. See id.
70. Id.
burden to the respondent to rebut the presumption. A presumption statute would address circumstances where each party accuses the other of violence and requires courts to determine who is the primary aggressor. Additionally, the mother had already testified at two trials by that time, one in criminal court and one in family court: how many times should she have to relive the violence?

The father was later arrested for violating the family court order of protection by going to the child’s school and attempting to visit him. A jury convicted him of criminal contempt. The criminal court granted Mr. S. a conditional discharge and a three-year order of protection was issued on behalf of Ms. B. and the child, except during court ordered visitation. According to the Assistant District Attorney (“ADA”) who prosecuted the case, the judge admonished the defendant not to “breathe or mutter” in Ms. B.’s direction, but denied the ADA’s request for a split sentence of jail and probation.

Had the findings of fact on the family offense been limited to the mother’s case, as the Appellate Division held they should have, it is likely there would have been stricter limits placed on visitation. The father would have been held completely accountable for his behavior instead of getting the clear message that the mother was partially responsible.

B. J. v. J.

In this Queens County matter, there had been a severe and lengthy history of violence against the mother. She had filed several family offense petitions in Queens County Family Court in the past, all of which resulted in the respondent either consenting to the issuance of an order of protection without any admission of wrongdoing, or in a default judgment being issued against him. The family offense and custody cases were tried concurrently. The cases were before the judge for almost three years before they were resolved. The mother had previously agreed to allowing the father to have custody of the two children because she believed that if he had custody then he would stop abusing and continually stalking her. About one year after consenting to his having cus-

71. In some states the presumption may be rebutted by showing that he had completed a batterer's intervention program or extraordinary circumstances evidencing there is no risk of continuing violence. See Kurtz, supra note 14, at 1350.
72. The mother also filed a violation petition in the family court which was later withdrawn.
73. Lorin B., 679 N.Y.S.2d at 11.
today, the children complained to her that their father was constantly yelling at them, treating them like “slaves” by forcing them to perform excessive chores in the household, and that he had hit one of them. Upon hearing her children’s stories, the mother filed to modify the custody arrangement.

The allegations in the family offense case were that the respondent threatened her that “you better run for your life” and that he would “rather see the children in foster care” than with her. Her petition further alleged an incident occurring around Christmas of 1995, during which time he had choked her with a scarf in front of the children. The mother testified to years of violence, including the incidents contained in her previous family offense petitions. Two specific incidents to which she testified were that the father had hit her in the face with a two-by-four piece of wood, and that on a different occasion he had broken her ribs. Both of these assaults occurred years before the trial. It was these two most serious incidents that the judge, the law guardian and the court-appointed forensics expert found the least credible.

Mrs. J. was forced to move on several occasions because her husband constantly followed her, attempted to force his way into her apartment, and yelled and cursed at her outside her window. Each time she moved she kept her address confidential but the respondent always managed to find her.

During his interview with the probation officer (“P.O.”) who was conducting the investigation and report that was ordered, the respondent admitted that indeed he had followed Mrs. J., and appeared at her apartment at 4:00 a.m. during the time the parties were separated. The respondent initially lied to the P.O. and denied following Mrs. J., stating, “I never follow her, she is not telling the truth.” Upon further questioning by the P.O. as to how the respondent knew where Mrs. J. was living, “he smiled at the P.O. and stated, ‘I followed her, I know everything about her.’” Despite evidence to the contrary, the respondent later denied in his testimony that he ever told the P.O. that he had followed Mrs. J., or that he found her at her apartment at 4:00 a.m., further undermining his credibility.

Four experts testified at the trial. The first was a school guidance counselor, a qualified social worker, with whom the children discussed witnessing specific incidents of their father’s abuse against their mother. The second was the court appointed psychologist who found the mother “hysterical” in her rendering of the domestic violence. He met with the children for twenty minutes each,
and recommended that custody be awarded to the father. The third expert was a psychologist retained by the mother with court ordered funds, but who was only permitted to evaluate the mother and children. The father refused to be seen by her as she was the mother’s witness. She recommended that custody be awarded to the mother and supervised visitation granted to the father. The last expert was the children’s social worker from a private agency where the family had been referred after reports were made against the father to the Administration for Children’s Services (“ACS”). Her testimony was primarily factual in nature regarding statements made by the father and children in counseling, and the children’s psychological diagnosis of depression and anxiety. She had not seen the mother in counseling.

A certificate of conviction against the father for harassment of his current girlfriend in Connecticut was introduced into evidence. The underlying facts of that incident could not be established, but the father admitted that he and his girlfriend indeed had a fight, and that the incident occurred in front of the children. In addition, as a result of several reports to the ACS regarding the children, the father attended individual counseling for several months. These reports were also admitted into evidence. The father admitted to hitting one of the children with a belt. After determining that an “Alternatives to Violence” program was necessary, the caseworker referred the father to such a program. The father never attended, and the caseworker never followed up.

The law guardian had represented the children during the earlier proceedings and resumed his representation on the current case. Although he supported granting custody to the mother, the law guardian did not believe that the domestic violence had occurred. In his written summation, he stated that the mother’s history of domestic violence was “troubling in that its details traveled beyond the realm of credibility.” Although his position throughout the trial was that his clients wished to live with their mother, he never conducted his questioning of the parties in a manner that would have supported the children’s position, nor did he present any evidence to that effect. The children were six and seven years old at the commencement of the case. The bases for his supporting that custody be granted to the mother were his clients’ wishes and, that although the children maintained a stable residence and did well in school while living with their father, their daily routine was “littered with verbal disputes, yelling, displays of anger from the father which are intimidating and sometimes frightening to them and
sometimes result in hitting, yanking of arms, and physical pushing and restraining.” The law guardian repeatedly noted his grave concern that the mother would be unable to prevent her negative feelings about Mr. J. from interfering with the children’s relationship with their father.

At one point during the trial, the judge stated specifically that no statutory mandate to consider domestic violence was necessary because case law already required the court to do so. Ultimately though, the court held that “none of the major parties were credible.” In particular, the court found the mother “grandiose and histrionic,” and her testimony, with respect to the history of violence, incredible. The court characterized the father as a “nominalist” with “poor impulse control.”

In a somewhat inconsistent written opinion, the judge dismissed the family offense case, holding that the petitioner did not prove the allegations by a preponderance of the evidence. He then granted custody to the mother and issued an order of protection on behalf of her and the children under the custody docket. Although the court did not believe that the father physically abused and stalked the mother, it found that he did verbally abuse her, issuing the order of protection on that basis. The court relied heavily on its two in camera interviews with the children. The court further noted that the children presented conflicting statements depending on whom they were speaking to and when. The court did not give weight to one child’s report of domestic violence because he could not discern whether it was her actual experience, or whether she heard about it and incorporated it into her belief system. Custody was awarded to the mother because she provided emotional stability for the children and because the father was found to have used excessive corporal punishment on one of the children.

The court gave no indication in its written decision of how much weight, if any, was given to the harassment conviction against the father in which his current paramour was the complainant. This incident alone could have provided the basis for a change in cus-

---

74. It is unclear why the court referred to the respondent as a “nominalist.” The dictionary defines “nominalism” as “[t]he doctrine that abstract concepts, general terms, or universals have no objective reference but exist only as names.” The American Heritage Dictionary 845 (2d College ed. 1991) (emphasis added). The court’s statement may allude to the respondent being a father in name only. In the context of the decision, however, it seems that the judge may have instead meant “minimalist,” referring to the respondent’s attempts to minimize the allegations of domestic violence and corporal punishment.
Domestic violence against a partner who is not the other parent must be considered in a best interest determination.\textsuperscript{75} Ironically, the court granted Mrs. J. more relief than she would have if the order of protection had been awarded on the family offense case. Protective orders issued pursuant to a custody action, as this one was, are in effect until the youngest child turns eighteen years of age.\textsuperscript{77} Had the order been issued under Article 8 of the FCA, the maximum duration could only have been three years.\textsuperscript{78}

A legal presumption alone would not have changed the outcome of this case because the court simply did not believe the mother's testimony about the violence. Nonetheless, had the court applied the legislative findings, then it might have found Mrs. J.'s rendering of the violence more plausible. For example, the timing of the incidents she relayed was consistent with the fact that violence generally escalates upon separation. Also, the statements from the children as to the father's verbal abuse and corporal punishment are consistent with the finding that there is a high correlation between spousal and child abuse.\textsuperscript{79} The testimony of her guidance counselor revealed that one of the children was exhibiting suicidal ideation. According to the mother's expert and the children's own social worker, both children were exhibiting signs of depression and anxiety. These symptoms can all arise from long-term exposure to domestic violence.\textsuperscript{80} The mother's relinquishment of custody to the father in an attempt to avoid further violence is also consistent with typical domestic violence cases.\textsuperscript{81} Much of the evidence brought before the court was consistent with the impact of domestic violence. Viewed within the framework of the legislative findings, together with the imposition of a presumption against awarding custody to a batterer, this evidence would have compelled the court to grant custody of the subject children to Mrs. J. unless Mr. J. could rebut the presumption.

\textsuperscript{75} See Irwin v. Schmidt, 653 N.Y.S.2d 627, 628-29 (1997) ("Notably, evidence of the father's acts of domestic violence against his current wife demonstrated that he possesses a character which is ill-suited to the difficult task of providing his young children with moral and intellectual guidance.").

\textsuperscript{76} See id.

\textsuperscript{77} See N.Y. DOM. REL. LAW §240(3) (McKinney Supp. 1999).

\textsuperscript{78} See N.Y. FAM. CT. ACT § 828 (McKinney 1999).


\textsuperscript{80} See id.

\textsuperscript{81} See Zorza, supra note 59, at 1124.
Some of the facts of this case study parallel the Westchester case discussed earlier. In that case, the expert also found the mother "evasive, anxious and histrionic," and recommended an award of custody to the father. That court, however, found that the mother's frequent crying "was heartfelt, not histrionic," and rejected the psychologist's recommendation in part based upon the fact that he skimmed over instances of domestic violence. In this case, the expert and the judge also found the mother "hysterical," but the court was unable to fit her behavior into a framework that incorporates the dynamics of domestic abuse. Many battered women suffering post-traumatic stress disorder are mislabeled as histrionic.

The court, the law guardian and the court-appointed expert all raised typical questions regarding the mother's credibility about the two most severe assaults. All three failed to understand how her injuries healed without medical treatment and therefore concluded she had lied or exaggerated. Although Mrs. J.'s cousin corroborated the incident in which Mr. S. hit Mrs. J. with a two-by-four, and Mrs. J. testified that she went to a private doctor for her broken ribs, neither the court nor the law guardian believed she could have possibly sustained such injuries and not sought treatment. The law guardian further questioned why those two incidents were not specifically alleged in the mother's earlier family offense petitions. The fact that Mrs. J. had sought orders of protection and had drafted the earlier petitions without representation, that Mr. J. had a later conviction against him for harassing his current paramour and had admitted to stalking Mrs. J., and that the children were complaining of verbal abuse and corporal punishment did nothing to enhance her credibility with the court, the law guardian or the expert. These factors were not viewed together in the context of domestic abuse, instead they were perceived in a disjointed manner. The legislative history sets forth many fundamental tenets of the dynamics and impact of domestic violence on women and children. Courts should look to it for guidance in un-

82. See E.R. v. G.S.R., 648 N.Y.S.2d 257 (Fam. Ct. 1996); see also supra notes 34-50 and accompanying text.
84. Id.
86. The medical records were unavailable because the incident occurred almost six years earlier and the doctor was no longer working at the same location.
understanding these dynamics, and apply the findings to the facts before them.

The APA recognizes that a victim of domestic violence is likely to be at a disadvantage in custody cases if the court does not consider the history of violence since "behavior that would seem reasonable as protection from abuse may be misinterpreted as signs of instability. Psychological evaluators not trained in domestic violence may contribute to this process by ignoring or minimizing the violence and by giving pathological labels to women's responses to chronic victimization."87 This heightened disbelief of battered women, coupled with misinterpretation of their behavior are two important reasons to impose a presumption against allowing a parent who commits acts of domestic violence to have custody. Battered women need help to overcome the image they sometimes present in court or during psychological evaluations. A victim may re-enact her adaptations to living in a hostile environment when she is in court, "becoming agitated, over-emotional or stupefied into silence. Attorneys as well as judges often react negatively to such behavior, particularly if the abusive partner appears calm, collected and sure of himself."88 This dynamic cries out for the scales of justice to be tipped in favor of protecting victims and their children, for the imposition of a presumption, in order to compensate for negative expert and judicial reactions.

Although awarded visitation on alternate weekends and holidays, Mr. J. moved to Florida shortly after losing custody and has not seen his children since.

C. M. v. M.

The third case was tried in Kings County. Here, the father had to be continually removed from the courtroom due to his outbursts. The visitation trial commenced shortly after the family offense trial. The father was ineligible for appointed counsel and appeared pro se on both cases. This case was also before the court for almost three years before its resolution.89 The parties were divorced.

87. American Psychol. Assoc., supra note 58, at 100.
89. Generally, family offense cases in New York City do not take quite that long to conclude. When the custody case is tried concurrently with the family offense case, however, they take significantly longer.
In this case, the judge made a finding of assault on the family offense case, and found aggravating circumstances based on the physical injury suffered by the mother. The court issued a three year order of protection on behalf of the mother and child, excepting court-ordered visitation. The mother testified that the respondent pushed and shoved her, kicked her, struck her in the face with a closed fist and grabbed her throat. The couple’s four-year-old child witnessed this assault at the home of the child’s babysitter. The mother vividly described her daughter’s reaction to witnessing the assault, stating that the child was crying and screaming for her father to stop. The mother testified that she had bruises on her legs and her face was red and swollen. Although Mr. M. was arrested for this assault, the criminal case was adjourned in contemplation of dismissal and an order of protection was issued for one year. This is a common result for misdemeanor cases involving domestic violence in criminal court.90

Mrs. M. also testified about incidents of domestic violence that occurred early in the relationship. In 1992, while pregnant with the subject child, the father threatened to burn Mrs. M. with an iron she was using at the time. After the child was born, he threatened to kill Mrs. M. and kicked at the apartment door while standing outside the apartment. During this time period, he cursed at her and called her a “whore” and a “bitch” in front of the children.91 During his cross-examination of Mrs. M., the respondent called her a “money-hungry dog” and a “lesbian.”

The court took judicial notice that Mrs. M. had an order of protection in place almost every year since she first sought one in 1992. These orders were issued either on consent or as a result of the respondent’s default.

The mother presented expert testimony by the child’s social worker who described the specific impact the domestic violence had on the subject child, including nightmares and clingy, later aggressive, behavior. The social worker, who specialized in domestic violence, also testified to the negative effects that domestic violence has on children in general. She submitted reports to the court almost every time the case was heard, urging the court to direct Mr. M. to complete a batterer’s intervention program.

90. In 1998, approximately 25% of the misdemeanor cases in Kings County were adjourned in contemplation of dismissal and orders of protection were issued for one year. See Office of Court Administration, Criminal Records Information Management Systems.

91. The mother also had an older son who had a different father.
A police officer testified to witnessing injuries, a bloody lip and swollen eye, suffered by the father's current live-in paramour. The officer testified that the girlfriend identified the respondent as the perpetrator of her injuries and that the respondent was arrested in the apartment they shared. The officer also testified that the respondent tried to resist arrest by flailing his arms. The officer's testimony was particularly relevant because Mr. M. testified as to his relationship with this particular girlfriend. He stated that she would act as a role model along with him, helping him impart his family values to his daughter.

Evidence was also presented regarding issues other than domestic violence. The father never lived with the child. When she was born, he visited a few times a week for a short time, but always in the presence of the mother or maternal grandmother. There was a long period of time during which he did not see the child at all because orders of protection were in place against him. He filed for visitation twice, but both cases were dismissed when he failed to appear.

In his closing argument, the law guardian supported a continued order of supervised visitation, and highlighted to the court the father's uncontrollable behavior in the courtroom. Although the law guardian stated that his client wished to see her father in an unsupervised setting and acknowledged that the supervised visitation had continued without major incident, he cited two reasons for making a recommendation contrary to his client's wishes. First, his client's young age rendered her unable to appropriately consider her own safety. Second, the numerous gifts her father bestowed on her, even after the court had admonished him to cease this behavior, had improperly influenced the child's thinking.

The court ordered unsupervised visitation for the father on alternate Sundays from 10:00 a.m. until 5:00 p.m.

Mrs. M. appealed the visitation ruling, arguing that the family court did not give the incidents of violence sufficient weight as required by the statute. Although the Appellate Division granted a stay of the lower court ruling, ultimately the court affirmed the order for unsupervised visitation, holding that Mrs. M. failed to show any detrimental effect on the child. App. Div. 1999. Apparently, the expert witness's testimony and the law guardian’s recommendation were insufficient. The Appellate Division’s failure to hold that domestic violence constitutes a detrimental effect is at odds with the legisla-
tive findings in the statute that clearly state that "a home environment of constant fear where physical or psychological violence is the means of control . . . must be contrary to the best interests of the child."\textsuperscript{93} The legislative findings also enumerate specific harms to children resulting from domestic violence.\textsuperscript{94} This issue is analyzed further in the following discussion.

IV. DISCUSSION

The enactment of a legal presumption, in addition to the strong legislative findings already in existence, would have changed the outcome in all of the cases presented. It is particularly notable that in the cases in the Bronx and in Brooklyn, the same judge who determined there was violence in the course of the family offense case later discounted his own findings in the custody case. This paradox could not have arisen if a presumption were imposed. The finding that a family offense was committed would have automatically triggered the presumption against awarding custody to the person against whom those findings were made. In Queens, had the court and the expert applied the legislative findings to the facts presented, the mother's testimony of violence would have made sense to them. It is likely that the court would have made a finding that the father committed acts of domestic violence, again triggering the presumption.

The Brooklyn and Queens cases share a long history of violence perpetrated by the respective respondents.\textsuperscript{95} In both cases, the petitioners had prior orders of protection from the family court. The orders were issued either on consent of the respondents, or upon their default. These orders were issued prior to the enactment of the Family Protection and Domestic Violence Intervention Act of 1994,\textsuperscript{96} and the expanded relief currently available under that law.\textsuperscript{97} In part because of the limited relief available prior to that legislation, there was no incentive to hold a hearing. Orders were typically issued for one year with the condition that the respondent not commit a family offense against the petitioner. Thus, there had never been a hearing in either case, even though several protective orders were issued throughout the years. Quick dispositions, without due deliberation, often lead to tolerance of unacceptable be-

\textsuperscript{93} Act of May 21, 1996, ch. 85, 1996 N.Y. LAWS 273, 274.
\textsuperscript{94} See id. at 273-74.
\textsuperscript{95} See supra Parts III.B-C.
\textsuperscript{96} Ch. 222, 1994 N.Y. LAWS 2232.
\textsuperscript{97} See N.Y. FAM. CT. ACT §§ 841-842 (McKinney 1999).
behavior. The permissive posture of the courts, the police and the community at large contributes to the continuation of intra-familial violence. A hearing, on the other hand, gives weight to the issues and holds batterers accountable for their behavior. Holding a hearing would probably empower the victim to return to court if the order were violated. Furthermore, it is likely that after a hearing the court may have made an order better fashioned to "provide meaningful protection." Last, a hearing would have likely prevented the extended custody trials both parties and the children had to endure if the court had appropriately considered the domestic violence when rendering its initial custody and visitation orders. At the very least, it would have limited the time period addressed in the course of the later trials.

A. Unintended Consequences on Child Protective Cases

Ironically, the legislative findings meant to help battered mothers in custody disputes are used by courts and child protective officials rely upon to pursue neglect and abuse cases against them under Article Ten of the FCA. In these child protective cases, the Appellate Division has held that exposure to domestic violence is harmful enough to warrant a finding of neglect, without expert testimony. Regardless of any actions that they may have taken to protect their children, mothers can be found guilty of neglect or abuse under a strict liability standard, because of their "failure to protect" their children against the harm that results from exposure to domestic violence. Courts seem to require a greater showing of harm in private custody matters between parents. The appellate decision in Mrs. M.'s case illustrates this point.

It is the child protective cases, however, where state intervention is a factor, that ought to require a greater showing of harm. State control routinely results in the placement of children into foster

100. See N.Y. FAM. CT. ACT § 1012(f).
care, without offering much assistance to a battered mother.\textsuperscript{103} The standards in these two types of cases are completely different — a finding of child neglect requires proof of impairment of a physical, mental or emotional condition,\textsuperscript{104} whereas custody determinations rest on the best interests of the child. Certainly if there is neglect then it may not be in the child’s best interest for the neglectful parent to maintain custody, but the converse is not necessarily true. Just because it is not in the child’s best interest to be in the custody of one parent does not mean that the parent is neglectful. Appellate courts, however, have held that severe domestic violence between parents in the presence of the child creates imminent danger of impairment “as a matter of common sense,” and no expert testimony is required to make a determination of neglect.\textsuperscript{105}

In some private custody/visitation cases, the Appellate Division requires a showing of a “detrimental effect” before limiting visitation, as in Mrs. M’s case discussed above.\textsuperscript{106} In others, evidence of a history of domestic violence was sufficient to support an order for supervised visitation.\textsuperscript{107} The court of appeals held that “absent exceptional circumstances, such as those which would be inimical to the welfare of the child . . . appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course.”\textsuperscript{108} The language in the legislative history of the 1996 amendment makes it abundantly clear that domestic violence is inimical to the welfare of the child. Therefore, no further showing of exceptional circumstances should be necessary. The court of appeals decision in \textit{Tropea v. Tropea},\textsuperscript{109} rejecting a three-tiered test, absent exceptional circumstances, in custody relocation cases, further calls into question whether all custody/visitation issues should be determined by the best interest standard.

\textsuperscript{103} See, e.g., V. Pualani Enos, Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children, 19 HARV. WOMEN’S L.J. 229, 249 (1996).

\textsuperscript{104} See N.Y. FAM. CT. ACT § 1012(f).

\textsuperscript{105} \textit{In re Athena M.}, 678 N.Y.S.2d 11, 12 (App. Div. 1998); see also Deandre T., 676 N.Y.S.2d at 666; \textit{Lonell J.}, 673 N.Y.S.2d at 116.

\textsuperscript{106} See Mackey, 696 N.Y.S.2d at 695; see also Thaxton v. Morro, 635 N.Y.S.2d 796, 798 (App. Div. 1995) (“While denial of visitation to a noncustodial parent is a drastic remedy, it will be ordered where there exist compelling reasons and substantial evidence showing that such visitation is detrimental to the children.”); Janousek v. Janousek, 485 N.Y.S.2d 305, 308 (App. Div. 1985).


\textsuperscript{109} 665 N.E.2d 145 (N.Y. 1996).
Courts have held that expert testimony is necessary to determine the degree to which a child has been affected by domestic violence, the prospect of emotional harm to the child if visitation were granted or denied and the extent to which the abuse is indicative of a general psychological problem which may pose a risk to the child.\textsuperscript{110} This rationale is inconsistent with appellate case law that holds domestic violence constitutes neglect, without the necessity of expert testimony.\textsuperscript{111} Nor does it provide a rationale for the ruling in the third case where there was expert testimony as to both the general harm resulting from exposure to domestic violence and the extent to which the individual child was affected by witnessing the assault on her mother. In that case, the Appellate Division did not explicitly hold that expert testimony was insufficient to establish a detrimental effect; it held that the visitation decision was within the sound discretion of the family court and would "not be set aside unless it lack[ed] a substantial basis in the record."\textsuperscript{112}

Although the child protective cases hold that expert testimony is not necessary to prove that exposure to domestic violence constitutes harm,\textsuperscript{113} no appellate court has yet to hold that acts of domestic violence between parents, even in the presence of the child, are sufficient as a matter of law to support a finding of neglect. In each of the appellate cases finding neglect, evidence was introduced showing actual impairment to the child's emotional condition as a result of the domestic violence.\textsuperscript{114}

The imposition of a presumption against awarding custody to an abusive parent would make the law more consistent with the child protective rationale set forth in the recent appellate cases, however, the child protective cases also need to be reexamined. The answer is not simply that expert testimony should be required in child protective cases, but that the strict liability standard should be replaced with a reasonable person standard that takes into account a battered mother's particular situation.\textsuperscript{115} Otherwise, there is no distinction between the victim and the abuser; both are viewed as equally liable. The unique circumstances facing battered women must be considered in child protective cases just as they must be in

\textsuperscript{110} See Elkins & Fosbinder, supra note 6, at 613.
\textsuperscript{111} See Athena M., 678 N.Y.S.2d at 11; Deandre T., 676 N.Y.S.2d at 666; Lonell J., 673 N.Y.S.2d at 116.
\textsuperscript{112} See Mackey, 696 N.Y.S.2d at 695.
\textsuperscript{113} See Athena M., 678 N.Y.S.2d at 11; Deandre T., 676 N.Y.S.2d at 666; Lonell J., 673 N.Y.S.2d at 116.
\textsuperscript{114} See Elkins & Fosbinder, supra note 6, at 78 (Supp. Mar. 1999).
\textsuperscript{115} See Miccio, supra note 98, at 1097; Enos, supra note 103, at 229.
custody cases. Battered mothers are not passive; rather, they engage in strategic, logical behavior as they attempt to stop the violence or leave. The major variable, however, the violent man, is outside their realm of control. Staying in the home, especially given the lack of resources and social supports for leaving, should never be read as accepting violence. The battered mother knows far too well that violence does not end upon separation, but tends to escalate. 

The 1996 amendment does not distinguish between custody and visitation. In most domestic violence cases, visitation should be supervised until the non-custodial parent can show he has completed a treatment program.

The studies showing a high correlation between spouse and child abuse should not surprise those familiar with Article Ten of the FCA that provides for derivative findings on siblings in neglect cases. The rationale for derivative findings is that, if one child is being abused, it is likely the other children are also being abused, or may be soon. The burden is on the parent to show the circumstances giving rise to the findings of abuse against one child no longer exist as to the other child. It is not a far leap to find that if a man is abusing his wife then he is also likely to abuse his children. Like the burden in the derivative neglect cases, the burden in custody cases should shift to the abusive parent to show that he has taken steps to remedy the condition and is no longer a threat to the physical or emotional well-being of the child.

B. Parent Education Programs

Parent education programs are designed to educate litigants about the effect of custody litigation on their children. The goal is to inform parents about the problems associated with divorce or separation and “encourage[s] parents to assume responsibility for creating a post-divorce environment in which their children are their first priority.” These programs stress the positive influence of co-parenting where children can enjoy a supportive relationship with both parents. Research shows this is often true in non-violent

118. See American Psychol. Assoc., supra note 58, at 99.
families.\textsuperscript{122} The imposition of parent education programs is an important approach for the non-battered population.

But the research on children of divorce and on children exposed to domestic violence developed as two separate branches, leading to conflicting advice for battered women.\textsuperscript{123} Where domestic violence is present, a co-parenting relationship and the impact of conflict often represents a negative influence on children.\textsuperscript{124} Referring battered women to parent education programs places them in a situation where they are advised to promote a relationship and set aside their past conflicts with a spouse who may be a danger to themselves and their children. Battered mothers and children share the same interest: Safety first. Many times it is the safety of their children that prompts battered women to seek judicial redress in the first place. "Children are a central focus in decisions battered women make about leaving the batterer or staying in the abusive relationship."\textsuperscript{125} The best way to protect children is by assisting mothers in safety planning and holding offenders accountable for their behavior.

Suggesting to the battered woman that it may be best to share custody or allow unsupervised visitation in an effort to maintain an amiable relationship with her abuser for the sake of the child, can be very dangerous. It takes an enormous amount of courage for a battered woman to seek court intervention. Questioning her decision by referring her to a program which tends to emphasize cooperation with her batterer is counterproductive. The woman may start to believe that her batterer really should have unsupervised visitation, or even custody, as illustrated by the case of Mrs. J. and her children when she relinquished custody to her abusive husband, thinking this would prevent him from stalking her.\textsuperscript{126} She may begin to believe that since the children really want to visit him, as Mrs. M.'s young child wanted to visit Mr. M, that she ought to withdraw her request for supervised visitation.\textsuperscript{127} A battered mother may begin to believe that maybe the judge is right; after all, he referred her to the parent education program, and he is the authority figure. Society would never condone referring a rape victim to a program that sends her the message that she ought to cooper-

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{122} See \textit{Jaffe \& Geffner}, supra \textit{note} 85, at 378.
\item \textsuperscript{123} See \textit{id.} at 378.
\item \textsuperscript{124} See \textit{id.}
\item \textsuperscript{125} \textit{Id.} at 377.
\item \textsuperscript{126} See supra Part III.B.
\item \textsuperscript{127} See supra Part III.C.
\end{enumerate}
\end{footnotesize}
ate with her assailant. Referrals to these programs are a poor substitute for judicial action. When the court fails to intervene it deepens a battered woman's sense of isolation and can be even more psychologically damaging. "The court's desire to smooth things over acts further to victimize the battered woman." 128

Cases where domestic violence is an issue must be screened out — whether the violence occurred in the past, or is ongoing. Again, violence does not end upon separation; it tends to escalate. 129 If referrals are to be made at all, they must be made on the consent of the parties, and litigants who decline to attend should not be penalized. Referrals to these programs ought to be made after the appointment of counsel so that the individual interests of the parties will be represented. As a seasoned attorney, I feel pressured when asked to consent to my client's attendance at a program. It must be almost impossible for a litigant to feel she has the option of not attending.

C. Specialized Domestic Violence Parts

Other changes in the New York City family courts will also advance the concerns of the new law, and the way domestic violence is handled in general. Chief Judge Judith Kaye has brought a new awareness to the issues facing victims by creating specialized domestic violence parts in each New York City family court. 130 Although judges assigned to these parts have no special training, the specialized parts raise the consciousness of those participating in the system to the unique problems presented by domestic violence. 131 In some boroughs, the judges who sit in the specialized domestic violence parts meet regularly with advocates, court officials, district attorneys and judges from the criminal court domestic violence parts thereby promoting communication and coordination. 132 One of the greatest needs for families experiencing violence is coordinated services. 133

128. Zorza, supra note 59, at 1120 (citing Peter Jaffe et al., Children of Battered Women 108 (1990)).
131. See id.
132. See id.
133. See Jaffe & Geffner, supra note 85, at 394.
V. LEGISLATIVE PROPOSAL

Under the law, judges who do not understand the nature and effects of domestic violence on children and their mothers are left too much discretion.\textsuperscript{134} The Legislature was unable to create the social change it desired because it failed to use language lawyers and judges understand. In order to overcome entrenched attitudes, legal reform must be clear. The Appellate Division also has not clearly defined exactly what constitutes "weighty consideration."\textsuperscript{135} Only by implementing the language of a legal presumption can legislation alter individual behavior.\textsuperscript{136}

Many advocates, myself included, fear the backlash a presumption might create; batterers know far too well how to manipulate the legal system to gain further control over their victims.\textsuperscript{137} A presumption statute must include additional language to protect victims of domestic violence. Permitting rebuttal of the presumption through evidence of a history of abuse by the other party is a necessary start. Although there will be cases in which the presumption is used against a victim of domestic violence, it is likely that the numbers of victims and their children who will benefit from the protection is far greater than the number of batterers who will succeed in manipulating the system.

The new law, although helpful, has had little impact on the way family court judges determine custody cases in which domestic violence is an issue.\textsuperscript{138} Although the Legislature specifically rejected a rebuttable presumption against granting custody to a parent found to have committed acts of domestic violence, it is apparent that a presumption is necessary in order to meet the goals advanced by the Legislature.\textsuperscript{139} In addition to the proof by example afforded by the three cases presented in Part III, the National Council of Juvenile and Family Court Judges,\textsuperscript{140} along with the American Bar As-

\textsuperscript{134} See Kurtz, supra note 14, at 1359.
\textsuperscript{135} See supra notes 34-50 and accompanying text.
\textsuperscript{137} See Zorza, supra note 59, at 1120.
\textsuperscript{138} See discussion supra Part III.
\textsuperscript{139} See Kurtz, supra note 14, at 1365-66; Catherine F. Klein & Leslye Orloff, Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801, 954-59 (1993).
\textsuperscript{140} See Model Code on Domestic and Family Violence § 401 (1994) (providing that in custody suits there is a rebuttable presumption that it is not in the best interest of the child to be in custody of the perpetrator of family violence).
and the United States Congress all support a statutory presumption against awarding custody to an abusive parent.

CONCLUSION

Many new laws and policies are emerging in the area of domestic violence. In 1994, the Legislature passed the Family Protection and Domestic Violence Intervention Act — a complete overhaul of laws dealing with domestic violence in both the civil and criminal arena. The Legislature declared that domestic violence is now a crime. It is unfortunate that batterers are not always considered criminals when they seek custody of their children. If convicted of a stranger crime, courts are known to accord weight to the batterer's criminal history. When the victim is the child's mother, it seems to be another story.

All the new reform in the area of domestic violence addresses the difference between domestic violence and most other assaultive behavior — in the former, the victim and perpetrator have or had an intimate relationship. Custody determinations do not seem to account for this unique aspect. The framework in which custody decisions are made is still the same regardless of the 1996 legislation. Women are expected to cooperate with their batterers for the sake of the child. Attempts at protection can be seen as interfering with access, and interfering with access may result in an award of custody to the abusive parent.

---

143. Family Protection and Domestic Violence Intervention Act of 1994, Ch. 222, 1994 N.Y. LAWS 2704 (granting concurrent jurisdiction between the family and criminal courts, providing for mandatory arrest, notice to victims, establishes technological advances and training for courts and law enforcement personnel).
144. See id.
145. See Hyde v. Hudor, No. 84077, 1999 WL 971927, at *2 (N.Y. App. Div. Oct. 28, 1999) (weighing respondent's plea of guilty to assault in the third degree and resisting arrest along with other factors in award of custody to petitioner); In re Nicole F., 634 N.Y.S.2d 78, 79 (App. Div. 1995) (“In view of respondent's long and violent criminal history, including at least three felony convictions for assault, none of which had been disclosed or discovered prior to the agreement of the parties to release the two-year-old child to his custody . . . Family Court erred in granting respondent unsupervised visitation.”). But see Ronald F. v. Lawrence G., 694 N.Y.S.2d 622, 627 (Fam. Ct. 1999) (awarding custody where “[t]here is absolutely no evidence in this record which indicates that the petitioner’s past criminal history has had an adverse effect upon the children”).
The New York law on custody is helpful to children who are exposed to domestic violence, but the negative impact on children must be given more weight when determining custody and visitation. The legislative mandate to give domestic violence "weighty consideration" is not enough to overcome entrenched attitudes about domestic violence. The language of the statute should be changed to create a presumption against awarding custody to abusive parents so that judges, lawyers, social workers and psychologists will change their behavior accordingly.
THE UCCJEA: WHAT IS IT AND HOW DOES IT AFFECT BATTERED WOMEN IN CHILD-CUSTODY DISPUTES

Joan Zorza*

INTRODUCTION

The Uniform Child-Custody Jurisdiction and Enforcement Act ("UCCJEA" or "Act") is the revised version of The Uniform Child Custody Jurisdiction Act ("UCCJA"), which states are now being asked to adopt immediately in its stead. The UCCJA was the original model act for states to determine when they have jurisdiction to decide a custody case and when they must give full faith and credit to the custody decrees of other states. When the National Conference of Commissioners on Uniform State Laws ("NCCUSL" or "Conference") wrote the UCCJA in 1968, it sought to correct two major problems of its day: child abductions by family members and jurisdictional disputes arising in interstate custody or visitation matters. While these issues can arise independently, the NCCUSL correctly saw the two problems as often interrelated. Indeed, more than half of the nation's 350,000 annual child abductions occur in the context of domestic violence, most of them perpetrated by abusive fathers.1 These abductions have been found to be as traumatic to children as when they are abducted by strangers, with many developing post-traumatic stress disorder.2

This article explains exactly what the new UCCJEA does, focusing on its benefits and some problem areas for battered women. Part I discusses the history of the Act, including the difficulties with, and the inconsistencies between, the Act's predecessors, the

* J.D., Boston College Law School, 1981. Editor, Domestic Violence Report and Sexual Assault Report, Liaison to the American Bar Association's Commission on Domestic Violence, Member of the boards of the National Coalition Against Domestic Violence, the New York State Coalition Against Domestic Violence and the New York City Coalition of Battered Women's Advocates. Before moving to New York in 1990 to start the National Battered Women's Law Project, Ms. Zorza represented more than 2000 battered women at Greater Boston Legal Services and as a clinical supervisor at one of Harvard Law School's clinical programs. She has been a consultant with the American Medical Association and the National Council of Juvenile and Family Court Judges.

2. See id. at 205-06.
UCCJA and the Parental Kidnapping Prevention Act ("PKPA"). Part II examines the UCCJEA, detailing the expanded options available to battered women for temporary emergency jurisdiction, denial of jurisdiction by courts that ordinarily hold such jurisdiction and protections for victims and their children. Part III explains some of the enforcement provisions of the UCCJEA. The article suggests some changes to improve the UCCJEA and PKPA, but concludes that despite some of the problems with the UCCJEA, even as currently written, it is a step in improving child custody jurisdiction and will better protect battered women and their children.

I. HISTORY OF JURISDICTIONAL DEBATE

A. The Supreme Court's Refusal to Resolve Important Jurisdictional Disputes

The jurisdictional problems that arise in interstate custody disputes and the inability to have custody decrees enforced by other states became increasingly prevalent throughout the last century. Attempts by lawyers to get the U.S. Supreme Court to resolve the matter failed, beginning with its 1947 decision in *Halvey v. Halvey*, which refused to require states to give full faith and credit to another state's custody decree. This refusal was based on the notion that every custody determination, whether issued as a "temporary" or "permanent" order, was actually only a temporary order, always modifiable, and that moving to another state constituted a change in circumstances warranting modification.4

Effectively, the *Halvey* decree rewarded losing contestants who abducted their children and relocated across state lines. At a minimum, an abducting family member was guaranteed a *de novo* trial in the new state to try to gain lawful custody.5 Further, because any prior custody decree could not be enforced beyond the issuing state's borders, abductors were also safe from contempt or abduction charges so long as the abductors never returned to the state from which they had fled.6

Additionally, if the abductors were able to successfully win custody in the new state, they were also not at risk from having the children lawfully removed and returned to the state from which

3. 330 U.S. 610, 612 (1947) (holding that because a custody decree could be modified at any time, it is not a final judgment entitled to full faith and credit).
4. See id. at 620 (Rutledge, J., concurring).
5. See id. at 613.
6. See id. at 620 (Rutledge, J., concurring).
they fled. However, as Justice Rutledge noted in his concurrence in Halvey, should the child be taken back to the original state of jurisdiction, it would set off “a continuing round of litigation over custody, perhaps also of abduction between alienated parents. That consequence hardly can be thought conducive to the child’s welfare.”

This decision was followed by May v. Anderson, in a second attempt to require states to honor and enforce the custody decrees of other states. Despite the May’s dissenter’s serious reservations, this later attempt proved just as unsuccessful as the first.

At the time of the U.S. Supreme Court’s decision in Halvey, most abductors were fathers or grandparents, who were far better situated than mothers to win custody in a new state for a number of reasons. Women of the time faced even greater gender bias discrimination, which impacted them financially and socially, thereby rendering them less able to litigate their interests or be seen as financially or socially fit. In addition, the United States had no awareness of domestic violence, further impeding women’s efforts to force courts to recognize abusive situations, and the need to protect them and not to be blamed for the abuse or receive help in becoming independent both financially and emotionally from the abuse. In light of these circumstances, the Conference probably never guessed how the UCCJA would be used to hurt so many mothers who later fled to protect themselves or their children from abuse.

B. Enactment of the Parental Kidnapping Prevention Act

Although the UCCJA was introduced in 1968, states were slow to adopt it throughout the next twelve years. Those states that did adopt the UCCJA often made alterations — some quite substantial.

---

7. With no legal remedy available to enforce the original custody decree in a new state, another effect of these laws was to encourage “self-help” remedies by the left-behind parent whose children were abducted as the only way to enforce their rights.
9. 345 U.S. 528 (1953). There were three dissenters in the case: Justices Jackson, Reed and Minton. See id. at 536, 542.
in their own versions. These practices produced conflicting judicial decisions about whether a state had to recognize another state's decree, even when both states' UCCJA versions differed only slightly. As a result, far too few custody decisions were being honored and enforced by courts of other states.

To correct this problem, Congress enacted the PKPA. The PKPA forced every state to give full faith and credit to any custody decree, no matter in which state the decision was rendered, provided it met due process and the PKPA jurisdictional requirements. The PKPA also prevented other states from modifying a custody order issued by any other state, with only a few exceptions. It also added various enforcement mechanisms for use against abductors, including: (1) the use of the Federal Parent Locator Service to locate abductors; and (2) provision for issuing federal Unlawful Flight to Avoid Prosecution ("UFAP") arrest warrants under the Fugitive Felon Act, for child abductors fleeing across state or international lines to avoid prosecution on state felony abduction charges.

The PKPA, as a federal law, preempts any state's enacted UCCJA whenever the two are inconsistent. Both the PKPA and UCCJA are jurisdictional in that they determine whether a court in

13. See id. When Congress enacted the PKPA in December of 1980, 43 states had adopted the UCCJA. By 1980 there was enough awareness of domestic violence that Congress could and should have taken it into account. However, domestic violence issues were never raised or considered in it. See Patricia M. Hoff, The ABC's of the UCCJEA: Interstate Child-Custody Practice Under the New Act, 32 Fam. L.Q. 267, 268 (1998).

14. The PKPA requires that, before a court can decide any custody matter, reasonable notice and opportunity to be heard has been given to all contestants, parents whose parental rights have not been terminated and to anyone actually having physical custody of the child. See 28 U.S.C. § 1738A(e).

15. Specifically, for initial custody determinations, the PKPA prioritizes home state jurisdiction over significant continuing jurisdiction and otherwise repeats the temporary and no other state jurisdictional requirements of the UCCJA. See id. § 1738A(e).

16. See id. The exceptions are if all of the contestants and the child have moved from the initial state or the initial state has declined jurisdiction. See id.


18. 18 U.S.C. § 1073 (1994). Once a UFAP warrant has been issued, the F.B.I. can become involved in searching for the abductor.

19. Id.

a particular state has the power to decide a case, not how the court should decide the actual custody issues being contested. The court may have jurisdiction under state law, for example, to decide the divorce between the parties, but may not have jurisdiction under the PKPA/UCCJA to decide the custody issues regarding the parties' children. Similarly, the court may have PKPA/UCCJA jurisdiction to decide custody of one child, but not that of another child, since the jurisdictional requirements are specific to each child. Courts have a real incentive to follow jurisdictional rules because their orders will not be entitled to full faith and credit when they do not have jurisdiction.

Specifically, the PKPA preempts the UCCJA by not allowing courts making initial custody decisions to consider significant connection jurisdiction in cases when there is a home state jurisdiction. It prevents any state from exercising modification jurisdiction when there is already a pending proceeding in a state in accordance with the PKPA/UCCJA, and further gives the original state the right to exclusive jurisdiction to modify any of its orders provided the child or one of the contestants continued to reside in that state.

II. THE UCCJEA

A. Re-Examination of the UCCJA

While the Conference knew that the UCCJA would have to be amended to conform with the PKPA, it was ironically the Uniform Interstate Family Support Act, which governs paternity establishment and child support determinations, collection and enforcement, that was the impetus for the reexamination of the UCCJA. The Conference began reexamination of the UCCJA in 1994, and soon realized it must harmonize the UCCJA with the full faith and

22. See id. § 1738A(d). See also infra Part II.C. (describing the difference between home state and significant connection jurisdiction).
23. 28 U.S.C. § 1738A(d). The U.S. Supreme Court held that the PKPA does not create a cause of action in federal court to resolve which of two competing custody decrees is valid, thereby ending the litigation that was creeping into federal court to resolve these disputes. See Thompson v. Thompson, 484 U.S. 174 (1988).
credit mandate of the Violence Against Women Act ("VAWA"),\textsuperscript{26} which was enacted on September 13, 1994, and requires states to honor and enforce orders of protection, including ex parte orders. The Conference would also need to decide whether to cover tribal court orders, resolve the ambiguities about which custody proceedings are covered, clarify that the "best interests" language in the UCCJA\textsuperscript{27} was not meant to open up the merits of the case, resolve whether orders of protection trigger emergency jurisdiction, determine when courts have declined jurisdiction, resolve confusion about how long temporary jurisdiction lasts and finally, determine how to effectively enforce orders quickly and uniformly throughout the country. While the NCCUSL continued to ignore the problems of domestic violence for anyone except those involving the particular child, domestic violence advocates\textsuperscript{28} forced the Commissioners to make a number of concessions in its final version to include some protections for victims of domestic violence. While these changes are rather minimal, in part because of PKPA limitations, they will help battered women and their children. These changes are discussed in the remainder of the article.

The Conference’s final version has been met with remarkable success. To date, at least fifteen states have adopted the new legislation,\textsuperscript{29} and many more states are actively considering enactment during their current or next legislative session.\textsuperscript{30}

\textsuperscript{26} 18 U.S.C. §§ 2265-2266 (1994) (requiring states to honor and enforce orders of protection, including ex parte orders). Although the full faith and credit mandate of VAWA specifically exempts custody orders, certain practice orders, including stay-away from a child orders, might be inconsistent with the UCCJA.

\textsuperscript{27} See UCCJA § 3(a)(2) (stating that "it is in the best interest of the child that a court of this State assume jurisdiction because (i) the child and his parents, or the child and at least one contestant, have a significant connection with this State, and (ii) there is available in this State substantial evidence concerning the child's present or future care, protection training, and personal relationships").

\textsuperscript{28} These advocates included Lesley Orloff, then of AYUDA (an immigration program for battered women in Washington D.C) and a small group of domestic violence advocates (including the author) acting through Roberta Valente, then staff director of the American Bar Association’s Domestic Violence Commission.


B. The UCCJEA Notice Requirements

The UCCJEA provides that any first child-custody determination made concerning a particular child under age 18 — as long as the jurisdictional requirements are met — binds all parties with notice. This specifically includes child custody provisions in orders of protection. Notice should be given to any parent whose rights have not been terminated and to any other person having physical custody of the child or who had physical custody of the child barring temporary absences for six consecutive months within the year prior to beginning the custody proceeding and has either been awarded legal custody by a court or claims a right under the law of the state to legal custody. Notice, in a way that is reasonably likely to give actual notice, can be given to any person outside of the state under either state’s notice laws, “but may be by publication if other means are not effective.” This change will enable a fleeing battered woman to protect herself against her abuser by being able to serve him and causing him to be bound by any decision later made in the case. It should also prevent her from being subject to federal kidnapping charges in cases where he has filed an action in the home state without ever giving her notice, but the court nevertheless defaults her and awards him custody.

C. UCCJEA Initial Jurisdictional Criteria

Except in emergencies, an initial custody determination must be made by a court having one of the UCCJEA’s four jurisdictional criteria, some of which are new and all of which are statutorily prioritized. Parties cannot confer jurisdiction on a court that does not otherwise meet one of these criteria; however, emergency juris-

---

31. See UCCJEA §§ 102(4), 205 cmt.
32. See id. § 102(12) (clarifying that “person” includes agencies of states involved with custody of a child).
33. Cf. id. § 102(13) (noting that “person acting as a parent’ means a person, other than a parent, who . . . has physical custody . . . [or] has been awarded legal custody”).
34. Id. § 108(a).
35. See id. § 108. He would also be bound if he appeared, unless it was a special appearance. See id. § 109(a).
36. While 18 U.S.C. § 1204 provides a defense to someone fleeing a pattern or incident of domestic violence, it does not mean that the charges will not be filed. See 18 U.S.C. § 1204(c)(2).
37. Although the UCCJEA explains that the “[p]hysical presence of, or personal jurisdiction over, a party or the child is not necessary or sufficient to make a child-custody determination.” UCCJEA § 201(c).
38. See id. § 201(a).
diction, while largely eliminated for initial permanent determinations, can often be used to obtain temporary orders and modifications. The four types of jurisdiction are "home state," "significant connection," "appropriate forum," and "no other state."

**Home State Jurisdiction:** As required by the PKPA, the UCCJEA states that if the child involved in the custody dispute has a home state, only that state may make the initial custody determination, unless the home state declines jurisdiction. A child's temporary absences from the state are not relevant to this determination. A child's home state keeps its status for six months after a child leaves, regardless of why the child has left, provided a parent or person acting as a parent remains in the home state. Unless acting as a parent, grandparents possessing visitation are not considered "contestants" for purposes home state retention.

**Significant Connection Jurisdiction:** As under the PKPA, when there is no home state or the home state court has declined jurisdiction, a state with significant connection jurisdiction is permitted to preside over a custody determination. In contrast to the old UCCJA, the child's presence is not required for there to be significant connection jurisdiction, and the "best interests" and "present or future care" language has been eliminated.

**More Appropriate Forum Jurisdiction:** A court in a state that is the appropriate forum may do so only if courts having home state or significant connection jurisdiction have decided to exercise it.

**No Other State Jurisdiction:** Only if no court of any other state has jurisdiction on any of the three previous jurisdictional criteria may a court exercise no other state jurisdiction to deal with these "vacuum" situations. This type of jurisdiction would enable a court to take jurisdiction in a custody action between the parents

---

39. But see infra Part II.D.
40. See id.
41. Under the UCCJA, a state could only remain a child's home state for six months after the child left because of wrongful removal or retention. See UCCJA § 3(a)(1).
42. See id. §§ 201, 208 (discussing declining jurisdiction for wrongful removal).
43. However, a recent change to the PKPA appears to preempt this. See 28 U.S.C. § 1738A(b)(2) (1999).
44. See UCCJEA § 201(a)(2) & cmt.
45. See id. § 201(a)(3).
46. See id. § 201(a)(4).
who work for a traveling circus, whose child has never spent, for example, more than two weeks per year in the same state.\textsuperscript{47}

Once a state court has made an initial child-custody determination consistent with one of these four jurisdictional requirements, the issuing court retains exclusive continuing jurisdiction with the following exceptions: (1) under certain exceptions when a court of another state has temporary emergency jurisdiction;\textsuperscript{48} (2) when the issuing court "or the court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in"\textsuperscript{49} the issuing state; or (3) when a court of this state finds "that neither the child, the child and one parent nor the child and a person acting as a guardian have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training and personal relationships."\textsuperscript{50} This section is necessary to bring this act in compliance with section 1738(d) of the PKPA, which prevents any other state from modifying an issuing state's custody decree except when all of the parties and child have left the state, unless the issuing state has declined jurisdiction.

\section*{D. Temporary Emergency Jurisdiction}

Temporary emergency jurisdiction only arises in the extraordinary circumstances where a child is present in a state and it permits that state's court to issue only short-term orders.\textsuperscript{51} However, the UCCJEA does permit a court to exercise this type of jurisdiction in an emergency to protect the child, its siblings or its parents who are subjected to or threatened with mistreatment or abuse. This is a major improvement over the comparable sections in both the UCCJA\textsuperscript{52} and the PKPA,\textsuperscript{53} which only permit jurisdiction to be assumed to protect the particular child in question, and not a parent or sibling.

