2001

Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes

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Source: Hastings Law Journal

Citation: 53 Hastings L.J. 1 (2001).

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Articles

Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes

by

LOIS A. WEITHORN, J.D., PH.D.*

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Introduction

On March 7, 1997, . . . Theodore Johnson violently attacked his ex-girlfriend Vanessa Parker as she walked home from the supermarket with her three daughters. [He] approached Parker and struck her in the back of the head, knocking her against a fence. The baby carriage Parker was wheeling, carrying their child, was also knocked over. Parker’s two older children, 7 and 12 years old, immediately began to cry. [Johnson] yelled and cursed at Parker about previously putting him in jail (Parker already had an order of protection against defendant in connection with a prior harassment incident). He grabbed her by the back of the neck, dragged her to her apartment entrance, ordered her to unlock the apartment and knocked her head against the door.

Parker's 12-year-old daughter picked up the baby carriage and the children followed them inside. Once inside, [Johnson] pushed Parker up the steps into the apartment, again causing her to fall. He continued his cursing, telling her that he would "leave [her] in the house for dead" and then she would "see how [her] children would like being motherless." After entering the apartment, the children went directly to their bedroom. [Johnson] followed Parker into the living room, and continued to beat her with his hands, feet and a metal pipe. Defendant also threw cups, plates and glasses at the walls and at Parker. He continued his verbal abuse, cursing and yelling at Parker for calling the police about past incidents of abuse. Trapped in their room, the children could hear the glass breaking, Parker's screams and defendant's yelling. [Johnson's] reign of terror lasted for over 10 hours. Parker was finally able to sneak out of the apartment and call the police. Only after [his] arrest did the children emerge from the bedroom, where they were exposed to broken glass and debris strewn around the living room. Later, when [Johnson] was in jail awaiting trial, he threatened to beat Parker if she did not drop the charges against him.¹

In the past two decades, researchers have amassed an impressive body of empirical data demonstrating the negative impact of exposure to domestic violence² upon children's psychological development and

1. *People v. Johnson*, 740 N.E.2d 1075, 1075-76 (N.Y. 2000).

2. The term "domestic violence," as used in this Article, refers to violence between adult intimate partners. The broader term "family violence" refers more generally to the range of types of intrafamily violence, including domestic violence, child maltreatment, and elder abuse. Lucy Salcido Carter et al., *Domestic Violence and Children: Analysis and Recommendations*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 4, 15 n.1 (1999), available at <http://www.futureofchildren.org/dvc/index.htm>.

Because most victims of serious domestic violence are female and most perpetrators male, I use gendered language in this Article. Importantly, however, the analyses and conclusions in this Article apply as well to circumstances in which gender roles are reversed, and to situations involving same-sex intimate partners. In addition, appropriate services of the type discussed herein should be available for all victims of severe domestic violence, irrespective of gender or sexual orientation.

Substantial evidence exists for the conclusion that females are disproportionately represented among domestic violence victims. For example, the U.S. Department of Justice reports that women are victims in 85% of incidents of violence between intimates partners. U.S. DEP'T OF JUSTICE, VIOLENCE BY INTIMATES: ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS 1 (1998), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/vi.pdf>. [hereinafter VIOLENCE BY INTIMATES] (reporting data for the years 1992 through 1996). Survey data collected by the National Institute of Justice and Centers for Disease Control and Prevention ("NIJ-CDC") indicate that women are three times more likely than men to report having been assaulted physically or sexually by an intimate partner. PATRICIA TJADEN & NANCY THOENNES, PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 6-7 (Nov. 1998), available at <http://www.ncjrs.org/pdffiles/172837.pdf>.

A minority of researchers, however, relies on other self-report survey data to conclude that women engage in more physical aggression toward intimate partners than do men, see, e.g., John Archer, *Sex Differences in Aggression Between Heterosexual*