If no previous custody determination has been made, and no child-custody proceeding is commenced in a court having jurisdiction to make an initial child-custody determination, the temporary

\begin{footnotesize}
\begin{enumerate}
\item[47.] Many law school exam-like scenarios are possible, for example, a custody fight over a baby born to two American parents on a Soviet spacecraft or U.S. Navy submarine in international waters.
\item[48.] See discussion infra Part II.D.
\item[49.] UCCJEA § 202(a)(2).
\item[50.] Id. § 202(a)(1).
\item[51.] See id. § 204 & cmt.
\item[52.] UCCJA § 3(a)(3).
\end{enumerate}
\end{footnotesize}
order made under the temporary emergency jurisdiction can become a final order, but only if it so provides, once the deciding state becomes the child's home state.\textsuperscript{54} However, if there is a prior custody decree that is entitled to be enforced or an action is filed in a court having jurisdiction to make an initial child-custody determination, the court with emergency jurisdiction must do two things. First, it must specify in the temporary emergency order a period of time that the court considers adequate to allow the person seeking the emergency order to obtain an order from the state having initial custody jurisdiction.\textsuperscript{55} Second, the court "shall immediately communicate with the court of that State to resolve the emergency, protect the safety of the parties and the child, and determine a period for the duration of the temporary order."\textsuperscript{56}

Once factual findings or rulings of law have been made after notice and opportunity to be heard in a custody or other proceeding entitled to full faith and credit, for example, in an order of protection case, no court may re-litigate the issues decided.\textsuperscript{57} Thus, a temporary emergency jurisdiction can make a final ruling as to the underlying abuse. It also will halt the practice of re-litigating the abuse finding on the theory that the allegation was only made for tactical advantage or to alienate the child from the other parent.

This new language in the UCCJEA is a significant improvement for battered women over treatment allotted under the original UCCJA. For example, it permits a court of another state to assume temporary jurisdiction when a parent removes herself to another state when she is being battered or threatened with abuse, and enables her to protect all of the children when only one is being abused. In addition, it tells both courts that safety of the parties and child is the first consideration.

However, there are serious deficiencies as well. Forcing women to rely on a judge to decide whether the temporary order may become permanent leaves the battered woman or protective parent at the mercy of a judge, who may fail to find that an emergency exists, or may fail to finalize the order because he or she believes there is a minimal likelihood of future danger, a common judicial failing.\textsuperscript{58}

\textsuperscript{54.} See UCCJEA § 204(b).
\textsuperscript{55.} See id. § 204(c).
\textsuperscript{56.} Id. § 204(d).
\textsuperscript{57.} See id. § 204 cmt.
\textsuperscript{58.} See, e.g., RUTH I. ABRAMS & JOHN M. GREANEY, REPORT OF THE GENDER BIAS STUDY OF THE SUPREME JUDICIAL COURT 90-91 (1989) (stating that the Massachusetts Gender Bias study found that judges expect more collaboration in domestic violence cases than they do in other serious crimes, and that they often asked inappro-
Nor will she be protected if her abuser initiates (or re-initiates) litigation before she has been gone for six months, and it may not protect her if she is forced to flee to yet another state. Similarly, the new language will not help in all emergency situations where she acts to protect someone who is not her and the abuser's child. For example, siblings are not defined in the statute, and only in a state that otherwise adopts a broad construction of that term would half- and step-siblings be included. Without a broad construction, emergency jurisdiction will not be able to protect a mother from being treated as a wrongful abductor in a case filed by her current husband when she has fled with all of her children because her prior husband was sexually abusing his child. It is even less likely to protect her if she fled with all children in an attempt to protect an abused niece, nephew, grandchild or foster child in her care, or her own parent or sibling who is being severely abused by her husband.59 Regardless of whether the emergency is covered under section 204, including the state's definition of "sibling," it may still be possible for her to convince the court that issued the initial decree to decline jurisdiction in a case where the abuse is particularly severe.60

Unfortunately, although the comments make it clear that section 208 of the UCCJEA should not be used to harm protective parents,61 section 208(c) makes it extremely risky for a battered wo-

---

59. Notwithstanding the UCCJEA's inability to protect her in such a situation, a necessity or justification defense should protect her from any criminal charges. 60. See infra Part II.G. 61. Specifically, the section states: The focus of this section is on the unjustified conduct of the person who invokes the jurisdiction of the court. A technical illegality or wrong is insufficient to trigger the applicability of this section. This is important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred
man who has fled abuse to seek protection under the court's temporary emergency jurisdiction. This is because the court may assess her with all of the opponent's "necessary and reasonable expenses" if the court declines jurisdiction or stays her proceeding. Her risk may be exacerbated because many batterers deliberately threaten to, and in some instances, drive their victims into poverty or even homelessness, even if it also may make them destitute themselves. Such an abuser, though taking a calculated risk, may deliberately escalate the violence to force his victim to flee, and then purposely drive up his expenses to further punish and control her. Even if she ultimately prevails, she will have been further emotionally drained by the flight and litigation, possibly impairing her parenting abilities.

E. Jurisdiction for Modifying Custody Decrees

Except under the limited circumstances, when temporary emergency jurisdiction exists, no other state's court may modify an issuing court's child-custody determination unless it has jurisdiction to make an initial child-custody determination and one of two determinations are made. Specifically, the issuing court must decide either that it no longer has exclusive continuing jurisdiction or that the would-be modifying state would be a more convenient forum. In the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances... 

UCCJEA § 208 cmt.

62. Section 208(c) makes her vulnerable to being considered the party who wrongfully removed or retained a child if the court does not believe how serious the victim's fears were or naively assumes that the police could have afforded adequate protection. Specifically, section 208(a) of the UCCJEA says that someone seeking unsuccessfully to invoke jurisdiction can be assessed "necessary and reasonable expenses including costs, communication expenses, attorney's fees, investigative fees, expenses for witnesses, travel expenses, and child care during the course of the proceedings, unless the party from whom fees are sought establishes that the assessment would be clearly inappropriate." UCCJEA § 208(a).


64. George W. Holden et al., Parenting Behaviors and Beliefs of Battered Women in Children Exposed to Marital Violence: Theory, Research, and Applied Issues 289, 293 (George W. Holden et al., eds., 1998).

65. See UCCJEA § 202(b).

66. See id. § 202(a).
Alternately, in situations where all parties and the child have moved from the state, either the issuing or would-be-modifying court can determine that the child, the child's parents or any other person acting as a parent do not presently reside in the other state. In the absence of an emergency, the would-be modifying court is prohibited from making any custody determinations except as to whether all of the contestants have moved from an exclusive continuing jurisdiction state, a determination that either court is permitted to make.

**F. Judicial Communication and Cooperation**

A primary goal of both the UCCJEA and PKPA is to avoid simultaneous proceedings in different states or the wrongful modification of a court order of a previous state by a court of a new state. One of the key mechanisms that the UCCJEA has implemented to prevent this from occurring is mandating that the courts involved communicate with each other. The changes in the UCCJEA, however, give the courts fewer situations when they will be required to do so, having resolved many of the ambiguities created by the UCCJA. The times when communication will be required will likely occur when there is no home state, no state with exclusive continuing jurisdiction, more than one significant connection state or, in cases involving temporary emergency jurisdiction.

In instances where a court does not have jurisdiction, but feels it should assume it to, for example, protect someone, it should stay its proceeding, but ask the court that does have jurisdiction to de-

---

67. See infra Part II.G.1.

68. See UCCJEA § 110 cmt. The UCCJEA provides no guidance except for judicial communication on how to resolve disputes when two courts make contrary determinations as to whether all parties have moved from the state, particularly when the determinations are made simultaneously. However, this is only a problem if the home state determines that all parties have not all left, whereas the other state determines that the parties have all left. When the courts have made contradictory findings, the other state can assume jurisdiction because the home state will have effectively declined jurisdiction.

69. Other mechanisms include prioritizing home state jurisdiction, creating the exclusive continuing jurisdiction provisions, restricting when states may modify, requiring all parties to disclose any information about other cases having courts examine those documents to see whether another state already has jurisdiction, and mandating that the courts involved communicate with each other. See generally Part II.

70. For example, by prioritizing home state over significant connection jurisdiction, courts will know which state is entitled to make an initial custody determination since only one state can be the child's home state at any point in time.
cline because it is an inconvenient forum. The parties to the suit may be allowed to participate in this communication. However, if they are not able to participate... they must be given an opportunity to present facts and legal arguments before a decision on jurisdiction is made.73 Furthermore, a retrievable record must be made and the parties must be promptly informed of the communication and given access to the record. Modern technology can be employed for the purpose of communication; not only may witnesses testify by telephone, audiovisual or other electronic means, but documentary evidence transmitted by technological means from another state to the court is admissible.76

Specific provisions permit the court to communicate with foreign courts, or, when states opt to recognize tribal orders, tribal courts.77

G. Declining Jurisdiction

As under the UCCJA, the UCCJEA provides that a court with jurisdiction may decline to exercise it for two reasons: inconvenient forum, which can be done at any time, and unjustifiable conduct.78 However, both grounds have been altered, in part to take domestic violence into account.

71. See UCCJEA § 207(a); see also supra Parts II.C-D. Section 112 of the UCCJEA permits a court to ask another court to order an evaluation, hold an evidentiary hearing, conduct discovery, order any party or person having physical custody of the child to appear with or without the child or forward certified copies of transcripts, evidence or custody evaluations. The court must preserve copies of the records until the child is 18 years old, and when requested by a court or law enforcement official of another state, forward a certified copy of those records. For domestic violence victims in hiding, the requirement in section 112(d) that law officers of this state can request records may greatly endanger them. Also potentially troublesome is the fact that the court can assess “[t]ravel and other necessary and reasonable expenses incurred” for out-of-state discovery or evidentiary hearings. UCCJEA § 112(c).

72. See UCCJEA § 110(b) (while not completely upholding Yost v. Johnson, 591 A.2d 178 (Del. 1991), the court held that it was error not to allow both parties to participate in the judicial communication).

73. Id.

74. See id. § 110(d). Courts may communicate in other circumstances, e.g., one court could ask another one to schedule an evidentiary hearing to obtain the testimony of a witness who lives in the second state. See id. § 111.

75. See id. § 111(b).

76. See id. § 111(c).

77. See id. § 110 cmt.

78. See id. § 207.

79. See id. § 207(a).

80. See id. § 208(a).
1. Declining Jurisdiction for Inconvenient Forum

A court can decline jurisdiction because it is an inconvenient forum upon a motion of a party, the court's own motion, or at the request of another court (but no longer at the request of a guardian ad litem).\(^81\) Declining jurisdiction in the custody matter does not mean that the court would have to decline jurisdiction in the divorce or another proceeding, or all aspects of the proceeding;\(^82\) however, once a court has declined custody jurisdiction, it should stay the custody matter upon condition that it is commenced in the appropriate designated state, imposing any other conditions that the court considers reasonable.\(^83\) In deciding whether to decline jurisdiction, a court is required to permit the parties to submit information and consider all relevant factors, including: (1) whether domestic violence has occurred and is likely to continue, and which state could best protect the parties and child;\(^84\) (2) how long the child has lived outside this state; (3) how far it is between the courts; (4) the relative finances of the parties; (5) any agreement of the parties as to which state should hear the case; (6) the nature and location of the evidence needed to resolve the case (including the child's testimony); (7) the ability of the court to decide the issues expeditiously and the procedures necessary to present the evidence; and (8) how familiar each court is with the facts and issues in the pending litigation.\(^85\)

Not only are domestic violence and safety listed as factors, but the relative financial circumstances of the parties must be considered, which often is a critical issue for battered women, who traditionally have far less access to finances, particularly when they must flee their abusers. Health of the parties is another specifically mentioned factor in the commentary after this section, another issue often relevant to victims of abuse because physical, emotional or sexual abuse can cause long-term or permanent physical or psychological injuries. Courts are urged not to divide custody of all the children amongst different courts, but also to remember that it

\(^{81}\) See id. § 207(a); cf. UCCJA § 7(b) (specifically including a guardian ad litem).
\(^{82}\) See id. § 207(d) (noting that a court might retain jurisdiction to determine paternity, divide property or order child support, but relinquish the custody aspect of a case).
\(^{83}\) See id. § 207(c).
\(^{84}\) Indeed, this is the first listed factor in section 207(b), thereby finally recognizing its importance.
\(^{85}\) See id. § 207(b)
may be desirable not to lose child support collection possibilities, two issues that may affect battered women and their children.  

2. Declining Jurisdiction for Reason of Conduct

In contrast to the UCCJA, the UCCJEA mandates that if a state court has jurisdiction, except in temporary emergency jurisdiction situations, the court must decline jurisdiction when a person seeking to invoke its jurisdiction has engaged in unjustifiable conduct, with three exceptions.  The court need not decline jurisdiction by reason of conduct if the parents and all persons acting as parents agree to the acceptance of jurisdiction, no court of any other state would have initial, exclusive continuing or modification jurisdiction, or the court of the state otherwise having jurisdiction determines that this state is the more appropriate forum.  Even if jurisdiction is declined, the court may retain it until jurisdiction is assumed in the other court, or so that it can issue temporary orders to prevent a repetition of the unjustifiable conduct or to ensure the safety of the child.

Unjustifiable conduct includes “removing, secreting, retaining or restraining” a child. However, in language specifically favorable to battered women, the comment to the statute reads:

A technical illegality or wrong is insufficient to trigger the applicability of this section. This is particularly important in cases involving domestic violence and child abuse. Domestic violence victims should not be charged with unjustifiable conduct for conduct that occurred in the process of fleeing domestic violence, even if their conduct is technically illegal. Thus, if a parent


87. See UCCJEA § 208(a).

88. See id. § 208(a)(1). But note that this does not include the state or agency or the guardian ad litem. This provision is likely to disadvantage battered women, who are far less likely to have equal bargaining power in negotiating or refusing to negotiate on acquiescence of jurisdiction.

89. See id. § 208(a)(3).

90. See id. § 208(a)(2).

91. See id. § 208(b).

92. See id. § 208 cmt.
flees with a child to escape domestic violence and in the process violates a joint custody decree, the case should not be automatically dismissed under this section. An inquiry must be made into whether the flight was justified under the circumstances of the case. However, an abusive parent who seizes the child and flees to another state to establish jurisdiction has engaged in unjustifiable conduct and the new state must decline to exercise jurisdiction under this section.\(^9\)

Following the International Child Abduction Remedies Act,\(^9\) a state court must assess all reasonable costs and fees to be paid to the parent who establishes that jurisdiction was based on unjustifiable conduct. In cases where a fleeing victim sought the court’s temporary emergency jurisdiction but the court declined jurisdiction or stayed its action, the court should presumptively assess all costs against the wrongful party (i.e., the parent who wrongfully fled, as determined by the court’s denial of accepting temporary emergency jurisdiction), unless the party from whom the fees are sought can establish that the assessment would be clearly inappropriate.\(^9\) This puts a battered woman or mother of an abused child at enormous risk when she attempts to claim temporary emergency jurisdiction. It greatly increases the chance that an abusive father, particularly if he has greater resources,\(^9\) will be encouraged to aggressively litigate, in his effort to make her liable for all of his “reasonable expenses including costs, communication expenses, attorney’s fees, investigative fees, expenses for witnesses, travel expenses, and child care during the courts of the proceedings.”\(^9\) Batters, who are known to retaliate by abusing the judicial process to further control and demoralize their victims or drive them into economic ruin,\(^9\) may well use this penalty to drive their victims into flight or hiding, and then have the judicial system simultaneously reward themselves and punish their victims. California has attempted to decrease this possibility for abuse of this section by batters.\(^9\)

\(^93\). See id.
\(^95\). See UCCJEA § 208(c).
\(^96\). See, e.g., Liss & Stahly, supra note 58, at 179, 181 (stating that batters are far less likely to pay child support than other men as part of their tactic of depriving their partners of access to money).
\(^97\). UCCJEA § 208(c).
\(^98\). See Zorza, Batterer Manipulation and Retaliation, supra note 63, at 73.
\(^99\). California has added language to its act’s counterparts of section 208(c) of the UCCJEA to clarify much more strongly that battered women and protective parents should not be punished for fleeing from abuse.
H. Affidavit and Address Confidentiality

The UCCJEA attempts to get each party in its first pleading to provide under oath essentially the same information that section 9 of the UCCJA required: (1) a child’s present address or whereabouts; (2) places where the child lived during the last five years and the names and present addresses of the persons with whom the child lived; (3) whether the party has ever participated in any capacity in any custody proceeding concerning the child and, if so, which court, docket number and date of any child-custody determination; (4) information about any other related proceeding, including those for enforcement, protective orders, termination of parental rights and adoptions; and (5) the names and addresses of anyone not a party who has physical custody of the child or claims rights to legal or physical custody or visitation with the child.\(^\text{100}\) Likewise, it places a continuing duty on each party to update the information about “any proceeding in this or any other State that could affect the current proceeding.”\(^\text{101}\)

However, the UCCJEA notice requirements make two changes, the first in partial response to those advocates asking for protections for battered women. That change is an option, which if taken by a state, can help victims of domestic violence by incorporating “local law providing for the confidentiality of procedures, addresses, and other identifying information,”\(^\text{102}\) including procedures to seal the information and not release it until “after a hearing in which the court takes into consideration the health, safety, or liberty of the party or child and determines that the disclosure is in the interest of justice.”\(^\text{103}\) The commentary to section 209 urges states that do not have procedures to keep sensitive identifying information confidential to adopt such statutory protections. As suggestions, it refers states to section 304(3) of the Model Code on Domestic and Family Violence of the National Council of Juvenile and Family Court Judges\(^\text{104}\) and section 312 of the Uni-

\(^\text{100.} \) See UCCJEA § 209(a).
\(^\text{101.} \) Id. § 209(d).
\(^\text{102.} \) Id. § 209(a).
\(^\text{103.} \) Id. § 209(e).
\(^\text{104.} \) Subsection 3 generally provides: A petitioner may omit her or his name from all documents filed with the court. If a petitioner omits her or his address, the petitioner must provide the court a mailing address. If disclosure of petitioner's address is necessary to determine jurisdiction or consider venue, the court may order the disclosure to be made: (a) After receiving the petitioner's consent; (b) Orally and in chambers, out to the presence of the respondent and a sealed record to be made; or (c) After a hearing, if the court takes into consideration the safety of the petitioner and finds such disclosure in the interests of justice. See Nat'l Council of Juvenile and
form Interstate Family Support Act ("UIFSA") as possible models.Obviously, states with identification protections should consider making them stronger, and are not limited by the protections in the two suggestions given.

The second change overturns roughly half of the existing case law that held that failure to comply with the affidavit requirements or knowingly submitting false information was a jurisdictional defect, allowing jurisdiction to be declined and the case dismissed, and that any resulting custody decree be considered void. Instead, section 209(b) of the UCCJEA permits the court on its own motion or that of a party to stay the proceeding until the information is furnished. Abusers are most likely to manipulate courts by falsifying information, and this change in the statute removes the possibility of having a case dismissed from victims faced with blatant fraud or deception.

I. Option to Recognize Tribal Orders

Unlike the UCCJA and PKPA, which never addressed tribal court custody proceedings, the UCCJEA gives states the option of

---


105. This statute states in pertinent part:

Upon a finding, which may be made ex parte, that the health, safety, or liberty of a party or child would be unreasonably put at risk by the disclosure of identifying information, or if an existing order so provides, a tribunal shall order that the address of the child or party or other identifying information not be disclosed in a pleading or other document filed in a proceeding under this [Act].

UIFSA § 312 (1996).


doing so. Furthermore, by taking this option, states help to bring custody law in greater conformity with the VAWA full faith and credit mandate and better protect abused victims. It is likely that reluctance of some states to recognize tribal custody decrees in the past prevented the Conference from including a provision requiring that all states honor and enforce tribal court orders and clarifying that “state” does include tribal lands. The UCCJEA does, however, clarify that it is not trying to diminish the protections of Indian children under the Indian Child Welfare Act (“ICWA”), noting that any proceeding subject to ICWA is not governed by the UCCJEA to the extent it is governed by ICWA. In addition, the commentary observes that the UCCJEA “does not purport to legislate custody jurisdiction for tribal courts,” but tells Tribes how they can adopt the UCCJEA.

III. Enforcing and Registering Custody Decrees

The UCCJEA has made many changes so that it can be better enforced to ensure return of the abducted child, including situations governed by the International Child Abduction Remedies Act (ICARA), implementing the Hague Convention. The enforcement section of the UCCJEA specifically covers situations before any party has commenced a custody action in any court, so that a court can order speedy return of the child to the petitioner. In addition, the UCCJEA requires states to enforce and not modify the child-custody determinations of other states or countries, or registered orders that were made in accordance with both the UCCJEA and the PKPA. The determinations entitled to enforcement specifically include temporary emergency jurisdiction orders and the custody provisions after notice of domestic vio-

108. See UCCJEA § 104(b).
111. 25 U.S.C. §§ 1901-1963 (1994) (governing custody proceedings when the state is a party, but not proceedings where the parents are the sole parties).
112. See UCCJEA § 104(a).
113. See id. § 104 cmt.
115. See UCCJEA § 310 (indicating procedure for filing a warrant to take physical custody of a child if the child is likely to suffer serious physical harm or be removed from the state).
116. See id. § 303(a).
lence orders. Enforcement remedies under the UCCJEA are in addition to any other remedies available under state law.\textsuperscript{117}

\section*{A. Registration of Decrees}

The UCCJEA creates a registration process for custody decrees.\textsuperscript{118} However, unlike the registration process required by VAWA's full faith and credit mandate, which does not require giving notice a second time to register a protection order in another jurisdiction, the UCCJEA does require giving notice to any parent or person acting as a parent who has been awarded custody or visitation as part of the registration process before a custody decree can be registered.\textsuperscript{119} Furthermore, very naively, the UCCJEA requires that notice must be given in each state where the order must be registered,\textsuperscript{120} further endangering those who are already at most risk of retaliation\textsuperscript{121} and very likely causing them further delay, uncertainty and expense.

The UCCJEA's registration process unfortunately ignored the urgings of the battered women's advocates submitted through Roberta Valente, former staff director of the American Bar Association's Domestic Violence Commission,\textsuperscript{122} who suggested that all custody decrees, particularly those entered in cases involving domestic violence, could be registered statewide, and ultimately national registry for orders of protection.\textsuperscript{123} This would immediately afford full protection for battered woman and endangered children throughout the United States no matter where they must flee, and without imposing time delays and endangerment resulting from further slow judicial processes\textsuperscript{124} and notification to their abusers.

\begin{itemize}
\item \textsuperscript{117} See id. § 303(b).
\item \textsuperscript{118} See id. § 304.
\item \textsuperscript{119} See id. § 304(b).
\item \textsuperscript{120} See id. § 304. Even if a state provides for registration without any filing or service fee, and the state is not mandated to do so, one must file at least one certified copy and an affidavit, which may incur further expense. See id. § 304(a)(2).
\item \textsuperscript{121} These are the people who are repeatedly stalked, pursued and abused, who must repeatedly flee.
\item \textsuperscript{122} See Hoff, supra note 13, at 291 n.94.
\item \textsuperscript{123} See Susan B. Carbon et al., Enforcing Domestic Violence Protection Orders throughout the Country: New Frontiers of Protection for Victims of Domestic Violence, 50(2) JUV. & FAM. CT. J. 39, 43 (Spring 1999) (citing the requirements of 18 U.S.C. § 2265). The authors note that as of April 12, 1999, only 23 states are participating to some extent in the National Crime Information Center's Protection Order File registry.
\item \textsuperscript{124} See UCCJEA § 304(c)(2), (d) (providing the respondent 20 days to contest the registration).
\end{itemize}
If custody decrees were all nationally registered, so would be any subsequent orders to vacate, stay or modify the prior order, so any enforcing court would have access to information about the validity of the decree.

Although NCCUSL ignored most of the suggestions concerning registration, it did provide for protecting the fleeing family in those few cases where a court has denied all custody or visitation to an abusive parent, by not requiring notice to be given to the abuser. However, since virtually no courts prohibit all contact by the abuser with the children, the fleeing family will be placed in great danger by having to reveal to which state they have fled as part of the notice given to the abusive parent.

In cases where her batterer has already abducted the child, the mother can file a petition to register the child-custody decree with an accompanying request for a warrant to pick up the child and will not have to notify the abductor until the child has actually been recovered. This provision for protection shows that the NCCUSL takes protection of children far more seriously than it does of that involving battered women, and still does not recognize that in about a quarter of cases where male batterers killing their intimate female partners, they also kill their children.

However, in the typical registration case requiring advance notice (i.e., when no abduction is involved), a victim of domestic violence must notify her abuser when she files to register the order, and he, like any other respondent, has twenty days to contest the validity of the order. The UCCJEA permits a respondent to challenge the order on only three grounds: (1) the issuing court did not have jurisdiction; (2) respondent did not have any notice and opportunity to be heard in the issuing court; or (3) the custody de-

125. The national registry for orders of protection already exists, although not all states are inputting their data yet.
126. See UCCJEA § 209(e).
127. See Liss & Stahly, supra note 58, at 186. Some courts restrict visitation to visitation by photograph or tape recording as a compromise when the court recognizes that any actual contact with the child would be too dangerous.
128. See UCCJEA § 310. See also infra, Part III.C.
129. See UCCJEA § 310.
130. See NEIL WEBSDALE, UNDERSTANDING DOMESTIC HOMICIDE 179-80 (1999) (finding that in 52.6% of domestic child homicides where two parents were involved in caring for the children, the woman was known to have been beaten before the child was killed — which is probably an undercount, since agencies did not seek out this data — and that the man often killed the children to spite the child's mother, whom he thought had betrayed him in some way). Websdale notes that overall children made up 26% of all domestic homicides. See id. at 201.
131. See UCCJEA § 304(d).
termination was vacated, stayed or modified. It would also be hoped that any finding of fraud, whether notice or the order itself had been faked or fraudulently obtained, will be reduced to a written finding that can later be used to impeach the respondent. Once any custody order is registered, the only permissible grounds for challenge is that it has subsequently been vacated, stayed or modified, although due process considerations and statutory ones should permit a challenge if the matter could not have been asserted previously.

B. Challenges on Jurisdictional Grounds

For battered women faced with orders that their abusers have obtained, the UCCJEA provisions can be an unfortunate change from under the old UCCJA, which generally permitted jurisdictional challenges to be raised at any time, provided one did not delay in doing so. This ability to raise late challenges is needed for several reasons. First, some abusers use dubious or illegal tactics, such as failing to give notice, faking her signature, sending her to the wrong court or on the wrong date or deflecting her attention, thereby effectively preventing her attendance. Second, abusers may threaten their victims and witnesses so that they dare not show up in court. Third, they may emotionally or financially drain their victims so that the victims are unable to contest custody. If the notice for registration does not warn that one’s ability to challenge the order at a later time will be solely limited if one does not show up and contest it now, it is especially unfair to battered women. Under the UCCJA, it was largely left to the registering or enforcing court to verify the pleadings from the issuing court. While the registering or enforcing court is not precluded from contacting the

132. See id. § 307(a)(1)(A)-(C). Presumably the fact that an order had been fabricated could also be raised at any time on due process grounds.
133. See id. §§ 304(f), 308(f)(2).
134. See id. § 305(c)(3). While it is not clear if “any matter that could have been asserted” encompasses that the party challenging could not have appeared in court or that the ground for challenging was not as yet known, the better interpretation is that either issue can be raised. Id.
135. See B.J.P. v. R.W.P., 20 Fam. L. Rptr. 1178 (D.C., No. 91-FM-700m, Feb. 3, 1994) (holding that mother’s failure to raise custody jurisdiction issue at outset prevents her from doing so later); Soderlund v. Alton, 467 N.W.2d 144 (Wis. Ct. App. 1991) (finding that lawyer’s seven-week delay in notifying a Florida court that he had filed wife’s divorce seeking custody in Wisconsin resulted in malpractice and the wife’s losing custody).
136. See Zorza, Batterer Manipulation and Retaliation, supra note 63; Raphael, supra note 86, at 32-37.
issuing court about the validity of the offered decree, the UCCJEA absolves the registering or enforcing court of responsibility for contacting the issuing court — not a very fair result given how few battered women are likely to be represented in these situations.¹³⁷

C. Enforcement Mechanisms

For a battered woman with a custody decree in one state who must allow visitation to her out-of-state abuser, it might be wise for her to have the court condition the out-of-state (or country) visitation on the prior registration of the child-custody decree so that it will be immediately enforceable. However, prior registration is not actually needed — though may still be desirable — for orders issued from other Hague Child Abduction Convention¹³⁸ signatory countries since that treaty provides for similar swift return of abducted or wrongfully retained children and enforcement of custody orders from those countries.¹³⁹

1. Issuing Warrants

Another remedy under the UCCJEA permits courts to enforce orders by issuing warrants to take immediate physical custody of the child. Section 311 permits the court to issue such a “pick up” warrant upon credible testimony “that the child is imminently likely to suffer serious physical harm or be removed from this State.”¹⁴⁰ Courts are directed to hear such petitions on the next judicial day after the warrant is executed, and may only delay if the next court date is “impossible.”¹⁴¹ Not only may law enforcement officers be directed to take physical custody of the child immediately, but if “a less intrusive remedy is not effective, it may authorize law enforcement officers to enter private property to take physical custody of the child including, in exigent circumstances, by forcibly entering at any hour.”¹⁴² The court must also provide for the placement of the child pending final relief.¹⁴³

¹³⁹. See UCCJEA § 302 & cmt.
¹⁴⁰. Id. § 311 cmt.
¹⁴¹. Id. § 311(b).
¹⁴². Id. § 311(e).
¹⁴³. See id. § 311(c)(3).
2. Enforcing Visitation

Although the UCCJEA forbids courts to modify the custody order of another state or permanently change custody, Section 305 does allow enforcing courts to enforce visitation rights in two limited situations. The first exception permits a court to provide for make-up visitation time when visitation time has been obstructed. Although the language only talks of visitation (which undoubtedly shows that the language was inserted at the request of fathers’ rights groups), custodial parents should be likewise entitled to make-up time if their time with the child has been obstructed. The second exception allows courts to temporarily designate specific visitation times when orders do “not provide for a specific visitation schedule” (e.g., “reasonable visitation.”) In a “reasonable visitation” case, the court must set an expiration date unless, as a result of judicial communication, the issuing court has deferred jurisdiction on this issue to the enforcing court on the grounds it is a more convenient forum, or, although not suggested under the UCCJEA, the order is issued simultaneously by both courts. Otherwise, the enforcing court’s order expires on whichever date occurs first, the expiration date set by the enforcing court or the date of a new order by the issuing court.

3. Prosecutor’s Role in Enforcement

Probably the most important addition to the enforcement section, unless a state opts out, is the creation in sections 315-317 of an interstate network of prosecutors modeled after California’s prosecutors who, for twenty years, have had authority to enforce child-custody orders from other states and countries. These officials will be able to help locate and return missing children, as well as seek enforcement in the state’s criminal and civil courts. As a practical matter, they can also help contact their counterparts in other states when the child is in another state. For left-behind battered women, and especially those who have little access to funding, these remedies should greatly help them in retrieving children who are wrongfully taken to other states.

144. See id. § 304 cmt.
145. Id. § 304(a)(2).
146. See id. § 304(a)(1).
147. See supra note 51 and accompanying text.
148. See UCCJEA § 304(b).
149. For example, in adopting the UCCJEA, Maine specifically chose to opt out of this section. See 1999 Me. Laws 486.
The danger is that these public officials, acting on behalf of the court, either fail to act because they do not take the abuse sufficiently seriously or they act against fleeing battered women without raising any domestic violence justifications. Furthermore, they may be subject to manipulation by abusers, especially if they are not very knowledgeable about domestic violence. They may also further endanger battered women and their children by either revealing confidential addresses or workplace locations. Consequently, courts will normally assess expenses pursuant to sections 312 and 317 against the losing party (including all direct expenses and costs incurred by the public officials). It is also likely that this section will be used to hurt fleeing battered women and protective mothers. In contrast, section 208(b), prevents fees, costs or expenses from being assessed against a state under the UCCJEA, although it does not prohibit recovery authorized by other laws.

**Conclusion**

The UCCJEA has fixed several problems of its predecessor, the UCCJA, with the result that the UCCJEA is more effective than the old UCCJA and better reconciled with other federal laws. For the first time courts that are making child-custody determinations are encouraged to look at domestic and family violence to protect the rest of the family from an abuser when a parent, the child or any sibling of the child is being abused. In addition, the UCCJEA makes clear that protective parents should not be punished for fleeing incidents or patterns of domestic violence, and that any judicial finding or determination that parental or child abuse occurred is res judicata as to each party who had notice of that proceeding.

A number of improvements in the UCCJEA are left as options to the states, and it is hoped that battered women’s advocates will urge states to adopt these options on behalf of their clients: addressing confidentiality provisions, granting full faith and credit to tribal child-custody determinations and designating prosecutors or other state officials to enforce child-custody determinations. In addition, advocates for battered women should urge their states to adopt the changes made by California for denying jurisdiction by reason of conduct in its version of the UCCJEA.

150. See Zorza, Batterer Manipulation and Retaliation, supra note 63.
The biggest problem with the UCCJEA for battered women is that it requires notice to be given all over again to register a custody decree in any other jurisdiction. It is likely that this problem can only be rectified by federal legislation amending the PKPA, the VAWA full faith and credit mandate, and requiring the state and federal registries for orders of protection to also register child-custody decrees.

Overall, the UCCJEA is an improvement over the UCCJA, and should be supported by battered women and their advocates, especially with the proposed changes.
DOMESTIC VIOLENCE AS A FACTOR IN
CUSTODY DETERMINATIONS IN
NEW YORK STATE

Hon. Judith J. Gische*

INTRODUCTION

In 1996, the New York State Legislature mandated that trial courts consider the effect of domestic violence in child custody and visitation disputes. In 1998, the legislature amended the law to provide that, under most circumstances, a person convicted of murdering a child's parent shall be denied custody and visitation.

The amendment was in response to a growing national trend to give greater attention to the serious effect domestic violence has on children. While the law now conveys the seriousness with which the legislature views domestic violence, many problems inherent in resolving custody and visitation disputes involving domestic violence still remain.

This essay examines the legislation and case law arising out of this issue, identifying remaining problems and judicial responses. Additional interventions will be suggested to assist in the appropriate resolution of these cases.

I. LEGISLATIVE HISTORY

In 1996, the state legislature amended section 240 of the New York Domestic Relations Law ("DRL") to provide that in connection with determining the "best interests" of the child in custody and/or visitation disputes, the court is mandated to consider as a factor, if raised, the issue of domestic violence. Thus, section 240.1(a) of the DRL now provides in pertinent part:

Where either party to an action concerning custody of a right to visitation with a child alleges in a sworn petition or complaint or sworn answer, cross-petition, counterclaim or other sworn responsive pleading that the other party has committed an act of

---

* Acting Supreme Court Justice presiding over the dedicated matrimonial part in Bronx County, New York. The author gratefully acknowledges the assistance and good counsel of Eileen Kaspar, Esq. in connection with the preparation of this essay.


domestic violence against the party making the allegation or a family or household member of either party . . . and such allegations are proven by a preponderance of the evidence, the court must consider the effect of such domestic violence upon the best interest of the child, together with such other facts and circumstances as the court deems relevant in making a direction pursuant to this section.4

In 1998, the legislature amended section 240.1-c of the DRL and added section 1085 of the Family Court Act ("FCA") to prohibit an award of custody or visitation to a person convicted of murdering the child's parent, except in very limited circumstances.5 The 1998 amendment provides in pertinent part:

no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree . . . of a parent, legal custodian or legal guardian of any child who is the subject of the proceeding . . . [n]otwithstanding paragraph (a) of this subdivision a court may order visitation or custody where: . . . such child is of a suitable age to signify assent and such child assents to such visitation or custody; or . . . if such child is not of suitable age to signify assent, the child's custodian or legal guardian assents to such order, or . . . the person who has been convicted of murder in the first or second degree . . . can prove . . . that . . . [h]e or she, or a family or household member of either party, was a victim of domestic violence by the victim of such murder; and . . . the domestic violence was causally related to the commission of such murder; and . . . the court finds that such visitation or custody is in the best interests of the child.6

Section 240 of the DRL sets forth the "best interest" standard for courts to employ in all custody and visitation disputes. Case law interpreting "best interests" has developed common law factors which, within the court's discretion, should be considered before a decision is made.7 The 1996 amendment provides the only

---
4. N.Y. DOM. REL. LAW § 240.1(a) (McKinney 1999).
6. N.Y. DOM. REL. LAW § 240.1-c(b).
7. See, e.g., Fox v. Fox, 582 N.Y.S.2d 863, 864 (App. Div. 1992) (weighing factors such as 1) the quality of the home environment; 2) the ability of each parent to provide for the child's emotional needs and her financial status; 3) the ability of each parent to provide for the child; 4) the individual needs and expressed desires of the child; and 5) the need of the child to live with a sibling). See also Lynn W. v. Guy C., 519 N.Y.S.2d 400, 401 (App. Div. 1987); Gill v. Gill, 523 N.Y.S.2d 309, 310 (App. Div. 1987); Cornelius C. v. Linda C., 506 N.Y.S.2d 702, 704 (App. Div. 1986); Milton v. Dennis, 464 N.Y.S.2d 874, 875 (App. Div. 1983).
statutorily mandated factor, domestic violence, that the court must consider. The 1998 amendment is even stronger because it eliminates judicial discretion and mandates a result in custody and visitation cases involving a murder conviction of the petitioning parent.

The 1996 amendment was adopted in response to a growing national concern about the effect of domestic violence on children. In 1990, a joint resolution of Congress urged the states to adopt a legislative presumption that it is detrimental to a child when custody is awarded to an abusive spouse. The Model Code on Domestic and Family Violence, developed by the National Council of Juvenile and Family Court Judges in 1994, and a report by the American Bar Association ("ABA") adopted this Congressional recommendation.

New York was one of the last states to adopt the recommended legislation. Thus, before the New York amendment was adopted in 1996, thirty-eight states and the District of Columbia already had laws making domestic violence a relevant factor in custody and visitation determinations. By 1997, the number of states grew to forty-four and, according to the most recent information from the ABA, forty-six states currently require consideration of domestic violence before custody decisions are made.

The New York statute, adopted six years after the original national proposal, differs from the congressional proposal in one major respect. New York expressly declined to adopt a presumption against awarding custody to a battering parent and, instead, only mandated that domestic violence be considered by courts as a factor in making such awards. Further, the statutory mandate only applies when allegations of violence are contained in a sworn pleading. In this regard, the New York amendment reflects the

---

10. See id.
tension between the strong public policy in favor of protecting children from the effects of a violent household and the concern that general, non-particularized claims of violence could be raised in order to gain an unfair advantage in a custody/visitation dispute.\textsuperscript{14}

\section*{II. Case Law}

Even before the statutory mandate was enacted, many courts had seriously considered the issue of domestic violence in connection with custody and visitation disputes.\textsuperscript{15} Consideration of the issue, however, was not uniform.\textsuperscript{16} Thus, the New York amendments ensure that the issue, if properly raised, must be considered.

Despite the fact that trial courts are statutorily obligated to consider domestic violence, courts still have an enormous amount of discretion in reaching a decision in a particular custody or visitation dispute. Where the existence of domestic violence is factually contested, the trial court must decide which of the parties is more credible. Moreover, the 1996 amendment does not: 1) define what constitutes "domestic violence"; 2) proscribe the weight accorded such finding of domestic violence; 3) determine what, if any, mitigating factors the court should consider before making a final award of custody or visitation; or 4) distinguish, in any way, between the effect of domestic violence in a custody proceeding as opposed to a visitation dispute.

\subsection*{A. Credibility Determinations on Issues of Domestic Violence}

In cases where domestic violence is alleged, there are often factual disputes that require the court, as the trier of fact, to make credibility determinations. The importance of a correct credibility determination is paramount since a custody/visitation issue may turn on such determination. Appellate courts give the trial courts, who directly observe the demeanor of the witnesses, great deference in making credibility determinations.\textsuperscript{17} Trial courts rely upon those things generally considered by any trier of fact in adjudicat-

\begin{itemize}
\item \textsuperscript{14} See N.Y. Dom. Rel. Law §§ 240 Practice Commentary, 240.6 (McKinney 1996).
\end{itemize}
ing the credibility of parties’ testimony, such as objective corroboration documentation,\textsuperscript{18} previously issued orders of protections or adjudications of abuse,\textsuperscript{19} medical records,\textsuperscript{20} photographs\textsuperscript{21} and non-party witness testimony.\textsuperscript{22}

Trial courts also may seek forensic evaluations from mental health experts to assist in determining whether the alleged violence occurred and whether the children of the particular dispute have been affected. While forensic input may be analyzed, only the court can assess credibility and the best interests of children. Thus, the court is duty-bound to critically evaluate any forensic recommendation and not just blindly accept it.\textsuperscript{23}

\section*{B. The Definition of Domestic Violence}

The 1996 amendment does not define domestic violence. It would be reasonable, however, for courts to conclude that domestic violence includes the commission of those acts enumerated in section 812(1) of the FCA\textsuperscript{24} as family offenses that justify the grant of an order of protection. In at least one reported decision, the trial court broadly defined domestic violence to include psychological violence and not just overt acts leading to physical injury.\textsuperscript{25} The court’s definition in that case drew upon the current mental health


\textsuperscript{20} See \textit{Joseph}, 646 N.Y.S.2d at 167 (admitting evidence of medical records).


\textsuperscript{24} N.Y. FAM. CT. ACT § 812(1) (McKinney 1998) (listing offenses of disorderly conduct, harassment in the first and second degree, aggravated harassment in the second degree, menacing in the second and third degree and attempted assault between spouses, former spouses, parent and child or members of the same family or household).

paradigm that refers to domestic violence as a pattern of behaviors designed to exercise control over the victim.26

C. The Weight to Be Given a Finding of Domestic Violence

Once the trial court finds, by a preponderance of the evidence, that there is domestic violence, the court must go on to consider what effect, if any, the finding will have on its custody or visitation determination. Courts often look at domestic violence in the factual context of an entire case, considering the common law factors of “best interests” as well. Courts may also consider mitigating factors, such as the parties’ successful efforts at domestic violence counseling.27 Thus, domestic violence, while a significant consideration in custody and visitation disputes, is not necessarily dispositive of the outcome of the case.

While not dispositive, however, a finding that a parent is a batterer will weigh heavily against an award of custody to that parent. On the other hand, the same finding will not usually result in the court denying visitation. In order to deny visitation, the court must find that contact will have a detrimental effect on the child.28 It is not enough for the court to conclude that no visitation is in the child’s best interest.29 In many cases where domestic violence is proven, the court will control the nature, duration and conditions of visitation, without denying visitation altogether. Courts rely heavily upon supervised visitation and/or referrals to counseling programs as appropriate safeguards even where the visiting parent is an abuser.30

D. The “Accused But Not Yet Convicted” Murderer Problem

The 1998 amendment is distinctive from the 1996 amendment in that it directs a custody result, with limited exceptions, in cases where the party seeking custody has been convicted of murdering the child’s parent. The 1998 amendment still leaves open to court

26. See id. at 471.
29. See John R. v. Marlene C., 683 N.Y.S.2d 724, 727 (Fam. Ct. 1998) (“Denial of visitation is a drastic remedy that should be invoked only when there is substantial evidence that visitation would be detrimental to the child.”).
discretion the question of where the child should reside after arrest, but prior to conviction.\textsuperscript{31}

In general, before a court can consider the custody or visitation petition of a non-parent, "extraordinary circumstances" must be established. The courts are divided over whether this threshold is met when one parent is accused of murdering the other.\textsuperscript{32} Even when such extraordinary circumstances are present, the court must still determine where it would be in the child's "best interest" to live. Custody cases necessarily require a prediction of future behavior based upon past history. The problem with making accurate predictions for a child's future well-being is exacerbated in these murder cases, due to the allegations and potential for harm present.

**Conclusion**

Both the 1996 and 1998 amendments to the DRL focus attention on the serious, long-lasting, detrimental effect that domestic violence can have on children living in the household. They each recognize that children are psychologically damaged by such behaviors regardless of whether the child, or some other household member, is the actual victim. The amendments, however, provide little guidance for the courts and leave many unanswered questions. Clearly, additional resources and legislation would alleviate some of these problems.

Victim advocates must recognize that courts' need objective, tangible, corroborating evidence in custody and visitation cases. Advocates should help their clients prove claims in court by helping them gather the evidence they need, including medical records, photographs and police reports. In fact, early intervention with victims should include evidence collection in the event that there is a court case.

Absent a legislative mandate, courts will continue to exercise their discretion in weighing domestic violence against other factors in custody and visitation cases. Although the statute mandates courts to consider domestic violence, it is clear that the presence of violence alone will not be outcome determinative. The legislature must define "domestic violence" in order for the courts to give this factor proper consideration. If the legislature continues to give the trial court unfettered discretion regarding the weight to be given a


finding of domestic violence, a more inclusive statutory definition would be in order. In the event that the legislature decides to adopt a legislative presumption in accordance with the congressional recommendation, then a more limited statutory definition would be appropriate.

Many times, the court will direct a final order of supervised visitation where it finds that there has been domestic violence in the home. Where supervision by a family member or other adult may be unavailable, unreliable and/or inadequate, the courts should look to an outside agency to provide such services. Currently, however, these programs in the New York City area are oversubscribed. Also, program hours may not always be convenient to working parents or school age children. Resources for creating new programs or expanding the existing programs are needed so that the court can, with confidence, order supervised visitation as a feasible safeguard on visitation with a potentially abusive parent.

It is evident that, where a parent has been convicted of the other parent's murder, the surviving parent should never be awarded custody. However, until the accused is adjudicated, the court is faced with the uncertainty of awarding temporary custody to a parent who may indeed be guilty of murder. The legislature should consider an amendment that permits a third party to seek custody of the child without having to prove extraordinary circumstances. In this manner the court can apply the "best interest" standard to determine custody rather than having to first make a threshold determination.

The statutory amendments are an important first step in addressing the complex issues of domestic violence in child custody/visitation disputes. In the meantime, those in the court system need to be vigilant in understanding how the laws work and what resources and improvements are necessary to ensure that children are in safe home environments.
STOPPING NEW YORKERS’ STALKERS:
AN ANTI-STALKING LAW FOR
THE MILLENNIUM

Demetra M. Pappas*

INTRODUCTION

This essay was to have discussed, and been entitled, Recent Historical Perspectives Regarding Judicial Approaches, Prosecutorial Responses and Anti-Stalking Legislative Efforts in New York State. At the time research for that article commenced, New York enjoyed the dubious distinction of being the only state in the United States that did not have a specifically designated anti-stalking stat-

* J.D. Fordham University School of Law, 1985; M.Sc. (Criminal Justice Policy), London School of Economics and Political Science (LSE), 1993. The author is currently the director of Special Projects at the New York law firm of Anderson Kill & Olick, P.C., and a doctoral candidate in the Law and Sociology Departments of the LSE, where she is submitting a thesis entitled, The Politics of Euthanasia and Assisted Suicide: A Comparative Case Study of Emerging Criminal Justice Policy in the United States and the United Kingdom. This essay is a result of the author's involvement with the (New York) Lawyers' Committee Against Domestic Violence, and is abstracted from a larger work in progress, The Stalked: Social and Legal Consequences Relating to Victims of Stalking Behavior, which, along with the author's doctoral thesis, will constitute The Enablement Doublet: Dying and Surviving.

While the author is solely responsible for the contents of this essay, a number of people enabled her to conduct the research and writing of the project, in record time. Anderson Kill and Olick, PC's founding partner, Gene Anderson and Maxa Luppi, Director of Insurance Litigation Support Services, provided a supportive environment, as did Ronnie ("Miss Ron") O'Farrell. Professor Paul E. Rock (Sociology) and Professor Robert Reiner (Law) of the LSE have consistently offered academic support, including successfully nominating a related writing by the author for the 1997 William Robson Memorial Writing Prize. Bob Schumacher, Editor-in-Chief of the Fordham Urban Law Journal, engaged in an enormous gesture of trust when he allowed the author to change the topic of an invited piece and provided the time and technical support to make it all happen.

Senator Michael A.L. Balboni generously interviewed with the author on the heels of the legislation while his staff answered questions, faxed documents and gave freely of their time and materials. Assemblyman Scott Stringer and Rob Hack, the former Legislative Director to Assemblyman Stringer, also graciously interviewed and provided information on short notice. The Hon. Margaret Marrinan, Judge of the District Court, Second District, of the State of Minnesota, and the soon-to-be Hon. Faith O'Neal of New York acted as sounding boards and provided background information. Elsa and Mac let the authorcommittee her ideas at all hours of the day and night, the former from halfway around the world, the latter from halfway across a borough. Last, but not least, Peter Andrews and Jon Springer have, on a number of occasions too numerous to count, brought analytical insight to the author's work, and fun to the author's life.
ute, and which further had ill-defined harassment and menacing laws. Since the first anti-stalking legislation was passed by California in 1990 (effective 1991), in response to the murder of the actress Rebecca Schaffer by an obsessed fan, there has been an explosion of legislation and litigation regarding stalking behavior, and there had been numerous (failed) efforts to enact legislation in New York.

On October 4, 1999, that latter fact became entirely historical in nature when the New York State Senate passed the Clinic Access and Anti-Stalking Act of 1999, thus ratifying the August 5, 1999 actions of the New York State Assembly. This comprehensive piece of legislation, signed on November 22, 1999, has as an effective date December 1, 1999, thus making the Clinic Access and Anti-Stalking Act of 1999 truly the anti-stalking law of the millennium, and the criminalization of stalking behavior in the United States the criminal justice project of the decade.

This essay concerns itself with some of the legislative responses to stalking in New York and will examine some of the specific anti-stalking provisions of the Clinic Access and Anti-Stalking Act of 1999, recently signed by New York Governor George Pataki. The signing ceremony was the concluding event of a largely collaborative process, as it was the Governor himself who requested that the sponsoring Senator, Michael A.L. Balboni (R-Mineola) introduce anti-stalking legislation. The legislative efforts of Senator Balboni and his Assembly anti-stalking counterpart, Assemblyman Scott Stringer (D-Manhattan) were, in fact, coordinated so as to facil-

4. A. 9036, 222d Sess. (N.Y. Aug. 5, 1999). It should be noted that once the bill passed the Assembly it was referred and delivered to the Senate, which in turn passed it and returned it to the Assembly on Oct. 7, 1999. See Actions on Bill A. 9036 (visited Nov. 17, 1999) <http://assembly.state.ny.us>.
7. See id. § 1 (offering this "short title," to the legislation that refers to various provisions of, inter alia, the criminal procedure law, the penal law, the executive law, the family court act and the civil rights law).
tate the legislative process. In this regard, interviews by the author with Senator Balboni, Assemblyman Stringer and Assemblyman Stringer's former Legislative Director, Rob Hack, offer elucidation and amplification of that which is on the printed page.9 The unique perspectives serve as the focus of this discussion and provide an education not to be found in any book.

I. THE ELEMENTS OF A COLLABORATIVE LEGISLATIVE PROCESS

As a general matter, even where attempts to criminalize stalking and to punish stalkers have been made, these efforts have often neglected the concerns of the victims of stalkers, overwhelmingly women.10 This is not surprising, in view of the gendered nature of the crime, given that "the politics of battered and raped women had become estranged from local [victim support] schemes, the State, and much of the criminal justice system."11

However, New York had the full benefit of participation during the "past seven or eight legislative sessions and multiple revisions of work with a lot of different groups over the years — working closely with the National Organization for Women and the New

9. Empirical, rather than theoretical in nature, much of what is reported and discussed herein is based upon these recorded interviews, as well as the legislation and supporting documents provided by these individuals.

The interviews were sought and conducted by telephone almost immediately following the passage of the legislation. Procedures consistent with Institutional Review Board requirements were followed, although not required by either the academic institution with which the author is affiliated or by Fordham University School of Law. All interviews were preceded by a lengthy consent colloquy, and each of the interviewees agreed to have the in-depth discussions taped.

10. Senate Majority Leader Joseph L. Bruno wrote in a press release that:

[i]n a 1998 study conducted by researchers from the National Institute of Justice and Centers for Disease Control and Prevention, an estimated one million women and 370,000 men are stalked annually in the United States. One out of every 12 American women and one out of every 45 men have been stalking victims and only 12% of all stalking crimes result in criminal prosecution.


11. See P.E. ROCK, HELPING VICTIMS OF CRIME 409 (1990). While this comment was a reference to the relationship between the victim support movement in Canada and women generally, certainly stalking, which has, to date, been considered a less serious crime than battering or rape, falls within the ambit of Rock's construct.
York State Coalition against Domestic Violence." Indeed in its Memorandum of Support of the legislation, the New York State Coalition Against Sexual Assault gave high praise, stating, "[t]hank you to Senator Balboni and Governor Pataki for listening to the advocate community, and working hard to increase the safety and well being of New Yorkers." 

Moreover, the New York legislature enjoyed "bi-partisan leadership on this issue, with Senator Balboni and [Assemblyman Stringer] work[ing] closely this year and . . . that was to the benefit of the people we were trying to help." 

II. THE GROWTH OF A LAW AND LESSONS FROM THE EXPERIENCES OF OTHER JURISDICTIONS

When first proposed, the New York anti-stalking legislation was ten to fifteen lines; the law ultimately enacted was over ten single-spaced pages long. By being the last state to enact anti-stalking legislation, New York had the advantage of learning from the examples, both positive and negative, of other states. One such example is that of providing protection for family members and loved ones. Rob Hack notes that California originally passed a simple anti-stalking bill that did not cover family members of the targeted victim, "where the woman is being stalked and all of a sudden the guy switches and goes after the sister or the mother, and its all wrapped into the same kind of offense." Indeed, the New York legislation not only protects against this, but takes the concept of family one (appropriate) step further, in that, for purposes of the Act, "members of the same family or household," are included.

Senator Balboni spent time researching legislation and subsequent litigation in other states, as well as combing through law re-

---

12. See Interview with Mr. Rob Hack, former Legislative Director to Assemblyman Scott Stringer (Oct. 27, 1999) (tape of interview on file with author) [hereinafter Hack Interview].

13. Memorandum of Support of New York State Coalition Against Sexual Assault to N.Y. State Legislators and Governor Pataki (May 3, 1999) (on file with author) (referring to a S. 1241-A, a predecessor bill to that ultimately passed); see also Victim Services' Statement in Support of Anti-Stalking Legislation (undated press release discussing "the bill introduced by Senator Balboni," and noting with approval that the bill, "will accomplish the key elements of an effective anti-stalking law, [as it] was drafted with the concerns of both prosecutors and victims in mind") (on file with author).

14. See Interview with Assemblyman Scott Stringer (D-Manhattan) (Oct. 29, 1999) (tape of interview on file with author) [hereinafter Stringer Interview].


17. A. 9036 § 8.
view articles, which he described as providing "a road map of where not to go." He also incorporated protections arising out of early opposition by the Coalition for the Homeless, which expressed concern regarding possible applications of anti-stalking measures to panhandlers. Among the safeguards to protect otherwise lawful conduct from being prosecutable as stalking are provisions exempting otherwise lawful conduct under the National Labor Relations Act, the National Railway Labor Act, the Federal Employment Labor Management Act and "any other conduct, including, but not limited to, peaceful picketing or other peaceful demonstration, protected from legal prohibition by the federal and state constitutions." Senator Balboni says that this last provision was designed to protect panhandlers,

but that taken in the spirit of what the issue is, stalking is a personal issue, even if not romantic or familial, i.e., someone who knows someone else, can identify someone else, with whom they have had repeated contact, and they use this contact as an opportunity to continually harass and stalk them; that's not pan-handling — panhandling is random acts, usually done with complete strangers, and therefore that doesn't fall within the central question, you can't make it a felony.

III. What Are Some Examples Of What Is Stalking In New York State?

Senator Balboni accurately comments on an extraordinary fact relative to a freshly legislated crime, that, "the nature of stalking, as an individualized campaign of terrorism against the victim, has hallmarks which the law enforcement communities are very familiar with." It should be noted that the New York Legislature set up a standard of intent that does not require that the stalker have a specific intent to stalk, but rather that the stalker intentionally engages in a course of conduct, which s/he "knew or reasonably should have known that such conduct" is likely to cause reasonable fear of material harm to the physical health, safety or property

19. See id.
20. A. 9036 § 12.
22. Id.
23. A. 9036, 222d Sess. (N.Y. 1999) (amending the New York Penal Law by adding five new sections: 120.40, 120.45, 120.50, 120.55 and 120.60, providing for, respectively, Definitions; Stalking in the Fourth Degree, a class B misdemeanor; Stalking in
of the victim or a member of the victim's family or the conduct causes material harm to the mental or emotional health of the victim or a member of the victim's family,24 or that the conduct "is likely to cause such person to reasonably fear that his or her employment is threatened, where such conduct consists of appearing, telephoning or initiating communication or contact at such person's place of employment or business, and the actor was previously clearly informed to cease that conduct." 25

This last, particularly bold, initiative was to provide within the statute recourse for victims who suffer employment, business or career consequences or reasonable fear in that regard, emanating from the conduct of the stalker, where the stalker has been clearly informed once to cease that conduct. 26 Senator Balboni noted that prior to this enactment, there was no recourse for interference with employment and business, even civilly. 27 This excellent provision statutorily recognizes that most stalking is statistically done by former intimates or arises out of or intrudes into the workplace. 28 Senator Balboni acknowledged the leadership of Governor George Pataki, "to get it into the statute . . . because now you are going to see a very different prosecution going on . . . because now you are going to actually take into account business interest." 29

Senator Balboni says that "everything works off of the provision for Stalking in the Fourth Degree, including a ten-year predicate felony, and including cases where a stalker stalks multiple victims as a higher offense." 30 Similarly, the legislature has created the status crime of the stalking of a minor, which Senator Balboni likened to statutory rape, where an adult stalks a child. 31

**IV. THE WAY FORWARD**

Successfully enacting anti-stalking legislation is not the end of the story, although it is a good beginning. Assemblyman Stringer observes that "[p]assing a stalking/anti-stalking bill is important, it

---

24. See id. § 13 (alteration in original).
25. Id. (alteration in original).
26. See Balboni Interview, supra note 18.
27. See id.
29. Balboni Interview, supra note 18.
30. Id.
31. See id.
will deter people from stalking, it will save lives, but we’ve really now got to focus our attention not just on the legislative piece, but on the budget side.” 32 He further notes that in addition to funding crisis centers, it is imperative to educate police officers and to

- do a lot of preventative education with kids at a young age,
- teach young boys to respect young girls at the beginning of their education, so that we don’t have to initiate a stalking law — a lot of this can be prevented through education, through counseling — and we have not yet dedicated the dollars in the state budget, given our surplus, to these issues. 33

Stringer says the real test for the legislature is going to be in upcoming budgets,

where money is put into programs, into communities, where we can deal with domestic violence issues, where we can deal with stalking issues, if we need, for example, to move a woman and a child into a shelter to shield them from an abuser or a stalker, we need clean, safe shelters where women can find a safe haven, and we have not yet dealt with that in the state budget. 34

It is Assemblyman Stringer’s hope and goal take a comprehensive approach, noting that “now we have an obligation to do the preventative work that will lessen the violence and protect people.” 35

One thing that Senator Balboni sees as interesting is the development of caselaw as a result of the legislation. 36 He looks forward to the statute being challenged in the courts, and to seeing how the courts of New York State respond to the challenge. 37 It bears noting, in this regard, that the New York State Legislature wisely included a severability clause protecting the integrity of each remaining provision of the statute should any portion of it be held to be invalid. 38

**Conclusion**

There can be no doubt that the New York State Legislature has benefited from the experiences of other states in terms of how to craft its anti-stalking legislation. The Clinic Access and Anti-Stalking Act of 1999 does more than merely protect against stalking as

---

32. Stringer Interview, supra note 14.
33. Id.
34. Id.
35. Id.
36. See Balboni Interview, supra note 18.
37. See id.
traditionally defined or described, including following, phoning and/or mailing a target. By legislating protections regarding the safety and lives of victims and their family members, and further statutorily protecting the victims' employment, educational and financial lives, this enactment provides the means for victims to take back ownership and control of their lives. Perhaps more important, the legislation provides the criminal justice system with a way in which to fight the insidious and pernicious conduct that previously was viewed as legally innocuous. What was once viewed as the crime before the crime is now culpable, criminal, prosecutable and punishable.

Ultimately, that makes the recent historical perspectives a mere — and soon to be distant — forerunner to the instant history regarding anti-stalking legislation in New York. As Senator Balboni observed,

[i]t is not only the end of the millennium, but it is also the end of the decade, the decade of the 1990s; the decade saw the wave across the nation of stalking legislation, beginning in 1990 in California, so it's fitting that it [is] now 1999 and New York is the last state — it literally has crossed the nation geographically, politically and in chronological order.39

39. Balboni Interview, supra note 18.
UNDERSTANDING THE VICTIM: A GUIDE TO AID IN THE PROSECUTION OF DOMESTIC VIOLENCE

Jennice Vilhauer*

INTRODUCTION

As one of the most prevalent crimes in the country, domestic violence is one of the most frequently handled cases for prosecutors across the nation. Despite their commonality, however, domestic violence cases can raise the anxiety level of even the most experienced prosecutor. There are several causes of such anxiety. First, domestic violence cases are often plagued by evidentiary problems that occur when a victim does not desire prosecution. Second, even in states where mandatory prosecution laws have been enacted, it can still be difficult to successfully prosecute a case when a victim is hostile, uncooperative and acting in direct opposition to attempts made by the prosecutor to help the victim. Third, most prosecutors receive a basic education on domestic violence and are only familiar with what have now become colloquial terms, such as “battered women’s syndrome” and the “cycle of violence.” Unfortunately, they are often not aware of how to utilize their knowledge to work effectively with the victim. This essay will attempt to provide prosecutors with a better understanding of domestic violence victims from a psychological perspective, in a way that will aid in the comprehension of the underlying dynamics of these difficult cases.

I. CYCLE OF ABUSIVE BEHAVIOR

The nature of domestic violence creates an entangled relationship between victim and perpetrator that is not encountered in most other crimes. The intense psychological dynamics involved in this relationship are often set in place long before any battering incident.1 The act of violence is only a physical manifestation of this deeply entrenched psychological interplay between the couple.

* Former Victim Advocate, Los Angeles District Attorney’s Victim/Witness Assistance Program, Los Angeles, CA; Ph.D. Candidate, Counseling Psychology Program, Fordham University, 2002; M.S.Ed. Counseling Psychology, Fordham University, 1999; B.A. University of California, Los Angeles, 1993.

The battery is often the briefest part of the interplay between parties and the most quickly forgotten, both because it is unpleasant and because focusing on the physical violence prevents movement into the next (and most gratifying) stage of the cycle. Lenora Walker, a pioneer in the study of domestic violence, has described this psychological interplay between couples engaged in abusive behavior as the "cycle of violence." The cycle occurs in three stages.

The first stage is known as the tension-building phase. This is the longest phase of the cycle that can last anywhere from several months to several years. During this stage, the perpetrator, who is usually extremely charming in the beginning of the relationship, becomes critical by verbally insulting his victim in ways that are meant to demean and damage her self-esteem. He also becomes controlling and seeks to isolate her from other people.

During this stage, the victim is trying to understand the changes in her partner's conduct and engages in behavior that is intended to pacify and soothe the perpetrator. However, as a result of the perpetrator's constant verbal attacks, the victim is made to feel that she is the cause of the unusual behavior, and thus becomes more susceptible to his attempts to control her.

The second stage is the violent phase, in which the batterer engages in physical battering. Often the first violent physical incident is not severe, and may consist of a push or a shove. These early incidents may not be enough to make the victim realize that she is in real danger. The violence usually increases each time this phase occurs and can terminate in death. During this phase, the couple may become involved with the criminal justice system, if the victim, or a third party, contacts the police in an effort to stop an acute battering episode.

2. See id.
4. Although there are domestic violence incidents involving male victims and female perpetrators, an overwhelming majority of reports show that women are generally the victims of abuse at the hands of a man. Therefore, this essay refers to the batterer with masculine pronouns, and the victim with female pronouns.
5. See Berry, supra note 1, at 36.
7. See Berry, supra note 1, at 36.
8. See id.
The third stage is the honeymoon phase. During this phase, the perpetrator calms down, realizes that the victim is hurt and angry and recognizes the possibility that she may leave him. He then engages in loving contrition. It is a period of relief for both partners: the batterer is apologetic and loving, and the victim believes that he has once again become the charming man with whom she fell in love. The perpetrator will usually beg for forgiveness and swear that it will never happen again.

It is during this phase that prosecutors become involved in a domestic violence case, which makes it extremely difficult for them to conduct an investigation. Essentially, by the time the police have taken a report of the battering incident, filed charges and brought the case to the prosecutor’s office, the couple has reunited and the victim no longer feels that she is in any threat of danger. She may therefore refuse to testify as a witness to the incident and may recant any incriminating statements made to the police. She may also feel responsible for the incident and even offer a made-up version of the events that make her out to be the wrongdoer.

When this cycle of violence repeats itself over time, the victim can develop what is known as Battered Woman Syndrome ("BWS"). BWS can be divided into three parts: 1) the traumatic effects of victimization; 2) learned helplessness; and 3) self-destructive coping responses to the violence. BWS is similar to Post Traumatic Stress Disorder, but includes the added element of repeat abuse. One feature of this disorder can be poor memory recall of the traumatic events. This symptom is important for prosecutors to understand because when some victims claim that they cannot remember an event, it may not be a lie. Women who suffer from BWS are less likely to respond to the violence against them, and consequently, become more deeply entrenched in the violent relationship. Women experiencing BWS are likely to be

10. See Walker, supra note 3, at 32.
11. See Berry, supra note 1, at 36.
more reluctant to cooperate with prosecutors, even though they are in great need of advocacy.

II. SUGGESTIONS FOR PROSECUTORS WHO HANDLE DOMESTIC VIOLENCE CASES

Many prosecutors are tempted to rely on expert witnesses to explain a victim's reluctant behavior to the jury. While this can be a useful tactic in a case where a witness absolutely refuses to cooperate, and may actually be better than putting a hostile witness on the stand, it is almost never as effective as getting the victim to corroborate her own evidence.\footnote{See Roberta Thyfault et al., Battered Women in Court: Jury and Trial Consultants and Expert Witnesses, in DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 58 (D. Sonkin ed., 1987).}

Moreover, the traditional prosecutorial approach to domestic violence cases may increase a victim's reluctance to cooperate.\footnote{See Goolkasian, supra note 12, at 56.} The probability of victim cooperation has been better predicted by the conduct of the prosecutor than by the conduct of the victim or defendant.\footnote{See Lisa Lerman, Prosecution of Spouse Abuse: Innovation in Criminal Justice Response 13 (1981).} If prosecutors make an effort to know the individual victim and use adversarial prosecution strategies, they will develop a better working alliance with the victim, and may be more empowered to effectively handle cases of domestic violence. There are several techniques a prosecutor might utilize in order to make a difference.

A. Prosecutors Must Know the Victim

It is important that a prosecutor get to know a victim, taking time to learn the personalities involved in the case and discovering potential concerns the victim may have that prevent her from leaving an abusive relationship and increasing her resistance to cooperating with the case. Prosecutors can play a large role in helping the victim to access resources that can alleviate some of the environmental stresses that are keeping her trapped. They can work closely with victim advocates and lend their leverage when needed. Educating the victim about options and providing her with a sense of empowerment is one of the greatest tools a prosecutor has in gaining a victim's cooperation.\footnote{See Goolkasian, supra note 12, at 68.} There are a number of issues that
a prosecutor should seek to discover in order to fully understand the psychological study of an abused victim.

The inherent cycle of violence explains only some of the general psychological dynamics that occur in abusive relationships. It does not account for the many complexities surrounding each individual case. The most important thing for prosecutors to keep in mind is that all victims are not the same. While BWS and the cycle of violence are models that have provided a tremendous advance toward helping professionals understand the plight of the battered woman, they may have also contributed to creating a stereotype that many professionals use as a cognitive heuristic to understand the victim. Prosecutors sometimes presume that they know more then they do, which limits their own instinct to continue investigating the situation. Many prosecutors working on domestic violence cases assume that they already know the "how's and why's" of the victim's behavior. This preconceived notion may be limiting their ability to process the case in the most effective manner. There may be many factors that the prosecutor is unaware of, which contribute to the victim's resistance to cooperate with the prosecution of the case. In order to gain a full understanding of the case, it is crucial that prosecutors ask certain questions about the victim's history and current situation.

It is also important to gain the best possible understanding of the victim's psychological involvement in the relationship. Not all victims of domestic abuse suffer from BWS.21 Those that suffer from BWS are more psychologically trapped in the abusive relationship and less likely to engage in efforts that will help their situation.22 BWS victims are also more fearful of the perpetrator and susceptible to threats. There are certain factors that may indicate a victim's psychological enmeshment in the relationship that prosecutors may detect by asking a few simple questions.

Knowledge about the current relationship will be most useful in understanding whether or not a victim will cooperate.23 By the time most cases of domestic abuse reach a prosecutor's desk, a history and pattern of abuse has been well established by the couple. The prosecutor should attempt to assess the length of the relation-

22. See id.
ship, the extent of abuse and a pattern of coercive control. These factors will provide the prosecutor with a greater understanding of the victim's behavior and will help clarify the psychological obstacles the victim must overcome in order to take the stand and testify against her abuser. For example:

One woman's husband inserted a loaded pistol with one bullet into her vagina and pulled the trigger four times — for her it only took one time to learn to respond to his slightest threat of violence. There were bruises from his punches and kicks, but no visible evidence of his near lethal behavior. In this case, an astute observer need not require evidence of multiple episodes of physical abuse to understand the scope of his control over her and her terror associated with it.²⁴

Perpetrators in domestic violence cases control their victims through fear and intimidation.²⁵ Often, the fear of threats cause as much psychological trauma as physical abuse, although in a court of law, physical injuries may be given much more consideration than psychological ones. Many victims are terrorized not only by what they think will happen to them, but by what the perpetrator threatens to do to their families and loved ones if they stand up to the abuse.²⁶ In one exemplary case, a woman was told by her batterer that, if she testified against him, he would burn down her mother's house.²⁷ Because he was in custody, the victim agreed to be cooperative.²⁸ However, without her knowledge, he was released on bail before the trial, and her mother's house burned to the ground the next day.²⁹ The woman recanted her statements and "disappeared" until after the trial was over because she felt she could not expose her relatives to that kind of danger.³⁰ After he was released from jail, she returned to her relationship with him, stating, "sometimes I feel safer when I live with him, because then I know where he is. Otherwise I'm always afraid he'll show up when I'm not expecting him."³¹

²⁴ Id. at 44.
²⁵ See Berry, supra note 1, at 36.
²⁷ See id.
²⁸ See id.
²⁹ See id.
³⁰ See id.
³¹ Id.
It is also important for prosecutors to realize that the fear of harm does not end when a woman is separated from her batterer. Statistically, a woman is at the greatest risk of severe injury or death at the hands of the abuser within the first year after she decides to leave the relationship. This danger arises because the perpetrator is angry at the victim for questioning his authority and seemingly no longer under his control. Leaving the relationship, therefore, does not reduce or eliminate the danger she is in.

Other factors that have been shown to increase a woman's susceptibility to psychological entrapment within a relationship include: 1) previous experiences with violence, such as child abuse or witnessing the abuse of a parent; and 2) cultural attitudes. Victims that have been exposed to family violence prior to their current relationships are less likely to see the violent behavior within their relationship as deviant, and less likely to view the efforts of the prosecutor and the criminal justice system as helpful.

Also, a woman's cultural attitudes about her role in the relationship may have a large impact on her willingness to cooperate. A woman who holds the traditional idea that her primary responsibility in the relationship is to respect her male partner may value loyalty and commitment to him above her right not to be abused.

External factors also play a role in whether a victim chooses to cooperate. While prosecutors have little control over the psychological dynamics that trap a woman in a relationship, they may be more able to assist the victim with environmental factors that prevent her from wishing to press charges.

Many victims who wish to leave an abusive relationship, especially one that they have endured for many years, are faced with the very real possibility that they will not be able to support themselves financially. It is not uncommon for a perpetrator to manipulate the situation to gain control of her financial assets, as well as important papers like a victim’s driver’s license, passport, birth certificate and/or immigration papers, so that it is almost impossible for her to get a job. Victims are often unaware of how to access public aid, and would not qualify for such assistance if still married to the abuser. Many victims have been socially isolated for years.

32. See Allison & Martineau, supra note 6, at 11.
33. See id.
34. See Douglas, supra note 14, at 44.
35. See id. at 45.
36. See Allison & Martineau, supra note 6, at 11.
37. See id.
38. See id. at 9.
and do not have the education or skills to secure employment in the marketplace. These victims feel completely dependent on the abuser and are terrified of what will happen if the perpetrator goes to jail. The average sentence for a first time domestic abuser prosecuted on a misdemeanor charge is no more than thirty days, which is just long enough for him to lose his job, but not long enough for him to get over his anger towards the victim. Many women are more willing to endure physical abuse rather than face the prospect of having to support themselves and a family with little or no resources.41

While having children at home raises an economic concern, there are other considerations surrounding children that pressure a woman to stay in an abusive relationship. Often victims fear that they will not receive custody of their children if they leave their relationship. The woman may also be afraid that if she leaves without the children, the husband may turn his abuse against them. In some states, a report is made to the Department of Child Services when children are reported to be present during an incident of domestic violence, and women fear the state will take custody of their children.44

Social or religious pressure may also be a factor contributing to a victim’s reluctance to testify. A family’s cultural beliefs can be stronger than the victim’s own, and if a victim’s family strongly believes in supporting one’s spouse and working out one’s “problems,” it can place incredible pressure on the victim to stay in the relationship. The pressures arises because divorce or separation violates a number of religious creeds that may exert a powerful influence over the victim.46

B. Prosecutors Should Utilize Adversarial Strategies

The prosecutor should keep in mind that the primary goal of prosecution in a domestic abuse case is to protect the victim from additional acts of violence committed by the defendant. According to the American Bar Association Standards for Prosecutors, “The prosecutor is both an administrator of justice and advocate. The

39. See id. at 10.
40. See Berry, supra note 1, at 143.
41. See Allison & Martineau, supra note 6, at 10.
42. See id.
43. See id.
44. See id.
45. See id. at 11.
46. See id.
prosecutor must exercise sound discretion in the performance of his or her functions. The duty of the prosecutor is to seek justice, not merely to convict.\textsuperscript{47} Domestic abuse cases present problems for prosecutors that make it difficult to balance the administration of justice and advocacy. Because of the fact that, unlike other crime victims, domestic abuse victims often remain in imminent danger of serious physical harm from the perpetrator,\textsuperscript{48} victim safety must be the foremost concern. This issue requires prosecutors to be sensitive to utilizing the options they have within their power to guide the victim through the criminal justice system in a way that will expose them to the least possible threat of harm. Additionally, prosecutors must recognize the limits of the system's ability to protect the victim.

After the abusing spouse has been arrested, the victim is usually encouraged to obtain a protective order from the court. While such a judicial decree makes it unlawful for a defendant to go within a certain distance of a victim, and provides additional material to aid the prosecution if the order is violated, it does not guarantee a victim's safety.\textsuperscript{49} Serving a defendant with a restraining order may fuel his anger with the victim. A protective order cannot prevent another attack, it can only address the incident after the fact. A prosecutor whose primary concern is the victim's safety should therefore warn the victim about the limitations of the order and evaluate the circumstances of each individual case to determine whether a protective order is necessary and appropriate.

It has been demonstrated in jurisdictions where there are "no-drop" policies,\textsuperscript{50} that proceeding with prosecution, despite the victim's initial unwillingness to cooperate, is beneficial to the victim psychologically and may increase her helpfulness later in the case. When the victim takes an active role in the prosecution of the offender, it can result in feelings of empowerment for her that can alter the balance of power in the battering relationship and lower rates of future violence.\textsuperscript{51} By taking control of the criminal process, the prosecutor sends a clear message that the batterer cannot use control over the victim to avoid criminal sanctions.\textsuperscript{52} Whether

\textsuperscript{47} See Asmus, supra note 23, at 134 (quoting the ABA Standards).
\textsuperscript{48} See Allison & Martineau, supra note 6, at 11.
\textsuperscript{49} See id.
\textsuperscript{50} See MILLS, supra note 9, at 307 (stating that mandatory prosecution requires government attorneys to bring charges against batterers whether or not the victim desires prosecution).
\textsuperscript{51} See Simon, supra note 13, at 69.
\textsuperscript{52} See id. at 53.
the victim is testifying of her own accord or because of mandatory prosecution laws, it is important for prosecutor's to always send a subpoena in order to protect the victim from pressure of the abuser or other parties who do not want the victim to participate in the case as a witness. This will diffuse the anger of the batterer towards the victim and will reduce the likelihood of continued threats.\(^{53}\)

Because violence in intimate relationships occurs in cycles and stages, it is important to prosecute a domestic abuse case in a timely manner, avoiding as many continuances as possible.\(^{54}\) Expedient prosecution will increase the likelihood of conviction and decrease the abuser's opportunity to pressure the victim and/or engage in violent acts against the victim. It is also beneficial for prosecutors to keep the time period it takes to complete the case as short as possible if they wish to increase their chance of getting the victim to cooperate. The time frame in which the victim is most likely to be receptive to help and desirous of prosecution is shortly after an acute battering incident.\(^{55}\) This is known as the window of opportunity in the cycle of violence.\(^{56}\) The longer the case continues, the more likely she is to minimize the battering incident and return to the relationship.

The way the prosecutor treats a victim will also have a large impact on the victim's desire to cooperate. The relationship between a prosecutor and a victim often parallels that of the batterer and the victim.\(^{57}\) If prosecutors are controlling and behave as if they know what is best for the victim, it is likely to elicit undesirable responses. The rage that is felt towards the batterer may be directed towards the prosecutor through negative transference, as the prosecutor is seen as a safe object that cannot physically harm the victim.\(^{58}\) This may encourage the prosecutor to engage in a power struggle with the victim, which will only be frustrating and unproductive for both parties. Intimidation tactics, such as warning victims that filing a false report is a crime for which they will be prosecuted, or using statements such as, "You were either lying then or you are lying now," to get a victim to admit that she is recanting, are also not recommended. Such statements presume

\(^{53}\) See Asmus, supra note 23, at 116.
\(^{54}\) See id. at 115.
\(^{55}\) See Simon, supra note 13, at 69
\(^{56}\) See Walker, supra note 3, at 37
\(^{57}\) See Douglas, supra note 14, at 52.
\(^{58}\) See Nancy McWilliams, Psychoanalytic Diagnosis: Understanding Personality Structure in the Clinical Process 32 (1994).
that the victim has a certain element of self-preservation that does not exist in a woman who is actively engaged in the intense dynamics of an abusive relationship. A sincere, empathetic, though straightforward, matter-of-fact attitude is usually the best approach.

**Conclusion**

Domestic violence cases provide unique challenges to prosecutors because of the intimate relationship that exists between victim and batterer. These cases can be fraught with evidentiary problems as a result of a victim's refusal to cooperate with the prosecution. While theoretical constructs, such as the cycle of violence and BWS, begin to explain the psychological reasons behind why some women do not cooperate, prosecutors should be aware that there are things they can do to increase a victim's desire and ability to cooperate with the case. An effort should be made to understand a victim's individual experience both internally and externally. By doing this, prosecutors can ensure that they are not making assumptions about the case based on stereotyped information, and are not overlooking circumstances that could be easily amended to gain a victim's cooperation. Victims should be educated about the process and should be assured that prosecutors will make every effort to employ strategies that will minimize the victim's exposure to harm. Understanding the fundamental dynamics of an abusive domestic relationships is a beginning, but in order to use this information to aid in prosecution and advocate on behalf of the victim, a concerted effort must be made to overcome the unique obstacles presented by these relationships.
GENDER DIFFERENCE IN PERCEIVING VIOLENCE AND ITS IMPLICATION FOR THE VAWA'S CIVIL RIGHTS REMEDY

Renée L. Jarusinsky*

INTRODUCTION

What is violence? A typical dictionary definition of violence defines it as "swift and intense force," "rough or injurious physical force, action, or treatment," and "an unjust or unwarranted exertion of force or power."1 A legal dictionary defines violence as "[u]njust or unwarranted exercise of force" and "the exertion of any physical force so as to injure, damage or abuse."2 Interestingly, studies show that men and women perceive violence differently, with women perceiving more acts as violent.3 The results of these studies call into question the accuracy of these definitions and beg the question: What is violence in the context of violence against women?

In accordance with the results of the studies described above, social scientists who study violence against women have expanded the definition of violence when perpetrated against women to include not only physical acts, but also "visual, verbal, or sexual acts that are experienced by a [female] as a threat, invasion, or assault and that have the effect of hurting her or degrading her . . . ."4 The

---

* J.D. Candidate, Fordham University School of Law, 2000; B.A., cum laude, Political Science, Purchase College, State University of New York, 1995. The author thanks Professor Katherine Franke for her guidance and suggestions on this Note, Ellen Gesmer for providing the opportunity to research the Violence Against Women Act's civil rights remedy, which was the inspiration for writing this Note, and her family and friends for their support.

1. WEBSTER'S NEW WORLD DICTIONARY 1585 (2d ed. 1984).
2. BLACK'S LAW DICTIONARY 1570 (6th ed. 1990) (citations omitted). The legal dictionary also notes that, in some contexts, violence can be more than a physical act; it may also include “false statements . . . and veiled threats by words or acts.” Id.
differences between men’s and women’s perceptions of violence contribute to the confusion surrounding violence against women. For example, is an act that does not include physical force violent or is an unwanted sexual touching unaccompanied by a slap or a punch violent?

Courts are often faced with these types of questions when determining what constitutes violence in cases brought under the Violence Against Women Act of 1994 (“VAWA”). Under the VAWA, victims are afforded a civil rights cause of action (“civil rights remedy”) that allows a woman to sue the perpetrator in federal court for money damages and injunctive and declaratory relief. The VAWA’s civil rights remedy has two requirements: 1) that the plaintiff be a victim of a “crime of violence;” and 2) that the “crime of violence” be motivated by the victim’s gender.

The first requirement, a “crime of violence,” is defined in the VAWA’s civil rights remedy as an act that 1) constitutes a felony under criminal law (“predicate offense”); and 2) comports with 18 U.S.C. § 16 (“section 16”).

---


6. See 42 U.S.C. § 13981(e). While the VAWA’s civil rights remedy is gender-neutral, this Note will address male violence against women. Also, the statute explicitly states that a VAWA civil rights claim may be brought in either federal or state court. See id. § 13981(e)(3). The vast majority of VAWA civil rights cases, however, have been brought in federal court, such as the cases discussed herein. See cases discussed infra Part I.B. In addition, the legislative history of the VAWA’s civil rights remedy suggests that “legislators contemplated federal courts as the primary forum for determination of VAWA civil rights claims.” Julie Goldscheid and Susan Kraham, Litigating Violence Against Women Act Civil Rights Claims: Procedural Concerns, in Violence Against Women 11-1 (David Frazee et al. eds., 1998).


8. See 42 U.S.C. § 13981(d). The statute allows for the predicate offense pleaded by the plaintiff to be either a federal or state criminal felony, and the statute does not require that the defendant had criminal proceedings brought against him under these predicate offenses. See id.

9. See id.
WHAT IS VIOLENCE?

nally used in the Federal Sentencing Guidelines, defines a "crime of violence" as:

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

In some VAWA civil rights cases, plaintiffs have alleged predicate offenses that do not contain an element that requires "the use, attempted use, or threatened use of physical force," pursuant to section 16(a). In such cases, courts must determine whether the predicate offense is one that involves a "substantial risk [of] physical force," pursuant to section 16(b). In the absence of statutory guidance, courts have developed various and often inconsistent approaches to determine what constitutes a substantial risk of physical force to women alleging civil rights violations pursuant to the VAWA.

This Note focuses on what acts pose a substantial risk of physical force to women for purposes of the VAWA's civil rights remedy. Specifically, this Note addresses the interpretation of section 16(b) in VAWA civil rights cases. Part I provides a general history and background of the VAWA's civil rights remedy. First, Part I details the evolution of the "crime of violence" requirement, and second presents the congressional intent behind the civil rights remedy. Part I also provides case illustrations of how federal courts have interpreted section 16(b) in VAWA civil rights cases. Part II discusses traditional understandings of violence against women in the law and presents social science data showing perceptual differences of violence between men and women to provide a contemporary understanding of violence against women. Part II then discusses the different legal approaches utilized by federal courts to interpret section 16(b), which often echo the difference between the traditional and contemporary notions of violence against women. Part III argues that utilizing traditional notions of violence against women to interpret section 16(b) rids the VAWA's civil rights remedy

10. See discussion infra Part II.B.
12. See cases discussed infra Part I.B.
13. See id.
14. See 42 U.S.C. § 13981; cases discussed infra Part I.B.
of any positive effect. Part III proposes that courts employ a broad, uniform approach to determine what acts pose a substantial risk of physical force. This Note concludes that utilizing such an approach would make the VAWA’s civil rights remedy the powerful tool for which it was created — a tool to benefit both women and society.

I. GENERAL BACKGROUND AND HISTORY OF THE VAWA’S CIVIL RIGHTS REMEDY

A. Legislative History

1. The Evolution of the “Crime of Violence” Language

On June 19, 1990, Senator Joseph Biden introduced the first version of the VAWA in the Senate. Senate Bill 2754 included a civil rights cause of action under Title III, which provided that “[a]ny person . . . who deprives another of the rights, privileges or immunities secured by the Constitution and laws as enumerated in subsection (b) . . . shall be liable to the party injured, in an action for the recovery of compensatory and punitive damages.” Subsection (b) enumerated the rights referred to above as freedom from “crimes of violence motivated by the victim’s gender.” This substantive right was defined as freedom from “any crime of violence . . . including rape, sexual assault, or abusive contact, motivated by gender.”

On October 4, 1990, Senator Biden introduced a substitute bill of the VAWA at an executive committee meeting of the Judiciary Committee (the “Committee”). This version included significant changes from the prior bill, increasing coverage from only sex crimes to all crimes of violence motivated by gender. After the Department of Justice complained about the vagueness of what


17. S. 2754, 101st Cong. § 301(c) (as introduced). The language of the civil rights cause of action in this version was akin to the language of 42 U.S.C. § 1983, but without “an under color of state law” requirement. See Nourse, supra note 15, at 8.

18. S. 2754, 101st Cong. § 301(b) (as introduced).

19. Id. § 301(d).

20. See id. § 301(d) (substitute bill), reprinted in S. Rep. No. 101-545, at 43.

21. See id.

22. Compare S. 2754 § 301(d) (as introduced), with S. 2754 § 301(d) (substitute bill); see also Nourse, supra note 15, at 12.
acts of violence would be covered, however, the Committee incorporated a reference to section 16, which was the federal criminal code's primary definition of "crime of violence." Later that day, the substitute bill, which incorporated the federal definition, was adopted by voice vote in the Committee. Against strong opposition, Senator Biden re-introduced the VAWA as Senate Bill 15 on January 14, 1991. In response to concerns about the wide range of acts that would be covered under the civil rights remedy, Senator Biden attempted to clarify the "crime of violence" requirement in this bill. By adding reference to section 16, the major issue in the "crime of violence" analysis is whether the defendant's alleged acts can be associated with a criminal offense. Senate Bill 15 also contained language stating that a plaintiff need not file criminal charges nor show a criminal conviction in order to prove that the defendant's acts amounted to a "crime of violence" under the VAWA's civil rights remedy. The addition of this language was intended to emphasize that a VAWA civil proceeding was to be governed by civil law, rather than criminal law.

During the term of the 103rd Congress, the VAWA gained considerable support in the House and the Senate. Supporters were

23. See supra note 11 and accompanying text; see also discussion infra Part II.B.
26. See Nourse, supra note 15, at 13. Opposition came from both state and federal judges over the fear that cases brought pursuant to the VAWA's civil rights remedy would "flood the federal courts." See id. Chief Justice Rehnquist publicly stated that the VAWA's "definition of a new crime is so open-ended, and the new private right of action so sweeping, that the legislation could involve the federal courts in a whole host of domestic relations disputes." 138 Cong. Rec. 583 (1992) (statement of Chief Justice William Rehnquist). The ACLU shared the concerns of the Chief Justice. See Crimes of Violence Motivated by Gender: Hearing on S. 15 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary House of Representatives, 103d Cong. 20 (1993) [hereinafter Crimes of Violence Hearing]. In response, Sally Goldfarb pointed out the "sexism" behind the floodgates argument, noting that the introduction of civil rights causes of action in other legislation, such as the Americans with Disabilities Act, only met opposition from staunch civil rights opponents, and not from the federal judiciary. See id. at 12 (statement of Sally Goldfarb, Senior Staff Attorney, NOW Legal Defense and Education Fund ("NOWLDEF")).
27. See Nourse, supra note 15, at 14.
28. See id. at 16.
29. See S. 15 § 301(d). This language was added to prevent a mini-criminal trial within a civil case. See Nourse, supra note 15, at 15.
31. See id. at 27.
concerned, however, that the VAWA would be stalled if brought to the Senate floor for debate and "would become a vehicle for unrelated, and extremely controversial, crime amendments such as the federal death penalty, habeas corpus reform, or gun control legislation." As a result, Senators Biden and Hatch decided to negotiate a bipartisan compromise bill that would deter "hostile floor amendments."

The Biden/Hatch compromise, embodied in Senate Bill 11, made several changes to the "crime of violence" requirement. Prior versions of the civil rights remedy contained a reference only to section 16(a), which covers acts classified as either misdemeanors or felonies. Senate Bill 11 now contained new language limiting the VAWA's civil rights remedy only to offenses serious enough to warrant classification as felonies. Also, the predicate offense had to include a risk of personal injury.

In addition to these limitations, the drafters added language broadening the "crime of violence" definition to include "acts that would constitute a felony . . . but for the relationship between the person who takes such action and the individual against whom such action is taken." The purpose of this language was to provide coverage to victims of relationship-based crimes because the drafters recognized that many states "downgrade" crimes committed by and against parties in a relationship, such as domestic violence and acquaintance rape. This new language required that the alleged act be determined by the seriousness of the offense and not by the relationship between the victim and the perpetrator. The addition of this language embodied one of the substantive goals of the VAWA — that state and local applications of the term "felony" not govern the civil rights remedy.

The limits on the "crime of violence" requirement were sufficient to garner majority support for the VAWA in the House and

32. Id.; see also S. 11, 103d Cong. § 301 (1993).
33. Nourse, supra note 15, at 27.
34. See id. at 27-29.
35. See id. at 28; see also supra note 11 and accompanying text.
36. See S. 11 § 301(d)(2)(A); see also Nourse, supra note 15, at 28.
37. See S. 11 § 301(d)(2)(A).
38. Id. § 301(d)(1)(A).
39. See Nourse, supra note 15, at 28-29. Crime "downgrading" occurs when a crime is committed by a party in a relationship against the other party, and the act is prosecuted as a misdemeanor even though the same crime committed against a stranger would be classified as a felony. See id.
40. See Nourse, supra note 15, at 28.
41. See id.
On September 13, 1994, President Clinton signed the VAWA into law. Consistent with Senate Bill 11, the VAWA's civil rights remedy does not reach all injurious actions motivated by gender. Rather, in its final form, the statute defines "crimes of violence" as:

act[s] or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another, and that would come within the meaning of State or Federal offenses described in section 16 of Title 18, United States Code, whether or not those acts have actually resulted in criminal charges, prosecution, or conviction. . . .

2. Congressional Intent

In his opening remarks at the first "Women and Violence" hearing before the Committee in October 1990, Senator Biden stated that "no matter how much we say we have changed as a society, there is something terribly wrong when, over the last 15 years, violence against young men in America has dropped by 12 percent, while violence against young women in America has increased [by] 50 percent." In recognition of society's pervasive "violent sexism," Senator Biden stated that his overarching intention in creating the VAWA's civil rights remedy was "to change the Nation's attitude."

Along with this ambitious goal, Senator Biden and the drafters identified at least three additional goals of the VAWA's civil rights remedy. First, the VAWA's civil rights remedy was intended to recognize gender-based violence as discrimination and a violation of an individual's civil rights. Congress cited a tradition of fighting
race-based and religion-based violence with civil rights laws and noted the 1986 U.S. Supreme Court holding that gender-based violence may constitute discrimination as support for creating the civil rights remedy.\footnote{See S. Rep. No. 101-545, at 40-42 (referring to the Court's holding in \textit{Meritort Savings Bank v. Vinson}, 477 U.S. 57 (1986)). The VAWA's civil rights remedy "makes explicit what the Court has already held: that an assault against a woman simply because she is a woman is no different than an assault against a black person because that person is black." \textit{Id.} at 42-43.}

Furthermore, Congress recognized the devastating effects that gender-based violence has on society and the economy.\footnote{See S. Rep. No. 101-545, at 32-33. Regarding the economic and societal costs of violence against women, Congress noted that it is not a simple matter of adding up medical costs, or law enforcement costs, but of adding up all those expenses plus the costs of lost careers, decreased productivity, foregone educational opportunities, and long-term health problems. Partial estimates show that violent crime against women costs this country at least 3 billion dollars a year. . . . Gender-based crimes and women's fears of those crimes . . . restrict the enjoyment of federally protected rights like the right to employment, the right to public accommodations, and the right to travel. . . . Gender-based crimes violate our most fundamental notions of equality—that no person's physical security should be at risk because of an immutable trait, because of race, religion, or gender. \textit{Id.} at 33, 43.} Congress also noticed that existing civil rights laws provided protection for gender-based discrimination only in the workplace.\footnote{See S. Rep. No. 101-545, at 40-42; see also Andrea Brenneke, \textit{Civil Rights for Battered Women: Axiomatic and Ignored}, 11 \textit{Law \\& Ineq.} J. 1, 44-53 (1992). Title VII of the Civil Rights Act of 1964 provides a civil rights remedy to victims of sex-based discrimination only in the workplace. \textit{See id.} at 50-52; 42 U.S.C. § 2000e (1994). The VAWA's civil rights remedy aims to attack sex-based violence outside of the workplace, such as violence that occurs in the home and on the streets. \textit{See S. Rep. No. 101-545, at 40.}} Thus, Congress sought to fill the gender gap in current civil rights laws and to spearhead a "national commitment" to fight discriminatory gender-based violence.\footnote{S. Rep. No. 101-545, at 41.}

Another goal of the VAWA's civil rights remedy was to supercede discriminatory state criminal and civil laws and to provide a civil forum for women who might otherwise be barred from legal redress.\footnote{See S. Rep. No. 102-197, at 43-48 (1992).} In the criminal context, for example, Congress noted that states often "downgrade" rape in marriage, and until quite recently, many states did not even consider marital rape a
WHAT IS VIOLENCE?

crime.\textsuperscript{54} Although marital rape is now a crime in all fifty states, thirty-three states still only allow prosecutions under limited circumstances, i.e., where there is evidence of physical injury or under other restrictions.\textsuperscript{55} Furthermore, Congress recognized that many states also "downgrade" rape and assault between unmarried acquaintances.\textsuperscript{56} In the civil context, for example, Congress noted that many states still enforce interspousal immunity doctrines, which often bar women from suing their abusive husbands in civil court for money damages.\textsuperscript{57}

A third goal of the VAWA's civil rights remedy was to avoid specific discriminatory practices at the state criminal level, often termed the "double victimization" problem, by providing access to federal court.\textsuperscript{58} "Double victimization" refers to the harm that a victim sustains first by her attacker and second by the criminal justice system, a system that often falls short of ensuring justice for her.\textsuperscript{59} While many states have passed law reforms to address this issue, these efforts have failed to eradicate gender bias from affecting criminal proceedings in those states.\textsuperscript{60} Because federal court is considered to be less biased than state court, allowing VAWA civil

\textsuperscript{54} See S. Rep. No. 102-197, at 45; see also Understanding Violence Against Women, supra note 4, at 127 ("For most of Western history, marital rape was not considered a crime. Its recognition as a crime today is by no means universal and remains controversial, despite evidence that rape within marriage is often repeated and extremely brutal.").

\textsuperscript{55} See S. Rep. No. 102-197, at 45 n.50 (citations omitted); Women and Violence Hearing I, supra note 45, at 64 (statement of NOWLDEF by Helen R. Neuborne and Sally Goldfarb); Raquel Kennedy Bergen, Wife Rape 4, 150 (1996). In many states, a husband is exempt from prosecution for marital rape when his wife is legally unable to consent (i.e., mentally or physically impaired, unconscious or asleep). See Bergen, supra, at 150.

\textsuperscript{56} See Women and Violence, Part 2: Hearing on S. 2754 Before the Senate Judiciary Comm., 101st Cong. 2 (1990) (intending to "debunk the myth" that acquaintance rape is not as violent as stranger rape) [hereinafter Women and Violence Hearing II]; see also Bergen, supra note 55, at 150-51.

\textsuperscript{57} See Women and Violence Hearing I, supra note 45, at 64 (1990) (statement of NOWLDEF by Helen R. Neuborne and Sally Goldfarb).


\textsuperscript{59} See id. at 40-41.

\textsuperscript{60} See S. Rep. No. 101-545, at 41; S. Rep. No. 102-197, at 45-46. Studies indicate that gender bias affects not only juries, but also judges, prosecutors and court employ-
rights plaintiffs to sue in federal court is an important facet of the civil rights remedy aimed at avoiding the "double victimization" problem. Indeed, Senator Biden described the federal judicial system as the "best court system in the world, with the most educated judges . . . and with a set of rules and regulations and a degree of sensitivity that is uniform."
As explained above, the VAWA's civil rights remedy was intended to fill "the gender gap in current civil rights laws," and to avoid discriminatory state laws and practices.\(^6\) Equally important as these intentions is how courts interpret the VAWA's civil rights remedy in actual cases.\(^6\) Part B provides three examples of how courts have interpreted section 16(b) in VAWA civil rights cases.

B. Current Interpretations of Section 16(b) – Case Illustrations

Without clear enumeration of what constitutes a substantial risk of physical force pursuant to section 16(b) in VAWA civil rights cases, federal district courts have employed different modes of analysis to interpret section 16(b), often with disparate impact.

1. **McCann v. Rosquist\(^6\)**

Melanie McCann, Noele Nelson and Lisa Nielson were employees of Bryon Rosquist, a chiropractor.\(^6\) Without their consent, Rosquist sexually assaulted\(^6\) each of them by fondling them repeatedly and rubbing his genitals against their bodies.\(^6\) McCann, Nelson and Nielson filed a joint lawsuit in federal court against

---


\(^6\) See id.

\(^6\) 998 F. Supp. 1246 (D. Utah 1998), rev'd, 185 F.3d 1113 (10th Cir. 1999).

Throughout this Note, the district court's opinion in *McCann v. Rosquist* will be referred to as "McCann I", whereas the Tenth Circuit's opinion will be referred to as "McCann II."

\(^6\) See McCann I, 998 F. Supp. at 1247.

\(^6\) The term "sexual assault" throughout this Note refers to any nonconsensual touching of or contact with the breasts, genitals or buttocks of another.

\(^6\) See McCann I, 998 F. Supp. at 1248. Each of the three plaintiffs made similar allegations against Rosquist. Melanie McCann alleged that Rosquist touched her "breasts, hips, buttocks, thighs, crotch, and pubic bone — sometimes clothed and sometimes not — on numerous occasions . . . ." Brief for Appellant at 2, *McCann v. Rosquist*, 185 F.3d 1113 (10th Cir. 1998) (No. 98-4049). Specifically, McCann alleged that Rosquist unzipped [McCann's] wet suit at a company water skiing party to expose [her] breasts, pulled out the elastic waist band on McCann's stretch pants to look down her pants, rubbed his genitals along McCann's body while 'adjusting' her, made lewd and suggestive comments, talked about sex, fondled her unclothed pubic area while 'adjusting' her, and pulled McCann's pants down while 'adjusting' her so that he could fondle her buttocks.

*Id.* at 3. Noele Nelson alleged that Rosquist "repeatedly patted and fondled [her] buttocks, thighs, and shoulders [and] . . . once rubbed his penis back and forth along [her] leg while adjusting her." *Id.* Lisa Nielson alleged that Rosquist "touched [her] breasts" clothed and unclothed. *Id.* He also "fondled Nielson's hips, thighs, and buttocks, and rubbed his hand up Nielson's leg near her crotch." *Id.*
Rosquist alleging civil rights violations pursuant to the VAWA’s civil rights remedy.\(^69\)

The district court found that while Rosquist’s acts were “offensive and repulsive,” those acts were not “crimes of violence” under the VAWA’s civil rights remedy.\(^70\) The court found that the alleged acts fell within the purview of the predicate offense pleaded by the plaintiffs.\(^71\) Nonetheless, the court determined that the acts were not of the violent nature required to state a VAWA cause of action because such acts do not constitute criminal offenses that, by their nature, involve a substantial risk of physical force as required by section 16(b).\(^72\) Moreover, the court stated that “the time, place, [and] manner . . . alleged are not such that the situation could escalate into one where there would be a substantial risk that physical force would be used.”\(^73\) Thus, the district court dismissed the plaintiffs’ case.\(^74\)

2. Palazzolo v. Ruggiano\(^75\)

Donna Palazzolo was a regular patient of Dr. Ruggiano, a psychiatrist, between 1992 and 1995.\(^76\) During counseling sessions, Ruggiano allegedly sexually assaulted Palazzolo on three separate occasions.\(^77\) On one occasion, while Ruggiano was reviewing Palazzolo’s file, he “asked her if there was anything in the file indicating that she did not need a kiss and a hug.”\(^78\) Palazzolo responded “No,” yet Ruggiano proceeded to put his arms around her shoulders and “pressed his genital area against hers.”\(^79\) Palazzolo filed

\(^{69}\) See McCann I, 998 F. Supp. at 1247.
\(^{70}\) Id. at 1252.
\(^{71}\) See id. at 1251-52.
\(^{72}\) See id. at 1252.
\(^{73}\) Id. The court further stated that “[a]ll of the acts alleged appear to have occurred at work or at social activities under circumstances that would have greatly discouraged any escalation of contact of the type of violent conduct required within the meaning of section 16(b) and [the VAWA].” Id.
\(^{74}\) See id. On appeal, however, the Tenth Circuit reversed the district court’s dismissal, holding that the predicate offense alleged does involve a substantial risk of physical force pursuant to section 16(b). See McCann II, 185 F.3d 1113, 1121 (10th Cir. 1998). For discussion of the Tenth Circuit’s analysis, see infra Part II.B.1.
\(^{76}\) See id. at 46.
\(^{77}\) See id. On the first occasion, Ruggiano placed his arms around Palazzolo’s body while she was being weighed. See id. On the second occasion, Ruggiano “placed [his] hand on [Palazzolo’s] shoulder and pressed his genitals against her buttocks.” Id.
\(^{78}\) Id.
\(^{79}\) Id.
suit in federal court alleging that Ruggiano's acts violated her civil rights pursuant to the VAWA's civil rights remedy.\textsuperscript{80}

The district court determined that Ruggiano’s acts did not amount to “crimes of violence.”\textsuperscript{81} Palazzolo relied on the state law criminal felony of second degree sexual assault as her predicate offense.\textsuperscript{82} The court stated that Palazzolo did not allege that Ruggiano used force or coercion, an element of the predicate offense she alleged.\textsuperscript{83} Further, the court found that Ruggiano did not use force or coercion during any of the three incidents because Palazzolo did not manifest a lack of consent.\textsuperscript{84} The court also found that the section of the predicate offense alleged by Palazzolo that refers to engaging in medical treatment of the victim for the purpose of sexual arousal does not pose a substantial risk of physical harm.\textsuperscript{85} Thus, according to the district court, Ruggiano’s actions did not pose the substantial risk of physical force required by the civil rights remedy.\textsuperscript{86} Accordingly, Palazzolo’s case was dismissed.\textsuperscript{87}

\textsuperscript{80} See id.
\textsuperscript{81} See id. at 47-49.
\textsuperscript{82} See id. at 47. This statute states, in pertinent part, that “[a] person is guilty of a second degree sexual assault if he or she engages in sexual contact with another person and if . . . [i] he accused uses force or coercion” or “[i] he accused engages in the medical treatment or examination of the victim for the purpose of sexual arousal, gratification or stimulation.” R.I. Gen. Laws § 11-37-4 (2) & (3) (1998).
\textsuperscript{83} See Palazzolo, 993 F. Supp. at 48. Rhode Island law requires that the force or coercion used by the accused in committing second degree sexual assault must “overcome the victim” and “must be something more than the sexual contact itself.” Id. (citations omitted). “Force that ‘overcomes’ the victim” means “physical force or contact taking place after the lack of consent has been manifested . . . . Any conduct making it clear that the victim does not consent to the contact is sufficient.” Id. (citations omitted).
\textsuperscript{84} Id. Regarding the first two incidents, the court noted that these incidents were “unexpected and lasted only a few seconds,” that “Palazzolo herself does not claim that she expressed any disapproval or otherwise reacted to the contact,” and that Palazzolo did not “allege that Ruggiano made any further advances.” Id. Therefore, the court reasoned, “there is no evidence that any such force or coercion was employed.” Id. Regarding the third incident, the court based its determination on the fact that Ruggiano did not know that Palazzolo was not consenting to his advances until she pushed him away after he embraced her. See id. Also, the court noted that “Ruggiano made no further advances after that manifestation of resistance.” Id.
\textsuperscript{85} See id. at 49. The court noted:
[T]here would be little reason for a doctor to employ physical force in such a situation. Patients who see doctors for medical treatment commonly recognize the likelihood that an examination and perhaps some physical contact will take place and they readily consent. Having obtained such consent, albeit under false pretenses, a doctor who conducts the examination for improper reasons would have little need to resort to physical force.