Partners: A Meta-Analytic Review, 126 PSYCHOL. BULL. 651 (2000), or that husbands and wives display fairly similar levels of violence towards the other, see Murray A. Straus & Richard J. Gelles, *How Violent are American Families? Estimates from the National Family Violence Resurvey and Other Studies*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES 95 (Murray A. Straus & Richard J. Gelles eds., 1990). Yet, Murray Straus and others who report some of these data caution against extrapolating from these data to reach certain conclusions. For example, research reveals that men tend to "under-report" their own violent behavior. See, e.g., Jan E. Stets & Murray A. Straus, *Gender Differences in Reporting Marital Violence and Its Medical and Psychological Consequences*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES 151, 156 (Murray A. Straus & Richard J. Gelles eds., 1990) (indicating that "data on violence by men obtained from men needs to be treated with skepticism"); NATIONAL RESEARCH COUNCIL, UNDERSTANDING VIOLENCE AGAINST WOMEN 32 (Nancy A. Crowell & Ann W. Burgess eds., 1996) [hereinafter NRC]. Furthermore, research consistently reveals that women far outnumber men as victims of serious intimate violence. See, e.g., NRC, *supra* at 163 ("survey findings and health and crime data . . . indicate . . . that women are more frequently and more seriously injured by intimates than are men"); Stets & Straus, *supra* at 163 (pointing out that women tend to sustain more physical injury, require more medical attention, and lose more time from work because of domestic violence than do men). In the NIJ-CDC report, Tjaden and Thoennes point out that:

differences between women's and men's rates of physical assault by an intimate partner become greater as the seriousness of the assault increases. For example, women were two to three times more likely than men to report that an intimate partner threw something that could hurt or pushed, grabbed or shoved them. However, they were 7 to 14 times more likely to report that an intimate partner beat them up, choked or tried to drown them, threatened them with a gun, or actually used a gun on them.

TJADEN & THOENNES, *supra* at 7. In addition, women are much more likely than are men to be killed by intimate partners. VIOLENCE BY INTIMATES, *supra* at 6. See also *infra* note 33. In 1995, Richard Gelles, one of the researchers whose work has been used to challenge the notion that domestic violence disproportionately endangers women, drafted an article dispelling this and other myths about domestic violence. Richard J. Gelles, *Domestic Violence Factoids*, available at <http://www.mincava.umn.edu/papers/factoid.htm> (Sept. 3, 2001). One of the myths Professor Gelles disputes is the assertion that "women are as violent as are men, and women initiate violence as often as do men." *Id.* He clarifies:

This factoid cites research by Murray Straus, Suzanne Steinmetz, and Richard Gelles, as well as a host of other self-report surveys. Those using this factoid tend to conveniently leave out the fact that Straus and his colleagues' surveys as well as data collected from the National Crime Victimization Survey (Bureau of Justice Statistics) consistently find that no matter what the rate of violence or who initiates the violence, women are 7 to 10 times more likely to be injured in acts of intimate violence than are men.

Id. See also Richard A. Berk et al., *Mutual Combat and Other Family Violence Myths*, in THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 197 (David Finkelhor et al. eds., 1983).

For further discussion of the controversies surrounding gender roles in domestic violence, see Jeffrey Fagan & Angela Browne, *Violence Between Spouses and Intimates: Physical Aggression Between Women and Men in Intimate Relationships*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE 115, 167-71 (Albert J. Reiss, Jr. & Jeffrey A. Roth eds., 1994); Archer, *supra*, and Jacquelyn W. White et al., *Intimate Partner Aggression—What Have we Learned? Comment on Archer (2000)*, 126 PSYCHOL. BULL.

functioning.³ Exposed children may develop a range of social, emotional, and academic problems, including aggressive conduct, anxiety symptoms, emotional withdrawal, and serious difficulties in school.⁴ Research also suggests that these children are more likely than are children from nonviolent homes to develop emotional and adjustment problems as adults, including repetition of the patterns of violence they observed as children.⁵ The data clearly demonstrate that growing up in violent homes is detrimental to children, even when children are not direct victims of physical or sexual abuse. Researchers have observed, in fact, that samples of children exposed to domestic violence display symptoms and difficulties quite similar to children who have been direct victims of physical abuse.⁶ In addition, there are children who are exposed to domestic violence *and* are

690 (2000).

3. For summaries of the empirical research on the effects of domestic violence on children, see B.B. Robbie Rossman, *Longer Term Effects of Children's Exposure to Domestic Violence*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN: THE FUTURE OF RESEARCH, INTERVENTION, AND SOCIAL POLICY 35 (Sandra A. Graham-Bermann & Jeffrey L. Edleson eds., 2001) [hereinafter DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN]; B.B. ROBBIE ROSSMAN ET AL., CHILDREN AND INTERPARENTAL VIOLENCE: THE IMPACT OF EXPOSURE 11-64 (2000) [hereinafter INTERPARENTAL VIOLENCE]; Jeffrey L. Edleson, *Children's Witnessing of Adult Domestic Violence*, 14 J. INTERPERSONAL VIOLENCE 839 (1999) [hereinafter Edleson, *Children's Witnessing*]; Gayla Margolin, *Effects of Domestic Violence on Children*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY AND THE COMMUNITY 57 (Penelope K. Trickett & Cynthia J. Schellenbach eds., 1998) [hereinafter VIOLENCE AGAINST CHILDREN IN THE FAMILY]; Janis Wolak & David Finkelhor, *Children Exposed to Partner Violence*, in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 73 (Jana L. Jasinski & Linda M. Williams eds., 1998); Alan J. Tompkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW & PSYCHOL. REV. 135, 143 (1992); PETER G. JAFFE ET AL., CHILDREN OF BATTERED WOMEN (1990). See also *infra* notes 372-407 and accompanying text.