Id.
\textsuperscript{86} See id.
\textsuperscript{87} See id. at 47-49.
3. *Smathers v. Webb*[^88]

At a party, Debra Smathers witnessed Daniel Webb sexually assault her thirteen-year-old niece.[^89] Later, Smathers told the young girl’s mother, who is Smathers’ sister, about the incident and encouraged her to contact the authorities.[^90] Smathers’ sister told Webb about this conversation.[^91] As a result, Webb left “five harassing, intimidating, and threatening phone messages on Ms. Smathers’ answering machine,” in an effort to keep Smathers from reporting him to the authorities for the sexual assault he committed upon her niece.[^92] In one message, Webb stated, “I have nothing else to do but fuck with you for the rest of my life and rest of yours. Just to give you a hard god damned time, bitch.”[^93]

Smathers pleaded two predicate felonies in her complaint: (1) malicious harassment; and (2) the crime of civil rights intimidation.[^94] In its memorandum opinion, the district court examined Webb’s messages and found that the messages did not “threaten the use of physical force against the plaintiff, nor did any of the alleged messages present a risk of serious physical injury to the plaintiff.”[^95] Accordingly, the court dismissed Smathers’ VAWA

[^90]: See Proposed Amici Curiae Brief of NOWLDEF at 5, Smathers v. Webb (6th Cir. 1998) (No. 98-5806) [hereinafter “NOWLDEF’s Smathers Brief”].
[^92]: *Id.*
[^93]: *Id.* Other portions of these messages are as follows:
You’re still a god damned queer bitch and you know it and I know it. . . .
Now you want to say anything else about me, we gonna get it right on.
Give me a call by eight o’clock, and I mean now or I’m gonna take a check somewhere you don’t want it to go.

. . . .

[M]y intentions are to harass the fuck out of you from now to hell on. And you’re gonna get your god damned mouth off of me now, and I mean you’re gonna get your god damned mouth off of me, because I won’t get mine off you.

*Id.* at 7-8.

[^94]: See Smathers Complaint, *supra* note 89, at 4-5. The crime of civil rights intimidation under Tennessee law is a felony offense when one injures or coerces “another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee . . . [or] of the United States.” TENN. CODE ANN. § 39-17-309 (1999).
claim. In addition, the court treated the predicate offense of malicious harassment as a claim separate from the VAWA claim. The court refused to exercise supplemental jurisdiction, and dismissed that claim as well.

These cases each demonstrate that how a court interprets section 16(b) determines whether a plaintiff will survive a motion to dismiss at the district court level. How each court defines and understands violence against women will shape its respective interpretation of section 16(b).

II. INTERPRETING SECTION 16(B) OF THE “CRIME OF VIOLENCE” REQUIREMENT

Traditional understandings of violence against women in the law often conflict with how women perceive violence. Part A first discusses how force, or a risk thereof, has been traditionally defined in the law in the context of violence against women. Part A then presents social science data that shows perceptual differences between men and women in determining what constitutes violence and what acts pose a substantial risk of physical force. Part B identifies approaches that courts have adopted to determine “crimes of violence” pursuant to section 16(b) in VAWA civil rights cases and other contexts where section 16(b) is implicated.

A. Traditional Notions of Violence and Gender Difference in Perceiving Violence

In VAWA civil rights cases, whether an act poses a substantial risk of physical force is to be determined objectively by a court as a matter of law. How a court defines violence or risk of force will shape that court’s determination. Part 1 discusses how violence against women has been defined traditionally in the law. Part 2 addresses the contemporary understanding of violence against women, showing that there are fundamental perceptual differences in what acts pose a substantial risk of physical force between men and women.

96. See id. at 2-3.
97. See id. at 3.
98. See id. (“To the extent that the plaintiff also claims a violation of [malicious harassment], the court declines to exercise its supplemental jurisdiction over this claim, and this claim will be dismissed, also.” (citation omitted)). The Sixth Circuit affirmed the district court’s dismissal of Smathers’ case. See Smathers v. Webb, No. 98-5806, 1999 WL 14046625 (6th Cir. Nov. 10, 1999).
99. See supra notes 73, 85 and 95 and accompanying text.
100. See Doe v. Hartz, 970 F. Supp 1375, 1402-03 (N.D. Iowa 1997).
1. Traditional Notions of Violence Against Women

To understand traditional notions of violence against women, it is important to understand the historical underpinnings of rape and domestic violence laws. A review of the history of the law in these areas explains the evolution of the law regarding violence against women and the thinking behind current, albeit traditional, policies and practices.

Rape law, for example, originated from legal codes that construed rape as a property crime of man against man, where the violated woman is the property.\textsuperscript{101} Moreover, the common law definition of rape states that a “man commits rape when he engages in intercourse with a woman not his wife; by force or threat of force; against her will and without her consent.”\textsuperscript{102} Implicit in this definition, a victim must physically resist the attacker and the attacker must use substantial force during the attack for the act to be considered rape.\textsuperscript{103} Every jurisdiction in the United States has traditionally made “force” or “threat of force” an element of the crime of rape.\textsuperscript{104}

Even in the last two decades, courts have commonly drawn a distinction between the “force” incidental to the act of intercourse and the “force” required to convict.\textsuperscript{105} To convict, courts have typically focused on force used to overcome the victim, and have not considered the act of nonconsensual penetration or touching as force.\textsuperscript{106} This distinction was made in State v. Alston,\textsuperscript{107} in which the North Carolina Supreme Court reversed a rape conviction.\textsuperscript{108}

\textsuperscript{101} See Charlene L. Muehlenhard et al., Definitions of Rape and Their Implications, 48 J. Soc. Issues 40 (1992). A famous statement of seventeenth-century English lord chief justice Matthew Hale explains early perceptions of rape: rape is a charge “easily to be made and hard to be proved, and harder to be defended by the party accused, tho' never so innocent.” Susan Estrich, Real Rape 5 (1987). According to Hale’s definition, because rape is very difficult to prove, the victim “must first prove her own lack of guilt.” Id.

\textsuperscript{102} Estrich, supra note 101, at 8.

\textsuperscript{103} See id. at 5.

\textsuperscript{104} See id. at 59.

\textsuperscript{105} See id. at 60.

\textsuperscript{106} See id.

\textsuperscript{107} 312 S.E.2d 470 (N.C. 1984) (cited in Estrich, supra note 101, at 60).

\textsuperscript{108} See id. at 471. In Alston, the defendant was the victim’s ex-boyfriend when the alleged rape occurred. See id. The court noted that during their relationship the defendant had been physically abusive and that his girlfriend often had sex with the defendant just to accommodate him. See id. (“On those occasions, she would stand still and remain entirely passive while the defendant undressed her and had intercourse with her.”). The relationship ended when the defendant struck his girlfriend, after which she moved out. See id. at 472-73.
One month after their relationship ended, the defendant went to his ex-girlfriend’s school, grabbed her arm, stated that she was coming with him and threatened to physically assault her. After she told him she did not want to have sex with him, he pulled her up, undressed her, pushed her legs apart, and penetrated her. The North Carolina Supreme Court held that the element of force had not been established by substantial evidence, although the court found that the act of sexual intercourse was nonconsensual. This decision shows that a legal definition of rape requires more than the forceful acts displayed by the defendant, such as grabbing the victim’s arm, threatening to hit her, undressing her, pushing her legs apart and penetrating her, thereby demonstrating how the common law definition has affected current rape law.

Sentencing proceedings can also be affected by how a court chooses to define “force.” When sentencing rapists, judges often remark about the type of force that was used by the defendant in particular cases. For example, in 1992 Ernesto Garay was convicted of anally raping and sexually abusing a retarded woman. At the sentencing hearing, the judge stated that “there was no violence here. There was an act.” In 1991, a judge “imposed a suspended sentence on a prominent businessman convicted of rape, stating that the victim had sustained no physical injuries.”

Like the origins of rape law, legal understandings of domestic violence also originate from the concept of women as property of men. Under British common law, the wife legally became the

---

109. See id. at 472-73. In particular, the defendant told her that he was going to “fix” her face to show he “was not playing,” and stated that he had a “right” to have intercourse with her again. Id.

110. See id.

111. See id. at 471.

112. See Estrich, supra note 101 at 61-63.

113. See Lynn Hecht Schafran, Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist, 20 FORDHAM URB. L.J. 439, 439 (1993). The victim was a twenty-three-year-old retarded woman with an I.Q. of 51 who behaved as a young child. See id. Garay raped the young woman in a bathroom of the building where she lived and where Garay worked as a custodian. See id. at 441. A carpenter discovered them while Garay was pinning the victim’s hands to the wall and anally raping her. See id. at 441-42.

114. Id. at 440 (quoting the transcript of New York v. Ernesto Garay, No. 669/91 (Sup. Ct. Mar. 11, 1992)). The judge agreed with the defense attorney’s characterization of this rape as non-violent because the medical evidence showed no bruises, scratches or lesions on the victim’s vagina or anus. See id. at 442.

115. Id. (The judge stated, “I think it was obvious it was non-consensual sex, but I don’t believe it was a violent act as most people think of rape.”).

116. See Brenneke, supra note 50, at 22.
property of her husband upon marriage. Because wives became property of their husbands upon marriage, British common law allowed husbands to discipline their wives, but "only blows with a switch no wider than a man's thumb were allowed." This rule came to be known as the "rule of thumb."

The "rule of thumb" and a husband's right to discipline his wife were also recognized in the United States. While the "rule of thumb" is an "increasingly outdated misconception," domestic violence continues and is often met "with little social or governmental intervention." Moreover, although advocacy efforts have been successful in enforcing criminal laws against domestic violence and have improved law enforcement policies toward domestic violence, the notion of domestic violence as a "private" matter remains. For example, in 1995, a New York jury acquitted a man who clubbed his ex-girlfriend with a length of four-inch wire cable and

\[\text{117. See id.}\]
\[\text{118. Id. At British common law, the state did have an obligation to protect the civil rights of its citizens, but this obligation did not reach relations between married couples. See id. British common law did reach domestic violence, however, but only when such violence "extended beyond the wife." Id. at 23. For example, when a pregnant woman was beaten, a crime was committed only if the baby died in her body, while no crime was committed if the pregnant woman was personally injured. See id.}\]
\[\text{119. Id. at 22-23. Specifically, husbands were expected to answer for their wives' misbehavior. See id. Thus, the common law afforded husbands the right to give their wives "'moderate correction,'" and the right to restrain their wives by "'domestic chastisement.'" Id. (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, FIRST BOOK 432 (Dawsons of Pall Mall ed., 1966)).}\]
\[\text{120. See id. at 23. ("This 'rule of thumb' created a distinction between single blows with large sticks and repeated blows with small sticks irrespective of the damage.").}\]
\[\text{121. See id. For the first time in the United States, the Mississippi Supreme Court recognized the "rule of thumb" and its rationale in 1824, and supported a husband's defense on charges for assault and battery of his wife. See id. at 23-24; Bradley v. State, 1 Miss. 156 (1824). Later, in 1864, a North Carolina court also followed the "rule of thumb" and stated that "a husband is responsible for the acts of his wife, and . . . the law permits him to use . . . a degree of force as is necessary to control an unruly temper and make her behave herself." Brenneke, supra note 50, at 24 (quoting State v. Black, 60 N.C. 262 (1864)). While both of these holdings were later overturned, the stigma against a "public display of familiar strife remained strong." Brenneke, supra note 50, at 24. Domestic violence was rarely spoken about in the nineteenth and early twentieth centuries, and legal support was unavailable for victims of domestic violence because of interspousal immunity doctrines and marital rape exceptions. See id. at 24-25. See also discussion supra notes 55-59 and accompanying text.}\]
\[\text{122. See Brenneke, supra note 50, at 25-26.}\]
\[\text{123. See id. at 26.}\]
stabbed her in the head with four different knives for ending their relationship. After the verdict, one juror stated, "Hey – men and women fight."

2. Contemporary Understandings of Violence Against Women and Social Science Data

Social scientists, psychologists and feminists have argued that traditional notions of violence against women perpetuate myths, not realities. Scholars have argued that one of the common myths about male violence against women is that certain acts are not actually harmful. For example, if a woman was sexually assaulted, but that assault did not result in physical markings such as bruises, the cultural myth is that the woman was neither culturally nor legally wronged. Similarly, if a wife was battered by her husband but no bones were broken, the myth is that she was not wronged. Scholars argue that such myths often minimize or cover up the harmful effects of violence against women, and prevent "the development of effective policies and programs designed to prevent such violence."

Moreover, as can be seen from the cases described previously, such myths "pervade our legal system." Indeed, some feminist legal scholars have recognized that women's perspectives on important legal issues surrounding sexuality, work, family and violence against women have been ignored in the law. Traditionally, a legal understanding of violence against women in the law came from the male perspective because legal definitions of rape and other crimes against women "have been written almost

---

125. Id.
126. See Koss, supra note 4, at 9.
127. See id.
128. See id.
129. Id. ("It is through gender-related roles that specific cultural norms related to gender and violence are patterned, learned, and transmitted from generation to generation.").
130. See Koss, supra note 4, at 9 (citation omitted); see also supra Part I.B.
exclusively by male legislators." 132 Thus, feminist legal scholars have argued that such "[c]onventional definitions . . . tend to be too narrow" and "serve to advantage men over women." 133

One commentator has argued that women's experiences of sexual and physical violence are often "[c]ast in a mould constructed within a male-dominated society," and as a result, such experiences "take on an illusion of normality [and] ordinariness." 134 What some men may see as normal and ordinary behavior, many women consider potentially violent. 135 Social science research confirms this disparity. 136

A recent study of heterosexual couples examined and compared male and female accounts of specific incidents of male violence against women. 137 The researchers found a "pronounced discordance" between what men and women perceive as violent (or po-

132. See Muehlenhard, supra note 101, at 23-24. This psychology professor has argued that, "In patriarchal social systems, men have controlled oral and written production of language. This 'man-made language' reflects and reifies the experiences of men. To the extent that this language does describe the experiences of women, it does so from the perspective of men." Id. at 40. Moreover, "a male-defined concept of violence -- [one] premised on a school yard fist fight or a barroom brawl -- and lack of knowledge about rape trauma produce erroneous assessments of rape and erroneous sentences for rapists." Schafran, supra note 113, at 441.

133. See Muehlenhard, supra note 101, at 40. Professor Muehlenhard continues that

[i]t is in the patriarchy's best interest to promote images of 'real rape' by strange men. These images keep women frightened and act as a form of social control, keeping women off the streets and out of male territory, and thus limiting women's freedom. They also promote the idea that women need to attach themselves to one man who will protect them from others (even though women are more likely to be raped by dates and husbands than by strangers). They promote the idea that women need to do whatever it takes to maintain relationships with their male protectors. If women become less wary of stranger rape and more wary of acquaintance rape, this would decrease the social control of women as well as men's sexual access to reluctant women.

Id. at 40-41.

134. STANKO, supra note 59, at 9.

135. See id. at 10.

136. Most courts have been unwilling to rely on social science research in support of holdings. One exception has been in the area of sexual harassment where some courts have relied on "perceptual difference research," which is the type of research presented herein, to support a reasonable woman standard. See Barbara A. Gutek & Maureen O'Connor, The Empirical Basis for the Reasonable Women Standard, 51 J. SOC. ISSUES 151, 160 (1995); Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

tentially violent). The findings indicated that three-fourths of the women reported incidents of serious violence, while less than half of the men reported such incidents. Moreover, thirty percent more women characterized incidents of choking, demanding sex and threats on their lives as serious violence. One-third of the women sampled reported being kicked or punched in the stomach when pregnant, while approximately one-tenth of the men sampled reported engaging in such acts.

Studies also show that women often perceive certain non-physical acts as posing a substantial risk of physical force. In one study, women described flashing (exposure of the male genitals) as potentially violent. Such behavior, especially when it occurs in a deserted place, “may engender fears of injury and death because of the uncertainty about what may happen next.” In addition, “[a]ggressive forms of demeaning and intimidating behaviors—such as threatening violence, feigning to strike, and aggressive pointing—when used by someone who is larger, stronger, and more aggressive” are often experienced as frightening and potentially violent.

Disparities also arise between male and female perceptions of sexual assaults. Studies show that men interpret certain behaviors more sexually than do females. There are also significant differences between male and female views of sexual touching.

138. *Id.* There were also striking differences between men’s and women’s perceptions of the effects of violent acts. *See Dobash & Dobash, supra* note 4, at 157-58. Over one-half of the women reported feeling nauseous or vomiting after a violent incident, whereas only seven percent of men reported inflicting such harm. *See id.* Forty percent of women reported being knocked unconscious on at least one occasion, while only 14% of men reported inflicting such an injury. *See id.* at 158.

139. *See Dobash, supra* note 137, at 395. For the purposes of this study, “serious violence” included punching of the face and/or body, kicking and dragging by the hair. *See id.*

140. *See id.*

141. *See id.* In regards to controlling and coercive behaviors, men reported that they rarely “attempt[ed] to intimidate and coerce their partners.” *Id.* at 404. Most of the women in the survey, on the other hand, reported that intimidating and controlling behavior was “nearly continuous” and “repetitive,” and an “integral aspect of their relationships.” *Id.*


143. *Id.* (citation omitted).

144. Dobash, *supra* note 137, at 404.

145. *See id.*

146. *See Muehlenhard, supra* note 101, at 29-30.

Eighty-four percent of women defined sexual touching as sexual harassment, as opposed to fifty-nine percent of men.\textsuperscript{146} In the context of rape, studies show that acquaintance rape accounts for eighty percent of all rapes.\textsuperscript{149} The element of force that is required in many criminal definitions of rape implies that the penetration itself is neither forceful nor violent.\textsuperscript{150} While the myth is that acquaintance rape is a non-violent act, studies show that the effects of sexual assaults between acquaintances are profound.\textsuperscript{151} One study showed that seventy percent of rape victims reported no physical injuries, twenty-four percent reported only minor physical injuries and just four percent sustained serious physical injuries.\textsuperscript{152} However, half of rape victims, whether they suffered physical injury or not, became fearful of death or serious injury during the rape.\textsuperscript{153}

Moreover, many rape survivors suffer from psychological injuries.\textsuperscript{154} Approximately one-third of victims developed Rape-Related Post Traumatic Stress Syndrome, one-third experienced major depression and one-third contemplated suicide.\textsuperscript{155} Rape victims from that study were thirteen times more likely to have serious alcohol problems and twenty-six times more likely to have major drug abuse problems than non-victims "because they turned to substance abuse to medicate their psychic pain."\textsuperscript{156} Moreover, a study of approximately five hundred female college student rape victims, a vast majority of whom were victims of non-stranger rape, found no difference between victims of stranger rape and victims of non-stranger rape regarding psychological trauma symptoms such as depression and anxiety.\textsuperscript{157} One scholar has argued that because of the profound psychological injury suffered by all rape victims,

\textsuperscript{146} See id.
\textsuperscript{149} See Schafran, \textit{supra} note 113, at 443.
\textsuperscript{150} See \textit{Stanko}, \textit{supra} note 59, at 44 ("Force, perhaps the most the crucial factor of raped women's experiences, has many forms but its effect is much the same. Physical or verbal threats are demands, not invitations.").
\textsuperscript{151} See Schafran, \textit{supra} note 113, at 443, 446.
\textsuperscript{152} See \textit{id.} at 443-44.
\textsuperscript{153} See \textit{id.} This national study, entitled "Rape in America," was performed by the National Victim Center and the Crime Victims Research and Treatment Center of the Medical University of South Carolina over a four-year period and its results were released in April 1992. See \textit{id.} at 443.
\textsuperscript{154} See \textit{id.} at 443, 446 ("The carving up of a rape victim's soul is an invisible crime, but the victim [of acquaintance rape] is no less maimed than the victim of a physical assault.").
\textsuperscript{155} See \textit{id.} at 444. Thirteen percent of victims actually attempted suicide. See \textit{id.}
\textsuperscript{156} \textit{Id.}
\textsuperscript{157} See \textit{id.}
WHAT IS VIOLENCE?

judges should "recognize that all rapes, by definition, are violent."158

This social science data shows that traditional notions of violence against women are often at odds with women's experiences. That is because traditional notions of violence against women are based on male rather than female perceptions. In the context of the VAWA's civil rights remedy, how a court determines when an offense poses a substantial risk of physical force will depend on whether the court has a traditional understanding or a contemporary understanding of violence against women.

B. Approaches to Interpreting Section 16(b)

The “crime of violence” definition of section 16 as incorporated into the VAWA's civil rights remedy was originally used for federal criminal sentencing purposes.159 When Congress created this statutory definition in 1984, its intent was to “expand the ‘crime of violence’ concept while creating a universally applicable definition of the term.”160 In 1989, the Sentencing Commission eliminated reference to section 16 in the guidelines, and redefined the term “in a more inclusive fashion.”161 The new definition was intended to give “federal courts the ability to use a low threshold of force in determining whether acts constitute crimes of violence.”162

The language of the new definition is substantially similar to section 16(b),163 although the new definition has no binding effect on the interpretation of the VAWA's civil rights remedy.164 However, courts interpreting section 16(b) in VAWA civil rights cases have

158. Id. at 453.
159. See David Frazee, Crime of Violence Requirement, in VIOLENCE AGAINST WOMEN 9-7 (David Frazee et al. eds., 1998) (citing Brenneke, supra note 50, at 60). This definition has been largely dropped in the criminal sentencing context, and is rarely used. See id. at 9-7 to 9-8.
161. Brenneke, supra note 50, at 60; see also Frazee, supra note 159, at 9-5, 9-8, 9-10.
162. Frazee, supra note 159, at 9-5.
163. The current sentencing guidelines definition of "crime of violence" is as follows:

“Crime of violence” includes murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses, robbery, arson, extortion, extortionate extension of credit, and burglary of a dwelling. Other offenses are included . . . if . . . the conduct set forth . . . in the count of which the defendant was convicted . . . by its nature, presented a serious potential risk of physical injury to another.

164. See Brenneke, supra note 50, at 60.
attempted to follow approaches taken by courts in the sentencing guidelines context.\textsuperscript{165} These perspectives include the “categorical” approach and the “actual conduct” approach.\textsuperscript{166}

1. The “Categorical” Approach

Under the “categorical” approach, a court examines the predicate offense only as it is set forth in the criminal code and does not consider the actual conduct of the defendant.\textsuperscript{167} The purpose of the categorical approach was “to create certain categories of crimes that would be evaluated the same regardless of the state of origin.”\textsuperscript{168} Two questions emerge in VAWA civil rights disputes with regard to this approach: 1) whether VAWA courts should apply determinations of whether an offense poses a substantial risk of physical force from the sentencing guidelines context; and 2) whether VAWA courts should apply the categorical approach without relying on precedent from the sentencing guidelines context, thereby creating a separate set of jurisprudence to define what offenses pose a substantial risk of physical force.

As previously stated, the new definition of “crime of violence” under the sentencing guidelines does not bind courts deciding VAWA civil rights cases.\textsuperscript{169} Some commentators and practitioners have argued, however, that courts should follow sentencing guidelines cases, “especially when the caselaw interprets Sentencing Commission language which mirrors the language of section 16.”\textsuperscript{170} For example, in its amicus brief to the Sixth Circuit Court of Appeals in Smathers v. Webb, the NOW Legal Defense and Education Fund (“NOWLDEF”) argued that the predicate offense of malicious harassment pleaded by the plaintiff is a “crime of violence” because such an act poses a substantial risk of physical force.\textsuperscript{171} NOWLDEF’s argument was premised on the fact that in the sentencing guidelines context “[c]ourts have consistently held that

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., cases discussed supra Part I.B.
\item See Frazee, supra note 159, at 9-1, 9-15, 9-20.
\item See id. at 9-15. ("In other words, the ‘question is not whether the particular facts constitute a crime of violence, but whether the crime . . . as defined by [state or federal] law is a crime of violence.’" (citations omitted)).
\item See supra note 164 and accompanying text.
\item Frazee, supra note 159, at 9-10 (noting that Congress chose not to use the new Sentencing Commission definition, but chose to incorporate section 16, a “mostly unused statute”); see NOWLDEF’s Smathers Brief, supra note 90, at 8.
\item See NOWLDEF’s Smathers Brief, supra note 90, at 8.
\end{enumerate}
\end{footnotesize}
WHAT IS VIOLENCE?

making threats are 'crimes of violence.'”172 Similarly, in McCann II, the appellants argued that because sexual assault has been categorically deemed a “crime of violence” pursuant to language mirroring section 16(b) in the sentencing guidelines context, the defendant’s acts of sexual assault should also be deemed “crimes of violence.”173

The Tenth Circuit Court of Appeals agreed with the appellants’ argument and reversed the district court’s dismissal of the case.174 Utilizing the categorical approach, the McCann II court held that Utah’s criminal offense of forcible sexual abuse, the predicate offense alleged by the plaintiffs, by its nature poses a substantial risk that physical force will be used in carrying out the offense, “even when unaccompanied by rape, bodily injury, or extreme forms of coercion.”175 In so holding, the court followed United States v. Reyes-Castro,176 a sentencing guidelines case, as advanced by appellants. The Tenth Circuit in Reyes-Castro held that sexual abuse of a child, the “analogous statutory counterpart” to the predicate offense alleged by appellants, is a “crime of violence” pursuant to the part of the new sentencing guidelines definition that mirrors section 16(b).177 The McCann II court noted that the Reyes-Castro court focused its holding on the fact that the offense was noncon-

172. Id. In support, NOWLDEF cited cases applying the “categorical” approach in the federal sentencing context. See id. at 8-9 (citing United States v. Bonner, 85 F.3d 522, 527 (11th Cir. 1996) (concluding that “making a threatening telephone call is a crime of violence” under the “categorical” approach)); United States v. Left Hand Bull, 901 F.2d 647, 648 (8th Cir. 1990) (holding that mailing a threatening letter to a person is a “crime of violence” under section 16 even though the defendant did not carry out the threat).

173. See Brief for Appellant at 12, McCann v. Rosquist, 185 F.3d 1113 (10th Cir. 1998) (No. 98-4049) (citing United States v. Reyes-Castro, 13 F.3d 377 (10th Cir. 1993)).

174. See McCann II, 185 F.3d at 1113.

175. Id. at 1121. Utah’s criminal offense of forcible sexual abuse provides that:

[a] person commits sexual abuse if . . . under circumstances not amounting to rape, object rape, sodomy, or attempted rape or sodomy, the actor touches the anus, buttocks, or any part of the genitals of another, or touches the breast of a female, or otherwise takes indecent liberties with another . . . without the consent of the other . . . .

Utah Code Ann. § 76-5-404(1) (1999). The McCann II court noted that it is irrelevant that the statute is labeled as “forcible” in making its determination of whether this offense poses a substantial risk of physical force, and that the analysis requires an examination of the elements of the statutory definition of the crime. See McCann II, 185 F.3d at 1119 n.5.

176. 13 F.3d 377, 379 (10th Cir. 1993) (holding that sexual abuse of a child is a “crime of violence” pursuant to language in the new sentencing guidelines definition that mirrors section 16(b)).

177. See McCann II, 185 F.3d at 1119-20.
sensual, and not that the victim was a child. Because the predicate offense before the court requires that the act be without consent, the McCann II court reasoned that the Reyes-Castro holding is applicable to the McCann II case, albeit in a different context. Further, the McCann II court rejected the district court's "assumption" that section 16 of the VAWA's civil rights remedy "is restricted to a certain 'type' of physical force." The court stated that

[the very act of nonconsensual sexual contact, which by its nature evinces a clear intention to disregard the victim's dignity and bodily autonomy, both demonstrates and creates a substantial risk of more serious physical intrusion or the application of force to ensure compliance.]

Lastly, the McCann II court recognized that a restrictive definition of "crime of violence" was not intended by Congress when incorporating reference to section 16 into the VAWA's civil rights remedy.

---

178. See id. at 1119. In Reyes-Castro, the Tenth Circuit "addressed the relationship between lack of consent . . . and the risk of physical force" and stated that:

[b]ecause the crime [of rape] involves a non-consensual act upon another person, there is a substantial risk that physical force may be used in committing the offense. It does not matter whether physical force is actually used. "Our scrutiny ends on a finding that the risk of violence is present."

Reyes-Castro, 13 F.3d at 379 (citations omitted).

179. See McCann II, 185 F.3d at 1119-20.

180. Id. at 1120 (citing McCann I, 998 F. Supp. 1246, 1252 (D. Utah 1998)). The McCann II court stated that

Section 16 only refers to "physical force"; it does not qualify that reference by requiring physical force of a particular nature or severity. In fact, the imposition of nonconsensual sexual contact, whether brought about by brute force or, as alleged here, by trick and abuse of authority, might itself be considered a form of violence, capable of causing mental and emotional injury no less severe than the physical injury caused by a blow.

Id.

181. Id.

182. See id.

In enacting the VAWA, Congress recognized the degree to which our nation's systems of law enforcement and adjudication have been complicit in perpetuating the epidemic of violence against women, in part by failing to recognize crimes of gender-motivated violence as serious crimes. . . . We will not compound that failing today by restricting, in contravention of the language of [section 16], the definition of "violence" to only those forms of violence most traditionally feared by men — murder and serious bodily injury. To adopt such a restriction would be to exclude much of the "widespread incidence of physical assault against women" from coverage of the VAWA. . . . It is simply not permissible for us to create, contrary to clear legislative intent, a special narrower construction of [section 16] for purposes only of the [VAWA] . . . .
Arguments against application of “crime of violence” determinations in the sentencing guidelines context to VAWA civil rights cases also rely on the congressional intent behind the passage of the VAWA’s civil rights remedy.\textsuperscript{183} For example, in \textit{Smathers v. Webb}, the defendant argued that the congressional intent behind the VAWA’s civil rights remedy was “to protect the civil rights of victims of gender-motivated violence,” and not to protect such victims from non-violent behavior.\textsuperscript{184} One commentator has suggested that perhaps Congress’s choice of reference to section 16, rather than the new sentencing guidelines definition, indicates that Congress “believed that the two situations differed such that each should develop an independent definition of ‘crime of violence.’”\textsuperscript{185}

Even if sentencing guidelines rulings should not apply in the VAWA context, it has been argued that the categorical approach should be used to determine what offenses pose a substantial risk of physical force for purposes of the VAWA.\textsuperscript{186} The district court in \textit{McCann I} concluded that, in accordance with congressional intent, “a policy furthering uniformity can and should be applied” in the context of the VAWA’s civil rights remedy.\textsuperscript{187} The court stated further that “in order to effectuate the policy of uniformity,” a categorical inquiry should be used whenever possible.\textsuperscript{188} Paradoxically, on appeal, the Tenth Circuit court noted that the district court did not follow the categorical approach, but instead erroneously “based its analysis on the particular circumstances of the alleged acts in this case.”\textsuperscript{189} The \textit{McCann} II court found that the

\begin{footnotesize}
\begin{enumerate}
\item[183.] \textit{Id.} at 1122 (citations omitted).
\item[184.] \textit{Id.} at 4 (citing 42 U.S.C. § 13981 (1994)).
\item[185.] Frazee, supra note 159, at 9-10. This commentator notes that: The purposes of the Sentencing Commission is [sic] to ensure uniform and proportional sentences for convicted criminals. The purpose of the VAWA is to provide a minimum threshold for a broad, remedial civil rights statute. Many of the concerns that arise in the context of criminal sentencing and punishment simply do not arise in the civil rights arena.
\item[186.] \textit{Id.} at 9-10, 9-11. He also points out that the legislative history of the VAWA “indicates that Congress merely sought a statutory reference in the U.S. Code and actually gave no thought to daunting problems of interpreting 18 U.S.C. § 16.” \textit{Id.}
\item[187.] \textit{Id.} at 1251.
\item[188.] \textit{Id.}
\item[189.] \textit{McCann} II, 185 F.3d 1113, 1116 (10th Cir. 1999). The Tenth Circuit noted that the district court relied on \textit{Taylor v. United States}, 495 U.S. 575 (1990), a case in the sentencing guidelines arena. In \textit{Taylor}, the Court for the first time established the categorical approach for determining whether acts are “crimes of violence” pursuant
\end{enumerate}
\end{footnotesize}
categorical approach should be used to determine whether acts are “crimes of violence” pursuant to section 16 in the VAWA civil rights context and applied that approach in its analysis.\textsuperscript{190}

2. The “Actual Conduct” Approach

Under the “actual conduct” approach, a court examines the facts of each case to determine whether the defendant’s acts created a substantial risk of physical harm.\textsuperscript{191} This approach differs from the categorical inquiry because the actual conduct approach requires a court to focus on the defendant’s acts rather than on the abstract nature of the predicate offense alleged.\textsuperscript{192}

One of the dangers of the categorical approach is that if a court rules that an offense does not pose a substantial risk of physical injury by its nature, then subsequent courts may follow that precedent in cases where the defendant’s acts may actually pose such a risk.\textsuperscript{193} To avoid this danger, proponents of a broad interpretation of section 16(b) in VAWA civil rights cases have argued that when a categorical inquiry fails to result in a “crime of violence” determination, courts should perform an actual conduct inquiry.\textsuperscript{194}

---

\textsuperscript{190} See McCann II, 185 F.3d at 1116 (“We conclude that the language of [section 16] and our precedents require that the crime of violence analysis be conducted at the level of the statutory definition.” (citing United States v. Reyes-Castro, 13 F.3d 377, 379 (10th Cir. 1993)).

\textsuperscript{191} See Frazee, supra note 159, at 9-11, 9-23.

\textsuperscript{192} See id. at 9-20. In other words, while the categorical approach is a decontextualized approach, the actual conduct approach is a contextualized approach.

\textsuperscript{193} See id. at 9-23. For example, in United States v. Fazio, a sentencing guidelines case, the defendant was arrested for possession of a firearm by a convicted felon. See id. at 9-21 (citing 914 F.2d 950 (7th Cir. 1990)). In Fazio, the defendant struggled with the police over the weapon. See id. Because the struggle “involved force, danger, and violence, the defendant’s actual conduct sufficiently augmented the possession to bring it within the scope of crimes of violence” under section 16(b). Id.

\textsuperscript{194} See id. at 9-22, 9-23, 9-24. In an amicus brief to the Sixth Circuit, NOWLDEF urged the court first to make a categorical inquiry when interpreting section 16(b), and if that approach does not lead to a clear result, to then utilize the actual conduct
WHAT IS VIOLENCE?

One such proponent has noted that the factual inquiry of the actual conduct approach “well suits the capabilities of a district court” because the court must find facts anyway. In the sentencing guidelines context, one of the arguments against the use of the actual conduct approach has been that courts were required to examine offenses that occurred in the past “to determine whether to augment a current sentence for prior conduct,” posing practical difficulties such as unavailable witnesses and lack of evidence, among others. In VAWA civil rights actions, this problem does not exist. This proponent also has argued that “it would be anomalous to exclude actually violent felonious conduct from the scope of” the civil rights remedy “while protecting conduct that involves a risk that violence may be used.” Moreover, he has noted that Congress, when deciding to make reference to section 16 in the VAWA’s civil rights remedy, chose not to resolve a split of the courts as to whether the actual conduct approach should be used in sentencing guidelines cases. Thus, he has argued that because civil rights actions demand broad, remedial interpretations, “courts should favor the interpretation that gives the greatest effect” to the VAWA’s civil rights provision.

Thus far, courts have adopted inconsistent standards for determining how the civil rights remedy’s “crime of violence” requirement should be interpreted. In McCann I, the district court stated that it was utilizing the categorical approach, but nevertheless, looked to the specific facts of the case to determine whether the approach to determine whether such conduct constitutes a “crime of violence.” See NOWLDEF’s Smathers Brief, supra note 90, at 8. See Frazee, supra note 159, at 9-23. When the Federal Sentencing Guidelines made reference to section 16, circuit courts split as to whether courts should use the actual conduct approach in the sentencing guidelines context. See id. at 9-23 to 9-24. Approximately half of the circuits allowed some form of the actual conduct approach. See id. at 9-21. These circuits recognized that some criminal statutory language embodies both violent and non-violent crimes, and have allowed an actual conduct inquiry in those instances. See id. Because the guidelines later eliminated reference to section 16, the Supreme Court has never needed to resolve this split. See id. (“In VAWA actions, courts will almost always make factual determinations from evidence before them. The problems of stale information in VAWA actions are no greater than in any civil trial.”). While this commentator admits that the VAWA’s civil rights provision was not intended to cover all acts of violence motivated by gender, but only “crimes of violence” motivated by gender, he argues that interpretation of the “crime of violence” requirement “should not exclude those violent felonies whose commission sparked the moral outrage which lies at the core of the [VAWA’s] passage.” Id. See id. at 9-23, 9-24.
defendant’s acts posed a substantial risk of physical harm.\textsuperscript{201} On appeal, the Tenth Circuit applied the categorical approach.\textsuperscript{202} In Smathers, the district court utilized the actual conduct approach, relying on the fact that the defendant did not explicitly threaten to injure the plaintiff physically in his messages.\textsuperscript{203} On appeal, the Sixth Circuit also based its decision on Webb’s actual conduct.\textsuperscript{204} Finally, in Palazzolo, the district court also utilized the actual conduct approach, looking to the specific acts of the defendant in determining whether his acts were “crimes of violence” pursuant to the VAWA’s civil rights remedy.\textsuperscript{205} These courts have taken approaches that often result in dismissals, thereby denying women a civil rights remedy and minimizing the significance of gender-motivated violence.

\section*{III. A Solution}

Reliance on traditional understandings of violence against women to interpret section 16(b) rids the VAWA’s civil rights remedy of the effect intended by Congress. Thus, in VAWA civil rights cases, courts should interpret section 16(b) in such a way that takes into account the broad scope of violent acts that women routinely sustain in this country. Part A argues that a uniform standard should be adopted for all courts to apply when interpreting section 16(b). Part B describes what that standard should be. Part C revisits the cases presented in Part I.B to show how application of the suggested standard would lead to different results, results that would be in accordance with women’s perceptions of violence.

\subsection*{A. Adoption of a Uniform Standard}

Adopting a uniform standard for all courts to apply would be consistent with the congressional intent in enacting the VAWA’s civil rights remedy. Congress intended to characterize the scope of violence against women as a problem facing young women throughout the United States.\textsuperscript{206} Congress also intended to equate violence against women with violence against other groups by recognizing gender-based violence as a form of discrimination and as

\begin{itemize}
  \item \textsuperscript{201} See supra Parts I.B.1. \& II.B.1.
  \item \textsuperscript{202} See supra note 190 and accompanying text.
  \item \textsuperscript{203} See supra Part I.B.3.
  \item \textsuperscript{204} See Smathers v. Webb, No. 98-5806, 1999 WL 1046625, at *2-3 (6th Cir. Nov. 10, 1999).
  \item \textsuperscript{205} See supra Part I.B.2.
  \item \textsuperscript{206} See supra text accompanying notes 45-46.
\end{itemize}
an affront to federally protected rights. Uniformity is also required in light of Congress’s intent to supercede discriminatory state laws and practices. Indeed, these goals would be furthered by use of a single standard for all courts because such uniformity would entitle women from different states to the same protection under the civil rights remedy.

Perhaps even more important in adopting a uniform standard for VAWA civil rights cases is the definitional history of section 16. Because Congress created section 16 to provide a “universally applicable” definition of “crime of violence,” albeit in the sentencing guidelines context, it is unreasonable and inefficient that courts in the VAWA context are left to their own devices to interpret section 16(b).

B. The Need For A Broad Approach

Courts should adopt a broad approach to analyzing what constitutes a “substantial risk of physical injury” pursuant to section 16(b). Based on congressional intent and social science data, courts are not effectuating the purpose of the VAWA’s civil rights remedy.

There has been disagreement over Congress’s intent regarding the scope of acts that would be covered under the VAWA’s civil rights remedy. Proponents of a broad interpretation of what acts create a substantial risk of physical force under section 16(b) have argued that Congress intended for such a broad application. Opponents of a broad interpretation have argued that Congress intended a more limited application.

An analysis of the congressional intent behind the legislation reveals that the former interpretation is more plausible than the latter. Senator Biden’s first version of the VAWA’s civil rights remedy covered “any crime of violence . . . including rape, sexual assault, or abusive contact, motivated by gender.” Senator Biden’s substitute version of the same bill included all crimes of violence motivated by gender. After these definitions of “crime of vio-

207. See supra text accompanying notes 47-51.
208. See supra text accompanying notes 52-62; supra note 41 and accompanying text.
209. See supra note 160 and accompanying text.
210. See supra notes 180, 184 and accompanying text.
211. See supra note 180 and accompanying text.
212. See supra notes 183-184 and accompanying text.
213. See supra note 19 and accompanying text.
214. See supra note 22 and accompanying text.
ence” were regarded as controversial and withstood opposition from Chief Justice Rehnquist and civil rights groups, among others, only then were limitations imposed on the types of acts that the civil rights remedy would cover.\textsuperscript{215} To ease the opposition against the VAWA’s civil rights remedy, supporters in Congress acted quickly to provide a statutory reference to section 16.\textsuperscript{216} Furthermore, the Tenth Circuit has agreed with this reading of congressional intent.\textsuperscript{217} Because the current “crime of violence” definition in the VAWA’s civil rights remedy was borne from political compromise, it is hardly fair to say that Congress intended to limit such causes of action to remedy only brutally violent attacks.

The underlying congressional intent behind section 16 for sentencing guidelines purposes also supports the argument for a broad approach. Congress’s intent when enacting section 16 was to provide a broad understanding of what constitutes a “crime of violence.”\textsuperscript{218} In addition, the subsequent definition of “crime of violence” under the sentencing guidelines, containing language virtually identical to section 16(b), was created to be more inclusive.\textsuperscript{219} Likewise, when Congress drafted the VAWA’s civil rights remedy, it sought to create a uniform statute guaranteeing civil rights protection to all victims of gender-motivated violence.\textsuperscript{220}

Utilizing existing precedent from sentencing guidelines cases would also allow for a broad interpretation of section 16(b) since courts in those cases have held more acts to constitute “crimes of violence” pursuant to language that mirrors section 16(b).\textsuperscript{221} In line with a broad approach, courts should apply “crime of violence” determinations from sentencing guidelines cases to VAWA civil rights cases.\textsuperscript{222}

To understand what constitutes a substantial risk of physical injury under section 16(b), courts should consider the social science data presented above.\textsuperscript{223} The cases cited previously\textsuperscript{224} demonstrate a phenomenon documented in social science literature: men and

\begin{verbatim}
215. See supra notes 26-35 and accompanying text.
216. See supra note 185.
217. See supra note 182 and accompanying text.
218. See supra note 160 and accompanying text.
220. See generally supra Part I.A.2.
221. See supra notes 171-182 and accompanying text.
222. See supra Part II.A.1.
223. See discussion supra Part II.A.2.
224. See supra Part II.B.
\end{verbatim}
women perceive the risk of physical harm differently. Two of these cases in particular, McCann I and Palazzolo, also demonstrate that some courts determine VAWA civil rights cases from the traditional perspective of sexual assault as non-violent, rather than the more realistic understanding of the harm that results from such acts. Because the traditional understanding of what poses a substantial risk of physical force does not account for how women perceive and experience certain acts, courts should consider nonconsensual sexual assaults as constituting a substantial risk of physical force irrespective of the particular facts of each case. To require a higher level of force is to ignore the problem of violence against women in this country. As it stands, courts are systematically thwarting the purpose of the VAWA’s civil rights remedy, perpetuating the myth that certain acts taken against women do not cause harm or create a substantial risk of harm and ignoring the devastating effects that such violence has on society. Therefore, the social science data provided above should guide courts in interpreting section 16(b), by taking into account women’s perspectives and experiences of violence.

With these concerns in mind, courts should seek to provide women with legal redress for a broad range of acts. To do so, courts should seek to deem an act a “crime of violence” by utilizing a two-step approach that includes both the categorical approach and the actual conduct approach. Because there is a gender gap in understanding what poses a substantial risk of physical force, this approach would allow for a broader range of acts to fall within the “crime of violence” requirement of section 16(b) thereby allowing for women’s perspectives of violence to be included in the analysis. Accounting for women’s perceptions of violence while utilizing the two-step process would result in “broad, remedial interpretations” that civil rights actions, such as the VAWA’s civil rights remedy, demand.

C. The Cases Revisited

In McCann I, Palazzolo and Smathers, the district courts misconstrued the nature of the acts alleged by concluding that such acts

225. See supra Part II.A.2.
226. See discussion supra Parts I.B.1 and I.B.2.
227. See supra notes 133-135 and accompanying text; see also generally Part II.A.2.
228. See supra note 49 and accompanying text.
229. See discussion supra Part II.B.
did not involve a substantial risk of physical force.\textsuperscript{231} Had the district courts applied the two-step approach and precedent from sentencing guidelines cases and utilized a more contemporary understanding of the reality of violence against women, all of the plaintiffs would have survived motions to dismiss.

In \textit{Palazzolo}, the court's reasoning that Ruggiano's acts did not amount to "crimes of violence" is flawed. The court stated that patients readily consent to some physical contact that is likely to occur during an examination between a doctor and a patient.\textsuperscript{232} Indeed, the court trivialized Palazzolo's claims by stating that "[h]aving obtained such consent, albeit under false pretenses, a doctor who conducts the examination for improper reasons would have little need to resort to physical force."\textsuperscript{233} Furthermore, the court implied that unwanted sexual contact is not forceful by its nature, and does not pose a substantial risk of force, when it stated that "there would be little reason for a doctor to employ physical force" in this situation.\textsuperscript{234} Utilizing the two-step approach with a contemporary understanding of what constitutes violence against women, the court should have come to the determination that the elements of the Rhode Island statute of second degree sexual assault, by their nature, categorically pose a substantial risk of physical force. Moreover, if the court applied the holding in \textit{Reyes-Castro}, which held that a sexual assault without consent constitutes a "crime of violence," Palazzolo would have survived the motion to dismiss.

Likewise, the court's reasoning in \textit{Smathers} is flawed. Under the categorical approach, Webb's conduct would have been deemed a "crime of violence" pursuant to section 16(b) because courts in the sentencing guidelines context have deemed the making of threats "crimes of violence" pursuant to section 16(b).\textsuperscript{235} Even under the actual conduct approach, the court should have determined that the defendant's messages threatened violence,\textsuperscript{236} particularly when he said "I have nothing else to do but fuck with you . . ." and "you're gonna get your goddamned mouth off of me, because I won't get mine off you." This alone should be sufficient to pass muster under section 16(b).

\textsuperscript{231} See supra notes 85, 93, 106 and accompanying text.
\textsuperscript{232} See supra note 85 and accompanying text.
\textsuperscript{233} Id.
\textsuperscript{234} See id.
\textsuperscript{235} See discussion supra Part I.B.3; supra notes 163-164 and accompanying text.
\textsuperscript{236} See supra note 93 and accompanying text.
The Tenth Circuit’s decision in McCann II, reversing the district court’s dismissal, should stand as an example for courts when interpreting section 16(b). First, the Tenth Circuit demonstrated a contemporary understanding of what constitutes violence against women and what acts pose a substantial risk of physical force when it stated:

[the very act of nonconsensual sexual contact, which by its nature evinces a clear intention to disregard the victim’s dignity and bodily autonomy, both demonstrates and creates a substantial risk of more serious physical intrusion or the application of force to ensure compliance.]

The Tenth Circuit recognized, in accord with the social science data, that nonconsensual sexual contact in and of itself poses a substantial risk of physical force.

The Tenth Circuit recognized that a broader understanding of what constitutes violence against women is necessary to further the congressional intent in enacting the civil rights remedy. Stating that the categorical approach should be used in VAWA civil rights cases, the Tenth Circuit followed precedent from the sentencing guidelines context when it applied the holding that sexual abuse without consent is categorically a “crime of violence” because such an act poses a substantial risk of physical force. Thus, all courts should follow the Tenth Circuit’s approach to interpreting section 16(b) in VAWA civil rights cases.

**Conclusion**

The enactment of the VAWA was viewed as “a potential vehicle of empowerment” for women, and was a long-awaited move toward gender equality in the United States. By enacting the VAWA, Congress emphatically expressed a strong commitment to curb and attack the pervasiveness of sex-based violence. In practice, however, the civil rights remedy has fallen short. In the few VAWA cases brought under the civil rights remedy, the “crime of violence” requirement has been interpreted in such a narrow way that it strips the remedy of any effect.

While there is confusion as to how a “crime of violence” should be interpreted, courts should adopt a uniform standard and “favor

---

237. Supra text accompanying note 181.
238. See supra note 180 and accompanying text.
239. See supra note 182 and accompanying text.
240. See supra notes 176-179 and accompanying text.
241. Schneider, supra note 47, at 428.
242. See supra text accompanying note 46.
the interpretation that gives the greatest effect to a broad, remedial statute such as the VAWA.” Courts should do this by utilizing a definition of violence that does not ignore women’s experiences. Moreover, utilizing a two-step approach and applying precedent determining cases under section 16(b) would broaden the scope of violent acts that would pass muster under the statute. By broadening the types of acts that would constitute crimes of violence in these ways, courts would finally breathe some life into the VAWA’s civil rights remedy and give it the definitional teeth it requires.

THE FIRST AMENDMENT, THE RIGHT NOT TO SPEAK AND THE PROBLEM OF GOVERNMENT ACCESS STATUTES

Anna M. Taruschio*

INTRODUCTION

The First Amendment guarantees that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." It has long protected speech, certain expressive acts and individual thought and belief. The First Amendment, however, does not only protect speech in its positive aspect. In *West Virginia State Board of Education v. Barnette*, and later in *Wooley v. Maynard*, the U.S. Supreme Court recognized that the First Amendment also protects a "concomitant" negative free speech right, the right not to speak: "The right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all . . . ." The Court's subsequent articulations of this negative right framed it as a "freedom not to speak publicly, one which serves the same ultimate end as freedom of speech in its affirmative aspect." The first articulation of this negative First Amendment right heralded a line of "right not to speak" cases that present their own set of conflicts in First Amendment jurisprudence and implicate several of the theoretical bases of freedom of speech.

Courts and commentators have also recognized that the government can play an active role in expanding free speech rights and in enabling the free speech principle that the Constitution estab-

* The author wishes to thank Professor Abner S. Greene for his patience and guidance with this project, as well as her parents, Giacomo Taruschio and Lisa Kramer Taruschio, for their support.

2. 319 U.S. 624 (1943).
4. *Id.* at 714.
5. *Barnette*, 319 U.S. at 645 (Murphy, J., concurring).
ishes. This active role often takes the form of “access legislation,” such as state-level free speech provisions, which are often enacted to expand free speech rights further than the federal First Amendment provision. Litigants often invoke the right not to speak in opposition to these access statutes, which are intended to encourage and facilitate speech. These access statutes, despite a stated purpose of expanding some individuals’ affirmative rights to speak freely, often incidentally infringe on negative free speech rights in the same speech forum. Thus, an access statute or a state-level First Amendment provision, meant to open speech forums and encourage debate, can ultimately cause conflict between affirmative and negative free speech rights, by sustaining one right at the price of infringing on the other.

This Note argues that this conflict emerges from the distinct ideological justifications that underlie both the positive right to speak and the negative right not to speak. It addresses the point of conflict between these speech rights, created by access statutes which seek to further the aims of free speech. To this end, it argues that each distinct speech right is animated by a different and vital ideological justification—the “marketplace of ideas,” as the positive First Amendment principle, on the one hand, and the “autonomy/self-expression” principle, as the negative one, on the other. Analyzing these two principles in First Amendment jurisprudence, this Note concludes that by close attention to the effects of government efforts to widen speech forums and to the conflicting speech princ-

---

7. See, e.g., Owen M. Fiss, The Irony of Free Speech 17 (1996) (noting that “fostering full and open debate—making certain that the public hears all that it should—[can be] a permissible end for the state”); Cass R. Sunstein, Democracy and the Problem of Free Speech 138 (1995) (noting that “positive government acts” such as the “provision of diverse opportunities” can be among the aims of government); see also PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 91 (1980) (Marshall, J., concurring) (noting with approval the “healthy trend of affording state constitutional provisions a more expansive interpretation than [the Supreme] Court has given to the Federal Constitution” (citing William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977) [hereinafter Brennan, State Constitutions] (discussing incorporation of the Bill of Rights to the states through the Fourteenth Amendment and noting that state courts can play an active role in protecting these rights)); PruneYard, 447 U.S. at 85 (noting that states can have an “interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution”).

8. For examples and discussion of these kinds of access provisions, see infra Part II.B.1.b.

9. See, e.g., Brennan, State Constitutions, supra note 7, at 491 (observing that “[s]tate constitutions . . . are a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation of federal law”).
THE RIGHT NOT TO SPEAK

Part I of this Note explores the two main theoretical principles underlying protection of speech in the United States: the marketplace of ideas and autonomy/self-expression. It ends by illustrating the uses of these principles in right not to speak case law. Part II discusses the Supreme Court's right not to speak cases, beginning with a review of current Supreme Court jurisprudence in this area. It further investigates and highlights the tension that government access statutes cause between the two speech principles in each case. Part III begins by addressing and refuting a major criticism of cases in the right not to speak area: that in certain circumstances they do not trigger First Amendment scrutiny at all. This Part goes on to argue that state and local governments should be permitted to open speech forums to encourage and facilitate free speech. Finally, this Note concludes by proposing methods for accomplishing this goal that avoid the pitfalls and injustices now present in the Court's system for resolving right not to speak cases.

I. TWO FIRST AMENDMENT PRINCIPLES: THE MARKETPLACE OF IDEAS AND AUTONOMY/SELF-EXPRESSION

This Part first defines and contextualizes the two leading free speech principles underlying free speech jurisprudence in the United States. Second, it illustrates how these two free speech justifications emerge throughout right not to speak case law.

Two distinct principles have traditionally supported the primacy of free speech in liberal democratic society. The first is the belief that free speech will spark debate and thus serve as a major catalyst for political democratic discourse. This principle, first articulated by John Stuart Mill, and appropriated by American legal theorists and courts, is the marketplace of ideas. The second, competing principle is the "autonomy/self-expression" principle that stresses more individualistic values, such as individual choice and self-determination, and views free speech as critical to human emotional and intellectual fulfillment.

A. The Marketplace of Ideas

Before analyzing the marketplace of ideas in American theory and jurisprudence, it is useful to begin with some primary concepts from an earlier text, John Stuart Mill's On Liberty.10 Three con-

cepts from Mill’s work are fundamental to analysis of the right not to speak. The first is the central concept of liberty of thought and expression that Mill’s work envisions; the second is the adversarial nature of this conception of liberty; and the third is its emphasis on “more speech” and corresponding low tolerance for silence.

For Mill, freedom of thought and discussion was a touchstone of liberty. The freedom to form, hold and voice one’s opinions played a central role in social evolution toward a great, objective and discoverable truth. Mill also considered this freedom essential to determining the limits of state interference in individual liberty. “[T]o find that limit,” Mill wrote, “and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.” According to this model of liberty, government encroachment on individual freedom is a fundamental evil to be resisted.

This freedom of thought and expression served several purposes for Mill. The first was truth-seeking: liberty creates and maintains an open forum where ideas, both true and false, can be voiced. As a result, true ideas will prevail over false ones because, by hearing both a proposition and its refutation, people can test true ideas, thus tempering and strengthening them. Second, liberty of thought and expression enables individuals to discover and correct mistakes, thus allowing society to evolve: “Wrong opinion and practices gradually yield to fact and argument.” Last, liberty rebuts a presumption of infallibility in deeply held ideas and beliefs. This rebuttal results in healthy abandoning of outdated ideas and signals acceptance of true ideas where untrue ones earlier prevailed, while also enabling people to hold fast to ideas that were

13. See infra text accompanying notes 46-50.
15. See id. at 16.
16. See id. at 5.
17. Id.
18. See id. at 9-10.
19. See id. at 20.
20. See id. at 47.
21. See id. at 20.
22. Id. at 19. This idea would be echoed with characteristic eloquence sixty years later by Justice Holmes in the observation that “time has upset many fighting faiths . . . .” Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
23. See Mill, supra note 10, at 52.
true from the outset, all through the test of aggressive and public debate.\(^{24}\)

Next, Mill’s concept of a free speech principle is adversarial.\(^{25}\) By definition, this model requires that more than one voice be heard in the marketplace and even encourages these voices to conflict. If truth is to be found through the expression of different ideas and opinions, it follows that “it has to be made by the rough process of a struggle between combatants fighting under hostile banners.”\(^{26}\) This adversarial, almost “Darwinian”\(^{27}\) model of truth-seeking helps to discern not merely that an idea is true, but also exactly why it is true: on what grounds it defends itself, and where its weaknesses lie.\(^{28}\) Mill’s conception of liberty thus finds little virtue in silence or unheard speech, regardless of whether the silence is imposed by the state or by the free will of the individual.\(^{29}\) Within this paradigm, then, one who refuses to speak has withheld her opinion and expression from the marketplace; and all humanity has lost by not having the benefit of these ideas.\(^{30}\) This paradigm therefore elevates dissent and places a premium on expression, no matter how unfounded, despicable or untrue the idea behind it may be.

24. See id.
25. See id. at 47.
26. Id.
28. See MILL, supra note 10, at 21 (“Strange it is, that men should admit the validity of the arguments for free discussion, but object to their being ‘pushed to an extreme’; not seeing that unless the reasons are good for an extreme case, they are not good for any case.”).
29. Id. at 16. Mill states that:
[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.
Id.
30. Id. at 48-52. As Mill observes:
[w]hen there are persons to be found, who form an exception to the apparent unanimity of the world on any subject, even if the world is in the right, it is always probable that dissentients have something worth hearing to say for themselves, and that truth would lose something by their silence . . . . Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil; there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth, by being exaggerated into falsehood.
Id. at 48, 52.
1. The Marketplace of Ideas in American Legal Theory

Early American jurists and legal theorists incorporated Mill's concept of a marketplace of ideas into their framework for a free society. Three aspects of this free speech principle are critical. First, the marketplace of ideas places itself almost entirely at the service of the public, rather than private, interest. The marketplace is primarily a political tool, instrumental to the ultimate goal of either truth-seeking (in Mill's model) or self-governance (in contemporary American theory). Second, it serves the listener in information-sharing, promoting free discussion and trade of ideas. Third, it invariably prizes "more speech" over less or none.

The American concept of the marketplace of ideas eventually abandoned Mill's truth-seeking goal in favor of a more political conception of the marketplace. Instead of striving after an ultimate, discoverable truth through the marketplace and its different voices, the American version of the marketplace of ideas found its justification in political terms.

---

31. See, e.g., Whitney v. California, 274 U.S. 357 n.3 (1927) (Brandeis, J., concurring) ("If there be any among us who would wish to dissolve this union or change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." (quoting Thomas Jefferson, First Inaugural Address)); C. Edwin Baker, Human Liberty and Freedom of Speech 6-24 (1989) (discussing the early adoption and continuing validity of Mill's marketplace of ideas to American legal theory and jurisprudence).

32. See infra notes 37-42 and accompanying text.

33. See infra notes 43-45 and accompanying text.

34. See infra notes 46-50 and accompanying text.

35. See, e.g., Alexander Meiklejohn, Free Speech and Its Relation to Self-Government 88 (1948). Meiklejohn argues that:

[n]o one can deny that the winning of the truth is important for the purposes of self-government. But that is not our deepest need. Far more essential, if men are to be their own rulers, is the demand that whatever truth may become available shall be placed at the disposal of all the citizens of the community. The First Amendment is not, primarily, a device for the winning of new truth, though that is very important. It is a device for the sharing of whatever truth has been won.

Id.

36. See id. Meiklejohn further notes that:

[The First Amendment's] purpose is to give to every voting member of the body politic the fullest possible participation in the understanding of those problems with which the citizens of a self-governing society must deal.... The primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counter belief, no relevant information, may be kept from them.

Id. at 88-89.
This First Amendment principle, therefore, is entirely at the service of the public: the highest aim of free speech, and of the principle that protects it, is to promote democratic self-government through discussion of political issues and rigorous public debate. Within this paradigm, "[t]o be afraid of ideas, any idea, is to be unfit for self-government."37

Many courts and scholars have criticized the marketplace of ideas as a viable First Amendment principle,38 charging that the concept serves all categories of protected speech, not merely those concerning political debate.39 While the marketplace of ideas theory today recognizes that speech may not be solely for political purposes,40 it protects only that speech concerning public issues and debate. Accordingly, one commentator has written that, "[s]peech is valued so importantly in the Constitution . . . not because it is a form of self-expression or self-actualization but rather

37. Id. at 27; see also Red Lion Broad. Co. v. FCC, 395 U.S. 367, 392 (1969) (noting that a goal of the First Amendment is to "produce[e] an informed public capable of conducting its own affairs" (citing J. MILL, ON LIBERTY 32 (R. McCallum ed. 1947))).

38. Shiffrin and Choper cite several scholars who criticize the marketplace of ideas. See SHIFFRIN & CHOPER, supra note 27, at 15-18. Some of their arguments include: 1) that people are socialized early on to accept society's political/economic institutions and therefore that "processes of critical judgment are short-circuited," id. at 16 (quoting CHARLES E. LINDBLOM, POLITICS AND MARKETS 207 (1977)); 2) that different levels of economic and political influence in the marketplace can lead to market distortion, see id. (citing LAWRENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 786 (2d ed. 1988)); and 3) that the marketplace of ideas under-emphasizes other important free speech values such as the value of dissent, see id. at 17 (citing STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE (1990)), and the value of free speech to the individual as opposed to society as a whole, see id. (citing Stanley Ingber, The Marketplace of Ideas: A Legitimizing Myth, 1984 DUKE L.J. 1, 4-5 (1984)). Professor Vincent Blasi notes that the concept of truth-seeking is susceptible of many different meanings for different kinds of people. See Vincent Blasi, Free Speech and Good Character, 46 U.C.L.A. L. REV. 1567, 1568 (1999). For some defenses of the marketplace model, see BAKER, supra note 31, at 6-24, 37-46.

39. See, e.g., Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (noting that while a fundamental purpose of the First Amendment "was to protect the free discussion of governmental affairs," an abundance of Supreme Court cases also find that expression about "philosophical, social, artistic, economic, literary, [and] ethical matters" comprises a "nonexhaustive" list of other kinds of expression receiving "full First Amendment protection" (citations omitted)).

40. See MEIKLEJOHN, supra note 35, at 61-62.

41. See id. at 94.

The guarantee given by the First Amendment is not, then, assured to all speaking. It is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal — only, therefore, to the consideration of matters of public interest. Private speech, or private interest in speech, on the other hand, has no claim whatever to the protection of the First Amendment.
because it is essential for collective self-determination." Thus, the marketplace concept of First Amendment liberty prizes public values promoting self-government, over individualistic ones.

Another important aspect of the marketplace of ideas is its emphasis on information-sharing and audience rights. This aspect of the marketplace of ideas comes as a necessary consequence of the principle’s conception and application: because the marketplace encourages free and open debate in a public forum, it follows that each member of the audience will have a wider range of ideas and information from which to choose in making his or her own decisions about the issue at hand. This facet of the marketplace of ideas thus serves the public interest by encouraging multifarious voices to be heard, thereby creating a more intelligent and informed citizenry.

Last, the concept of “more speech” is central to the marketplace of ideas. “More speech” means that under the marketplace of ideas paradigm, more speech, never less, is the remedy for false or untrue speech. In this way, false or untrue ideas will always be countered by new and different ones, and will eventually be defeated. It follows, therefore, that one who withholds (or is forced by regulation from withholding) discussion and debate from the marketplace of ideas, refrains from the civic discourse that the theory encourages. This “more speech” tenet of the marketplace of

42. Fiss, supra note 7, at 2 ("[T]his view [the protection of free speech from encroachment by the state] is predicated on a theory of the First Amendment and its guarantee of free speech that emphasizes social, rather than individualistic, values. The freedom the state may be called upon to foster is a public freedom.").

43. See Pacific Gas & Elec. Co. v. Public Utils. Comm’n, 475 U.S. 1, 8 (1986) (“By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public’s interest in receiving information.” (citations omitted)).

44. See, e.g., Baker, supra note 31, at 67 (noting that the jurisdiction behind the marketplace of ideas model of free speech is to protect “the interest in the listener’s receipt of information”).

45. See Pacific Gas & Elec. Co., 475 U.S. at 8 (“The constitutional guarantee of free speech ‘serves significant societal interests’ wholly apart from the speaker’s interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack the First Amendment protects the public’s interest in receiving information.” (citations omitted)); see also Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (“It is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial . . . .”)

46. See generally, Baker, supra note 31, at 7-9 (discussing the “more speech” concept within the marketplace of ideas framework).

47. See id. at 7 (noting in discussing the marketplace of ideas that “[r]egulation of speech would only undermine the discovery and recognition of truth and impede wise, well-founded decision making”).
ideas is best illustrated by Justice Brandeis’ Whitney v. California\textsuperscript{48} concurrence, when he argued that the state should be permitted to regulate only speech that poses a “clear and present danger” so imminent as to inhibit more speech; that is, leaving no further “opportunity for full discussion.”\textsuperscript{49} Brandeis’ “clear and present danger” test derives directly from the marketplace of ideas because it allows the government to regulate that speech which poses a threat to the “more speech” principle. Thus, under the second prong of Brandeis’ test, a danger is “present” if it precludes opportunity for “more speech” or further discussion.\textsuperscript{50}

2. The Marketplace of Ideas in American Jurisprudence

The concept of the marketplace of ideas entered American jurisprudence as a principle of First Amendment liberty in Justice Holmes’ dissent in Abrams v. United States:\textsuperscript{51} “[T]he ultimate good desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market.”\textsuperscript{52} This principle, while subject to a great deal of criticism,\textsuperscript{53} has consistently been used by the Supreme Court as a paradigm for positive First Amendment values.\textsuperscript{54} In a similar vein, the Supreme Court has also manifested a concern that the First Amendment be used primarily for public and political purposes: “Speech concerning public affairs is more than self-expression, . . . it is the essence of self-government.”\textsuperscript{55} The Court has also stated that “there is practically universal agreement that a major purpose of [the First Amendment] was to protect the free dis-

\begin{itemize}
\item\textsuperscript{48} 274 U.S. 357 (1927).
\item\textsuperscript{49} Id. at 377 (Brandeis, J., concurring).
\item\textsuperscript{50} See BAKER, supra note 31, at 7-8 (discussing Brandeis’ Whitney concurrence in the marketplace of ideas context).
\item\textsuperscript{51} 250 U.S. 616 (1919).
\item\textsuperscript{52} Id. at 630 (Holmes, J., dissenting).
\item\textsuperscript{53} See SHIFFRIN, supra note 27, at 15-18; see also Blasi, supra note 38, at 1568 (“Yes, truth is important, but truth seeking is such a different activity for the true believer, the pragmatist, and the skeptic as to confound any effort to generalize regarding the priority to be accorded truth seeking, the role free speech plays in facilitating it, and the significance of the many ‘market failures’ that distort the flow of ideas and information.”).
\item\textsuperscript{54} See BAKER, supra note 31, at 7 (“The marketplace of ideas theory consistently dominates the Supreme Court’s discussions of freedom of speech.”); see also Whitney, 274 U.S. at 375-76 (Brandeis, J., concurring) (“Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law — the argument of force in its worst form.”).
\item\textsuperscript{55} Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (citations omitted).
\end{itemize}
Thus the marketplace of ideas stands as a means, rather than an end, toward collective self-government and prizes public values over individualistic ones.

B. Autonomy/Self-Expression

The First Amendment principle that competes most directly with the marketplace of ideas is the one that elevates human autonomy and self-expression over other, more public values. Although this notion of autonomy/self-expression shares many concepts with general Fourteenth Amendment autonomy, most courts locate this right — as it pertains to individual freedom of thought, conscience and expression — within the First Amendment. Central to this concept of First Amendment freedom is the idea that the individual is free to choose her own method of self-expression. As such, it is a free speech principle that views the individual conscience and self-fulfillment as an end unto itself, in contrast to the marketplace principle that views freedom of speech as instrumental to the ultimate goal of either truth-seeking or democratic self-government. The autonomy principle thus sets up a First Amendment theory that focuses primarily on individual freedom. In


57. See Fiss, supra note 7, at 2-3; Ingber, supra note 38, at 4-5 (noting that courts invoke the marketplace of ideas theory because it benefits society and not merely individual speakers, and thus “relegates free expression to an instrumental value, a means toward some other goal, rather than a value unto itself”).

58. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 97 (1980) (Powell, J., concurring) (noting that the Fourteenth Amendment also protects expression and belief); Abner S. Greene, The Pledge of Allegiance Problem, 64 FORDHAM L. REV. 451, 480 (1995) (arguing that due process autonomy applies to right not to speak cases).

59. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 573 (1995) (finding it a rule of protection “under the First Amendment, that a speaker has the autonomy to choose the content of his own message”).

60. See, e.g., BAKER, supra note 31, at 52 (“[T]he first amendment values of self-fulfillment and popular participation in change emphasize the speech’s source in the self, and make the choice of the speech by the self the crucial factor in justifying protection.”); see also Blasi, supra note 38, at 1568 (noting that “liberty to express one’s thoughts and to form them by unrestricted reading and listening is an essential attribute, it is said, of human autonomy—of what it means to be a self-directed person possessed of human dignity”).

61. See Fiss, supra note 7, at 2-3.

62. See THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) [hereinafter EMERSON, FREEDOM OF EXPRESSION]. In this sense, Emerson writes that:

[F]reedom of expression is essential as a means of assuring individual self-fulfillment. The proper end of man is the realization of his character and
contrast to the marketplace of ideas, the autonomy principle considers the freedoms the First Amendment grants as ends unto themselves, promoting human intellectual fulfillment, rather than solely as means of promoting social change and growth. Most proponents of this First Amendment principle thus distinguish it from the marketplace of ideas. Other First Amendment scholars define autonomy in terms of individual choice and emphasize self-determination. In this context, a person is “sovereign in deciding what to believe and in weighing competing reasons for action. He must apply to these tasks his own canons of rationality, and must recognize the need to defend his beliefs and decisions in accordance with these canons.” Furthermore, an autonomous person is one who “cannot accept without independent consideration the judgment of others as to what he should believe or what he should do.” This notion of individual autonomy is not inconsistent with government regulation, but holds as its central tenet the idea that an autonomous individual is one who chooses when and how to submit to government authority. Thus, the autonomy principle can be de-

potentialities as a human being. For the achievement of this self-realization the mind must be free. Hence suppression of belief, opinion, or other expression is an affront to the dignity of man, a negation of man’s essential nature.

*Id.*

63. *But see Fiss, supra* note 7, at 83 (noting that “[t]he autonomy protected by the First Amendment and rightly enjoyed by individuals and the press is not an end in itself, as it might be in some moral code, but is rather a means to further the democratic values underlying the Bill of Rights”).

64. *See Baker, supra* note 31, at 24 (“This perspective, however, is quite different from that of the classic marketplace of ideas theory.”); *see also Fiss, supra* note 7, at 3 (noting that “[a] distinction is thus drawn between a libertarian and a democratic theory of speech. . . . The libertarian view—that the First Amendment is a protection of self-expression—makes its appeal to the individualistic ethos that so dominates our popular and political culture”).

65. *See, e.g., Sunstein, supra* note 7, at 137-38 (characterizing one aspect of autonomy as simply “right—a recognition of individual dignity—to let people choose their own path”); Thomas Scanlon, A Theory of Freedom of Expression, 1 Phil. & Pub. Aff. 204, 216 (1972) (“An autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do.”).


67. *Id.* at 216.

68. *Id.* (“An autonomous man may, if he believes the appropriate arguments, believe that the state has a distinctive right to command him . . . . What is essential to the person’s remaining autonomous is that in any given case his mere recognition that a certain action is required by law does not settle the question of whether he will do it.”).
fined in terms of individual choice or self-mastery, allowing individuals to be "authors of the narratives of their own lives."\textsuperscript{69}

Last, in contrast with the marketplace of ideas principle, the autonomy theory allows and even encourages individuals to remain silent,\textsuperscript{70} rather than promoting more speech as in the Millian\textsuperscript{71} or American jurisprudential models.\textsuperscript{72}

The autonomy view, that the First Amendment protects individual self-expression, therefore, conflicts with the theory of a First Amendment that protects speech as a means toward achieving self-government and which prizes individualistic values over collective ones.

### C. The Marketplace of Ideas and Autonomy Principles in Right Not to Speak Case Law

This section begins discussion of the right not to speak cases and illustrates how these two First Amendment paradigms, the marketplace of ideas and autonomy/self-expression, function within each case. The autonomy and marketplace of ideas principles often conflict in right not to speak cases. The autonomy principles in these cases can be defined as those in which a speaker's interest lies either in silence or in freedom from forced association with an idea she finds repugnant.\textsuperscript{73} Marketplace principles, on the other hand, serve the interests of those speakers who want to be able to speak freely; thus, the marketplace principle is the one that encourages more speech, enables democratic self-government, and prizes public or collective values over individual self-realization or self-expression.\textsuperscript{74} In the discussion that follows, the argument that a case is decided based on marketplace principles means that the Court reached a result that would provide for more speech, rather than

\begin{itemize}
\item \textsuperscript{69} \textsc{Sunstein}, supra note 7, at 138.
\item \textsuperscript{70} \textsc{See Baker}, supra note 31, at 24 (noting that "[w]hat is important is not that everything worth saying be said . . . . [r]ather, the important concern is that society deny no one the right to speak").
\item \textsuperscript{71} \textsc{See supra} note 29 and accompanying text.
\item \textsuperscript{72} \textsc{See supra} notes 45-50 and accompanying text.
\item \textsuperscript{73} \textsc{See, e.g.,} Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 576 (1995) (observing that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised").
\item \textsuperscript{74} \textsc{See, e.g.,} Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (noting that "[i]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here").
\end{itemize}
upholding the right not to speak, which is identified more with an autonomy interest.

The first and still central articulation of the autonomy principle informing the right not to speak is found in *West Virginia State Board of Education v. Barnette*, in which the Supreme Court invalidated a state law requiring elementary school students to salute the American Flag. The Court held that the Board of Education's actions "transcend[ed] constitutional limitations on [its] power and invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." The Court also invalidated the state's invasion on each child's "freedom . . . to be vocal or silent according to his conscience or personal inclination." The Court concluded that "[t]o sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind." Thus, in *Barnette* the negative free speech autonomy/self-expression values of choice, self-mastery and individual freedom of conscience, prevailed over affirmative marketplace of ideas principles. In this case, a decision based on marketplace of ideas principles would have let the Board of Education's regulation stand, and perhaps would have urged the children or families who were offended by the speech to counter it with more speech of their own.

In *Wooley v. Maynard*, the Court continued to apply autonomy principles in the right not to speak context. The plaintiffs, who brought suit challenging a New Hampshire law that required non-commercial vehicles to bear the state's motto, "Live Free or Die," on their license plates, invoked their right not to speak under the First Amendment. The Court found that New Hampshire could

75. 319 U.S. 624 (1943).
76. Id. at 642 (striking as unconstitutional a West Virginia Board of Education order requiring children in public schools to say the Pledge of Allegiance to the Flag).
77. Id. at 646 (Murphy, J., concurring).
78. Id. at 634.
80. See id. at 715 (reasoning that the First Amendment invalidates state efforts to coerce private speech).
81. See id. at 707 (citing N.H. REV. STAT. ANN. § 263:1 (Supp. 1975)). The Court also noted that another New Hampshire statute made it a misdemeanor to "knowingly [obscure] the figures or letters on any number plate." Id. (citing N.H. REV. STAT. ANN. § 262:27(c) (Supp. 1975)).
82. See Wooley, 430 U.S. at 714 ("We begin with the proposition that the right of freedom of thought protected by the First Amendment against state action includes
not compel private individuals to carry its motto, “Live Free or Die,” on their family automobile’s license plates.\textsuperscript{83} “The First Amendment,“ the Court wrote, ”protects the right of individuals to hold a point of view different from the majority and to refuse to foster . . . an idea they find morally objectionable.”\textsuperscript{84} This reading of the First Amendment therefore values an individual, autonomy principle over a collective, marketplace of ideas theory. A marketplace of ideas reading of the same case would perhaps have encouraged the plaintiffs to counter the state’s speech with their own.

In the years following Barnette and Wooley, the Supreme Court confronted the issue of the right not to speak in three cases involving the news media. In these cases, the Court balanced the right of the public to the free and unfettered exchange of ideas that the press promotes on the one hand, and the principles of editorial autonomy on the other.

In \textit{Red Lion Broadcasting Co. v. FCC},\textsuperscript{85} the Court applied the marketplace of ideas as its principal First Amendment justification in unanimously upholding a right of reply statute requiring radio stations to supply airtime to political candidates who had been attacked by their opponents on the air.\textsuperscript{86} The Court noted that “it is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by government itself or a private licensee.”\textsuperscript{87} The right of reply in this case would further the “more speech” interest of the marketplace of ideas since it would enable more voices to be heard by the public.

Five years later, however, in \textit{Miami Herald Publishing Co. v. Tornillo},\textsuperscript{88} on facts similar to \textit{Red Lion’s}, the Court went in the other direction. A newspaper challenged a Florida statute requir-

\textsuperscript{83} See id. at 717. The plaintiff in this case, a Jehovah’s Witness, described his objection to New Hampshire’s “Live Free or Die” motto thus: “Although I obey all laws of the State not in conflict with my conscience, this slogan is directly at odds with my deeply held religious convictions . . . . I believe that life is more precious than freedom.” \textit{Id.} at 717 n.2.

\textsuperscript{84} Id. at 715.


\textsuperscript{86} See \textit{id.} at 400-01.

\textsuperscript{87} \textit{Id.} at 390 (citations omitted).

\textsuperscript{88} 418 U.S. 241 (1974) (striking as unconstitutional a Florida statute requiring newspapers to afford political candidates a right to reply to editorials that attack the candidate’s personal character).
ing it to afford political candidates a right to reply to attacks on their "personal character or official record." The Court invalidated the mandatory access statute. In so doing, it rejected the marketplace of ideas argument proffered by the state, and instead accepted the editorial autonomy argument of the newspaper. The Court based its decision on editorial, not individual, autonomy, holding that the marketplace of ideas interest held out by the state in its mandatory right of reply statute could not defeat the newspaper's editorial autonomy interest in deciding what to print in its own pages. The Court defined the marketplace interest in terms of the press' interest in unfettered freedom of information in the service of the public, noting that "[the First Amendment] rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society."  

Last in the line of media cases, in *Turner Broadcasting System Inc. v. FCC*, a group of cable television operators brought suit challenging the constitutionality of a federal "must-carry" provision which required the cable networks to carry some local broadcast channels. The Court swung back to a Red Lion-type rationale when it found the provisions constitutional. It accepted a marketplace of ideas argument in noting an important governmental interest in "promoting widespread dissemination of information from a multiplicity of sources." The Court also noted, however, that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself the ideas and beliefs deserving of expression, consideration, and adherence." This opinion again expressed concern that autonomy not be in-

---

89. *Id.* at 244.  
90. *See id.* at 257-58.  
91. *See id.* at 257 ("[T]here is practically universal agreement that a major purpose of [the First] Amendment was to protect the free discussion of governmental affairs." (citing Mills v. Alabama, 384 U.S. 214, 218 (1966))).  
92. *See id.* at 258 (concluding that "[t]he Florida [right to reply] statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors").  
93. *See id.*  
94. *Id.* at 252 (citing Associated Press v. United States, 326 U.S. 1, 20 (1945)).  
95. 512 U.S. 622 (1994) ("TBS I"), aff'd on reh'g, 520 U.S. 180 (1997) ("TBS II").  
96. *See TBS II*, 520 U.S. at 180.  
97. *See id.*  
98. *Id.* at 189.  
fringed, but this time in the wider context of cable television media.  

In *Abood v. Detroit Board of Education*, associational freedom, another aspect of individual autonomy, prevailed over the marketplace interest asserted by a union. In this case, the State of Michigan had enacted legislation permitting unions to exact dues from members that were used in part to fund a number of social and political activities that the plaintiff union members did not support. The Court found the legislation unconstitutional, noting that, "at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the state." The Court accepted the "negative association" argument advanced by the union members protesting the dues on the grounds that they had been prohibited, "not from actively associating, but rather from refusing to associate" with the speech the union supported.

100. See id. at 627.


102. See id. at 234-35.

103. See id. at 211.

104. Id. at 234-35. Similarly, in mandatory student activities' fees cases, the interests advanced by universities in support of the fees is often buttressed by marketplace of ideas values. See, e.g., *Carroll v. Blinken*, 957 F.2d 991, 999 (2d Cir. 1992) (holding that a public university could constitutionally assess students an activities fee and noting that a valid interest advanced by the university was the stimulation of campus debate); see also cases cited infra note 105.

105. *Abood*, 431 U.S. at 234 ("The fact that appellants are compelled to make, rather than prohibited from making, contributions for political purposes works no less an infringement of their constitutional rights."); see also *Southworth v. Grebe*, 151 F.3d 717 (1998), cert. granted, 67 U.S.L.W. 3496 (U.S. Mar. 29, 1999) (No. 98-1189) (finding that a public university's use of a portion of mandatory student activity fees to fund private organizations that engaged in political and ideological activities, speech, and advocacy violated free speech rights of students who objected to such funding); *Keller v. State Bar*, 496 U.S. 1 (1990) (holding that California State Bar's use of compulsory dues to finance political and ideological activities with which members disagreed violated their First Amendment right of free speech when such expenditures were not necessarily or reasonably incurred for purpose of regulating legal profession or improving quality of legal services). But see *Glickman v. Wileman Bros. & Elliot*, 521 U.S. 457 (1997) (upholding Secretary of Agriculture order requiring California fruit growers to pay dues to fund generic advertising); *Lehnert v. Ferris Faculty Assoc.*, 500 U.S. 507 (1991) (finding that a union could constitutionally charge activities to dissenting employees if activities are "germane" to collective bargaining activity, are justified by government's interest in labor peace and avoiding "free riders," and do not add significantly to burdening of free speech inherent in allowance of agency or union shop).
Autonomy principles also prevailed in *Pacific Gas & Electric Co. v. Public Utilities Commission of California.* In this case, a privately owned utility, Pacific Gas, brought suit challenging a California Public Utilities Commission ("PUC") order that required Pacific Gas to carry the newsletter of a third party public interest group in its monthly billing statements. The Court held the order unconstitutional, and found, based on autonomy principles, that the PUC could not constitutionally dictate the content of Pacific Gas's speech. The Supreme Court thus refused to sacrifice Pacific Gas's autonomy right to PUC's marketplace of ideas argument that having more speech available to the public always fulfills the First Amendment mandate.

The Court applied a similar analysis in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group,* when it considered the claim of the Irish-American Gay, Lesbian and Bisexual Group of Boston ("GLIB") to be included as marchers in Boston's St. Patrick's Day Parade. The Court unanimously concluded that the speaker's choice of whether or not to voice views or opinions should remain with the speaker, and not the government. Accordingly, "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." The parade organizers therefore did not have to allow GLIB to join in the parade. Furthermore, the Court reemphasized a "fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." The purpose was to "shield just those choices of

107. See id. at 4.
108. See id. at 11 (noting that "[j]ust as the State is not free to 'tell a newspaper in advance what it can print and what it cannot,' the State is not free either to restrict [Pacific Gas's] speech to certain topics or views or to force [it] to respond to views that others may hold" (quoting Pittsburgh Press Co. v. Human Relations Comm'n, 413 U.S. 376, 400 (1973) (Stewart, J., dissenting))).
109. See id.
111. See id. at 559.
112. See id. at 575 ("[W]hatever the reason [to disagree with a certain point of view], it boils down to the choice of a speaker not to propound a particular point of view, and that choice is presumed to lie beyond the government's power to control.").
113. Id. at 576.
114. See id. at 580-81.
115. Id. at 573 (stating that "one important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say" (quoting Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S 1, 16 (1986))).
content" that one decides are right or wrong according to individual conscience.\textsuperscript{116} In \textit{PruneYard Shopping Center v. Robins},\textsuperscript{117} however, the Court took the opposite tack, and based its decision on marketplace principles rather than autonomy ones.\textsuperscript{118} A California state constitutional provision provided that "every person may freely speak, write and publish his or her sentiments on all subjects."\textsuperscript{119} The Court held that, under this state-level free speech provision, the plaintiff did not have the right to exclude from its private property a group of high school students who had set up a table to petition and pass out pamphlets soliciting opposition to an anti-Zionist United Nations resolution.\textsuperscript{120} The speakers' positive right to speak was more compelling in this instance than the shopping center's right not to speak or to be associated with the speech of the students.\textsuperscript{121} The Court distinguished the holding in \textit{Wooley} by observing that the message in that case was the government's own (New Hampshire's "Live Free or Die" motto).\textsuperscript{122} In contrast, the message in \textit{PruneYard} was that of other private speakers and there was "no danger of governmental discrimination for or against a particular message."\textsuperscript{123} Thus, the right of the shopping center not to speak in \textit{PruneYard} was outweighed by the marketplace principle that had motivated the state constitutional provision, namely, to strengthen affirmative First Amendment values and encourage more debate.\textsuperscript{124}

As these cases illustrate, two First Amendment principles have achieved preeminence in American legal theory and jurisprudence in the last century: the marketplace of ideas and autonomy/self-expression. The contrast between these two paradigms is the source of the tension behind right not to speak cases. The marketplace of ideas, on the one hand, encourages more individuals to speak, be heard and engage in the free trade of ideas. The autonomy interest, on the other, allows individual speakers to either remain silent, or to not be associated with or foster speech they do

\begin{itemize}
\item \textsuperscript{116} Id. at 574.
\item \textsuperscript{117} 447 U.S. 74 (1980).
\item \textsuperscript{118} See id. at 87-89 (rejecting the shopping center's contention that it was being compelled to affirm a belief in any position that the government had prescribed).
\item \textsuperscript{119} Id. at 79-80 n.2.
\item \textsuperscript{120} See id. at 77.
\item \textsuperscript{121} See id. at 88.
\item \textsuperscript{122} See id. at 87 (observing that in Wooley the message being prescribed was the government's own).
\item \textsuperscript{123} Id.
\item \textsuperscript{124} See id. at 88.
\end{itemize}
not support. In these cases, with the exception of Barnette and Wooley, the right not to speak is usually buttressed by autonomy concerns, while the positive right to speak is often justified by the marketplace of ideas principle, urging more speech.

II. RIGHT NOT TO SPEAK CASES AND THE CONFLICT WITH GOVERNMENT ACCESS STATUTES

This Part first examines present resolution of right not to speak cases, and, second, illustrates the conflict between these two speech principles created by access statutes in each case.

A. Current Method of Resolving Right Not to Speak Cases

The Supreme Court currently resolves right not to speak cases by determining whether certain factors and risks are present in each case, weighing these and balancing the burden on one speaker against the right of the other not to speak.

The Court isolates and weighs several factors in deciding right not to speak cases. First, it examines whether there is a “ventriloquism” problem, the probability that the speech in question is likely to be taken as that of the speaker, or the danger that it will be misattributed to another speaker.125 Related to this point is the question of whether there is a practical possibility of disclaimer, that is, whether a speaker who desires that the speech not be mis-takenly attributed to her can easily disclaim it.126 Also related to the ventriloquism problem is the issue of whether avenues of dissent are open to the speaker.127 A second factor is whether the speaker is a natural person or a corporation.128 Third, the nature

125. See, e.g., Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 577 (1995) (“Without deciding on the precise significance of the likelihood of misattribution, it nonetheless becomes clear that in the context of an expressive parade . . . the parade’s overall message is distilled from the individual presentations along the way, and each unit’s expression is perceived by spectators as part of the whole.”).
126. See id. at 576 (considering whether or not “there is [a] customary practice whereby private sponsors disavow ‘any identity of viewpoint’ between themselves and the selected participants”).
127. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (taking into consideration that “[owners of the shopping center] can expressly disavow any connection with the message by simply posting signs in the area where the speakers or handbillers stand. Such signs, for example, could disclaim any sponsorship of the message and could explain that the persons are communicating their own messages by virtue of state law”).
128. See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm’n, 475 U.S. 1, 34-36 (1986) (Rehnquist, J., dissenting) (noting that “[Pacific Gas] is not an individual or a newspaper publisher; it is a regulated utility. The insistence on treating identically for
of the property interest in the speech and the forum in which it occurs, whether private or public, also affects the Court's decision. Fourth, in cases involving the media in particular, the Court considers the degree of editorial control traditionally allotted to the speaker.

Two threshold issues should be noted here. The first is that all cases discussed in this section are ones in which the government has attempted, through access-broadening statutes or state-level First Amendment provisions, to expand the marketplace of ideas by making more speech forums available to the public. The second is that the speakers in each case are private individuals and not government actors.

1. The Ventriloquism Problem, the Risk of Misattribution and the Possibility of Disclaimer

A risk of ventriloquism occurs when there is potential for a message to be misattributed to another speaker because of mistaken association with the speech. Often, the possibility of disclaiming the speech can alleviate the risk of ventriloquism. Accordingly, some right not to speak cases carry a relatively high risk of ventriloquism and a correspondingly low possibility or feasibility of disclaimer. For example, the ventriloquism problem in Abood lay in the central claim of the dissenting union members. They invoked their right of association to avoid "compulsory subsidization of ideological activity" with which they disagreed. The union members had no opportunity to disclaim except through their lawsuit, illustrating their reluctance to foster speech they did not support.

---

constitutional purposes entities that are demonstrably different is as great a jurisprudential sin as treating differently those entities which are the same”).

129. See, e.g., PruneYard, 447 U.S. at 87 (noting that “the shopping center by choice of its owner is not limited to the personal use of appellants. It is instead a business establishment that is open to the public to come and go as they please”).


131. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 234 (1977) (noting that “[t]he fact that the [union members] are compelled to make, rather than prohibited from making, contributions for political purposes works . . . an infringement of their constitutional rights”).

132. Id. at 237; see also Southworth v. Grebe, 151 F.3d 717, 729 (7th Cir. 1998) (discussing Abood and compelled subsidization and concluding that while hateful speech may have “a place in our society [the] Constitution does not mandate that citizens pay for it”).
Ventriloquism problems also arise in false, or mistaken, association cases. In *Pacific Gas*, for example, the Court did not explicitly consider the ventriloquism problem, but found that the PUC's order impermissibly burdened Pacific Gas's right not to speak under the same kind of right of association argument that prevailed in *Abood*. Under PUC's orders, the privately-owned utility would be forced to foster speech it did not support. The Court held this burden on Pacific Gas unconstitutional partly because the privately-owned utility was "required to carry speech with which it disagreed, and might well feel compelled to reply or limit its own speech in response." Thus, the Court concluded, the access order impermissibly required Pacific Gas to associate with speech it did not support. The Court further found that this kind of forced dissemination and association with "potentially hostile views" ran the risk of forcing Pacific Gas to "speak where it would prefer to remain silent."

In *Hurley*, the Court found a high risk of ventriloquism and a low possibility of disclaimer. Hence, the parade organizers, who received funding from the City of Boston, had a right to exclude GLIB's expressive marching. Forcing the parade to include GLIB's message therefore presented an unconstitutional infringement on its autonomy interest. The Court recognized a significant ventriloquism problem in *Hurley* because the parade was made up of a variety of messages, each contributing to a "common theme." As such, the Court found that the "likelihood of misattribution" was high because the "overall message is distilled from the individual presentations along the way, and each unit's expression is perceived by spectators as part of the whole." Similarly, the possibility of a disclaimer here was very low because it

---

133. See supra note 107 and accompanying text.
134. See *Abood*, 431 U.S. at 234.
136. *Id.* at 11 n.7.
137. *Id.* at 12.
138. *Id.* at 18.
140. *Id.* at 576 (observing that "when dissemination of a view contrary to one's own is forced upon a speaker . . . [her] right to autonomy over the message is compromised").
141. See *id.* at 576.
142. *Id.*
143. *Id.* at 577.
144. *Id.*
was impractical. In fact, the Court specifically noted that "such disclaimers would be quite curious in a moving parade."  

In contrast, the PruneYard Court found, without explanation, that the risk of misattribution of the message was low, presumably because the shopping center was open to the public and therefore each member of the public would naturally assume that views expressed by a table of teenagers distributing leaflets and gathering signatures were not those of the shopping center. The Court also noted the high possibility of a disclaimer or disavowal of the message by the shopping center, so that it would not be mistakenly imputed to the owner. Thus, it would be reasonably feasible for a shopping center to put up signs disassociating its views from those expressed by the public.

Similarly, in the TBS cases, the Court found that because it was usual for broadcasters to disclaim any "identity of viewpoint" between the station and the channels using the facility, there was "little risk" that audiences would mistakenly assume that the opinions expressed by the stations were those of the broadcasters. The Court also noted, however, that cable networks traditionally and historically served as "conduits" and therefore, there was a low risk of ventriloquism.

2. Identity of the Speaker: Corporation or Natural Person

Another important factor the Court considers in resolving right not to speak cases is the identity of the speaker, whether a corporation or natural person. As a general proposition, most jurists agree that corporations have positive free speech rights—that is, as corporate entities, they are entitled to speak with one corporate voice according to their preferences. Justices disagree, however, on the issue of whether corporations should be accorded the same au-

145. Id.
146. See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) ("[T]he views expressed by members of the public ... will not likely be identified with those of the owner.").
147. See id. at 87.
148. See id.
150. Id.
151. See, e.g., First Nat'l Bank v. Bellotti, 435 U.S. 765, 784 (1978) (noting that "[w]e find no support in the First or Fourteenth Amendments, or in the decisions of this Court, for the proposition that speech that otherwise would be within the protection of the First Amendment loses protection simply because its source is a corporation . . . .").
tonomy rights as natural people or associations. Justice Powell notes that, in Pacific Gas, for example, "speech does not lose its protection because of the corporate identity of the speaker." Powell found that for both positive and negative aspects of speech, corporate speakers are protected by the First Amendment. Justice Rehnquist's dissent in the same case, however, argued that a corporate speaker's negative free speech right of autonomy should not be protected. While acknowledging that the affirmative corporate right to speak is protected by the First Amendment, Rehnquist argued that protection does not extend to the right not to speak. He reasoned that the right not to speak is informed by autonomy principles; because corporations have no interest in autonomy or self-expression in the way natural people do, they have no corresponding First Amendment right not to speak.

Rehnquist contended that this argument was even more persuasive in the case of Pacific Gas because the utility company was a

154. See id. ("Were the government freely able to compel corporate speakers to propound political messages with which they disagree, this protection would be empty, for the government could require speakers to affirm in one breath that which they deny in the next. It is therefore incorrect to say . . . that our decisions do not limit the government's authority to compel speech by corporations.").
156. Bellotti, 435 U.S. at 765 (holding invalid under the First Amendment a Massachusetts criminal statute prohibiting banks or business corporations from making contributions or expenditures to influence voters). In his Pacific Gas dissent, Justice Rehnquist noted that Bellotti held that "the First Amendment prohibits the government from directly suppressing the affirmative speech of corporations." Pacific Gas, 475 U.S. at 27 (Rehnquist, J., dissenting).
157. See Pacific Gas, 475 U.S. at 33 ("In extending positive free speech rights to corporations [in Bellotti], this court drew a distinction between the First Amendment rights of corporations and those of natural persons. It recognized that corporate free speech rights do not arise because corporations, like individuals, have any interest in self-expression." (citation omitted)).
158. See id. at 33-34 (Rehnquist, J., dissenting). Justice Rehnquist observes that: Extension of the individual freedom of conscience decisions to business corporations strains the rationale of those cases beyond the breaking point. To ascribe to such artificial entities an "intellect" or "mind" for freedom of conscience purposes is to confuse metaphor with reality . . . . The interest in remaining isolated from the expressive activity of others, and in declining to communicate at all, is for the most part divorced from this "broad public forum" purpose of the First Amendment.
Id.; see also Greene, supra note 58, at 482 (arguing that autonomy rights are personal and thus should not extend to corporate entities).
regulated monopoly,\textsuperscript{159} and thus had given up its autonomy interest to the authority that governed it. He therefore concluded that autonomy rights are "purely personal" extending only to individuals and perhaps to newspapers.\textsuperscript{160}

3. \textit{Nature of the Property Interest: Private or Public}

In resolving right not to speak cases, the Court also examines the nature of the property interest at stake in the litigation. In \textit{PruneYard}, for example, the nature of the property interest was a critical factor in the Court’s decision-making.\textsuperscript{161} In contrast to the family car in \textit{Wooley}, the Court found in \textit{PruneYard} that the shopping center was open to members of the public "to come and go as they please,"\textsuperscript{162} and had thus acquired a public character in contrast to the private nature of the Maynard’s personal property.\textsuperscript{163} In his concurrence, Justice Powell argued that merely because property in a given situation may be public in character, the property owner did not surrender his right to decline to foster speech with which he did not agree.\textsuperscript{164} In this sense, Powell found no meaningful distinction between the property interest advanced by the Maynards in their family car and that asserted by the shopping center owner.\textsuperscript{165} Powell argued that "'[a] system which secures the right to proselytize religious, political, and ideological causes must also guarantee

\textsuperscript{159} See \textit{Pacific Gas}, 475 U.S. at 34 (Rehnquist, J., dissenting) ("Any claim [Pacific Gas] may have had to a sphere of corporate autonomy was largely surrendered to extensive regulatory authority when it was granted legal monopoly status.").

\textsuperscript{160} Id. But see \textit{Hurley v. Irish-American Gay, Lesbian and Bisexual Group}, 515 U.S. 557, 574 (1995) (observing that "the rule's [that the speaker has the right to tailor the speech] benefit is not restricted to the press, being enjoyed by business corporations generally"); \textit{Pacific Gas}, 475 U.S. at 8 (noting that "[t]he identity of the speaker is not decisive in determining whether speech is protected. Corporations and other associations, like individuals, contribute to the 'discussion, debate, and the dissemination of information and ideas' that the First Amendment seeks to foster" (citations omitted)).

\textsuperscript{161} PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80-85 (1980).

\textsuperscript{162} Id. at 87.

\textsuperscript{163} See \textit{id.}; see also \textit{Pacific Gas}, 475 U.S. at 25 (Marshall, J., concurring) (finding that the incursion onto the PruneYard's property interest in that case was "slight" while the intrusion on Pacific Gas's property interest was greater). But see \textit{PruneYard}, 447 U.S. at 90 (Marshall, J., concurring) (arguing that because of the prominence of shopping mall culture in this country that this case is similar to others in which shopping malls were regarded as "effectively replacing the State with respect to such traditional First Amendment forums as streets, sidewalks, and parks"); \textit{Brennan, State Constitutions, supra note 7, at 496, n.45.}

\textsuperscript{164} See \textit{PruneYard}, 447 U.S. at 97 (Powell, J., concurring).

\textsuperscript{165} See \textit{id.} at 97-98 n.1 ("property [does not] lose its private character merely because the public is generally invited to use it for designated purposes" (citations omitted)).
the concomitant right to decline to foster such concepts’ . . . . This principle on its face protects a person who refuses to allow use of his property as a marketplace for the ideas of others.”

4. Editorial Autonomy: Media Cases

Three cases in the Supreme Court’s right not to speak jurisprudence concern the media and the constitutional validity of enforced “right of access” statutes under federal, state or local laws. In these cases, the Court has looked to factors distinct from those in other right not to speak cases. These include editorial autonomy, spectrum scarcity and monopoly concerns caused by spectrum scarcity. For example, in Red Lion the editorial autonomy argument failed when a radio broadcaster argued that broadcasters would be “irresistibly forced to self-censorship and their coverage of controversial public issues will be eliminated or at least rendered wholly ineffective” under the right of reply statute. Spectrum scarcity was an important factor in that case and led the Court to find the marketplace aspect more important than the autonomy right not to speak argument put forth by the radio, because there was a limited quantity of broadcasting frequencies, thus limiting speakers’ access to these media.

In Tornillo, concern for editorial autonomy prevailed over fears of monopoly in the Court’s decision finding an enforced right of

166. See id. (citing Wooley v. Maynard, 430 U.S. 705, 714 (1977)).
168. See Tornillo, 418 U.S. at 261 (White, J., concurring) (“[T]he First Amendment [never] permitted public officials to dictate to the press the contents of its news columns or the slant of its editorials.”).
169. Spectrum scarcity is a peculiar physical characteristic of radio that renders it more regulable because of the limited number of radio frequencies, while there are potentially unlimited newspaper and cable television outlets. See Red Lion, 395 U.S. at 398 (“The radio spectrum has become so congested that at times it has been necessary to suspend new applications.”).
170. See id. at 389.
171. Id. at 393.
172. See id. at 396-401.
173. See id. at 380 (“Th[e] mandate to the FCC to assure that broadcasters operate in the public interest is a broad one . . . .”).
access provision unconstitutional. In this case, the editorial autonomy argument prevailed as it had not in Red Lion. Evaluating a right of reply statute, the Court reasoned that if the statute were upheld, newspaper editors might “conclude that the safe course is to avoid controversy . . . Therefore . . . political and electoral coverage would be blunted or reduced.” Thus, the Court found that the Florida statute failed to “clear the barriers of the First Amendment because of its intrusion into the function of editors.” Editorial autonomy is analogous to individual autonomy in this context, in the sense that editorial decision-making must be protected under the First Amendment from government intrusion lest editorial discretion be chilled.

B. Government Access Statutes and the Conflict in Right Not to Speak Cases

This section examines the phenomenon of government access statutes in right not to speak cases. It observes that, with the exception of Barnette and Wooley, all the cases present instances of some form of access statute. These access statutes reflect a legislative deliberation by federal, state or local governments to act affirmatively to expand opportunities for free speech and debate. As such, they fulfill the positive marketplace of ideas mandate to open more speech forums, either for truth-seeking or for democratic self-government purposes.