4. INTERPARENTAL VIOLENCE, *supra* note 3, at 11-32; Margolin, *supra* note 3, at 62-77; Edleson, *Children's Witnessing*, *supra* note 3, at 846-61; JAFFE ET AL., *supra* note 3, at 32-73.

5. See Edleson, *Children's Witnessing*, *supra* note 3, at 860-61; Fagan & Browne, *supra* note 2, at 194-95, 211-12; Margolin, *supra* note 3, at 63-64; Cosandra McNeal & Paul R. Amato, *Parents' Marital Violence: Long-Term Consequences for Children*, 19 J. FAM. ISSUES 123 (1998). See also Gerald T. Hotaling et al., *Intrafamily Violence and Crime and Violence Outside the Family*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES 431 (Murray A. Straus & Richard A. Gelles eds., 1990). Despite the repeated observation that children exposed to violence are more likely to engage in such acts as adolescents and adults, some investigators urge caution because the empirical studies rely substantially on retrospective self-reports and may be characterized by a range of other methodological limitations. See, e.g., OLA W. BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION 14 (1997); Cathy Spatz Widom, *Does Violence Beget Violence? A Critical Examination of the Literature*, 106 PSYCHOL. BULL. 3 (1989).

6. See, e.g., Peter Jaffe et al., *Similarities in Behavioral and Social Maladjustment Among Child Victims and Witnesses to Family Violence*, 56 AM. J. ORTHOPSYCHIATRY 142 (1986).

victims of direct physical or sexual abuse.⁷ Not surprisingly, these “multiply-victimized” children reveal levels of psychological and behavioral disturbance that are even more severe than those displayed by children who have experienced only one form of victimization.⁸

Whereas the 1960s and 1970s brought with them widespread professional and public concern about children who are physically abused,⁹ and the 1980s and 1990s brought similar attention to the plight of children who are sexually abused,¹⁰ we are now witnessing increasing concern about children exposed to domestic violence.¹¹ For example, in the past several years, major professional organizations, such as the National Council of Juvenile and Family Court Judges,¹² the American Bar Association,¹³ the American

7. Research reveals that in approximately 45% to 70% of the families in which domestic violence or child abuse is discovered, the other type of abuse exists as well. See, e.g., Margolin, *supra* note 3, at 60-61. See also Jeffrey L. Edleson, *The Overlap Between Child Maltreatment and Woman Battering*, 5 VIOLENCE AGAINST WOMEN 134 (1999) [hereinafter Edleson, *The Overlap*]. Early research reports suggest that the co-occurrence of domestic violence and physical child abuse presents a particularly salient risk factor for subsequent child homicide perpetrated by the domestic violence offender. *Id.* at 143-44.

8. INTERPARENTAL VIOLENCE, *supra* note 3, at 17; Edleson, *Children's Witnessing*, *supra* note 3, at 861-62; Margolin, *supra* note 3, at 60; Kimberly L. Shipman et al., *Co-Occurrence of Spousal Violence and Child Abuse: Conceptual Implications*, 4 CHILD MALTREATMENT 93, 99-100 (1999). See generally, MULTIPLE VICTIMIZATION OF CHILDREN: CONCEPTUAL, DEVELOPMENTAL, RESEARCH AND TREATMENT ISSUES (B.B. Robbie Rossman et al. eds., 1998) [hereinafter MULTIPLE VICTIMIZATION].

9. See, e.g., SETH C. KALICHMAN, MANDATED REPORTING OF SUSPECTED CHILD ABUSE: ETHICS, LAW, & POLICY 12-17 (2d ed. 1999) (discussing the historical events leading to public and professional attention to child abuse in the United States).