These access statutes, this Note argues, lie at the root of the conflict between the two First Amendment principles discussed above: the marketplace of ideas and the autonomy principles. This conflict emerges from the tension between the government’s twin goals in these cases: to both respect negative autonomy principles and also to expand access to speech forums and facilitate robust debate through affirmative free speech marketplace principles. Accordingly, in requiring or allowing one entity to give access to a second one in the way these access provisions require, the statutes set up an opposition between the positive right to speak in one speaker, and the negative right not to speak in another. Thus, the

175. See id. at 261 (White, J., concurring) (“[T]his law runs afoul of the elementary First Amendment proposition that government may not force a newspaper to print copy which, in its journalistic discretion, it chooses to leave on the newsroom floor.”).
176. See supra note 167.
177. Tornillo, 418 U.S. at 257.
178. Id. at 258.
179. See supra Part I.
conflict between the two speech rights, one informed by positive marketplace principles, and the other by negative autonomy ones, is created by the access provisions present in each case.

Before examining this conflict in the law, a critical distinction, the one between government promotion of speech, on the one hand, and government participation in speech markets, on the other, should first be drawn.

1. The Distinction Between Government Promotion and Participation

The conflict that access statutes create between the autonomy principle and the marketplace of ideas is not problematic when the government is an active participant in the speech forum rather than a mere facilitator or promoter of speech. Whether the government acts as participant in a speech market or as a mere promoter is the essence of the distinction between cases like Wooley and Barnette, on the one hand, and the right not to speak cases that remain, on the other. The distinction between government “promotion” and “participation” is therefore critical to this analysis. While both Barnette and Wooley are decided on autonomy/self-expression principles, and uphold a right not to speak they are not access statute cases because the government has not opened more forums for the speech of other private parties. Rather, it has sought to use the property of private individuals to promulgate its own message. These cases therefore present examples of government participation: instances where the government seeks to enter the speech market by coercing unwilling private citizens to voice its sentiments.

Government promotion of speech, on the other hand, involves an effort on the part of state or local governments to create more opportunities for speech, make more speech forums available to more speakers and generally fulfill the positive marketplace of ideas mandate of more speech and robust public debate. Access provisions facilitate more speech in the marketplace of ideas by,

181. See Wooley v. Maynard, 430 U.S. 705, 715 (1977) (“New Hampshire’s statute in effect requires that [the plaintiffs] use their private property as a ‘mobile billboard’ for the State’s ideological message — or suffer a penalty . . . .”); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”).
for example, opening more speech forums or by legislating above the constitutional minimum prescribed by the federal First Amendment provision. Far from discouraging this type of activist legislation, many Justices have applauded it as a "healthy trend of affording state constitutional provisions a more expansive interpretation than [the Supreme] Court has given to the Federal Constitution." As argued below, government promotion of speech in the form of access statutes implicates the conflict in right not to speak cases after Barnette and Wooley.

(a) Barnette and Wooley: Government Participation in Speech Markets

In both Barnette and Wooley, only one private speaker's interest is at stake. In both cases, it is the government's message that is imposed on the reluctant speakers. Simply put, the government in these cases has dictated the required speech, thereby engaging in speech itself rather than merely promoting it. Accordingly, these cases involve no positive speech right, only the negative right not to speak of the private speaker. Thus, these two cases prove useful to this analysis only insofar as they highlight right not to speak autonomy and illustrate how important this "sphere of intellect and

182. See, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (bringing suit under a California constitutional provision protecting speech and petitioning); Tornillo, 418 U.S. at 241 (bringing suit under a Florida statute requiring newspapers to afford political candidates a right to reply to editorials attacking the candidate's personal character); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) (bringing suit under an FCC provision which required radio stations to provide "equal time" for response to personal attacks); see also Brennan, State Constitutions, supra note 7, at 495 ("Of late, however, more and more state courts are construing state constitutional counterparts of the Bill of Rights as guaranteeing citizens of their states even more protection than the federal provisions, even those identically phrased.").

183. PruneYard, 447 U.S. at 91 (Marshall, J., concurring); see also id. at 85 (noting that the State of California had an "interest in promoting more expansive rights of free speech and petition than conferred by the Federal Constitution"); Brennan, State Constitutions, supra note 7, at 491 ("The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed.").

184. See infra Part II.B.1.a.

185. Wooley, 430 U.S. at 713 (citing statement of Plaintiff George Maynard: "I refuse to be coerced by the State into advertising a slogan which I find morally, ethically, religiously and politically abhorrent.").

186. See PruneYard, 447 U.S. at 87 (interpreting Wooley as "a case in which the government itself prescribed the message [and] required it to be displayed openly on [Maynard]'s personal property").

187. For the purposes of this discussion, this analysis assumes that the government has no affirmative speech right in this context. A full discussion of whether, and when, the government does have this right is beyond the scope of this Note.
spirit" is within the Court’s First Amendment principle. They are analytically distinct from the remaining right not to speak cases and illustrate the difference between government participation in speech (Barnette and Wooley) and government promotion of speech markets and forums (those cases that remain).

(b) Government Access Statutes: Government Promotion of Speech

Each right not to speak case decided after Barnette and Wooley involves an instance of the federal, state or local government either requiring or allowing more speech forums to be opened through an access statute. Furthermore, in each case, the access statute triggers the cause of action.

In PruneYard,189 the access statute took the form of a California state constitutional provision providing that “[e]very person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of the right.”190 In Red Lion,191 the FCC imposed a fairness doctrine on radio broadcasters that required radio stations to send a “tape, transcript, or summary of the broadcast to [the opposing party] and [to] offer [him or her] reply time.”192 The Court called the FCC regulations “affirmative obligations,”193 and noted that broadcasters must operate in the public interest.194 In Tornillo, a Florida right of reply statute provided that “if a candidate for nomination or election is assailed regarding his personal character or official record by any newspaper, the candidate has a right to demand that the newspaper print, free of cost . . . any reply the candidate may make to the newspaper’s charges.”195 In the TBS cases, the access statute that sparked the conflict was the FCC’s must-carry provision requiring cable television operators to carry local broadcast stations on their cable networks.196 Similarly, in Abood the State of Michigan had enacted access legislation permitting unions and government employers to agree to “Agency Shop Clauses,” which exacted dues from mem-

189. 447 U.S. 74 (1980).
190. Id. at 79 n.2.
192. Id. at 372.
193. Id. at 378.
194. See id. at 379-80 (“The [FCC] is specifically directed to consider the demands of the public interest in the course of granting licenses and renewing them[,]”).
bers and which were in turn used to support a number of different activities. Likewise, in Pacific Gas the statute granting access was the California Public Utilities Commission’s order that Pacific Gas & Electric, a private utility, place the newsletter of a third party public interest group in its own billing envelopes. Last, in Hurley, GLIB sought access to Boston’s St. Patrick’s Day Parade under a Massachusetts public accommodations law.

These are examples of access statutes, by which the federal, state or local government goes beyond the First Amendment’s negative prohibition against encroachment on protected free speech rights, and acts affirmatively in expanding opportunities for speech rights, opening up more speech forums, and encouraging debate. Generally these statutes fulfill the positive marketplace of ideas mandate that debate be “uninhibited, robust, and wide-open.” These state statutes also reinforce the marketplace of ideas notion that more speech, never less, is a remedy for all free speech ills. Furthermore, these acts are taken in the name of affirmative marketplace values because access statutes always increase opportunities for public speech and debate.

While many scholars and courts applaud and encourage these statutes, many also have recognized the problematic aspects of access legislation in the context of a constitution made up of negative liberties. The infringement of negative autonomy rights in right not to speak cases, this Note argues, is a manifestation of this problematic aspect of a positive liberty approach to our negative Constitution. Before an examination of the conflict this approach causes in right not to speak cases, however, it is instructive to review the fundamental political theory underlying positive and negative liberty and its application in American legal discourse.

199. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 575 (1995). A public accommodations law like the one in Hurley has an equal protection aspect to it, when contrasted with a First Amendment provision or a right to reply statute; however, as the Court put it, “once the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts’ application of the statute had the effect of declaring the sponsors’ speech itself to be the public accommodation.” Id. at 573.
201. See supra notes 46-50 and accompanying text.
202. See supra note 194; see also Fiss, supra note 7, at 18-19 (noting that speech regulation that tries to “preserve the fullness of debate” should be allowed, since it seeks to “further the democratic values that underlie the First Amendment itself”).
203. See generally Brennan, State Constitutions, supra note 7.
204. See infra Part II.3.
2. Positive and Negative Liberty

The question of whether government access legislation is permissible under the First Amendment is essentially one of positive and negative liberty, a theory that recognizes that liberty has two fundamental aspects: "freedom to" and "freedom from." This dual aspect of liberty is central to the question of government power and the state's ability to compel individuals:

The first of these political senses of freedom or liberty[,] which I shall call the 'negative' sense, is involved in the answer to the question 'What is the area within which the subject—a person or group of persons—is or should be left to do or be what he is able to do or be without interference of other persons.' The second, which I shall call the positive sense, is involved in the answer to the question 'What, or who, is the source of control or interference that can determine someone to do, or be, this rather than that?'

American jurists have generally recognized that the Constitution is a source of negative and not positive liberties. The Supreme Court has also recognized that the Constitution envisioned by the Founders was one of non-interference, founded on principles of laissez-faire. Some legal scholars, however, have argued that the First Amendment in particular is a source of positive as well as negative liberties. These positive liberty interpretations of the First Amendment derive from the marketplace of ideas princ-

206. Id. at 121-22.
207. See, e.g., DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting) ("No one . . . has asked the Court to proclaim that, as a general matter, the Constitution safeguards positive as well as negative liberties . . . . The Court's baseline is the absence of positive rights in the Constitution.").
208. For example, the Court in Barnette has noted that,
   [t]hese principles [those embodied in the Bill of Rights] grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs.
209. See, e.g., Sunstein, supra note 7, at 47 (observing that "the First Amendment . . . is not entirely a negative right. It has positive dimensions as well. Those positive dimensions consist of a command to government to take steps to ensure that the system of free expression is not violated by legal rules giving too much authority over speech to private people."); Emerson, Affirmative Side, supra note 180 (arguing that "[t]raditionally, the first amendment, like other provisions of the Bill of Rights, has operated primarily as a negative force in maintaining the system of freedom of expression. It has served to prevent the government from prohibiting . . . speech or
ple. The First Amendment, in addition to prohibiting government from placing impermissible restraints on speech, also can be interpreted to require or enable the government to affirmatively create and maintain open speech forums. It therefore can be read to contain not only a negative prohibition against government interference, but also an affirmative mandate or capacity to establish "essential preconditions for collective self-government by making certain that all sides are presented to the public." Similarly, other jurists have concluded that the government's role in promoting this kind of free and open debate consists not merely in a negative "freedom from" interference, but also in affirmative "positive government acts designed to furnish the preconditions for autonomy." In this sense, the positive "more speech" mandate of the First Amendment is used as a sword to ensure that more speech is available in the marketplace of ideas. The other side of the coin, however, shields a speaker, enabling her to withhold her speech from the marketplace if she so desires. Government access statutes emerge, therefore, when the government, by either requiring or allowing a private actor to foster speech, seeks to create more speech forums in the name of the marketplace of ideas.

These government access statutes therefore emerge from affirmative "penumbras" in the ordinarily negative prohibition of the First Amendment. In this context the historical role of the govern-

210. See Fiss, supra note 7, at 18 (noting that "[t]he state, moreover, is honoring those claims [of citizen groups for an opportunity to participate in public debate] not because of their intrinsic value or to further self-expressive interest but only as a way of furthering the democratic process. The state is trying to protect the interest of the audience—the citizenry at large—in hearing a full and open debate on issues of public importance.").
211. See id.
212. Id.
213. SUNSTEIN, supra note 7, at 138.
214. See, e.g., Miami Herald Publ'g v. Tornillo, 418 U.S. 241, 251 (1974) ("Proponents of enforced access to the press take comfort from language in several of this Court's decisions which suggests that the First Amendment acts as a sword as well as a shield, that it imposes obligations on the owners of the press in addition to protecting the press from government regulation").
215. As an interesting semantic note in this context, it is instructive to observe that many state-level First Amendment provisions (examples of government access statutes) are positively worded, in contrast to the negative wording of the Federal Constitution's First Amendment prohibition against "abridging the freedom of speech." U.S. CONST. amend. I. See Emerson, Affirmative Side, supra note 180, at 797. See also, e.g., PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77 n.2 (1980) (bringing suit under a State of Michigan constitutional provision granting each citizen the right to "freely speak, write, and publish his or her sentiments on all subjects").
ment as a danger to be guarded against shifts: “the traditional framework rests upon the old liberal idea that the state is the natural enemy of freedom, [but] now we are being asked to imagine the state as the friend of freedom.”


Imagining the state as the “friend” of free speech, however, is not without attendant problems. As one scholar has noted, positive governmental intervention in the First Amendment has a “decided tendency” to aggravate “distortions in the system.” Foremost among these distortions is the creation of a conflict in right not to speak cases between positive speech rights, grounded in the marketplace of ideas, and negative ones, grounded in autonomy. As Justice Powell, concurring in PruneYard observed, “state action that transforms privately owned property into a forum for the expression of the public’s views could raise serious First Amendment questions.”

These kinds of “questions” arise because in many instances a private speaker who would rather remain silent, or not run the ventriloquism risk of being associated with speech she does not support, is burdened either by speech mistakenly imputed to her (the ventriloquism problem) or by a pressure to respond. In PruneYard, for example, the government access statute was a state First Amendment provision. The positive First Amendment right to speak was asserted in the name of the marketplace of ideas, which would encourage more speech in this case by allowing the students to petition and thus benefit the shoppers who heard the speech. The negative autonomy right, on the other hand, was that of the owner of the shopping center, protesting the use of his private property for promulgation of someone else’s message. His autonomy was threatened not only by the risk of the students’ message being misattributed to him, but also by the pressure to respond that being compelled to carry the message imposed. The state’s affirmative legislation, the “essential precondi-

216. Fiss, supra note 7, at 19.
217. Emerson, Affirmative Side, supra note 180, at 797.
219. See id. at 79-80 n.2 (“Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right.” (quoting CAL. CONST. art. I, § 2)).
220. See id. at 90-92 (Marshall, J., concurring).
221. See id. at 85-87.
tion for self-government,” therefore created the conflict between marketplace and autonomy principles that animates the case.\textsuperscript{222}

The same two First Amendment principles were in conflict in \textit{Pacific Gas} where PUC’s access requirement ordered Pacific Gas to place TURN’s newsletter in its billing envelopes.\textsuperscript{223} Here the positive marketplace interest in expanding speech forums pertained to PUC, and through it, to TURN.\textsuperscript{224} PUC had an interest in creating more speech in the marketplace, and TURN had an interest in promulgating its own message.\textsuperscript{225} Pacific Gas, relying on autonomy principles, brought suit to defend its negative autonomy right not to be associated with speech it found objectionable.\textsuperscript{226}

Last, in \textit{Hurley}, the marketplace of ideas and the autonomy interest conflicted in the context of a positive use of the Massachusetts public accommodations law.\textsuperscript{227} GLIB, which wanted to march as part of Boston’s St. Patrick’s Day Parade, asserted the marketplace interest in robust debate.\textsuperscript{228} On the other side, the Veteran’s Council that organized the parade asserted its autonomy interest in the right not to speak or be compelled to incorporate a message in its private parade with which it did not agree.\textsuperscript{229} The Court decided in favor of the Veteran’s Council on autonomy grounds, not-

\begin{itemize}
\item 222. See id. at 98 (Powell, J., concurring). Indeed, as Justice Powell phrased it, “even when no particular message is mandated by the State, First Amendment interests are affected by state action that forces a property owner to admit third-party speakers. In many situations, a right of access is no less intrusive than speech compelled by the State itself.” \textit{Id.}
\item 224. See \textit{id.} at 8 (noting that the Court had previously overturned statutes in which “the State sought to abridge speech that the First Amendment is designed to protect, and that such prohibitions limited the range of information and ideas to which the public is exposed”).
\item 225. See \textit{id.} at 6-8.
\item 226. See \textit{id.} at 11 (observing that “the State is not free either to restrict [Pacific Gas’] speech to certain topics or views or to force [it] to respond to views that others may hold” (citations omitted)).
\item 228. See \textit{Hurley}, 515 U.S. at 570 (noting that “[GLIB’s] participation as a unit in the parade was . . . expressive. GLIB was formed for the very purpose of marching in it . . . in order to celebrate its members’ identity as openly gay, lesbian, and bisexual descendants of the Irish immigrants, to show that there are such individuals in the community, and to support the like men and women who sought to march in the New York parade”).
\item 229. See \textit{id.} at 574 (observing that “[the Parade’s] claim to the benefit of this principle of autonomy to control one’s own speech is as sound as the South Boston parade is expressive”).
\end{itemize}
ing that "when dissemination of a view contrary to one's own is forced upon a speaker intimately connected with the communication advanced, the speaker's right to autonomy over the message is compromised." 230

This case, however, does not involve a government access statute like, for example, the state-level First Amendment provision in PruneYard; rather, the government access in this case was a Massachusetts public accommodations law, enacted after the Civil War to ensure equal access to public accommodations without regard to race. 231 Interestingly, the Hurley Court found that GLIB's use of the public accommodations law "had the effect of declaring the [Veteran Council's] speech itself to be the public accommodation." 232 The Court refused to accept this use of the public accommodations law as an access statute for First Amendment purposes. 233 It found instead that this use violated the Parade organizer's right not to speak, noting that "it boils down to the choice of a speaker not to propound a particular point of view." 234

Right not to speak cases thus illustrate the conflict between marketplace principles and autonomy ones occasioned by government access statutes. In order to strike an appropriate balance of positive and negative speech interests, the remaining part of this Note argues, as a threshold matter, that violation of the right not to speak triggers the First Amendment and that the right therefore deserves First Amendment protection. This Note concludes by suggesting methods to avoid some constitutional dangers that government access legislation can create, while still encouraging this kind of access-widening legislation to promote more speech in the marketplace of ideas.

III. FUTURE RESOLUTION OF RIGHT NOT TO SPEAK CASES

Because a conflict exists between affirmative and negative free speech rights in the context of government access statutes, suggestions for resolution must reconcile these interests and not infringe either the affirmative or negative free speech rights of any one

230. Id. at 576.
231. See id. at 571. The scope of the law was later broadened to prohibit discrimination on the basis of "race, color, religious creed, national origin, sex, sexual orientation . . . in the admission of any person to, or treatment in any place of public accommodation, resort or amusement." Id. at 572 (citing MASS. GEN. LAWS ch. 272, § 98).
232. Id. at 573.
233. See id.
234. Id. at 575.
speaker. This Part proposes three methods to reconcile both interests, not infringe on negative autonomy interests, and still allow government access provisions. Before examination of these methods, however, this section first seeks to dispel an objection and address a fundamental premise of right not to speak doctrine, namely, that compelled speech, by infringing on an autonomy right, triggers First Amendment protection.

A. Compelled Speech Always Triggers the First Amendment

When the government acts to broaden First Amendment liberties, it must be sensitive to the autonomy rights of those who wish not to speak or to have their property used to foster speech with which they do not agree. This Note has argued thus far that this conflict between positive and negative First Amendment values is especially apparent in the right not to speak area.235 This argument rests, however, on the premise that compelling a speaker to "mouth" words she does not agree with or with which she does not want to associate always triggers First Amendment protection. The argument that certain kinds of compelled speech do not trigger First Amendment protection, as long as certain conditions surrounding the speech are met, has been made by Abner S. Greene.236

Professor Greene's argument proceeds as follows: the Free Speech Clause of the First Amendment covers both speech and certain acts that are deemed "expressive."237 For an act to be expressive in this context, it must communicate to the reasonable observer some aspect of the speaker's "internal mental state, such as beliefs, attitudes, or convictions."238 Within this framework, the right not to speak is the right not to reveal one's "internal mental state,"239 or, put differently, the right not to "share with others what is 'on [one's] mind.'"240 Greene reasons, however, that not all acts that involve speech require expression of the speaker's mind; that is, a speaker could be compelled by law to speak in the same way that she is compelled to use a left turn signal when turning.241 Greene concludes that whether or not the speech triggers First Amendment protection depends on the perception of the rea-

235. See supra Part II.
236. See generally Greene, supra note 58.
237. Id. at 473.
238. Id.
239. Id.
240. Id. (citations omitted).
241. See id.
reasonably perceived as compelled by the observer, and (2) avenues of dissent are open to the speaker, Greene argues that the "speech" no longer deserves First Amendment protection because it is not expressive.\textsuperscript{245} In these cases, Greene suggests, the speaker is "merely following the law, which happened to involve a speech act."\textsuperscript{246} These speech acts do not trigger Free Speech Clause scrutiny since the Free Speech Clause protects only that speech or act which is expressive.\textsuperscript{247} Speech of this order is "externally motivated"\textsuperscript{248} and therefore does not impermissibly burden either the speaker's or the listener's autonomy interest in any way that the First Amendment protects. Greene finds instead that a speaker's right not to speak or to be compelled to merely "mouth" insincere words, can be protected by the speaker's autonomy interest outside of the First Amendment.\textsuperscript{249}

Contrary to Greene's arguments, however, this Note maintains that the First Amendment always protects an individual's autonomy interest. Requiring the utterance of specific speech, even if reasonably perceived as compelled, offends this autonomy interest.

\textsuperscript{242} Id. at 475.
\textsuperscript{243} See id. at 473-74.
\textsuperscript{244} See id. at 476.
\textsuperscript{245} See id. at 473-78.
\textsuperscript{246} Id. at 474.
\textsuperscript{247} See id. at 473 ("For an act to be considered expressive, and thus worthy of prima facie protection under the Free Speech Clause, that act must involve (or appear to a reasonable observer to involve) the communication of the speaker's internal mental state, such as her beliefs, attitudes, or convictions.").
\textsuperscript{248} Id. (citation omitted).
\textsuperscript{249} See id. at 480-81 (arguing that an autonomy/personhood argument in this context would be similar to the autonomy arguments recognized by such cases as \textit{Planned Parenthood v. Casey}, 510 U.S. 1309 (1994), \textit{Roe v. Wade}, 410 U.S. 113 (1973) and \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965)).
for a number of reasons. First, labeling a verbal or symbolic act as “action” rather than “speech” has traditionally been a way to allow regulation of speech since it simply re-defines the “speech” as action, and therefore beyond the scope of First Amendment protection.\footnote{250}{See, e.g., Cass R. Sunstein, \textit{Words, Conduct, Caste}, 60 U. CHI. L. REV. 795, 807-08 (1993) [hereinafter Sunstein, \textit{Words, Conduct, Caste}] (re-defining pornography as noncognitive speech because, \textit{inter alia}, “many forms of pornography are not an appeal to the exchange of ideas, political or otherwise; they operate as masturbatory aids and do not qualify for top-tier First Amendment protection under the prevailing theories”); Fiss, \textit{supra} note 7, at 13 (critiquing Professor MacKinnon’s argument against protecting pornography under the First Amendment because “pornography is not speech at all but rather action, thus denying it the privileged status accorded to speech as an especially protected liberty” (citing \textsc{Catherine A. MacKinnon}, \textit{Only Words} 29-41 (1993))).} Governmental prohibitions on action are, of course, much less closely scrutinized than those on speech.\footnote{251}{See, e.g., Fiss, \textit{supra} note 7, at 27-28 (noting that “the state acts in . . . a regulatory manner, issuing commands and prohibitions and using the power at its disposal to enforce those directives . . . . Most First Amendment scholars have focused on the regulatory function of the state and in that context have presented the Constitution as creating a shield around the street-corner speaker, protecting the individual citizen from the menacing arm of the policeman.”).} In this sense, re-classification of speech as action is roughly analogous to the argument that pornography is a non-cognitive form of speech, that it does not “appeal to deliberative capacities about public matters, or about matters at all,” and is therefore undeserving of the same protections afforded to speech and other expressive behavior by the First Amendment.\footnote{252}{Sunstein, \textit{Words, Conduct, Caste}, \textit{supra} note 250, at 807-08. But see David Cole, \textit{Playing by Pornography’s Rules: The Regulation of Sexual Expression}, 143 U. PA. L. REV. 111, 126-27 (1994) (“[T]he argument that sexual speech is ‘noncognitive’ because it is designed to produce a physical effect is predicated on an impoverished view of sexuality.”).} As one commentator viewing speech re-classification in a different context has noted, however, this method is not always useful to First Amendment analysis since it “masks all the hard judgments that the First Amendment requires.”\footnote{253}{Fiss, \textit{supra} note 7, at 13.} These kinds of “hard judgments” would include, for example, determining whether compelling speech adequately justifies invasion of a person’s autonomy interest. In addition, as a result of this line of reasoning, the government would also be tempted to frame more arguments about compelled speech in terms of legal speech acts not protected by the First Amendment.

Second, a problem arises from Greene’s assumption that, as a practical matter, a reasonable observer will always be able to judge whether the speech is compelled. For example, if the speech were
recorded and played back at a later date, the same observer might not have the same reaction to the speech. Thus, changing the original context of the speech vitiates the basic conditions set by Greene—that a reasonable observer would know the speech was compelled and that avenues for dissent were left open. Applying these conditions therefore requires all subsequent observers to make the same assumption of non-expression that the original observers did.\textsuperscript{254}

Third, compelled speech violates the speaker’s autonomy interest because it creates a “pressure to respond,” which is an unconstitutional burden on a protected speech interest grounded in the speaker’s autonomy. This pressure to respond occurs regardless of whether or not the speaker agrees with the speech. Furthermore, this violation of the speaker’s protected First Amendment interest is complete at the time the pressure is created; it therefore triggers First Amendment protection regardless of the speaker’s response to the compulsion to speak. In this scenario, “the right to control one’s own speech may be burdened impermissibly even when listeners will not assume that the messages expressed on private property are those of the owner [of the property].”\textsuperscript{255} This pressure to respond argument is grounded in the dual nature of the protection that the right not to speak affords: first, the right to disassociate oneself from speech with which one disagrees, and second, the right to control over the right to speak or not to speak at all.\textsuperscript{256} Thus, the right not to speak comprises both the autonomy right to resist compelled speech and also the absolute right to remain silent unless and until one chooses to break that silence.

Fourth, the autonomy right in the First Amendment should not only address the public’s perception of an individual’s speech. Rather, it should afford a basic measure of human dignity, which compulsion to parrot words violates. In this sense, infringement on the right not to speak, like violation of the right against self-incrim-

\begin{itemize}
\item \textsuperscript{254} Greene’s argument assumes that observers (even those at a considerable remove in time and space) will be able to discern whether the speech was compelled. As a practical matter, however, it seems highly improbable that all subsequent observers would be able to recognize the speech as such.
\item \textsuperscript{255} PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 100 (1980) (Powell, J., concurring) (noting that when a state law requires access to otherwise private property that the property owner may be “virtually compell[ed] . . . to respond”); see also Pacific Gas & Elec. Co. v. Public Utils. Comm’n, 475 U.S. 1, 15-16 (1986) (observing that Pacific Gas faced a pressure to respond because the access provision forced it “either to appear to agree with TURN’s views or to respond”).
\item \textsuperscript{256} See PruneYard, 447 U.S. at 100 (Powell, J., concurring).
\end{itemize}
ination in the Fifth Amendment context,\textsuperscript{257} takes away the voluntary aspects of speech and discounts, "the importance of . . . self-expressive uses of speech, independent of any expected communication to others, for self-fulfillment or self-realization."\textsuperscript{258} Thus, defining speech that is not self-expressive as outside of the First Amendment and placing the burden on the shoulders of the reasonable observer blurs the line between speech and action to a degree that jeopardizes many sincere speech interests that lie at the core of the autonomy principle of the First Amendment.

Further, drawing the line between expressive speech and speech acts is difficult. This difficulty arises, for example, in ascertaining when non-expressive compelled speech becomes expressive. Next, it can be similarly difficult to determine when the will of the individual succumbs to government coercion of her speech. Finally, if whether speech falls within the ambit of First Amendment protection is gauged by its effect on listeners and reasonable observers, then these listeners and observers are also affected by the coercive power of the government to oblige a person to "mouth" words whose truth she does not believe.

Last, it is instructive to contrast this "captive speaker" problem with that of the captive audience. A classic captive audience problem in First Amendment theory occurs when the government compels a listener to attend to government speech with no actual or constructive means of escape, such as averting one's eyes or stopping one's ears.\textsuperscript{259} This situation creates unconstitutional restraints on a listener's First Amendment rights.\textsuperscript{260}

On a final note, however, Justice Rehnquist's dissent in \textit{Wooley} suggests that Greene's argument may gain ground in the future:


\textsuperscript{258} \textit{Baker}, supra note 31, at 53.


\textsuperscript{260} Indeed, as one commentator has noted:

\[\text{compulsory listening is the counterpart of compulsory expression of a belief. The requirement that any person entertain a belief, opinion or idea, or be forced to listen to the government's version of events, is an affront to dignity and an invasion of autonomy . . . . Moreover, it is hardly an effective method for discovering the truth. . . . Indeed, compulsion to listen is the hallmark of a totalitarian society.}\]

Emerson, \textit{Affirmative Side}, supra note 180, at 833 (footnote omitted).
The State has not forced [the Maynards] to "say" anything; and it has not forced them to communicate ideas with nonverbal actions reasonably likened to "speech," . . . . The State has simply required that all noncommercial automobiles bear license tags with the state motto . . . ; they are simply required by the State, under its police power, to carry a state auto license tag for identification and registration purposes . . . . What the Court does not demonstrate is that there is any "speech" or "speaking" in the context of this case.261

Since compelled speech always triggers the First Amendment, the government must maintain respect for the speaker's autonomy interest even as it seeks to promote discourse in the marketplace.

**B. Future Resolution**

Because infringement of an individual's autonomy in the form of a right not to speak violation triggers First Amendment scrutiny, this section concludes by suggesting methods for resolution of right not to speak cases that reconcile the interests of both affirmative and negative speech in the context of government access legislation. One possible method to reconcile these interests is to alleviate the "pressure to respond" created by an infringement on individual autonomy. Another is to insure that when equality principles, inherent in the First Amendment,262 drive government access provisions, their content-neutrality is assured so that one speaker's viewpoint is not favored over another, as the First Amendment forbids. A third method is to limit autonomy rights to individuals, thereby preempting an autonomy argument in any setting where the speaker who claims an autonomy right not to speak is either a corporation or an association of speakers made up of different voices.

These arguments accept, as a threshold matter, that government access provisions benefit society.263 They provide this benefit in a number of ways—by promoting a more vigorous system of free speech; enabling more people to hear different and conflicting voices; increasing diversity and pluralism; and perhaps most importantly, facilitating more people to participate who, because of social, political or economic disadvantages, might otherwise have

---

262. See Fiss, supra note 7, at 9-18.
263. But see id. at 79-81 (noting that cases like Red Lion and Pacific Gas present a "marked hostility toward the state and a refusal to acknowledge the role the state can play in furthering freedom of speech").
remained silent.264 In sum, society accepts that the state “may have
to allocate public resources – hand out megaphones – to those
whose voices would not otherwise be heard in the public
square.”265

In this sense, these access provisions help the government fulfill
the dual role the First Amendment has been interpreted to allow,
namely, to both protect speech and to encourage it.266 Thus, ac-
cepting the premise that government access statutes provide signif-
ican t value to our system of government, this Part seeks to strike a
balance between affirmative and negative speech interests against
the backdrop of access legislation.

1. The Pressure to Respond

As noted earlier,267 the pressure to respond is a corollary to the
ventriloquism problem because it arises when a likelihood of misat-
tribution exists, regardless of the reasonable possibility of a dis-
claimer. In this sense, it is a constitutional violation that is
complete at the moment the pressure is created.268 Imagine, for
example, that a state passed a law requiring a store, hospital or
shopping center to supply a bulletin board on which all members of
the public could post signs. In this case, it would be reasonable for
one to assume that the private owner of the forum shared the views
expressed on the board.269 The owner of the forum is now faced
with pressure to respond. She has a choice. She can either act, for
example, by posting a sign expressly disavowing the speech, or she
can do nothing, thereby accepting the risk that others will mistake
the speech for her own. Should the owner choose the first option,
she has been forced to speak though she may have preferred to
remain silent; if she opts for the second, she has been forced to
voice someone else’s belief.270 In short, the mere fact that she is at
liberty to disavow the offending speech and the views it espouses

264. See, e.g., SUNSTEIN, supra note 7, at 138 (noting that among the “preconditions
for autonomy” is “provision of diverse opportunities” by the government); Pacific
ing) (“The right of access here constitutes an effort to facilitate and enlarge public
discussion; it therefore furthers rather than abridges First Amendment values.”).
265. Fiss, supra note 7, at 4.
the First Amendment is aimed at “protecting and furthering communications”).
267. See supra Part III.A.
268. See PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 98 (1980) (Powell, J.,
concurring).
269. See id. at 99.
270. See id.
comes after the pressure to respond has been created. The avenue of disavowal is therefore irrelevant to alleviating the pressure to respond because the pressure has been created at the moment the owner is faced with the choice.\textsuperscript{271} This pressure thus constitutes an impermissible infringement on the individual’s autonomy rights independent of whether the owner agrees with the speech in question.

The U.S. Supreme Court has commented on this pressure to respond in \textit{Pacific Gas} where it stated that “[\textit{Pacific Gas}] is still required to carry speech with which it disagree[s], and might well feel compelled to reply or limit its own speech in response to \textit{TURN’s}.”\textsuperscript{272} “This kind of forced response,” the Court noted in a different context, “is antithetical to the free discussion that the First Amendment seeks to foster.”\textsuperscript{273}

Thus, the pressure to respond is a significant intrusion on the right not to speak; it forces someone to speak when they would rather remain silent or run the risk of agreeing with the offending speech. Thus, the pressure to respond transforms an intrusion on the right not to speak into compelled speech to vocalize that with which one does not agree. Adequate protection of a right not to speak, therefore, should insure that a pressure to respond is not created.

Two safety mechanisms would allow both speakers and drafters of access legislation to alleviate this pressure. The first is an “anticipatory disclaimer,” which would ensure that the pressure to respond is never created. The second is to strengthen “opt-out” provisions. The second mechanism does not completely alleviate the pressure, but mitigates some of its deleterious effects.

To completely avoid creating a pressure to respond, a government access provision must place the burden of disclaimer on the positive marketplace speaker. Thus, the beneficiary of the provision would be required to announce that her ideas are unrelated to the owner or controller of the forum to which the statute has granted her access. Requiring such an “anticipatory disclaimer” would have the effect of alleviating the pressure to respond before it is created. This objective could be accomplished, for example,

\textsuperscript{271} See id. (citations omitted); see also Turner Broad. Sys. v. FCC, 512 U.S. 622, 654 (1994) (“[B]y affording mandatory access to speakers with which the newspaper disagreed, the law induced the newspaper to respond to the candidates’ replies when it might have preferred to remain silent.” (citations omitted)).


\textsuperscript{273} Id. at 2.
simply by requiring speakers who use the property (the positive marketplace speakers) whether private or semi-private, to voice or carry a disclaimer, stating that the viewpoints expressed in the speech are solely their own and should not be attributed to the property owners.

Against this argument, it can be asserted that when only private speakers and not government actors are involved, no protected speech interest is infringed, since the First Amendment applies only to government actors. As some have suggested, however, the degree to which a private owner is enabled by a government access statute to take over a historically governmental function, such as sponsoring a parade, or providing gas and electricity to consumers, is the same degree to which that private actor should be held to the same standards as the government. Therefore, the First Amendment autonomy infringement created by the pressure to respond would be actionable in the same way as if perpetrated by a "true" government actor, such as an elected or appointed government official.

The second method of attenuating the harmful effects of the pressure to respond is to strengthen the safety mechanisms by which unwilling speakers can "opt-out" by enforcing disclaimers in every context. These mechanisms do not avoid the problem of the pressure to respond entirely, but they do mitigate the effect of speech upon the owner or controller of a forum. This objective will be easier in some contexts than in others; much of the determination dovetails with the traditional and historical understanding of whether the forum is public or private.

For example, a parade often has a public character, though it can be privately sponsored. Accordingly, the pressure to respond is created in this situation because the majority of the public might assume that the marchers all share one point of view, or at least that they are sponsored by the city hosting the march, and therefore that the city itself favors one message over another. To alleviate this pressure, different marching groups could carry disclaimers on their banners. As the Court observed in Hurley, this method of disclaimer is impractical, but it does have the effect of alleviating

274. See Emerson, Affirmative Side, supra note 180, at 810.
275. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 560-61 (1995). In Hurley, the Parade had been sponsored by the City of Boston from at least 1876 through 1947, after which it was privately sponsored by the Veteran's Council but continued through 1992 to use the City's official seal as well as to receive direct funding from the City. See id.
the pressure to respond created by the assumption that some pa-
rades are sponsored by the government.\textsuperscript{276} 
This pressure is more easily alleviated in contexts involving pri-
ivate property, on which the public is allowed for a limited purpose. 
In this sense, one important factor is whether the forum is tradi-
tionally a private or public one. If private, then a disclaimer must 
be boldly stated so it is seen, heard, or understood by those who 
expect otherwise because of tradition or custom.

2. Government Access Statutes Must Insure Content-Neutrality

Government promotion of speech should support pluralism and 
diversity, exemplified by the marketplace of ideas paradigm as well 
as by government access provisions that enable these pluralistic 
values. The government’s opening of speech forums using access 
statutes relates to what many have called the “equality aspect” of 
the First Amendment.\textsuperscript{277} This equality component within First 
Amendment jurisprudence finds its source in Fourteenth Amend-
ment due process considerations.\textsuperscript{278} These egalitarian considera-
tions thus illustrate the impetus behind government creation of 
opportunity for speech because they present efforts to create 
equality in the marketplace of ideas by allowing those a voice who 
would otherwise be drowned out by the “louder voices” of those 
with greater economic, political, or social power.\textsuperscript{279}

As discussed earlier,\textsuperscript{280} the Court has noted an interesting dis-
tinction between government participation in speech markets and 
government promotion of speech. Indeed, the Court has at times 
stated that attempts at promotion of speech have the virtue of de-
creasing the risk of the government favoring or disfavoring a par-
ticular message because the state has dictated no specific message

\textsuperscript{276} See id. at 576-77.
\textsuperscript{277} See, e.g., Fiss, supra note 7, at 18 (suggesting that the equality aspect of the 
First Amendment is occasioned by concern with access of groups to speech forums: 
“the concern is with the claims of those groups [who might be injured by speech regu-
lation] to a full and equal opportunity to participate in public debate . . . . The state is 
trying to protect the interest of the audience—the citizenry at large—in hearing a full 
and open debate on issues of public importance.”); Baker, supra note 31, at 42-43 
(discussing liberty and equality in the First Amendment).
\textsuperscript{278} See, e.g., Fiss, supra note 7, at 9-26 (discussing the equality component of the 
First and Fourteenth Amendments).
\textsuperscript{279} See Fiss, supra note 7, at 12-13; Emerson, Affirmative Side, supra note 180, at 
802-03 (observing that the equality aspect of the First Amendment acts as a “guaran-
tee that some diversity will be achieved is built into the system”).
\textsuperscript{280} See supra Part II.B.1.
of its own. This situation contrasts with actual government participation in speech markets where the government has a vested interest in the content of the speech.

But while access statutes do have many of the virtues outlined above, they also can backfire in the sense that they can facilitate favoring one message over another. Avoidance of this kind of governmental discrimination against one speech in favor of another is a bedrock principle of First Amendment jurisprudence. For example, in Pacific Gas, the Court found that the access requirement requiring Pacific Gas to allow TURN to insert a newsletter in its billing statement constituted an impermissible infringement on First Amendment values because it discriminated on the basis of content. Here the Court observed that Pacific Gas had “the right to be free from government restrictions that abridge its own rights in order to 'enhance the relative voice' of its opponents.”

The Court concluded that access to the billing envelopes was content-based, and therefore forbidden, because access was limited to only those who opposed Pacific Gas.

Similarly, in Hurley the Court disagreed with the state court's use of the public accommodations law. Here, the Court noted that the public accommodations law had been rendered an access statute. The Court rejected this use of the statute when discussing the equality aspect of the First Amendment, which is ironic, because the public accommodations law itself had its roots in equal

---

281. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980) (distinguishing Wooley v. Maynard, 430 U.S. 705 (1977), on the ground, among others, that "no specific message is dictated by the State to be displayed on appellants' property. There consequently is no danger of governmental discrimination for or against a particular message.").


283. See supra notes 263-265 and accompanying text.


285. See id. at 13-16.

286. Id. at 14 (citing Buckley v. Valeo, 424 U.S. 1, 49 & n.55 (1976)).

287. See id. at 13.

288. See id. The Court here used Miami Herald Publ'g Co. v. Tornillo, 418 U.S. 241 (1974), to illustrate its point, noting that in that case the right of reply was a content-based penalty. See Pacific Gas, 475 U.S. at 13.

289. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U.S. 557, 573 (1995) (“[O]nce the expressive character of both the parade and the marching GLIB contingent is understood, it becomes apparent that the state courts' application of the statute had the effect of declaring the [Parade's] speech itself to be the public accommodation.”).

290. See id. at 572-73.
protection, Reconstruction-type amendments. The Court noted that the effect of the public accommodation law in this instance was to discriminate against certain kinds of speech, i.e., content-based speech discrimination, because “a speaker who takes to the street corner to express his views . . . should be free from interference by the State based on the content of what he says.” Indeed, as the Court concluded, “[t]he very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression.”

Therefore, when government access provisions are used to shape the orthodoxy of a message, they can run afoul of the First Amendment’s mandate to maintain content-neutrality and thus risk favoring one party’s message over another’s. They can therefore shape the content of a message in a way that is antithetical to the First Amendment. As the Court in Hurley observed, “[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”

Access statutes and state free speech provisions, therefore, require exercise of great discretion lest they appear to favor one point of view over another, as in Pacific Gas or Hurley. This goal is accomplished in part by placing government access provisions under heightened scrutiny, and by awareness, under traditional First Amendment doctrine, that they are susceptible to this danger. Care should also be taken, in the right not to speak context, to protect the autonomy interests of individual speakers. By protecting and strengthening this autonomy interest, government access provisions can avoid the danger of favoring one speaker’s message over that of another, as the First Amendment forbids.

291. See id. at 571-73.
292. Id. at 579 (citing Police Dep’t v. Mosley, 408 U.S. 92, 95 (1972)).
293. Id. (“While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government.”).
3. Autonomy Rights Must Pertain to Individuals

Commentators and jurists have argued that autonomy rights should not extend to corporations. Many problems that arise when government access statutes infringe on autonomy rights can be resolved if autonomy rights, here in the form of the right not to speak, are limited to individuals. Under this scheme, autonomy rights would be inapplicable to corporate speakers, as well as to those speakers that, while not corporate in nature, are composed of different viewpoints. Such a speaker might, for example, be a parade with different ideological or political contingents in it.

Justice Rehnquist's dissent in Pacific Gas argues that negative First Amendment rights should not be available to corporations. His reasoning grows from the notion that corporations only have positive First Amendment rights because of the listeners' interest in receiving diverse information in the marketplace of ideas. Therefore, negative speech rights should not extend to corporations because they have no individual speaker's interest in autonomy or self-expression.

Autonomy rights, however, could also be limited to only those individuals who have a speaker's personal autonomy interest in self-expression and self-fulfillment, and therefore in a right not to speak. Under this scheme of a negative First Amendment principle, Hurley was decided incorrectly because it allowed the autonomy interest of the Parade organizers to exclude GLIB's message from the St. Patrick's Day Parade. As the Court reasoned, "a narrow, succinctly articulable message is not a condition of constitutional protection . . . . [A] private speaker does not forfeit constitutional protection simply by combining multifarious voices, or by failing to edit themes to isolate an exact message as the exclusive subject matter of the speech." A "succinct" message certainly should not be a precondition of constitutional protection for

296. See, e.g., Pacific Gas & Elec. Co. v. Public Utils. Comm'n, 475 U.S. 1, 26 (1986) (Rehnquist, J., dissenting) ("I [do not] believe that negative free speech rights, applicable to individuals and perhaps the print media, should be extended to corporations generally."); Greene, supra note 58, at 482 (arguing that the autonomy right should not extend to corporations or corporate speech); Baker, supra note 31, at 52 (arguing that if the speech of a corporation did not represent the views of any "relevant people" in the corporation that the liberty theory of speech, in opposition to the marketplace one, would not protect the speech).
298. See id; see also supra notes 43-46 and accompanying text.
this kind of "associated" speech in its affirmative aspect; a positive right should be granted to a parade made up of different voices so that it can freely speak, or march, in public with a message, or messages, of its choosing.

Granting a parade the autonomy right to exclude other voices because of a personal right not to speak, however, quickly becomes a more suspect endeavor because it undermines the fundamental purpose of an access statute or free speech provision: to enhance and expand opportunities for speech. In Hurley, by contrast, the government access legislation resulted in exclusion of the very kind of diverse speech that these statutes were enacted to promote. Accordingly, it can be said that government access legislation runs the danger, whenever corporate or "associated" speech is present, of allowing the right not to speak to become a tool for exclusion of speech such associations find disagreeable. Such content-based regulation of expression is, of course, antithetical to the First Amendment. A solution, therefore, is to limit the autonomy right not to speak to individual speakers only.

Accordingly, a stricter definition of an autonomy right should be personal to individuals. First, only individuals possess a "sphere of intellect and spirit" that autonomy and negative free speech rights protect. Second, when governments enact access legislation, they should do so to create either balance or diversity in speech forums, not to enable private organizations with often greater economic or political power in the marketplace to exclude speech they find offensive: "governmental intervention for affirmative purposes must be directed toward expanding, not contracting, the range of fact and opinion available to the community." The goal of preserving an autonomy right from official control is to ensure each citizen's ability to achieve the kind of self-realization and self-expression that champions of autonomy rights find necessary to human intellectual and emotional fulfillment. Therefore, both corporations and "speech" that is composed of a multitude of voices, yet has no unified point of view, should have no right to this kind of autonomy interest.

Under this analysis, only those autonomy rights that pertain to individuals, or to groups of individuals where there is an articulable message or messages that all members of the organization share, would stand. In this context, the media cases, Red Lion, 303

---

302. Emerson, Affirmative Side, supra note 180, at 804.
Tornillo, TBS I, and TBS II would stand as decided, since the media autonomy right has traditionally been seen as equivalent to a personal one. Abood would also stand under this scheme, because the Court in that case upheld the individual autonomy right of the union members to not be compelled to subsidize speech they found objectionable. PruneYard, however, would be reversed because in that case the autonomy right not to speak was that of the shopping center's owner, who is an individual with an articulable point of view. Pacific Gas would also be reversed, in accordance with Justice Rehnquist's dissent. Finally, in Hurley, the parade organizers would not have an autonomy right since they do not have a single unified message.

These three methods, therefore, confront and resolve some problems that result from the conflict between positive and negative First Amendment rights in the context of government access provisions. They therefore seek to shape and limit government access provisions and right not to speak autonomy so as to insure that the interests of all speakers in a speech market are protected.

307. See, e.g., Tornillo, 418 U.S. at 258 (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment.”).
308. See Abood v. Detroit Bd. of Educ., 431 U.S. 209, 235-36 (1977) (“[We hold] that the Constitution requires only that such expenditures [by a union to fund expression] be financed from charges, dues or assessments paid by employees who do not object to advancing those ideas and who are not coerced into doing so against their will by the threat of loss of governmental employment.”).
309. See Pacific Gas, 475 U.S. at 33 (Rehnquist, J., dissenting) (“To ascribe to such artificial entities an 'intellect' or 'mind' for freedom of conscience purposes is to confuse metaphor with reality.”).
310. But see Hurley v. Irish-American Gay, Lesbian and Bisexual Group, 515 U. S. 557, 574 (1995). Here the Court noted that:

[The Parade's] claim to the benefit of this principle of autonomy to control one's own speech is . . . sound . . . . Rather like a composer, the Council selects the expressive units of the parade from potential participants, and though the score may not produce a particularized message, each contingent's expression in the Council's eyes comports with what merits celebration on that day.

Id.
CONCLUSION

The dual principles of promoting the marketplace of ideas and protecting individual autonomy lie at the core of the First Amendment. When the government assumes an affirmative role by opening opportunities for public speech, it places individuals' negative liberties, such as the right not to speak, at risk. This conflict cannot be avoided by analyzing compelled speech outside of the First Amendment; the autonomy promised by the Bill of Rights and repeatedly affirmed by Supreme Court jurisprudence protects the right not to speak. Scholars, jurists, and practitioners therefore should pay close attention to the right not to speak when the government pursues affirmative policies of widening access. In so doing, the government may not ignore the negative speech rights of private citizens.
THE CRIMINALIZATION OF CHILD WELFARE IN NEW YORK CITY: SPARING THE CHILD OR SPOILING THE FAMILY?

Alison B. Vreeland*

INTRODUCTION

Recently, in New York City, increasing numbers of parents have been charged with "[e]ndangering the welfare of a child" and prosecuted in criminal court for acts of child neglect that were traditionally handled through child protective services and the family court. Historically, the police have arrested and prosecuted parents and custodians for child abuse, including sexual abuse. But in cases of suspected neglect, the Administration for Children's Services ("ACS") would respond to complaints of child neglect reported to the State Central Registry. The police are acting under a directive by New York City Police Commissioner Howard Safir to "take action . . . when [they] see children in dangerous situations." Opponents assert that this recent trend in criminal prosecutions is an expansion of the "mandatory arrest policy" used in cases of domestic violence.5

* J.D. Candidate, Fordham University, 2000; B.A., Middlebury College, 1995. Associate Notes and Articles Editor, Fordham Urban Law Journal. This Note is dedicated to my parents for all of their love and support, and their inspiring vision of family. I would like to thank the attorneys at Lansner & Kubitschek, who first introduced me to this exciting topic. I am forever indebted to Professor Ann Moynihan for her mentoring and thoughtful advising on this project.

3. The State Central Registry is the intake center in Albany that receives reports and complaints from all over the state and refers the cases to local agencies to investigate. All complaints are accepted if the allegations could constitute maltreatment. See N.Y. SOC. SERV. LAW § 422(2)(a) (McKinney 1992).
5. In 1994, the New York State Legislature amended section 140.10 of the New York Criminal Procedure Law to address the failure of police to arrest an offending party in cases of domestic violence unless the victim chooses to press charges. See N.Y. CRIM. PROC. LAW § 140.10(4)(c) (McKinney 1998). The new mandatory arrest policy requires police to arrest the offending party, rather than the previous practice of having them take a walk to cool off. See id.
There is a growing debate over this criminalization of child welfare. Increasing numbers of arrests for child endangerment indicate that the police are more inclined to automatically arrest parents suspected of neglect. Often the perpetrators arrested are parents who, because of poverty or poor judgment, have committed comparatively minor offenses such as leaving children unsupervised, at home or on the street. The debate over the police policy centers on whether or not arrest and criminal prosecution are the most appropriate responses to child neglect.

This new policy is, in part, a response to tragic, high-profiled child abuse cases where a child reported to the child welfare system died at the hands of her parents. In an effort to avoid other unnecessary deaths, Mayor Rudolph Giuliani has reinstated the long-abandoned practice of using police power to arrest and prosecute parents when there is probable cause to believe a parent has endangered the welfare of a child. As a result, the criminal court system is confronting more and more of these cases.

The criminalization of child welfare law is having a dramatic effect on the rights of children within the family. This Note addresses the debate over whether increased police involvement in, and criminal prosecution of, acts of child neglect adequately preserves the rights of the child. Part I discusses the criminalization trend and the fundamental differences between how the family court and the criminal court handle neglect. Part II presents the

---

6. In 1990, there were 303 total arrests for the primary charge of “Endangering the Welfare of a Child.” In 1998, there were 1111. See app. infra, tbl.5.
7. See Rachel L. Swarns, In a Policy Shift, More Parents Are Arrested for Child Neglect, N.Y. TIMES, Oct. 25, 1997, at A1 (discussing instances where mothers who had left their children unattended were arrested for child endangerment).
8. See Martin G. Karopkin, Child Abuse and Neglect: New Role for Criminal Court, N.Y. L.J., Feb. 28, 1996, at 1 (discussing how “[a] few highly publicized events have worked to change” the approach to child neglect that preferred the family court over the criminal court). One such case was that of Elisa Isquierdo. In November 1995, six-year-old Elisa died at the hands of her crack-addicted mother after months of abuse and torture. Despite countless reports by the child’s teachers, neighbors and friends, New York City child welfare workers failed to remove the child from her mother. See Mona Charen, With Kids, the Cautious Seldom Err, DENVER ROCKY MOUNTAIN NEWS, May 22, 1997, at 67A.
9. See infra Part I.B.
10. See Karopkin, supra note 8. Judge Karopkin asserts that a few highly publicized incidents of child abuse have led to fundamental changes in the way child welfare cases are handled by police and prosecutors. See id. “These changes have brought a steady stream of criminal cases where the injuries are less severe or where there is no injury and the charges involve allegations of neglect.” Id. Statistics support Judge Karopkin’s observation. Arrests for the criminal charge of “endangering the welfare of a child” have more than tripled since 1990. See app. infra, tbl.5.
arguments for and against increased police involvement and criminal prosecution of neglectful parents. It examines the child's liberty interest in the parent-child relationship, a right that is implicated when a child is removed from her parents. Part II further compares how this constitutional right is affected in family court neglect proceedings and in criminal court child endangerment prosecutions. Part III argues that the criminalization of child welfare does not reflect the status that children have achieved as rights-bearers, in that the child has no voice and no right to self-determination in the parent’s prosecution. Part III furthers argues that this criminalization trend poses a threat to any interest of the child that is independent of that of the State and that of the parent. The child’s rights are presumed protected by either the parent or the State, although her true interests often do not fully align with either, leaving her voiceless in child endangerment prosecutions.

This Note concludes that the criminal justice system, by focusing on the parent’s claims against the State and the State’s interest in child protection, is inadequate in accommodating the constitutional rights of the child to self-determination. Therefore, child neglect is best adjudicated in family court under the New York Family Court Act (“FCA”), which provides the child with legal representation and thereby protects the child’s right to self-determination as well as her liberty interest in the parent-child relationship.

I. THE CRIMINALIZATION TREND

A. How Neglect Cases Are Handled Through Child Protective Services and the Family Court

While child abuse and neglect have existed throughout history, it has only been in the last fifty years that public awareness of this problem has grown, prompting State intervention on behalf of


children. Today every state has established child protective services agencies to receive reports of abuse and neglect.

In New York, the Child Protective Services Act of 1973 regulates the provision of protective services to abused and maltreated children. In 1998, 57,842 cases of child abuse and neglect were reported in New York State. These cases come to the state's attention through the New York State Telephone Hotline ("Hotline"). These reports are received by the Statewide Central Registry of Child Abuse and Maltreatment ("State Central Registry"). Anyone can call in a report to the Hotline. The caller must simply have "reasonable cause" to make a report of suspected child abuse or maltreatment.

Under New York law, certain individuals are mandated to report any suspicion of child abuse or neglect. These "mandated reporters" include school officials, physicians and police officers. Once a report is received, a state worker at the State Central Registry makes a preliminary determination of the validity of the allegations. If it is determined that the allegations received by the Hotline constitute a report of abuse or maltreatment, the state becomes obligated to report the matter to a local agency.

The standard for determining the validity of an allegation is whether the allegation "could reasonably constitute a report of

---

15. See id. at 2070-78.
17. See id.
18. See app. infra, tbl.1.
19. The term "maltreatment" is broader than "neglect" as defined in section 1012 of the FCA because it covers children in foster care and state run institutions. See N.Y. Soc. Serv. Law § 412(2).
20. See id. § 414.
21. See id. § 413(1). Section 413(1) of the New York Social Services Law provides that mandated reporters must:
   report or cause a report to be made in accordance with this title when they
   have reasonable cause to suspect that a child coming before them in their
   professional or official capacity is an abused or maltreated child, or when
   they have reasonable cause to suspect that a child is an abused or maltreated
   child where the parent, guardian, custodian or other person legally responsi-
   ble for such child comes before them in their professional or official capacity
   and states from personal knowledge facts, conditions or circumstances
   which, if correct, would render the child an abused or maltreated child . . . .

Id.
22. See id. (containing an exhaustive list of mandated reporters).
23. See id. § 422(2)(a).
child abuse or maltreatment.”25 If this standard is met, the case is then referred to local child protection agencies.26 In New York City, the borough offices of ACS receive these reports.27 Within twenty-four hours of receiving a report, ACS must commence an investigation.28 This investigation includes conducting a home visit with the family, evaluating the environment of the child named in the report and any other children living there, assessing the risk to the children, as well as determining the nature, extent and cause of any condition enumerated in the report.29 The caseworker typically interviews the child or children, determines their names and ages and evaluates their condition.30 The case worker must then “forthwith notify the subjects of the report and other persons named in the report in writing of the existence of the report and their respective rights . . . .”31 Part of the decision-making process includes deciding whether the facts alleged are sufficient to establish neglect.32

Under existing guidelines, ACS must make a preliminary report within seven days.33 ACS must complete its investigation and determine whether the report is “indicated” or “unfounded” within sixty days.34 An “indicated” report means that some credible evidence of maltreatment exists, whereas an “unfounded” report means there is no credible evidence to support it.35 On average, the number of indicated reports is less than half of the number of total reports.36 When a report of suspected child neglect is indicated by ACS, the Agency assesses what, if any, preventive services might be put in place for the family.37 Before a petition is filed against the parent in family court, ACS must have conducted an

25. N.Y. SOC. SERV. LAW § 422(2)(a).
26. See id. § 422(2)(b).
27. See id.
28. See id. § 424(6).
29. See id.
30. See id.
31. Id.
32. See id. § 422(2)(b).
33. See id. § 424(3).
34. Id. § 424(7).
35. See id. § 412(11), (12).
36. For example, in 1997, 40% of all mandated reports were indicated. See app. infra, tbl.3.
37. See N.Y. SOC. SERV. LAW § 384-b(1)(a)(iii) (“[T]he state’s first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home.”).
investigation, assessed the threat to the child and attempted to provide the family with assistance.\textsuperscript{38}

If the Agency determines that the child faces imminent risk, a neglect petition can be filed in family court or the child may be removed under emergency conditions.\textsuperscript{39} Article 10 petitions are filed in only a fraction of the total cases.\textsuperscript{40} When a child is removed under emergency conditions, the child is taken into the protective custody of the Commissioner of the Administration for Children's Services, and ACS must file a petition in family court.\textsuperscript{41} The parents would then be served with a summons and a copy of the petition containing the allegations against them.\textsuperscript{42} Under these circumstances, the parent is entitled to an immediate hearing to be held within three days at which the court will assess if there is imminent risk to the child.\textsuperscript{43}

The court later holds a "fact-finding hearing" to decide whether the child has been abused or neglected.\textsuperscript{44} At this hearing, ACS may present evidence and witness testimony in support of the allegations in the petition.\textsuperscript{45} If the court finds that the allegations have not been proven, the petition is dismissed and the child is returned home.\textsuperscript{46} If the court "makes a finding," that is, finds that the allegations are true and that the child has been abused or neglected, a dispositional hearing is held to determine what is in the best inter-

\textsuperscript{38} The assessment of conduct employs the standard established by the FCA and requires the following inquiry: does the parent fail to exercise "a minimum degree of care" so that the child's physical, mental or emotional condition has been impaired or is in imminent danger of being impaired? N.Y. Fam. Ct. Act § 1012(f)(i) (McKinney 1999).

\textsuperscript{39} ACS may remove the child from the home prior to filing the petition if the child is in "imminent danger." Id. § 1024.

\textsuperscript{40} In 1998, 57,842 abuse and neglect reports came in, but only 11,000 petitions were filed. See app. infra, tbls.1, 4.

\textsuperscript{41} See N.Y. Soc. Serv. Law § 424(10).

\textsuperscript{42} See N.Y. Fam. Ct. Act § 1036.

\textsuperscript{43} "Imminent risk" is the statutory language and standard by which the family court judge is to assess the removal of a child. See id. § 1027(b)(i). Under section 1027(a) of the FCA, when a child has been removed without a court order, a hearing must be held to determine if the child should remain in the custody of ACS pending the fact-finding trial. If the court finds that removal is necessary to avoid imminent risk to the child's life or health, the court should continue the removal. See id. § 1027(b)(i). The respondent parent can then apply for the return of the child. See id. § 1028(a). The court shall grant the application unless it finds the return presents an imminent risk to the child's life or health. See id. § 1027(b)(i).

\textsuperscript{44} Id. § 1044.

\textsuperscript{45} See id. § 1046.

\textsuperscript{46} See id. § 1051.
ests of the child. If the child has not already been removed from the home before the fact-finding, once a finding has been made, the court can remove the child from the home and "remand" her to the custody of ACS. Following a finding, the court will order an investigation of the child's home and family by ACS. The court will hear the results of this investigation at the dispositional hearing and make a determination about the child's disposition based on the child's best interests. Possible dispositions may include returning the child to the home on certain conditions or placing the child in foster care while services are provided to the parents.

This traditional approach to child neglect has recently changed in New York City.

B. Current Police Policy and the Trend Towards Criminalization

Prior to 1977, New York family courts had exclusive jurisdiction over acts between family members that would constitute crimes if they were between strangers. In 1977, the New York Legislature amended the Criminal Procedure Law to give the criminal court concurrent original jurisdiction over these acts. Once a case was brought in one of these two courts, the complainant had three days in which to decide whether to transfer the case to the other court.

47. Id. §§ 1047(a), 1052. Judge Cardozo first enunciated the "best interests of the child" standard. See Harvey R. Sorkow, Best Interests Of The Child: By Whose Definition?, 18 PEPP. L. REV. 383, 384 n.75 (1991) (citing LeAnn Larson LaFave, Origins and Evolution of the "Best Interest of the Child" Standard, 34 SAN DIEGO L. REV. 459, 467 (1989)). While the standard is not clearly defined, it typically requires an examination of factors relating to a child's safety, happiness and physical, mental and moral welfare. See id. at 384 (citing Fantony v. Fantony, 122 A.2d 593, 598 (N.J. 1956)).

48. See N.Y. FAM. CT. ACT § 1052(a)(3).

49. See id. § 1034 (authorizing the family court judge to order the child protective agency to conduct a child protective investigation in any proceeding under Article 10).

50. See id. § 623 ("[A] dispositional hearing' means a hearing to determine what order of disposition should be made in accordance with the best interest of the child.").

51. A child may be placed in foster care for a period of up to one year. This placement can be extended if a petition is filed by the foster care agency, and a hearing is held in which the court decides whether or not continued placement is necessary. See id. § 1055.

52. See id. § 1057; see also COMMITTEE ON CHILDREN AND THE LAW, ASS'N B. N.Y.C., INTRODUCTORY GUIDE TO THE NEW YORK CITY FAMILY COURT 27-30 (1997).


54. See id. (discussing the amendment to section 530.11 of the New York Criminal Procedure Law).

55. See id.
The case could not be heard by both courts simultaneously.\textsuperscript{56} If the complainant chose to transfer the case to family court, the district attorney could not prosecute.\textsuperscript{57} However, this policy was not well-received, and in 1994, the Family Protection and Domestic Violence Intervention Act was passed.\textsuperscript{58} This Act provided that incidents involving disorderly conduct, harassment (first and second degree), aggravated harassment in the second degree, menacing (second and third degree), reckless endangerment, attempted assault and assault (second and third degree) between family members could not be prosecuted in both courts simultaneously.\textsuperscript{59} The stated purpose of this amendment was “to give greater protection and choice to the victims of domestic abuse, not less.”\textsuperscript{60} The amendment did mark a new development in domestic violence law by enabling the district attorney to pursue a criminal case even over the direct wishes of the complainant that the matter be brought in family court.\textsuperscript{61}

In 1994, the New York State Legislature amended the Criminal Procedure Law to address the common police practice of failing to arrest the offending party in cases of domestic violence.\textsuperscript{62} The new policy is referred to as a “mandatory arrest” policy, which requires the police to arrest an offending party rather than permit him to “cool off.”\textsuperscript{63} The new policy is intended to provide endangered women with a reliable source of assistance.\textsuperscript{64} The police no longer may ask the complainant whether she wishes to press charges in order to execute an arrest.\textsuperscript{65}

\textsuperscript{56} See id.
\textsuperscript{58} See 1994 N.Y. Laws ch. 222.
\textsuperscript{59} See Criminal Court Loses Jurisdiction, supra note 53, at 25.
\textsuperscript{60} Id.
\textsuperscript{61} See id.

\textsuperscript{62} See N.Y. CRIM. PROC. LAW § 140.10(4)(a) (McKinney 1999) (mandating police officers to arrest, not attempt to reconcile the parties or mediate, where an officer has reasonable cause to believe that a felony has been committed by one family member against another).

\textsuperscript{63} Section 140.10(4)(c) of the New York Criminal Procedure Law provides that where an officer has reasonable cause to believe that a misdemeanor constituting a family offense has occurred, the officer shall arrest the offender, and “shall not attempt to reconcile the parties or mediate ....” N.Y. CRIM. PROC. LAW § 140.10(4)(c).

\textsuperscript{64} See Jill M. Zuccardy, Brooklyn B. Ass’n Volunteer Law. Project, Overlapping Jurisdiction and Orders of Protection: Criminal, Civil and Family Court (1997).

\textsuperscript{65} See N.Y. CRIM. PROC. LAW § 140.10(4)(c).
In the last two to three years, the New York Police Department has played a more active role in child welfare. As a result, more and more parents are being arrested and charged with the misdemeanor crime of “endangering the welfare of a child” for acts that constitute child neglect.66 This Note addresses only the arrest and criminal prosecution of parents for acts of neglect that do not include abuse or excessive corporal punishment. The offending behavior in many child endangerment cases includes, for example, leaving a child alone, failing to ensure school attendance or poor house-keeping.67 There is a growing sentiment that the police have actually expanded the “must arrest” policy used in domestic violence cases to child welfare matters as well.68 Regardless of whether this sentiment is true, the criminal court system has seen more cases of child neglect in recent years than it has in the past.69 Statistics show that while arrests for acts constituting criminal child endangerment have nearly tripled in the last eight years, the number of petitions filed in family court for neglect have not similarly increased but have instead decreased.70 This outcome may indicate that the increased number of arrests are not due to increased neglectful behavior, but rather increased enforcement of the criminal statute and police arrests.

In People v. Smith,71 a mother of four was arrested in her home and charged with “endangering the welfare of a child” for leaving her four children, ages five, seven, twelve and thirteen, home alone for two hours.72 In the decision, the judge noted that “there are an increasing number of these so called ‘home alone cases’ appearing

---

66. See app. infra, tbl.5. The number of arrests where “endangering the welfare of a child” was the primary charge has nearly quadrupled since 1990. See id.

67. See infra notes 71-87 and accompanying text.

68. In her testimony before the New York State Assembly on December 16, 1997, Jill Zuccardy argued against “the New York Police Department policy of using ‘must arrest’ as a justification for acting independently of ACS in cases of alleged child neglect . . . .” Public Hearing, infra note 134.

69. See Karopkin, supra note 8. In his article, Judge Karopkin discusses how the Criminal Court generally only saw severe cases involving child or sexual abuse, but that this practice has changed because a few highly publicized cases of abuse have brought attention to the issue. See id. Now the Criminal Court sees more cases where the injuries are less severe, or the allegations are of neglect alone. See id.

70. See app. infra, tbls.4, 5.


72. See id. at 873. The police found the children home alone when they went to the house in response to a 911 call placed by an unidentified caller. The defendant was arrested and held overnight in jail. See id. at 874. At the arraignment, the judge refused the people’s request for an order of protection for the children, and the defendant was released on her own recognizance. See id. The court granted the defendant’s motion to dismiss on the grounds that the defendant’s action failed to make out
in Criminal Court which are charged under section one of Penal Law 260.10, which provides no such guidance." 73 This trend is significant because it shows that the police may now be making arrests for poor decision-making or lack of resources among parents.

Unlike the defendant in Smith, Laura Vanegas was arrested and jailed overnight in July of 1997 when the police found her two sons alone outside of their aunt's apartment in East Harlem. 74 The children were placed in foster care, but the charge of child endangerment was later dropped. 75

In 1997 and 1998, there was much discussion in the press about increasing numbers of arrests in New York City for acts of neglect. 76 This attention sparked criticism of the new police policy. 77 The criticism was that the circumstances did not seem egregious enough to warrant arrest. 78 In 1997, Sourette Alwysh, a thirty-four-year-old mother, was arrested for living with her five-year-old son in a roach-infested apartment without electricity or running water. 79 Ms. Alwysh, a Haitian immigrant, had been living in a foreclosed building. 80 When the police discovered this fact they took her away in handcuffs and placed her son in foster care. 81

---

73. See id.
75. See id.
78. See Pollitt, supra note 77.
79. See Swarns, supra note 74.
80. See id.
81. See id.
sons, ages ten and four, at home for an hour and a half while she shopped at a grocery store. In September of 1997, Lucia Savarin, forty-one, was arrested for losing sight of her four-year-old son, who wandered outside into the night while his mother helped a friend move into a new apartment. Ms. Savarin had trusted a friend to watch her son, but somehow the boy was unattended long enough to make it outside. Samantha Stevens, thirty-three, was charged with six counts of child endangerment in August of 1998 when she left her six children home alone for five hours. The children ranged in age from five-months to eleven-years-old. They were discovered after the three-year-old slipped outside and was found on the street.

Until recent years, mothers who had committed similar acts of child neglect would have been referred to ACS, where they would have received counseling and services, but probably not have been arrested. In fact, "[b]efore the change in policy, police officers who found children briefly left home alone or living in substandard housing would call child welfare workers, who would arrange for counseling, day care, housing subsidies or, in extreme cases, place the children in foster care. The parents were rarely arrested." Typically, after social services had been notified, the family would have been monitored by social workers.

Statistics have indicated that the New York Police Department is more likely to make an arrest in cases of child neglect than in prior years. By 1998, the number of arrests for child endangerment had more than tripled since 1990. The rise in arrests has been attributed to Police Commissioner Howard Safir's directive to the police to "take action ... when [they] see children in dangerous situations." While child advocates promote dealing with child neglect through social services, Commissioner Safir has indicated that

---

82. See id.
83. See id.
84. See id.
85. See Rayman, supra note 76.
86. See id.
87. See id.
88. See Swarns, supra note 74.
89. Id.
90. See id.
91. See app. infra, tbl.5.
92. See id.
93. Wasserman, supra note 76 (quoting New York City Police Commissioner Howard Safir).
he would prefer that cops be aggressive.\textsuperscript{94} "Quite honestly, I would much rather be accused of overreaction than underreaction," he stated in 1997.\textsuperscript{95} This new police initiative has led to a sixty percent increase in misdemeanor arrests for endangering children since 1995.\textsuperscript{96}

The practices used by the police when investigating suspected child neglect can differ substantially from those of ACS. The police receive their policy dictates from sources including the \textit{Police Student's Guide},\textsuperscript{97} a training manual, and the \textit{Police Patrol Guide},\textsuperscript{98} a practice manual. Under the \textit{Police Student's Guide}, when an officer responds to a domestic incident, the investigation includes determining if there are any children present who may be victims of neglect, abuse or maltreatment.\textsuperscript{99} If the officer "reasonably suspects" a child of being abused, neglected or maltreated, they first must prepare a Report of Suspected Child Abuse or Maltreatment\textsuperscript{100} and notify the State Central Registry.\textsuperscript{101} If the police feel that there is probable cause to believe the crime of endangering the welfare of a child has been committed, the parent is arrested and removed from the home.\textsuperscript{102} The \textit{Student Guide} defines "probable cause" as "[a] combination of facts, viewed through the eyes of a police officer, which would lead a person of reasonable caution to believe that an offense is being or has been committed."\textsuperscript{103} After the arresting officer has called the State Central Registry, the normal procedure is presumably followed and the case is investigated

\textsuperscript{94} See id.

\textsuperscript{95} Id.

\textsuperscript{96} See Swarns, supra note 74.

\textsuperscript{97} See \textit{Police Dep't N.Y.C., Police Student's Guide} (on file with the author).

\textsuperscript{98} See id.


\textsuperscript{101} See supra note 3 (State Central Registry); see also supra note 21 (mandated reporters).

\textsuperscript{102} See supra note 100, at 3.

\textsuperscript{103} \textit{Police Dep't N.Y.C., Police Student's Guide, Interim Order No. 10}, at 25 (1995) (on file with the author). The U.S. Supreme Court has stated that probable cause for an arrest exists where the facts and circumstances within the arresting officers' knowledge and of which they have reasonably trustworthy information are sufficient in themselves to convince a man of reasonable caution that an offense has been or is being committed. The evidence need not be sufficient to establish guilt, although the officer's mere suspicion or good faith belief is not enough to constitute probable cause. \textit{See Henry v. United States}, 361 U.S. 98 (1959); \textit{Ker v. California}, 374 U.S. 23 (1963).
within twenty-four hours. 104 The Police Student's Guide is silent regarding what is to be done with the child for those twenty-four hours.

The Patrol Guide authorizes the emergency removal of children deemed to be abused, neglected or maltreated. 105 The definitions of "neglect" and "abuse" are taken from the FCA. 106 Under this Patrol Guide procedure, an officer who has reasonable cause to believe that the child's continued presence within the home presents an imminent danger to the child's life or health has the authority to remove the child after requesting the response of a patrol supervisor. 107 The child is then taken to the station house or to the hospital if deemed necessary. 108 The arresting officer then refers the child to ACS and reports the case to the State Central Registry. 109

Under New York Criminal Procedure Law, when a criminal action involving a complaint charging any crime or violation between spouses, former spouses, parent and child, or between members of the same family or household is pending, the court may issue a temporary order of protection. 110 The court may issue this order ex parte upon the filing of an accusatory instrument and for good cause shown. 111 The defendant is entitled to an opportunity to be heard only if recognizance or bail is involved. 112 It is common practice in criminal prosecutions for the prosecutor to request the court to issue such an order of protection barring the parent from contact with the child. 113 There is no provision in the criminal statutes that give the defendant an opportunity to be heard where an order of protection has been requested. 114 The order of protection prevents the parent from contacting the child, but the parent still

104. See supra Part I.A.
106. N.Y. Fam. Ct. Act § 1012(e), (f) (McKinney 1999).
108. See id. at 3.
109. See id. at 3, 5.
111. See id. § 530.12(3).
112. See id. § 510.20.
114. A defendant is only entitled to an opportunity to be heard if recognizance or bail is involved. Otherwise, the criminal court can issue a temporary order of protection ex parte. See N.Y. Crim. Proc. Law §§ 510.20, 530.12(3).
It is necessary for the arresting officer to have contacted ACS and initiated child protective custody, or else the child remains in limbo, without a custodian. The criminal court system has no legal mechanism to provide for the child while the parent is detained. It is necessary for ACS to file a petition in family court for the child to be placed in foster care.

C. FCA “Neglect” v. Penal Law “Child Endangerment”

The concepts of “abuse,” “neglect” and “maltreatment” are by no means universal. Article 10 of the FCA defines what behavior by adults constitutes child abuse or neglect. However, Article 10 child protective proceedings do not protect children against the behavior of all adults. Under the FCA, the child is protected from the improper behavior of the child’s custodian, guardian or any other person legally responsible for the child’s care at the time. A “person legally responsible” can include any adult who is living in the household and has regular contact with the child. This definition may include a relative or paramour living within the home.

Under section 1012 of the FCA, a child is a neglected child if the caretaker fails to exercise a minimum degree of care in providing for specified basic needs of the child, with the result that the child’s physical, mental or emotional condition is impaired or in danger of

---

115. Under section 530.12 of the New York Criminal Procedure Law, “when a criminal action is pending involving a complaint charging any crime or violation between . . . parent and child . . . the court . . . may issue a temporary order of protection . . .” Id. § 530.12(1).

116. See N.Y. Soc. Serv. Law § 374 (McKinney 1999). While section 1024 of the FCA provides that:

- a peace officer . . ., police officer, or law enforcement official, or an agent of a duly incorporated society for the prevention of cruelty to children or a designated employee of a city or county department of social services shall take all necessary measures to protect a child’s life or health including . . .
- taking or keeping a child in protective custody,” only an authorized agency may place a child in foster care.


118. See id. § 1012(c), (f).

119. See id. § 1012(g).

120. See, e.g., In re Yolanda D., 673 N.E.2d 1228 (N.Y. 1996) (holding that the uncle of the subject children was a person legally responsible where the subject child visited him every other week during the time in question and the uncle was regularly present at the child’s own house); In re Heather U., 632 N.Y.S.2d 285 (App. Div. 1995) (holding that the mother’s live-in paramour was a person legally responsible for the subject child in that he had been living in the home for three years).

121. See In re Heather U., 632 N.Y.S.2d at 285.
impairment; or if the child is abandoned by the caretaker. While the statute does not set thorough guidance for the care of a child, it sets a bare minimum standard to be met by the caretaker. The child must be provided with adequate food, clothing, shelter, education and medical care. The statute requires that a causal connection be established between the lack of care and the impairment of the child. An important element of the FCA definition of neglect is that it takes into account the financial ability of the parent to provide for the child. A failure to provide a child with basic care can only be found after a determination that the parent is "financially able to do so or [has been] offered financial or other reasonable means to do so . . . ."

New York Penal Law criminalizes behavior that endangers the welfare of a child. A person is guilty of child endangerment when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child under the age of seventeen. Violation of the statute also occurs when a parent, guardian or other person legally charged with the care or custody of a child under eighteen fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," under Articles 10, 3 and 7 of the FCA. Child endangerment can encompass a broad range of acts. In fact, under the statute, no actual harm need result; rather, the course or conduct alleged must be likely to be injurious. Despite the breadth of conduct the statute

122. N.Y. FAM. CT. ACT § 1012(f).
123. See id. § 1012(f)(i)(A).
124. A preponderance of the evidence must show parental failure to exercise a minimum degree of care, impairment or imminent danger of impairment to the child and a causal connection between the two. See In re T. Children, 621 N.Y.S.2d 25 (App. Div. 1994).
125. See N.Y. FAM. CT. ACT § 1012(f)(i)(A).
126. Id.
128. See id. The statute also criminalizes directing or authorizing a child to engage in an occupation involving a substantial risk of danger to his life or health. See id.
129. See id. § 260.10(2). Article 10 of the FCA governs child protective proceedings; Article 3 governs juvenile delinquency; and Article 7 governs persons in need of supervision.
130. See Karopkin, supra note 8.
131. See People v. Doe, 512 N.Y.S.2d 636, 638 (Crim. Ct. 1987) (stating that although "the alleged conduct of the defendant did not involve physical contact with the child [this] does not lead to the conclusion that such conduct was not 'likely to be injurious to the . . . mental or moral welfare' of the child" (citing N.Y. PENAL LAW § 260.10(1)).
covers, challenges claiming unconstitutional vagueness have failed.132

The penal law refers to the FCA for its definition of neglect.133 Therefore, acts sufficient to establish neglect would also be sufficient to establish child endangerment. As a result, the difference lies not in the statutes, but rather in how the offending behavior is prosecuted under each. The primary difference between how neglect cases are handled in criminal court and how they are handled in family court is a result of the nature of these two different courts.134 The family court is a rehabilitative setting that aims to identify families in crisis, protect the parties in danger and provide services to the family.135 In addressing child abuse and neglect, courts have struggled to accomplish several goals. In making dispositional orders, judges are bound to consider the child's best interest first and foremost.136 However, the preservation of families also is a prominent goal in federal and New York State legislation.137

The Adoption Assistance and Child Welfare Act of 1980 requires states receiving federal foster care funds to make "reason-

---

133. See N.Y. PENAL LAW § 260.10(2) ("[A]n 'abused child,' a 'neglected child,' a 'juvenile delinquent' or a 'person in need of supervision,' as those terms are defined in articles ten, three and seven of the FCA.").
135. See People v. Roselle, 643 N.E.2d 72, 74 (N.Y. 1994) (noting that the family court's duty was to protect the child and if possible work toward the future rehabilitation of the family, whereas in criminal proceedings the state is primarily concerned with the determination of the guilt of the accused).
136. The standard at a dispositional hearing is the child's best interests. See N.Y. FAM. CT. ACT § 623 (McKinney 1999) ("'dispositional hearing' means a hearing to determine what order of disposition should be made in accordance with the best interests of the child"); id. § 1052(b)(1)(A) (obligating judge in dispositional order to consider whether continuation in the child's home would be contrary to the best interests of the child); In re Anthony "OO," 685 N.Y.S.2d 494, 496 (App. Div. 1999) ("It is . . . well settled that unless all parties consent to dispense with such, a dispositional hearing is required to determine the appropriate order of disposition to be entered upon an adjudication of permanent neglect, and at the dispositional hearing the sole criterion is the best interest of the child . . . ." (citations omitted)).
137. See N.Y. SOC. SERV. LAW § 384-b[1][a][iii] (McKinney 1998) ("[T]he state's first obligation is to help the family with services to prevent its break-up or to reunite it if the child has already left home."); see also Adoption Assistance and Child Welfare Act of 1980, infra note 138 (requiring state agencies to make reasonable efforts to keep families together).
able efforts” to prevent a child from entering foster care and to develop a case plan for each child in foster care that assures the provision of services designed to facilitate the child’s return to her parents.138 New York’s compliance with this mandate is represented in the New York Social Services Law.139 New York case law reflects a policy of preserving the parent-child relationship where ever possible, while still acting in the child’s best interest.140

In 1997, Congress passed the Adoption and Safe Families Act (“ASFA”).141 This federal act shifted the priority of the child welfare system from family reunification to child protection.142 The federal law clarifies that efforts at reunification are not required where a child’s health or safety would be endangered.143 Under the Act, if certain aggravating circumstances are present, social workers no longer have to make a reasonable effort to preserve families.144 The Act emphasizes expediting the procedure through which a child is freed for adoption.145 Before ASFA, New York law required officials to undertake “reasonable efforts” to reunify foster children with their parents.146 Once ASFA was passed, New

138. See Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1980). In the 1970s, the foster care system was criticized because the predominant approach to dealing with neglect and abuse was to separate the child from the parent. See Judith Areen, Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases, 63 GEO. L.J. 887 (1975). This approach was criticized for failing to consider that the child’s emotional health was at risk when the child was separated from her family. See id. In response to this type of criticism, Congress passed the Adoption Assistance and Child Welfare Act, which made a priority of reuniting families whenever possible. See Kathleen A. Bailie, Note, The Other “Neglected” Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them, 66 FORDHAM L. REV. 2285, 2289 nn.38-40 and accompanying text (1998).

139. See N.Y. SOC. SERV. LAW § 384-b[1][a][iii] (requiring the state to provide families with services to prevent its break-up); see also id. § 131[3] (“As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life.”).

140. See In re Dickson, 423 N.E.2d 361, 363 (N.Y. 1981). “Consistent with the constitutional protection of family integrity, Congress and the New York State Legislature have expressed a clear preference for the preservation of the family unit by enacting laws to further this goal.” Martin A. v. Gross, 524 N.Y.S.2d 121, 124 (Sup. Ct. 1987). See also In re Sayeh R., 693 N.E.2d 724, 736 n.7 (N.Y. 1997).


142. See Bailie, supra note 138, at 2286 (“This federal legislation significantly changed the goals of the child welfare system which, prior to this law, focused mainly on reuniting families.”).

143. See AFSA, supra note 141.


145. See id. 671(a)(15)(F).

York, along with other states, was required to pass its own implementing legislation in order to receive federal funding.\footnote{147}{See Robert M. Gordon, \textit{Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997}, 83 MINN. L. REV. 637, 681-83 (1999) (noting that Congress conditioned federal funding for states on compliance with the federal legislation).} New York stood to lose $450 million in funding if the legislation was not enacted.\footnote{148}{See Shannon McCaffrey, \textit{New York Dragging Its Feet on Meeting New Federal; Child-Welfare Guidelines}, \textit{BUFF. NEWS}, Jan. 19, 1999, at 3A.} That legislation came in February of 1999, but not before the New York Assembly missed three deadlines that Congress had set.\footnote{149}{See Lara Jakes, \textit{Funds to Follow Adoption Law Passage}, \textit{TIMES UNION}, Feb. 12, 1999, at B2.} Disagreement among Democrats and Republicans of the Assembly caused the delays.\footnote{150}{See McCaffrey, \textit{supra} note 148, at 3A.} Assembly Democrats feared that the legislation would go too far in allowing for the termination of parental rights.\footnote{151}{See id.} The new law allows for the termination of parental rights if a child has been in foster care for fifteen out of the last twenty-two months.\footnote{152}{See id. at 2116-17. Where the child has been subjected to such aggravated circumstances, reasonable reunification efforts are not required. See id.} The state will also seek to terminate parental rights if a parent abandons a newborn or assaults or kills a child.\footnote{153}{See id. at 2118 (amending 42 U.S.C. § 675(5)).}

ASFA and New York State's implementing legislation has fed the debate over what role family preservation should play in child protection. This question is paramount to the issue of criminalization because a shift toward child protection, and away from family reunification, will embrace the increased role of law enforcement in child welfare matters.

While this legislation made great strides for those who felt that efforts at family preservation were hindering foster care children's access to stable adoptive homes, the statute continues to require that unless the aggravating circumstances are present, reasonable efforts must be made to preserve and reunite families.\footnote{154}{See Social Security Act, 42 U.S.C. § 671(a)(15) (1994).}

In the last two decades, judges and social workers have placed a priority on keeping families together.\footnote{155}{See Lara Jakes, \textit{Saving Kids by Splitting Families}, \textit{TIMES UNION}, Aug. 23, 1998, at A1.} The goal of family preservation is evidenced by New York Social Services Law, under which ACS is required to offer and provide services to prevent the break-
up of families. Courts are left to strike a delicate balance between adequately protecting a child and fulfilling the obligation to preserve families. The legislature has set out means to achieve this balance by prescribing both preventive and protective services.

Since New York enacted the Child Welfare Reform Act in 1976, programs that provide "preventive services" have been available to families in crisis. One of the purposes of the Act was to provide "increased emphasis on preventive services designed to maintain family relationships rather than responding to children and families in trouble only by removing the child from the family." The services include counseling, therapy, drug and alcohol abuse treatment, parenting skills training and homemaker services.

The Department of Social Services' regulations in conjunction with section 409 of the Social Services Law do not impose a nondiscretionary duty on social service officials to provide preventive services in all cases. However, the statute indicates the preference for family preservation whenever possible. A child may not be placed in foster care before preventive services have been provided to the family. However, if the services have been refused, placement is ordered by the court, the child is at serious risk of harm by the parent or the parents are unavailable, the child may be immediately removed.

In addition to these statutory provisions that define the family court as rehabilitative in nature, family court judges have authority over ACS to ensure that the statutory mandates were followed. The family court must inquire into what reasonable efforts were made and what preventive services were offered prior to removal.

---

157. See statutes cited supra note 136.
160. See N.Y. Comp. Codes R. & Regs. tit. 18, § 423.2(b)(1)-(18) (1997). New York State Department of Social Services regulations provide that the provision of preventive services shall be considered mandatory where children are in foster care, are at risk of placement in foster care, or are at risk of return to foster care. See id. § 430.9.
162. See N.Y. Soc. Serv. Law § 409.
163. See Adoption Assistance and Child Welfare Act, supra note 138.
165. See N.Y. Fam. Ct. Act §§ 1022(a), 1027(b), 1028(b), 1052(b)(i) (McKinney 1999).
of the child and at every stage of the proceedings by the agency.\(^{166}\) The family court has the authority under the FCA to compel ACS to conduct an investigation and report to the court.\(^{167}\) In family court, ACS supervises the respondent parent and may impose conditions upon that parent.\(^{168}\) Moreover, ACS is a party to the case and is required to appear and to comply with family court orders.

In contrast to the family court setting, the criminal court is a punitive setting, designed to punish individuals for unlawful acts, not to mend families.\(^{169}\) In the criminal adjudication, the state is the prosecutor and the perpetrator is the defendant; the victim has little or no involvement in determining the course the prosecution takes.\(^{170}\) There is no legislated requirement that reasonable efforts be made to offer preventive services to the offender in the family before criminal proceedings are initiated.\(^{171}\) The criminal court has no jurisdiction over ACS and cannot compel ACS to conduct an investigation or oversee the family’s progress. Often the district attorney prosecuting the case has had no direct contact with the child and knows little about the home situation.\(^{172}\) The effort that ACS must make under the FCA and the Social Services Law to preserve families whenever possible is not considered in criminal adjudications, and is rather left to the domain of the concurrent, if any, family court proceeding.\(^{173}\)

### II. The Debate Over Criminalization

The growing prevalence of child endangerment arrests has spawned a debate that questions what is the most appropriate approach to child neglect. Historically, children enjoyed very little

---

166. See id.
167. See id. § 1034.
168. See id. § 1039.
169. See N.Y. Penal Law § 1.05(5) (McKinney 1998) (stating the purpose of the penal provisions is to provide “an appropriate public response to particular offenses . . .”); see also Criminal Court Loses Jurisdiction, As Complainant Chose Family Court; People v. Damon McCoy, N.Y. L.J., Sept. 25, 1998, at 25.
170. See Criminal Court Loses Jurisdiction, supra note 169.
171. See N.Y. Penal Law § 1.05(5) (stating “[a] criminal prosecution is punitive and is not designed to heal or mend the family”).
172. See Karopkin, supra note 8.
173. See People v. Pettiford, 516 N.Y.S.2d 586 (Sup. Ct. 1987). A person can face a civil proceeding under the FCA and criminal prosecution under New York Penal Law for the same acts. This rule does not violate the double jeopardy clause because the family court action is a civil proceeding instituted for the protection of children and does not bar subsequent criminal prosecution. See id.
protection from violence within the home.\textsuperscript{174} Children were seen as the property of their parents.\textsuperscript{175} Child-rearing was left to the parents' discretion and unfettered corporal punishment was the prevailing means of discipline.\textsuperscript{176} As child advocates have made the case for the state's role in child protection,\textsuperscript{177} the legislature and the courts have attempted to define what is acceptable treatment of a child.\textsuperscript{178} Child protectors have advocated that children have rights and that the state has an obligation to protect those rights.\textsuperscript{179} Both criminal and civil legislation has reflected this sentiment. In New York, Article 10 of the FCA has defined what acts constitute impermissible neglect.\textsuperscript{180} In addition, section 260.10 of the New York Penal Law protects the child by criminalizing acts that endanger the welfare of a child.\textsuperscript{181}

On December 16, 1997, the New York State Assembly Standing Committee on Children and Families held a public hearing on the issue of law enforcement involvement in child welfare matters.\textsuperscript{182} The hearing was chaired by Assemblyman Roger L. Green, and was held partly to discuss Assembly Bill 7068, which had been introduced by Green in 1996.\textsuperscript{183} The Bill was intended to codify into law the role of police and other law enforcement officials, in the form of multi-disciplinary teams, to investigate cases of child

\textsuperscript{174} See Justin Witkin, \textit{A Time for Change: Reevaluating the Constitutional Status of Minors}, 47 FLA. L. REV. 113, 115 (1995) (stating that "[f]or many centuries, children were seen as chattels; they were mere property which was created and could be sold or destroyed by their fathers").

\textsuperscript{175} See id.; see also Barbara B. Woodhouse, "Who Owns the Child?: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1043 (1992) (stating that "[t]he notion of the child as property is at least as old as the Greek and Judeo-Christian traditions identifying man as a procreative force").

\textsuperscript{176} See id. at 1046.

\textsuperscript{177} See Moore, supra note 14, at 2066-67 n.25 (1995). The history of child protection is thought to have begun with the story of Mary Ellen Wilson in 1974. See id. at 2066 n.25. Mary Ellen was an eight-year-old girl who was chained, starved and beaten by her adoptive parents. See id. The founder of the Society for the Prevention of Cruelty to Animals advocated on behalf of this child, claiming that, as a member of the animal kingdom, she should be free from abuse. See id.

\textsuperscript{178} See supra Part I.C.


\textsuperscript{180} See N.Y. FAM. CT. ACT § 1012 (McKinney 1999); see also supra Part I.C.

\textsuperscript{181} See N.Y. PENAL LAW § 260.10 (McKinney 1999); see also supra Part I.C.

\textsuperscript{182} See Public Hearing, supra note 134.

\textsuperscript{183} See id.
abuse.\textsuperscript{184} The hearing was intended to examine the existing policies.\textsuperscript{185}

Assembly Bill 7068 was part of a package of bills entitled “Safe Homes, Safe Children.”\textsuperscript{186} One reason for the hearing was to examine “the emergence of what appears to be a new policy within the New York City Police Department, which has resulted in a number of arrests of parents and custodians for alleged instances of neglect.”\textsuperscript{187} Assemblyman Green expressed a concern that the new “must arrest” policy was being expanded to apply to child neglect cases.\textsuperscript{188} In light of this possibility, the Assembly decided to examine the police policy’s purpose and discern its impact on investigations conducted by Child Protective Services.\textsuperscript{189} Bill 7068 recommended that “law enforcement personnel should participate in inter-agency, multi-disciplinary teams and they should be charged with the responsibility of investigating cases of sexual abuse and other severe instances of child abuse in accordance with the state statutes.”\textsuperscript{190} The speakers who appeared to testify at the public hearing included legal professionals from child welfare and criminal practices.\textsuperscript{191}

\section*{A. Arguments for Increased Police Intervention and Criminal Prosecution of Neglect Cases}

Of all of the “great sins against children,” neglect is often considered to be less severe than physical and sexual abuse.\textsuperscript{192} While more than a half of the children in child protective services agen-

\begin{thebibliography}{99}
\bibitem{184} Assembly Bill 7068 was amended and enacted as section 422(14) of the New York Social Services Law to allow disclosure of certain information of the statewide central register of child abuse and maltreatment for the purpose of prosecuting a charge of falsely reporting an incident in the second degree under section 240.55 of the New York Penal Law.
\bibitem{185} See Public Hearing, supra note 134.
\bibitem{186} See id. at 7.
\bibitem{187} Id. at 8.
\bibitem{188} See id.
\bibitem{189} See id.
\bibitem{190} Id.
\bibitem{191} Those in attendance included representatives of the Juvenile Rights Division of the Legal Aide Society, the New York Society for the Prevention of Cruelty to Children, New York University Law Professor Martin Guggenheim and New York City Criminal Court - Kings County Judge Martin Karopkin. The Assembly was disappointed to find that neither New York City Police Commissioner Howard Safir nor ACS Commissioner Nicholas Scoppetta attended the public hearing. Neither sent a representative in his place.
\bibitem{192} Deborah Blum, \textit{Attention Deficit: Physical and Sexual Child Abuse Grab All the Headlines. But What You May Not Realize is That Neglect Can Be Worse}, 24 \textit{Mother Jones} 58 (1999).
\end{thebibliography}
cies are victims of neglect, it is physical and sexual abuse that draw the most attention and the most serious reaction from the public. However, a growing number or researchers are finding that neglect may in fact have a more severe long-term impact on a child than either physical or sexual abuse.

Advocates of active police involvement in, and criminal prosecution of, child neglect assert that the civil FCA and the criminal Penal Law are separate and necessary legislation to deal with the growing problem of child neglect. The child protection system serves the important purpose of rehabilititating families in crisis. The criminal justice system maintains order by restraining perpetrators, and deterring and punishing crime. Ann Reiniger of the New York Society for the Prevention of Cruelty to Children stated the following in support of proposed New York Assembly Bill 7068:

The role of the police is to enforce the law on behalf of children through the arrest of offenders followed by criminal prosecution and punishment for the violation of the law. The role of child protective services is to protect children by assessing risk as it impacts on the child and providing services with the authority to remove children, if necessary.

This distinction exemplifies the different purposes embodied in the civil and criminal systems. These different purposes are thought to justify separate systems dealing with the same problem.

193. See id. (stating that neglect accounts for 52%, abuse 24% and sexual abuse 6%, with the remaining attributable to medical abuse, emotional maltreatment and unidentified factors).
194. See id. Studies by Bruce Perry, chief of psychiatry at Texas Children's Hospital in Houston and Susan Rose, professor at the School of Social Welfare at the University of Wisconsin in Milwaukee have indicated that victims of child neglect may suffer more severe developmental delays than victims of other kinds of abuse. See id. Penelope Trickett, a child abuse expert at the University of Southern California has studied the developmental consequences of physical abuse, sexual abuse and neglect and concluded that neglected children exhibit the most severe delays in learning and social development. See id. Perry even offers physical proof of the damage done by neglect. His proof consists of a slide of a child's brain who was a victim of global neglect. The slide shows the ventricles of the brain, which should be small at the stage of development captured, to be tripled in size and filled with fluid because the surrounding brain did not grow to its full potential. He attributes this developmental delay to the neglect. Other studies have indicated similar developmental delays associated with neglect. See id.
195. See supra notes 180-181 and accompanying text.
196. See supra Part I.C.
197. See supra note 169.
Children have the right to be free from harm or risk at the hands of their parents. Proponents of criminal sanctions for child neglect argue that because endangerment is a criminal act, the state has an obligation to protect children from it, and prosecute offenders.\textsuperscript{199} The police can take an offender into custody upon making a determination of probable cause.\textsuperscript{200} The New York City "must-arrest" policy in cases of domestic violence has already proven that safety within the home is a public matter, and has helped ensure that safety.\textsuperscript{201}

Violence in the home no longer enjoys the privacy and protection that historically sheltered abusers from prosecution.\textsuperscript{202} This development reflects society's disapproving sentiment toward violence in the home, which, in turn, enforces the value society places on safe homes.\textsuperscript{203} Children, as victims, are less able to protect themselves and are more deserving of state intervention.

In home alone cases, the police will contact ACS or bring the child to the precinct to await the arrival of child protective services.\textsuperscript{204} An arrest warrant is issued for the parent, who, when found, will be charged with child endangerment.\textsuperscript{205} The police take this action, rather than simply calling ACS, because they fear the child's safety will be jeopardized if ACS engages in a lengthy investigation. The police act swiftly so as to ensure that if a mistake is made, they will have erred on the side of caution. Police Commissioner Safir has stated that "even if we make a mistake in an intervention, that's a mistake that doesn't really harm a child."\textsuperscript{206}

Criminal prosecution advocates support a multidisciplinary approach to child protection.\textsuperscript{207} This approach involves social work...

\textsuperscript{199} See \textit{In re} Maria F., 428 N.Y.S.2d 425 (Fam. Ct. 1980) (noting that the state has an obligation to protect the health, safety and well-being of children).


\textsuperscript{201} See Donald Bertrand, \textit{Domestic Violence Up}, N.Y. Daily News, Jan. 5, 1998, at 1 (quoting Queens District Attorney Richard Brown that the police department's mandatory arrest policy has helped increase public awareness about domestic violence and provide help to victims).

\textsuperscript{202} See \textit{supra} Parts I.A-B.

\textsuperscript{203} See Cathy Young, \textit{Domestic Violations}, Reason, Feb. 1998, at 24 (discussing how, in the campaign against domestic abuse, many states have instituted policies of mandatory arrests in domestic violence cases; and how these policies have increased arrests and addressed the problem of domestic violence).


\textsuperscript{205} Interview with Carmen Melendez, Spokesperson for the New York City Police Department Office of Media Relations (Mar. 1999).

\textsuperscript{206} See Golden, \textit{supra} note 113, at 5.

\textsuperscript{207} See Public Hearing, \textit{supra} note 134 (statement of Ann Reiniger).
ers, law enforcement and medical personnel working together to identify and address both neglect and abuse.\textsuperscript{208} Ann Reiniger advocated increased collaboration between the New York Police Department and ACS: "Our goal should be to protect children by combining the punitive and the rehabilitative approaches."\textsuperscript{209} She did assert, however, that arrests should not be made without first consulting with Child Protective Services.\textsuperscript{210}

One element of the criminal procedure law that can be helpful in child protection is a temporary order of protection. Under New York Criminal Procedure Law, when a criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, parent and child or between members of the same family or household, the court may issue a temporary order of protection.\textsuperscript{211} The court may issue this order \textit{ex parte} upon the filing of an accusatory instrument and for good cause shown.\textsuperscript{212}

It is common practice in criminal prosecutions for the prosecutor to request the court to issue such an order of protection barring the parent from contact with the child.\textsuperscript{213} Nothing in the criminal statutes requires that the defendant be given an opportunity to be heard where a temporary order of protection has been requested. As a result, the temporary order may be issued without a hearing.\textsuperscript{214} If convicted of endangering the welfare of a child, the punitive nature of criminal prosecutions allows for the levying of a punishment that fits the crime.\textsuperscript{215}

\section*{B. Arguments for the Child Protective System and Family Court as More Appropriate Adjudicator of Child Neglect}

The family court was designed and created to deal with the unique and complex problems facing families.\textsuperscript{216} Opponents of the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{208} See id.
\item \textsuperscript{209} Id.
\item \textsuperscript{210} See id.
\item \textsuperscript{211} See N.Y. CRIM. PROC. LAW § 530.12(1) (McKinney 1999).
\item \textsuperscript{212} See id. § 530.12(3).
\item \textsuperscript{213} See Golden, supra note 113.
\item \textsuperscript{214} See N.Y. CRIM. PROC. LAW § 530.12 (3).
\item \textsuperscript{215} Upon entering a guilty verdict for child endangerment, the judge can levy a sentence of up to one year imprisonment. Under section 260.10 of the New York Penal Law, "endangering the welfare of a child" is a class A misdemeanor. See N.Y. PENAL LAW § 260.10 (McKinney 1999). Under section 70.15, a sentence of imprisonment for up to one year can be levied for a class A misdemeanor. See id. § 70.15.
\item \textsuperscript{216} See WALTER GELLHORN ET AL., ASS'N B. N.Y.C., CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY: A REPORT AND STUDY ON THE ADMINISTRATION
\end{enumerate}
\end{footnotesize}
criminalization of child neglect focus on the inability of the criminal justice system to adequately accommodate the unique needs of the family.\textsuperscript{217} They cite the historical development of child protective services and family court jurisdiction as a sophisticated and appropriate response to the fragile nature of family offenses.\textsuperscript{218}

The FCA recognizes the need for specialized attention for families. Under the Act, the family court has “exclusive original jurisdiction” in abuse and neglect proceedings, except for the jurisdiction retained by the supreme court.\textsuperscript{219} Judge Karopkin of the New York City Kings County Criminal Court points out that where an arrest is made and a criminal court prosecution pursued, “the Criminal Court becomes the first court to address issues involving removal of the child from the parent. This practice seems to ignore the FCA and fails to make use of procedures that are already in place to protect the interests of the child and the parent.”\textsuperscript{220}

As a unique and fragile institution, the family has been deemed deserving of specialized attention and services.\textsuperscript{221} The family court and ACS have well-developed services and procedures to protect children and to assess and treat families in crisis. Through the use of such practices, the child welfare system protects the psychological and emotional well-being of a child as well as maintains the unity of the family.

The family court has jurisdiction over ACS and can compel the agency to provide services or even to investigate allegations.\textsuperscript{222} This power gives the court the benefit of the input of trained child welfare professionals in determining the needs of the child.\textsuperscript{223} Child protection workers and family court judges are guided by statutes that strike a delicate balance between the goals of family preservation and child protection.\textsuperscript{224} This balance gives these child

\begin{footnotesize}
\begin{enumerate}
\setcounter{enumi}{215}
\item See supra Part II.A.
\item See id.
\item See Karopkin, supra note 8.
\item See Gellhorn et al., supra note 216.
\item See N.Y. Fam. Ct. Act §§ 1034, 1039 (McKinney 1999).
\item New York Social Services Law promotes family preservation by requiring ACS to provide preventive services to families in need and by requiring caseworkers to
\end{enumerate}
\end{footnotesize}
protection workers the latitude to use their discretion and make informed decisions on a child by child basis. Child protective workers are obligated under the New York Social Services Law to preserve families wherever possible. However, because the best interests of the child are paramount in child protection decisions, there are due process protections in family court procedure that prevent the unnecessary separation of parent and child. While there are due process protections in criminal court, they are for the individual. They are not for the family as a unit.

One important indicator of the “best interests of the child” standard in family court adjudications is the appointing of a law guardian to all children who are the subjects of abuse and neglect cases. The FCA provides that, at the first court date, all subject children be appointed a law guardian who is assigned to represent the child in the child protective proceedings. The theory behind this practice is that the most thorough and effective prosecution of a negligent parent in family court does not always allow for the effective representation of the child’s best interests. In his prosecutorial role, the Commissioner of ACS seeks a finding of neglect or abuse against the parent. Independent representation create a family service plan whenever a child is considered for foster care placement. See N.Y. Soc. Serv. Law § 409-a-e (McKinney 1999). New York Social Services Law promotes child protection by empowering social services officials to investigate complaints of abuse and neglect and to offer protective services to prevent injury to children. See id. §§ 397, 398.

225. New York Social Services Law gives public welfare officers the power to investigate the family circumstances of each child reported to them in order to determine what, if any, assistance is needed. See id. § 398(6)(a).

226. Section of 409-a of the New York Social Services Law identifies family preservation as a priority in requiring ACS to provide preventive services when foster care placement of a child is threatened. See id. § 409-a.


228. See, e.g., id. § 1027(a) (providing that in any case where there has been an emergency removal of a child, the court shall hold a hearing as soon as practicable after the filing of the petition to determine whether the child’s interests require protection pending a final order of disposition).

229. See supra note 47 and accompanying text for a discussion of the best interests standard.


231. See id.


Prosecution or presentment of the petition is not the law guardian’s function – the County Attorney or county Department of Social Services counsel fulfills that purpose. Equally, defending a client against charges is not the law
for the child is necessary to give the court a full picture of the family and its needs, as well as an informed child perspective. The law guardian is charged with putting the interest of the child first and foremost.

Section 249 of the FCA governs the appointment of law guardians. The proceedings in which law guardians are appointed have been slowly expanded by the legislature and the courts. This expansion is due to recognition that because of the possibility of adversity between the interests of the parent and the child, it would be difficult for one attorney to represent them both. That a law guardian is appointed by the court to represent the minor, and not retained by the parent, ensures true independence of representation.

---

guardian’s responsibility – the attorney for the respondent fulfills that purpose and the child is the alleged victim rather than the accused. Thus, neither the parents, parents' counsel, Department of Social Services and its counsel, nor the Court can properly represent the child.

Id. 234. See id. at 112.

The law guardian’s primary statutory function is to articulate and litigate the child’s position, and to protect the child’s legal interests. In addition, the law guardian should insure that every fact in support of the child’s position which may be relevant to preliminary orders, fact-finding proceedings or dispositional remedies, is presented to the Court.

Id. 235. See id. at 111 (“The law guardian’s representation must be confined to the interests of the child – and only the child.”)

236. See N.Y. Fam. Ct. Act § 249(a) (stating “in a proceeding under articles 7, 3 or 10 or under § 384(b) of the Social Services Law . . . or when a minor is sought to be placed in protective custody under § 158, the Family Court shall appoint a law guardian . . .”). When the New York Supreme Court has before it a case under the FCA, it enjoys the power to appoint a law guardian. See Borkowski v. Borkowski, 396 N.Y.S.2d 962 (Sup. Ct. 1977).


238. “[I]t is generally assumed that parents should not and ... cannot engage counsel to represent their own children in child protective proceedings initiated against them or in which they are an interested party because the appearance of a possible conflict of interest and the danger of an actual conflict is too great to tolerate.” Id.

239. See Law Guardian Standards, supra note 233, at 112 (“By requiring the law guardian to protect the child’s ‘interests’ (rather than promote the ‘best interests’ of the child), the Legislature clearly intended law guardians to perform a function distinct from the judicial assessment of the best interests of the child.”). Under section 623 of the FCA, when a judge makes a dispositional order, the best interests of the child are the paramount concern. See id. at 113.

The law guardian’s role at trial, or fact-finding hearing, is extensive, and frequently crucial. Recent caselaw imposes a high burden of effective representation, including the responsibility of proving or disproving child abuse or neglect when appropriate. The law guardian must be a full participant, introducing evidence and effectively examining and cross-examining witnesses.

Id.
The FCA and Social Services Law also contain provisions for protecting parents’ rights to due process. When child protective services has removed a child in cases of suspected abuse or neglect without a court order, a hearing must be held as soon as practicable after the petition is filed.\footnote{240} The petition must prove imminent risk to the child’s life or health and that protective custody is necessary to avoid this risk.\footnote{241} While parents need not be present at this hearing, their due process rights are protected by the procedure set forth in section 1028 of the FCA for the return of a child temporarily removed.\footnote{242} Upon the request of a parent, a section 1028 hearing must be held within three days of the parent’s application for an order returning a child who has been removed.\footnote{243} At such a hearing, the court must assess imminent risk to a child’s life or health.\footnote{244}

Because a child is represented by a law guardian at these hearings, the child’s due process rights are protected as well.\footnote{245} In 1987, section 1028 was amended to authorize the law guardian to make an application for the return of a child.\footnote{246} With the law guardian as the voice of the child in the courtroom, the child can now participate in this important stage of child protective proceedings.\footnote{247}

Opponents of the trend of criminalizing neglect make a clear distinction between abuse and neglect. They are concerned that in many of the cases currently prosecuted for child endangerment, the alleged offending acts are merely symptoms of poverty.\footnote{248} They assert that police practices are outdated examples of state paternalism and that the police are not properly trained to deal with child

\footnotesize
\begin{itemize}
\item \footnote{240}{See N.Y. Fam. Ct. Act § 1027.}
\item \footnote{241}{See id. § 1027(b).}
\item \footnote{242}{See In re Z., 339 N.Y.S.2d 3 (App. Div. 1972).}
\item \footnote{243}{See N.Y. Fam. Ct. Act § 1028(a).}
\item \footnote{244}{See id.}
\item \footnote{245}{The appointment of the law guardian in family court protects the child’s due process rights by giving her a voice. \textit{See, e.g.}, \textit{In re Orlando F.}, 351 N.E.2d 711 (N.Y. 1976).}
\item \footnote{246}{N.Y. Fam. Ct. Act § 1028(a).}
\item \footnote{247}{\textit{See id.} Under section 1028, the application for an order mandating the return of the child need not be made within any prescribed time limit, so long as it is made before an adjudication of abuse or neglect. \textit{See id.} § 1028, at 42 (commentary by Douglas J. Besharov). Therefore, the timing of requesting a 1028 hearing often involves important strategic considerations. \textit{See id.} at 45. Before this amendment, the timing was largely under the discretion of the parents, and the child had no mechanism to bring on request to be returned. \textit{See id.} The amendment now provides such a mechanism. \textit{See id.} § 1028(a).}
\item \footnote{248}{For example, home alone cases often are instances where the parent was at the store or at work and could not afford childcare. \textit{See} Swarns, \textit{supra} note 74.}
\end{itemize}
neglect, which is often difficult to identify. While a collaborative effort between the police and ACS may assist caseworkers in dealing with massive case loads, critics of criminalization are concerned that the police are showing little discretion in implementing the policy on child protection.

In her opinion in People v. Smith, Judge Smith expressed concern over the increasing number of "home alone cases" appearing in criminal court. She pointed out that the statute, section 260.10 of the New York Penal Law, provides no guidelines on this subject. Judge Smith discussed how leaving non-infant children within the care of responsible twelve- and thirteen-year-old siblings is a "common and well established tradition," and further that "[t]his practice is not based purely on economic factors, but rather, touches on the very essence of the concept of family and child rearing goals aimed at fostering and encouraging independence, responsibility, love and support among siblings."

In dismissing the charges, Judge Smith stated:

Until such time as the legislature clarifies its intentions with respect to these often troubling "home alone" cases, so that the public in general, and unwary parents in particular, can be made aware of the legal ramifications of leaving children home alone; well established and traditionally accepted community standards must continue to be carefully applied on a case by case basis.

Opponents of criminal prosecution argue that there is an identifiable harm in zealous prosecution of child neglect. For one, it restricts the commissioner of ACS's discretion in filing a neglect

249. See Public Hearing, supra note 134 (statement of Professor Martin Guggenheim).

It is nothing short of astonishing to observe the Mayor of the City of New York in 1997 enter the fray as a new kid on the block and come up with the atavistic, long-rejected concept of using the police power to arrest, fingerprint, detain, arraign and prosecute parents merely because the police have probable cause to believe a parent has endangered the welfare of a child.

Id. "[T]he assessment of neglect requires a professional assessment by trained personnel, social workers, caseworkers, and we need to know what role should law enforcement have in making assessments of child abuse and of child neglect." Id.

250. Jill Zuccardy argues against the "misuse of the 'must arrest' statute [and] the New York Police Department policy of using 'must arrest' as a justification for acting independently of ACS in cases of alleged child neglect . . . ." Supra note 68.


252. Id. at 875.

253. See id.

254. Id.

255. Id.

256. Id. at 876.

257. See Public Hearing, supra note 134.
petition. If a parent is arrested for child endangerment, a neglect petition will most likely have to be filed. The fact that the parent has been accused of acts that endanger the welfare of the child, and that the parent has been taken into police custody can provide the impetus for ACS to file regardless of the agency's own assessment of the allegations. Once a family court proceeding is initiated, it is difficult to stop. Heavy caseloads and backlogged dockets make the proceedings move slowly, and children can languish in foster care indefinitely. This delay is a problem because under the new federal regulations, the New York codifications of the Adoption and Safe Families Act, the longer a child remains in foster care, the more likely parental rights termination proceedings will be initiated.

There is also another concern about criminalization that arises when, despite an arrest and prosecution, no family court petition is filed by ACS. The concern is that if there is no concurrent family court case, the orders of protection issued by criminal court will be the only standing order in the case, and it is an order that does not take into account the best interests of the child. Often judges in criminal court will issue orders of protection with a clause that makes them "subject to family court," which relies on the family court judge to ameliorate the situation. Here, the concern is not that the arrest initiates a family court case, but rather that, without a concurrent family court case, a full protection order remains in place, barring the parent from seeing the child. Judge Karopkin

258. See id.
259. According to the ACS Office of Public Information, under ACS policy, the arrest of a parent does not necessarily lead to ACS intervention or to the filing of a petition. However, when speaking with a Emergency Children's Services worker, the author was informed that, in practice, if a parent is arrested for child endangerment, this creates a presumption of neglect, and the agency will take action.
260. See Megan M. O'Laughlin, A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Terminations vs. Reunification, 51 VAND. L. REV. 1427, 1433 (1998) (stating that, according to statistics, children removed from their homes and placed in foster care spend an average of three years in the system, and that one in ten will spend more than seven years in foster care, and attributing these delays to the complex foster care system).
261. See id.
262. Under the New York Social Services Law, if a child has been in foster care for fifteen of the last twenty-two months, ACS may be required to file a petition to terminate parental rights. See N.Y. SOC. SERV. LAW § 392(6)(i) (McKinney 1999).
264. Id.
found this concern to be so compelling that, as a result, he often issues limited, rather than full, orders.\textsuperscript{265}

Opponents of criminalization point out that arresting parents for neglect is one of many contradictions of the New York City child welfare system.\textsuperscript{266} While the public may like the image of police rescuing children in danger, most people do not consider the consequences of this police action.\textsuperscript{267} Often, the charges are dropped, and even when they are not, the criminal prosecution does little to mend the family.\textsuperscript{268} There is also a concern that parents who face poverty will be less likely to reach out and ask for assistance and services if they feel that drawing attention to themselves will leave them vulnerable to arrest.\textsuperscript{269} If parents are not willing to access the available services that provide housing and child care, then children will suffer.\textsuperscript{270}

While many criminal acts committed against children, including physical and sexual abuse, require criminal prosecution and punishment, neglect is often the product of poor parenting skills, poverty or cultural barriers.\textsuperscript{271} These barriers are problems that can be overcome through social work counseling, court supervision and access to services.\textsuperscript{272} In these cases it is often in the child's best interests to remain with the family – in such a case, family preservation is a viable priority because it is the child's best interest.\textsuperscript{273} Since the 1970s, child protective services have rejected separation of parent and child as the predominant approach to abuse and neglect.\textsuperscript{274} Reasonable efforts at preserving families replaced the

\begin{itemize}
\item\textsuperscript{265} See id.
\item\textsuperscript{266} See Ilze Betins, \textit{Child Welfare Doesn't Belong in Police Hands}, N.Y. TIMES, Oct. 30, 1997, at A30 (Ilze Betins is the program director at El Faro Beacon Youth and Family Service.).
\item\textsuperscript{267} See id.
\item\textsuperscript{268} See app. infra, tbl.5.
\item\textsuperscript{269} See id.
\item\textsuperscript{270} See id.
\item\textsuperscript{271} See Bailie, \textit{supra} note 138, at 2294 ("[F]amilies involved in neglect proceedings are overwhelmingly poor.").
\item\textsuperscript{272} See N.Y. SOC. SERV. LAW § 131(3) (McKinney 1999) ("As far as possible families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life.").
\item\textsuperscript{273} See id. The Social Services Law contains a presumption that family preservation is often in the child's best interest, and therefore remains a primary goal of the regulations. \textit{See id.}
\item\textsuperscript{274} See Judith Areen, \textit{Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases}, 63 GEO. L.J. 887, 889 (1975) (noting that the predominant approach to protecting children in the 1970s was to separate the child from the parent).\end{itemize}
"child rescue philosophy" of the 1970s.\textsuperscript{275} This pro-family sentiment acknowledged that separating a child from her parents can be damaging to a child's emotional health.\textsuperscript{276}

In child endangerment cases, the police and the criminal court have the ability to interfere with the parent-child relationship by determining when acts of neglect constitute criminal activity and by issuing orders of protection that prevent the parent from contacting the child.\textsuperscript{277} The debate over criminalization must consider to what degree this policy jeopardizes the constitutional right to the parent-child relationship. This debate raises the question of what rights the child has to remain with her family. That determination involves weighing the child's liberty interest in family autonomy and unity with the state's interest in a thorough and expeditious prosecution of criminally-neglectful parents.

C. The Constitutional Rights Implicated by Criminalizing Child Welfare

1. The Constitutional Status of the Family

The integrity of the family unit has found protection in the due process clause of the Fourteenth Amendment, equal protection clause of the Fourteenth Amendment and the Ninth Amendment.\textsuperscript{278} While the State has a substantial interest in protecting minor children, parents and children have a constitutional right to remain together with limited governmental interference.\textsuperscript{279} In

\textsuperscript{275} See Bailie, \textit{supra} note 138, at nn.43-47 and accompanying text.
\textsuperscript{276} See \textit{id.} at 2290. See \textit{generally} Areen, \textit{supra} note 138.
\textsuperscript{277} See infra notes 291-295 and accompanying text.
\textsuperscript{278} See \textit{Lassiter v. Department of Soc. Servs.}, 452 U.S. 18, 27 (1981) (holding that "[t]his Court's decisions have by now made plain beyond the need for multiple citation that a parent's desire for a right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and . . . protection.'" (citations omitted)); \textit{Stanley v. Illinois}, 405 U.S. 645, 651 (1972). \textit{See also} U.S. \textit{CONST.} amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. \textit{CONST.} amend. XIV, § 1 ("No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").
1923, the U.S. Supreme Court first recognized the right of child-rearing in *Meyer v. Nebraska* when it struck down a statute that made it unlawful to teach foreign languages to grade school children. A few years later, the Court struck down an Oregon statute requiring public school attendance that effectively outlawed private and home schooling in *Pierce v. Society of Sisters*.

The concept of family autonomy has been incorporated into the modern right to privacy, which is considered part of the First Amendment’s “penumbra” of associational privacy. These “penumbral rights ensured that the specific rights stated in the Bill of Rights would remain secure.” In *Roe v. Wade*, Justice Blackmun stated that the Court has recognized that “a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist in the Constitution.” The origin of the right of privacy is both in property rights as well as liberty rights. Historically, privacy in the constitutional (as opposed to tort) sense was defined not as an individual right, but rather a right belonging to the institutions of marriage and family. Eventually, privacy developed into an individual right. The modern right to privacy was primarily cultivated by the Court in the 1960s and 1970s.

Historically, the family unit enjoyed a great deal of autonomy from the State. Family members existed in gender-based roles, and the family as an institution maintained a great deal of privacy. However, increasing public concern for women and children within

---

280. 262 U.S. 390 (1923).
281. See id.
283. See *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (holding that several of the Bill of Rights’ guarantees protect privacy interests and create a zone of privacy). Douglas’ majority opinion described *Meyer* and *Pierce* as part of the First Amendment’s penumbra. See id. at 482-83.
287. See id.
288. See id. ("Eisenstadt marked the elevation to constitutional status of an individual's right to be let alone.").
the home has led to increased state involvement over the years.\textsuperscript{291} Today, the State has tremendous power to intervene in the family on behalf of a child.\textsuperscript{292} While this power represents the State's important interest in the safety of children, it has been criticized because zealous advocacy can often result in the witch-hunting of parents.\textsuperscript{293} In response to increased State involvement, parents have actively pursued the right to autonomous decision-making and freedom from State interference.\textsuperscript{294} As a result, modern discourse on the family and familial obligations has centered on the parents' rights versus those of the State, i.e., the right to care for children, to direct their education, and to have custody.\textsuperscript{295} Child advocates argue that this focus has lost sight of the child's interest in these very same rights, the elements that make up the parent-child relationship.\textsuperscript{296}

2. The Constitutional Status of the Child

Children have always held a unique status in the context of constitutional rights.\textsuperscript{297} While they are members of a family and therefore have some entitlement to the family autonomy that the Supreme Court has recognized, they are not adults and therefore retain a status that is not wholly independent.

As the law has progressed, children have been held to have certain constitutional rights. The U.S. Supreme Court has recognized the "personhood" of children.\textsuperscript{298} In \textit{Tinker v. Des Moines In...
dependent Community School District, the Court stated that minors are included in the constitutional concept of "person" and that children are possess fundamental rights that the State must respect. In In re Gault, the Court stated that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone."

The concept of children having rights within the constitution is well-grounded. Advocates of children's rights often think the inadequacy of those rights is grounded in the failure of society to identify children as "persons" in the constitutional sense. Despite the Court's acknowledgment of the personhood of children, a barrier has remained that prevents children from participation equal to that of their social status, ability and need. Liberalism and the triumph of individual rights and autonomy have developed the modern concept of parental rights in such a way as to focus child welfare disputes on a parent-versus-state model. This model has

Constitutional Status of Minors, Justin Witkin presumes a liberal interpretive theory is necessary to protect the rights of children. See Witkin, supra note 297, at 131. Witkin embraces a "human rights theory" to understand the scope of the protections provided to children by the Constitution. See id. at 132. He advocates that "human dignity mandates that the Constitution provide equal protection for the autonomy and capacity for autonomy of all children that it provides for adults." Id. at 135. "The Constitution might be seen as guaranteeing that adults will 'have a voice' in processes which affect their person and/or property. This guarantee should apply to children as well." Id. at 135, n.182 (citing Charles R. Tremper, Respect for the Human Dignity of Minors: What the Constitution Requires, 39 SYRACUSE L. REV. 1293, 1312-14 (1988)).

299. 393 U.S. 503 (1969) (recognizing children's First Amendment rights and holding that a school could not prohibit students from wearing black armbands to protest the Vietnam War).
300. Id. at 511.
301. 387 U.S. 1 (1967).
302. Id. at 13.

The liberal constitutional view of persons as autonomous individuals and the popular view of children as anything but autonomous individuals clash irrecocilably. As a result, when deciding constitutional issues involving children the Supreme Court has inadvertently demonstrated the inadequacy of the liberal model of personhood for children.

Id.

304. Some constitutional theorists have asserted that the liberal movement has defined the individual by the individual's relationship with the State. See id. at 23. Under traditional liberal theory, government "should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends." MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 4 (1996). Some authors assert that interpreting the Constitution by reference to the liberal model leads to a constitutional system that favors the parents' interests as against the child's. See Roberts, supra note 296, at 491. Parents have fought for their liberty and privacy rights under the Fourteenth Amendment, and typically the conflict was between the parents' and the State's perception of
spawned a debate that alleges that liberalism leaves the child voiceless in determinations that gravely affect the child's status as a person and as a family member. This critique of liberalism asserts that while liberalism has been a successful vehicle for the triumph of individual rights for parents, it has failed to encompass individual rights for children. This dubious victory is because the emphasis on individuals' rights and autonomy has focused family law debates on parents' rights versus the State. The child has legitimate and enforceable rights to liberty and due process, which indicate that she deserves representation when a court makes a custodial determination. However, it is presumed that either the State or her parent has her best interests accurately identified and adequately represented.

Proponents of children's rights assert that it is no wonder that children have a level of participation that is unequal to that of their status, ability and needs. They claim that the constitutional imbalance between the rights of parents and the rights of children is the result of a liberal theory of constitutional interpretation. Under liberal political theory, the prevailing political philosophy of the time, the government "should provide a framework of rights that respects persons as free and independent selves, capable of choosing their own values and ends." The State is to remain neutral on the subject of what is "the good life" in order to respect the child's best interest. See, e.g., Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding the state's interest in universal education is subject to a balancing test when it infringes on fundamental rights - here the right of parents to handle the religious upbringing of their children, after Amish parents refused to send their children to public school in violation of state law); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (establishing the right of parents to control the upbringing and education of their children); Meyer v. Nebraska, 262 U.S. 390 (1923) (upholding parents' rights to determine their children's education). In this way, the liberal model, which focuses on the parent as an individual, has focused the family matter disputes on a parent-versus-state model. See Sandel, supra note 304.

305. See Fitzgerald, supra note 298.
306. See id.
307. See supra note 286.
308. See supra notes 279-282 and accompanying text.
309. Melinda Roberts asserts that "cases in which children have been taken to have constitutional rights are cases in which the parents' and child's interests typically coincide." Roberts, supra note 296, at 492 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)). David Fisher asserts that part of the reason for this development is the presumption that parents act in the best interests of their children, a presumption that has been upheld by the Court even in cases involving abuse and neglect. See Fisher, supra note 284, at 412.
310. See Fitzgerald, supra note 298, at 23.
311. See id.
312. Sandel, supra note 304, at 4.
the individual rights of persons. Proponents of this interpretation advocate the notion of the State respecting the autonomous individual's choices and decision-making. The republic's role in enforcing liberty is predominantly procedural; it is charged with ensuring the dignity and autonomy of individuals. The individual, as an "unencumbered self," is free to make decisions without State intervention. The State may only interfere with autonomy to the degree that it is necessary in order to preserve the autonomy of others.

3. The Child's Constitutional Rights within the Family

The constitutionally protected liberty interest in the parent-child relationship extends to the child as well as the parent. It is "the right of the family to remain together without the coercive interference of the awesome power of the state." A child has a liberty interest in remaining with a parent. It has been decided that the forcible removal of a child from parents constitutes seizure subject to the Fourth Amendment requirements. While removing a parent from a child may not restrict the child's liberty interest in her freedom, it does restrict the child's liberty interest in remaining with her family. In *Quillion v. Walcott* the Court stated: "We

---

313. See *id.* at 92.
314. See *Fitzgerald, supra*, note 298, at 24.
315. See *id.* at 23.
316. See *id.*
317. Sandel criticizes the liberal model because it promotes the notion of the unencumbered self, and ignores the individual's responsibilities as a member of a community. He promotes a civic republicanism that focuses more on membership, participation and contribution, rather than on insulation. He proposes that "[t]he public philosophy by which we live cannot secure the liberty it promises, because it cannot inspire the sense of community and civic engagement that liberty requires." *Sandel, supra* note 304, at 6.
318. See *Fitzgerald, supra* note 298, at 24.
319. Robison v. Via, 821 F.2d 913, 920 (2d Cir. 1987) (quoting Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977))). Other circuit courts agree that a "child's interest in her relationship with a parent is sufficiently weighty by itself to constitute a cognizable liberty interest." *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991) (quoting *Smith v. City of Fontana*, 818 F.2d 1411, 1419 (9th Cir. 1987)). "The integrity of the parent-child relationship is harmed by depriving children of adult care . . . ."
320. See *Soldal v. Cook County*, 506 U.S. 56 (1992); *U.S. Const. amend. IV* ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").
have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.\textsuperscript{322} However, the constitutional status of the child within the family is not considered wholly secure by some child advocates.\textsuperscript{323} There is concern that especially within the acute situation where the State’s over-protective inclination aims to remove a child from her parent, the parent’s rights are balanced with the State’s interest, and this balance neglects the child’s own rights and interest.\textsuperscript{324} This view can be critiqued in that it is not a comprehensive approach to the family’s right to privacy and autonomy because it fails to acknowledge the child as a central bearer of those rights.\textsuperscript{325} It is argued that when a court sides with a parent or with the State, it is justified by the assertion that the prevailing party’s interest in the child represents the best interest of the child herself, but that the child’s interest is rarely represented in and of itself.\textsuperscript{326}

The debate over criminalizing child welfare in New York City has involved various articulations of the core problem, and propositions for the most appropriate solution.

III. **Criminalizing Child Welfare Does Not Adequately Protect the Rights of Children and Families**

A. **Identifying the Problem with Criminalization**

Child neglect is a severe societal ailment. While it is different from child abuse, it is no less harmful and may have more long-term effects.\textsuperscript{327} The evolution of the child protective system signifies that society will not tolerate child neglect.\textsuperscript{328} This development also signifies that the family and the child are unique and that a unique approach and a specialized system are necessary to deal with problems.\textsuperscript{329} This specialized system is necessary because traditional criminal justice does not address the problem of preserving families and does not take into account the best interest of

\textsuperscript{322} Id.
\textsuperscript{323} See Fitzgerald, supra note 298, at 17, 22-23.
\textsuperscript{324} See id.
\textsuperscript{325} See id.
\textsuperscript{326} See Roberts, supra note 296, at 492 n.16 (citing Brown v. Board of Educ., 347 U.S. 483 (1954)) (asserting that “cases in which children have been taken to have constitutional rights are cases in which the parents’ and child’s interests typically coincide.”).
\textsuperscript{327} See supra Part II.A.
\textsuperscript{328} See supra Part I.A.
\textsuperscript{329} See supra Part II.B. for an overview of family court.
the child. The child protective system and the family court as governed by the FCA are specifically designed for this consideration.

Opponents of the criminalization trend argue that the police have no role in child welfare. However, because neglect is a crime under the child endangerment statute, and because the problem of neglect affects all of society – as do most crimes – law enforcement must play a role. Society cannot demand public attention to child welfare and then exclude law enforcement. In addition, while many of the arrests made are truly erring on the side of caution, many others are justified. Even in home alone cases, there is a broad range of benign circumstances leading up to this neglect. Some unfortunate parents, on account of a lack of daycare resources, have merely left children in the care of an older sibling or alone briefly for a trip to the market. Here, poverty is often the primary cause of the “neglectful” actions, and poverty should not indiscriminately be mistook for neglect. Other egregious circumstances have uncovered parents’ blatant disregard for their children’s well-being. It would be inappropriate to lump these cases together.

From 1990 to 1998, the number of arrests where the primary charge was “endangering the welfare of a child” has more than tripled. It is important to identify the significance of this increase. Does it mean that there is more neglect and therefore more arrests? Answering this question requires a look at the number of abuse/neglect reports that came into the child protective system. From 1990 to 1998, the number of these reports has in-

330. See supra Part II.B.

331. The arrests are often justified in that the parents have left the child in a dangerous situation. See, e.g., Associated Press, Teen Mother Arrested After Leaving Infants Alone, BUFF. NEWS, Dec. 22, 1997, at 6A (describing how a teenager in Harlem was arrested for leaving one-year-old and two-year-old alone with food smoldering on stove while she went out partying all night).

332. New York Social Services Law acknowledges poverty as a factor that may result in conditions that are symptomatic of, and therefore mistaken to be, neglect. See N.Y. SOC. SERV. LAW § 131[3] (McKinney 1999) (“As far as possible, families shall be kept together, they shall not be separated for reasons of poverty alone, and they shall be provided services to maintain and strengthen family life.”).

333. For example, in 1997 a Russian couple were arrested for endangering the welfare of a child when they left their four-year-old daughter home alone all night while they were out partying in an upscale Manhattan club. See Barbara Ross et al., Party Parents Busted for Leaving Girl, N.Y. DAILY NEWS, Apr. 5, 1997, at 4.

334. See app. infra, tbl.5. In 1990, the number of arrests was 303, whereas in 1998, it was 1111.
creased only slightly. In addition, while the number of reports coming into the State Central Registry has increased slightly, the number of Article 10 petitions filed has actually gone down substantially.

Overall, these numbers seem to indicate that it is not that there is more neglect, it is that the police are making more arrests. While it is exactly this "trend" that has concerned some child and family advocates, the increase in arrests may not be as alarming as is feared. That is because the number of arrests is still minute compared to the number of reports—founded or unfounded. The 1111 arrests in 1998 represent only 1.9% of the 57,842 reports that year and 1.01% of the 11,000 petitions filed. Therefore, even if the police are arresting more neglectful parents, they are still only reaching a fraction of the problem.

The real concern with this "trend" emerges when one looks at the arrest statistics in and of themselves and asks whether this new police policy is appropriate and effective. Its appropriateness is a policy question, but whether it is effective is best determined by looking at the dispositions of the arrests. Among the arrests for which disposition information is available, the rate of dismissal is extremely high. Of the cases that are prosecuted, the overwhelming majority plead out and never go to trial. On average, only two to three people a year (of the reported dispositions) go to trial and get a verdict. It is hard to determine what increasing arrests accomplish because few offenders serve any time or even receive probation or fines.

The real problem with the recent trend of arresting parents and prosecuting them for acts of neglect is that the criminal justice system is not equipped to deal with families in the way in which society decided families should be dealt when it created the child protection system. The criminal justice system can only help victims and society by keeping perpetrators away from their victims and possibly away from society. However, this policy conflicts with

335. See app. infra, tbl.1. In 1990, the number of reports was 55,158, whereas in 1998, it was 57,842.

336. See app. infra, tbl.4. In 1990, 21,719 Article 10 petitions were filed. In 1997, the number was 11,154 (based on this number the projected figures for 1998 are 11,000).

337. See app. infra, tbls.3-5.

338. See app. infra, tbl.5.

339. See id.

340. See id.

341. See id.
the priority that society has given to the preservation of families.342

The goals of family preservation and the child's best interests dictate that the most effective means of addressing child protection must involve more than simply punishment and protection.

Families are too complicated to fit into the rigid two-party system of criminal justice prosecutions. Where an act of neglect has taken place, the three parties involved, the parent, the child and the State, may have different goals. Often the parent's goal is to be reunited unconditionally with the child. Likewise, the State's goal may be to keep the child from the parent, thereby ensuring her safety and reducing state liability. The child, however, has interests that may intersect with both those of the parent and the State, but are not completely represented by either. Where the parent has been neglectful by failing to properly supervise or by being unable to fully provide for the child due to poverty, such non-violent behavior may not justify placing the child in foster care. In New York City, ACS has the ability to provide multiple services to the family, short of foster care placement of the child, to help the parent remedy the neglectful behavior.343 The child may wish to remain with her parent. However, she would not want this reunion to be unconditional, which would relegate her to the powerless position of Joshua DeShaney.344 She may want a reunion conditioned on her parent's compliance with State-offered parenting services, and effective supervision of that compliance by child protective workers.

Under the Fourteenth Amendment, parents have been accorded various liberty and privacy rights with respect to the custody and care of their children.345 In the cases that gave rise to these rights, there was typically a conflict between the parent's and the State's perception of the child's best interest, and the matter was litigated

342. See supra Part I.C.
343. See supra note 145.
344. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989). Joshua DeShaney was a four-year-old boy who was left profoundly retarded after several beatings by his father. Social Services had become involved with the family after Joshua's physician notified them of suspected abuse. See id. at 192. He was temporarily removed, but returned on the condition that his father comply with the agency's proffered services. See id. Social Services failed to take action, despite the fact that while Joshua was under their supervision the caseworker noticed unusual bruises, the father failed to comply with services and Joshua went to the emergency room twice with injuries. See id. at 192-93. The Court held that the due process clause conferred no affirmative right to governmental aid, even where such aid may be necessary to secure a life, liberty or property interest, of which the government itself may not deprive the individual. See id. at 196.
focusing on those two positions. Little consideration was given to whether the parents accurately represented the child’s *actual* best interest, or merely asserted their *own* interest. The result is that the focus on the rights of parents, and parents’ interest in the child versus the State’s interest in the child, has left the child powerless as a rights-bearer. Children’s rights are generally thought to be represented insofar as they align with either the interest of the State or the interest of the parents.

The conflicting goals of parents, children and the State are not well accommodated in criminal court. The child has no advocate in the criminal court proceedings because victims are never independently represented in criminal prosecutions, and the prosecutor is not obligated to abide by the victim’s requests. Without representation, the court lacks input on what is in the child’s best interests when making a ruling.

In child endangerment cases, the criminal court makes determinations that inevitably affect the custodial status of the child. Because the child’s fundamental rights of due process and liberty are affected, the question becomes to what extent does the child have a right to remain with her parent. If that right is limited, then per-

---

346. *Pierce* and *Meyer* were decided without reference to the interests of the child, reinforcing the concept of children as property. In *Meyer*, the Court’s decision that the state could not forbid the teaching of foreign languages in public schools centered on the Court’s assertion that such a law would infringe upon the liberty rights of parents and teachers. The child’s interest in an education that included foreign language instruction was not discussed. See *Meyer*, 262 U.S. 390. In *Pierce*, the Court similarly limited its discussion to the liberty interests of parents and teachers. See *Pierce*, 268 U.S. 510.

347. This development is often blamed on the presumption that parents act in the best interest of their children. This presumption also has been embraced by advocates for parents and family preservation. See, e.g., Fisher, *supra* note 284, at 399. “Even in cases involving parental abuse and neglect, the Court has upheld the presumption that parents act in their children’s best interest. In *Santovskey v. Kramer*, this presumption was expressed by requiring a heightened standard of evidence to terminate parental rights.” Id. at 412. As deference to parents’ rights expands, courts tend to reject children’s claims if they conflict with those of their parents. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130 (1989) (“We have never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship. We need not do so here . . . .”). See also *Fitzgerald*, *supra* note 298, at 26.

The liberal constitutional view of persons as autonomous individuals and the popular view of children as anything but autonomous individuals clash irreconcilably. As a result, when deciding constitutional issues involving children the Supreme Court has inadvertently demonstrated the inadequacy of the liberal model of personhood for children.

348. This paper does not advocate raising the child’s status to a level equal with that of adults. In the modern welfare state it is sound policy to acknowledge the
haps it is acceptable that a child endangerment prosecution disregards family preservation and the child’s best interest in pursuit of retribution and deterrence. The child’s best interests may be peripherally considered when the court or the jury determines if the State has proved beyond a reasonable doubt that the crime of endangerment was committed. However, if the child’s right to the parent-child relationship is substantial, then perhaps it dictates that the only appropriate forum for adjudicating child neglect is one that is free to consider the child’s best interest first and foremost, as well as strive for family preservation when possible. This consideration is simply not possible within the confines of a criminal prosecution with its own burden of proof and standard for review. If the child’s right to the parent-child relationship is fundamental, it may demand that the child be represented in any court proceeding that affects her custodial status. The expansion of the law guardian’s role in family court matters exemplifies the importance of representation for the child. However, victims are not independently represented in criminal prosecutions.

Ultimately the question is whether the child’s right to remain with her family is so compelling that the forum in which that right will be best protected is the forum that should be chosen for neglect adjudications. If it is, then clearly neglect belongs in family court. Such a determination should involve weighing the child’s liberty interest in family autonomy and unity with the state’s interest in prosecuting criminally-neglectful parents. The debate around criminalization then will turn on the constitutional implications of each policy. The child’s liberty interest is protected under New York Social Services Law, the FCA and federal legislation that requires that the best interests of the child be the overriding consideration, and that family preservation remain a goal where ever possible. In a criminal prosecution, however, such considerations are absent. In this way, the criminal prosecution of child neglect does not adequately represent the status that children have achieved as rights-bearers. The state can separate a parent and patriarchal role of the State and family in the lives of children. Instead, this paper asserts that children have interests independent of the State and their parents and that protection of these interests requires legal representation and some degree of autonomy in decision-making.

349. See supra Part II.B.
350. See supra note 136.
351. See supra notes 155-160.
352. See supra Part I.C.
child without any attempt to safeguard the parent-child relationship.

B. Why Criminalization Does Not Adequately Protect the Rights of Children and Families

The child protection system and the family court should be used to address the problem of neglect because under the child protection system, the child's constitutional right to the parent-child relationship is best considered and protected.

Law enforcement should certainly play a role because child endangerment is a crime. However, social workers should be included in criminal investigations of child neglect to make sure that the child is considered at all stages. Police and caseworkers together conduct a thorough investigation. Caseworkers often employ the assistance of police when making home visits or removing children in order to ensure the safety of everyone involved.353

The problem with criminalization is not that the police are playing a more active role in child welfare. The problem is what happens after the arrest. The defendant-parent may go through a criminal prosecution and receive some form of punishment, without receiving any help to change the root of the problem. The retribution and the punishment that is achieved by a criminal prosecution may be valuable for society, but it may have little value to the family itself. The parent ultimately goes back to the home and the child, still ill-equipped to remedy the neglectful behavior that is the root of the problem.

Opponents of criminalization assert that the police are expanding the domestic violence "must arrest" policy to neglect.354 It is difficult to determine if this assertion is really the case. The New York Police Department's position is that they have always responded to child neglect the way they have in recent years.355 This response would indicate that the increased number of arrests is simply due to a higher rate of neglect. However, the numbers reported by child protection services do not indicate this claim.356

354. See supra note 61.
355. See supra note 169.
356. See app. infra, tbl.1 (showing that the number of reports has increased very little in the last eight years).
Regardless of the policy behind the arrests, the result is where the real problem lies.

Family advocates should reject the criminalization of child welfare not because it is a wholly bad option, but because there is a better option. The child protective system and the FCA promote family preservation and the child's best interests, and promote society's goal for safe and stable families for all children. The criminal prosecution of child endangerment can achieve separation of the victim and the offender and punishment of the offender. However, this outcome is not in the best interests of children and parents because it does not provide for family preservation and unification.

What, if anything, does criminal prosecution achieve that family court cannot? In cases of abuse, where the harm to the child is more immediate, prosecution under the assault statute provides an immediate remedy. Neglect, however, poses more of a long-term threat. Whether the neglect is a product of poor parenting skills, poverty or other ailments, a civil remedy designed to address the harm that has been done, and prevent harm in the future, may be more effective in the long-term.

The New York City child protective system may not be perfect, but it is designed to look out for the best interests of the child and to preserve families whenever possible.

Essentially, this choice is a policy question: Who is better equipped to handle the problem of neglect? The answer depends on what resolution society wants for families in crisis. If family preservation is to remain a priority, then family court proceedings are more appropriate. If punishing the crime and preventing further offense is more important, then criminal prosecution may be more appropriate. This Note supports the legislative goals of family preservation and child protection as identified in the New York Social Services Law and the FCA, and for this reason supports the use of family court proceedings to address child neglect, its causes and effects.

The child has a recognizable liberty interest in the parent-child relationship. The exclusion of the child from the criminal prosecution does not reflect the status that children have achieved as rights-bearers in that the child has no voice and no right to self-determination in proceedings that affect custodial status.\textsuperscript{357} Criminal prosecution creates a chasm in the relationship between the

\textsuperscript{357} See supra Part II.B.
parent and child, and there are no provisions that address this problem. It is not sufficient to presume that the child’s interest is represented by the parent or the State because it is precisely this presumption that was discarded when the role of the law guardian was created in the family court system.358

Because the criminal context is centered around a strict two party system – parent versus the State, the child is left voiceless. Her rights are presumed protected by either the parent or the State, although her true interests often do not fully align with either. The lack of protection for the child’s best interest that currently exists in a criminal prosecution seems to call for a procedural remedy. One possibility would be for the criminal court judge to hold an automatic hearing before an order of protection is issued. Essentially, this goal can be achieved if defense counsel requests the hearing. However, the standard by which to judge the criminal charges still will fail to encompass an assessment of what is best for the child. Thus, the child should be represented by legal counsel in a child endangerment prosecution and the child’s best interests should be considered before an order of protection is issued. However, to add the role of a law guardian in child endangerment cases is implausible because victims generally have no independent representation in criminal prosecutions. Such an expansion would set a precedent of the victim as a party to criminal prosecutions. While this is not the direction in which the criminal justice system is likely to move, it would certainly help the criminal prosecution of child neglect achieve a holistic remedy for families.

Within the constraints of the criminal justice system families are not treated as a rights-bearing unit. Therefore, the most appropriate forum for neglect adjudication is family court, where the child is better represented, and the standard is the child’s best interests.

CONCLUSION

As child protection comes to the forefront of law-enforcement, the legislature, judicial scrutiny and the criminal justice system must reassess the effectiveness of the traditional two-party system in proceedings that affect the custodial status of non-party children. Because the child has traditionally been the victim in neglect cases, the rights of children have been discussed and developed in the context of asking, what rights does a child have against her parent? That is, when is corporal punishment excessive, what constitutes

358. See id.
neglect, to what extent can a parent control the child's education, medical care and so forth. This discussion, while an important one, has neglected to encompass the question of what rights does a child have to be with her parent? Addressing this point requires a balancing of interests – the State's interest in protecting children, the parents' interest in raising their children and the child's interest in both safety and a parent-child relationship.

The trend in child welfare has been to err on the side of protection, often considered erring on the side of the child. While this approach may have been appropriate to overcome a long history of State abstinence from involvement in the family domain, it has been under-inclusive in protecting the child's fundamental right to a parent-child relationship. A delicate balance must be struck between family autonomy and State intervention. This balance is best achieved in the family court when the child's best interest is represented and the family is addressed as a whole. Under traditional criminal procedure, which focuses on the parent-defendant versus the State, one of these two parties is presumed to represent the child's best interest. This presumption effectively precludes the notion that the child may have an interest that is independent of either the parent or the State. The result has left the child voiceless, dependent on the judgment of the parent, the State or a court. This judgment will always be under-informed without input from the child. This Note concludes that the criminal justice system, by focusing on the parent's claims against the State and the State's interest in child protection, is inadequate in accommodating the constitutional rights of the child to self-determination. Neglect is more appropriately adjudicated under the FCA, which considers the best interests of the child first and foremost, and which strives for family preservation.
APPENDIX

TABLE 1

ABUSE AND NEGLECT REPORTS
FY 1990-1998$^{359}$

Abuse/Neglect Reports: Total number of all reports recorded by the State Central Register (SCR), for the Fiscal Year received.

Children: Total of all children in reports

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Abuse/Neglect</td>
<td>55,158</td>
<td>52,985</td>
<td>52,504</td>
<td>52,458</td>
<td>49,129</td>
<td>47,571</td>
<td>52,994</td>
<td>53,567</td>
<td>57,842</td>
</tr>
<tr>
<td>Children</td>
<td>88,334</td>
<td>84,540</td>
<td>83,295</td>
<td>86,651</td>
<td>77,238</td>
<td>75,017</td>
<td>85,432</td>
<td>86,852</td>
<td>89,719</td>
</tr>
</tbody>
</table>

TABLE 2

MANDATED/NON-MANDATED REPORTS
CY 1990-1997$^{361}$

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Mandated</td>
<td>31,970</td>
<td>33,139</td>
<td>32,699</td>
<td>33,927</td>
<td>31,521</td>
<td>30,202</td>
<td>32,858</td>
<td>39,572</td>
</tr>
<tr>
<td>Total Non-</td>
<td>19,746</td>
<td>19,210</td>
<td>19,728</td>
<td>17,026</td>
<td>15,348</td>
<td>16,356</td>
<td>19,185</td>
<td>16,559</td>
</tr>
</tbody>
</table>

TABLE 3

PERCENT OF INDICATED ABUSE/NEGLECT CASES BY REPORTING SOURCE
CY 1990-1997$^{362}$

Indicated Abuse/Neglect Reports: Percent of reports, determined upon investigation to have credible evidence of abuse or neglect.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Mandated</td>
<td>50.1%</td>
<td>43.5%</td>
<td>34.4%</td>
<td>33.2%</td>
<td>34.8%</td>
<td>36.0%</td>
<td>40.1%</td>
<td>40.0%</td>
</tr>
<tr>
<td>Total Non-</td>
<td>26.3%</td>
<td>22.5%</td>
<td>16.7%</td>
<td>16.5%</td>
<td>17.6%</td>
<td>18.1%</td>
<td>16.7%</td>
<td>17.4%</td>
</tr>
</tbody>
</table>

$^{359}$ For the source of this data, see Administration for Children's Servs., Outcome and Performance Indicators (June 1998) (deriving data from State Central Register Monthly Reports).

$^{360}$ The 1998 figures are projected.

$^{361}$ For the source of this data, see Administration for Children's Servs., Outcome and Performance Indicators (June 1998) (deriving data from State Central Register Monthly Reports).

$^{362}$ For the source of this data, see id.
**Table 4**

**ARTICLE 10 PETITIONS FILED ANNUALLY**

FY 1990-1998<sup>363</sup>

<table>
<thead>
<tr>
<th>Article 10</th>
<th>Petitions</th>
<th>Filed</th>
</tr>
</thead>
<tbody>
<tr>
<td>1990</td>
<td>21,719</td>
<td>16,200</td>
</tr>
<tr>
<td>1991</td>
<td>12,837</td>
<td>10,798</td>
</tr>
<tr>
<td>1992</td>
<td>9,646</td>
<td>8,554</td>
</tr>
<tr>
<td>1993</td>
<td>9,381</td>
<td>11,154</td>
</tr>
<tr>
<td>1994</td>
<td>11,000</td>
<td></td>
</tr>
</tbody>
</table>

<sup>364</sup> The 1998 figures are projected.

---

**Table 5**

**STATE OF NEW YORK – DIVISION OF CRIMINAL JUSTICE SERVICES**

OJSA/BUREAU OF STATISTICAL SERVICES

**ARRESTS FOR ENDANGERING WELFARE OF A CHILD**

(PL 260.10)

**NEW YORK CITY**<sup>365</sup>

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total Arrests</td>
<td>303</td>
<td>335</td>
<td>419</td>
<td>424</td>
<td>466</td>
<td>644</td>
<td>872</td>
<td>1052</td>
<td>1111</td>
</tr>
<tr>
<td>Unreported Dispositions</td>
<td>26</td>
<td>30</td>
<td>32</td>
<td>27</td>
<td>51</td>
<td>67</td>
<td>80</td>
<td>204</td>
<td>492</td>
</tr>
<tr>
<td>% of Arrests</td>
<td>8.6%</td>
<td>9.0%</td>
<td>7.6%</td>
<td>6.4%</td>
<td>9.9%</td>
<td>10.4%</td>
<td>9.2%</td>
<td>19.4%</td>
<td>44.3%</td>
</tr>
<tr>
<td>Not Prosecuted</td>
<td>17</td>
<td>14</td>
<td>42</td>
<td>29</td>
<td>51</td>
<td>63</td>
<td>59</td>
<td>66</td>
<td>71</td>
</tr>
<tr>
<td>Prosecuted</td>
<td>260</td>
<td>291</td>
<td>345</td>
<td>368</td>
<td>387</td>
<td>514</td>
<td>733</td>
<td>782</td>
<td>548</td>
</tr>
<tr>
<td>Convicted</td>
<td>108</td>
<td>120</td>
<td>142</td>
<td>172</td>
<td>192</td>
<td>195</td>
<td>308</td>
<td>272</td>
<td>283</td>
</tr>
<tr>
<td>— Plea</td>
<td>105</td>
<td>117</td>
<td>134</td>
<td>171</td>
<td>192</td>
<td>189</td>
<td>299</td>
<td>271</td>
<td>282</td>
</tr>
<tr>
<td>— Verdict</td>
<td>1</td>
<td>1</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>6</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>— Unknown</td>
<td>2</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
<td>2</td>
<td>3</td>
<td>1</td>
<td>0</td>
</tr>
<tr>
<td>Dismissed</td>
<td>148</td>
<td>167</td>
<td>197</td>
<td>187</td>
<td>187</td>
<td>310</td>
<td>420</td>
<td>498</td>
<td>250</td>
</tr>
<tr>
<td>Acquitted</td>
<td>1</td>
<td>0</td>
<td>3</td>
<td>5</td>
<td>4</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Other Disposition</td>
<td>3</td>
<td>4</td>
<td>3</td>
<td>4</td>
<td>4</td>
<td>8</td>
<td>4</td>
<td>9</td>
<td>14</td>
</tr>
</tbody>
</table>

**Sentences to:**

- **Prison** | 1 | 1 | 1 | 0 | 1 | 1 | 1 | 2 | 2 |
- **Jail** | 9 | 11 | 26 | 14 | 21 | 19 | 31 | 28 | 26 |
- **Time Served** | 17 | 6 | 7 | 7 | 6 | 9 | 9 | 7 | 14 |
- **Jail + Probation** | 1 | 0 | 3 | 0 | 4 | 3 | 9 | 8 | 8 |
- **Probation** | 12 | 17 | 12 | 27 | 21 | 16 | 30 | 29 | 13 |
- **Fine** | 11 | 5 | 17 | 7 | 10 | 15 | 20 | 20 | 20 |
- **Cond. Discharge** | 55 | 78 | 73 | 116 | 127 | 126 | 202 | 171 | 189 |
- **Other** | 0 | 0 | 0 | 0 | 0 | 2 | 2 | 2 | 1 |
- **Unknown** | 2 | 2 | 3 | 1 | 2 | 6 | 4 | 5 | 10 |

<sup>363</sup> See id.

<sup>364</sup> For the source of this date, see COMPUTERIZED CRIMINAL HISTORY (Jan. 1999).
<table>
<thead>
<tr>
<th>CONVICTION RATE</th>
<th>39.0% 39.3% 36.7% 43.3% 43.8% 33.8% 38.9% 32.1% 45.7%</th>
</tr>
</thead>
<tbody>
<tr>
<td>(% OF DISPOSED)</td>
<td>INCARCERATION RATE</td>
</tr>
<tr>
<td></td>
<td>25.9% 15.0% 26.1% 12.2% 16.7% 16.4% 16.2% 16.5% 17.7%</td>
</tr>
<tr>
<td>(% OF CONV)</td>
<td>% OF CONVICTION TO:</td>
</tr>
<tr>
<td></td>
<td>FELONIES</td>
</tr>
<tr>
<td></td>
<td>0.9% 0.8% 3.5% 1.2% 0.5% 1.0% 0.6% 0.7% 0.7%</td>
</tr>
<tr>
<td>MISDEMEANORS</td>
<td>32.4% 35.0% 37.3% 38.4% 35.9% 42.6% 33.1% 44.5% 33.9%</td>
</tr>
<tr>
<td>LESSER OFFENSES</td>
<td>66.7% 64.2% 59.2% 60.5% 63.5% 56.4% 66.2% 54.8% 65.4%</td>
</tr>
</tbody>
</table>