10. See, e.g., Penelope K. Trickett & Frank W. Putnam, *Developmental Consequences of Child Sexual Abuse*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY, *supra* note 3, at 39, 39-40 (indicating that public and professional attention to the prevalence of sexual abuse increased dramatically during the 1980s and 1990s).

11. The increasing concern about children exposed to domestic violence may reflect the broader concern about psychological or emotional maltreatment. Some researchers and practitioners have suggested that exposure to domestic violence is a form of psychological or emotional maltreatment. See, e.g., AM. PSYCHOL. ASS'N, VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 50 (1996). See also INTERPARENTAL VIOLENCE, *supra* note 3, at 5-6. The scientific and policy issues relating to concepts of psychological maltreatment are reviewed below, as well as the theoretical relationships between concepts of psychological maltreatment and children's exposure to domestic violence. See *infra* notes 293-347 and accompanying text.

12. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, EFFECTIVE INTERVENTION IN DOMESTIC VIOLENCE AND CHILD MALTREATMENT CASES: GUIDELINES FOR POLICY AND PRACTICE (1999) [hereinafter THE GREEN BOOK]. This document, referred to by those in the field as “The Green Book” because of the color of its cover, has become the guidepost for agencies and professionals who seek to promote the well-being of children exposed to domestic violence through effective agency and community intervention. The Recommendations were authored for the National Council

Psychological Association,¹⁴ and the American Medical Association,¹⁵ as well as government agencies,¹⁶ have sponsored conferences, convened task forces, commissioned reports, or published recommendations addressing the policy issues related to protecting and assisting children exposed to domestic violence.

The obvious question confronting researchers, practitioners, and policymakers is how society can best prevent children's exposure to domestic violence and assist those children already exposed. Fortunately, in many locations, social scientists, medical and mental health professionals, social service and law enforcement personnel, domestic violence workers, educators, and others have begun to formulate training and practice guidelines and policies so that the various systems that encounter these children can respond in an appropriate and useful manner.¹⁷ There is a growing consensus about

by two of the most influential pioneers in the field, Susan Schechter and Jeffrey Edleson, with significant contributions by many highly-respected experts representing the judiciary, child welfare, domestic violence workers, and policymakers.

In addition, after intense competition from around the country, six communities have been chosen by the U.S. Department of Justice and Department of Health and Human Services to receive federal funding for local implementation and evaluation of the Green Book principles. See Dep't of Justice & Dep't of Health & Human Servs., A Demonstration Initiative to Address Domestic Violence and Child Maltreatment (Program description on file with the Hastings Law Journal, received 5/7/01). The communities selected are: Santa Clara County, California; San Francisco, California; Lane County, Oregon; El Paso County, Colorado; St. Louis County, Missouri; and Grafton County, New Hampshire.

13. Howard A. Davidson, *The Impact of Domestic Violence on Children: A Report to the President of the American Bar Association*, 1994 A.B.A. Ctr. on Children and the Law.

14. AM. PSYCHOL. ASS'N, *supra* note 11.

15. AM. MED. ASS'N, NATIONAL CONFERENCE ON FAMILY VIOLENCE: HEALTH AND JUSTICE (1994).

16. OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, DEP'T OF JUSTICE, SAFE FROM THE START: TAKING ACTION ON CHILDREN EXPOSED TO VIOLENCE (2000), available from National Criminal Justice Reference Service, 800-851-3420 or at http://ncjrs.org/html/ojjdp/summary_safefromstart/index.html [hereinafter OJJDP]. This publication is a product of a National Summit held on June 22, 1999: "Attorney General Janet Reno and Secretary of Health and Human Services Donna E. Shalala, with the leadership of Deputy Attorney General Eric Holder, brought together 150 practitioners and policymakers" to address how to prevent and reduce "the negative impact of children's exposure to violence." See *id.* In addition, the Office of Juvenile Justice and Delinquency Prevention has launched its "Safe Start Initiative," to implement the policies embodied in the report in nine sites around the country. See News Release, Office of Justice Programs, *Deputy Attorney General Announces New Effort to Help Children Exposed to Domestic Violence* (Feb. 29, 2000), available at <http://ojjdp.ncjrs.org/about/press/ojp000229.html>. After a competitive review of 208 applications, OJJDP selected the following locales as recipients to share over \$6 million over 5 ½ years to address the needs of children exposed to domestic violence: San Francisco, CA; Bridgeport, CT; Pinellas County, FL; Chicago, IL; Washington County, ME; Baltimore, MD; Rochester, NY; Chatham County, NC; and Spokane, WA.

17. See, e.g., THE GREEN BOOK, *supra* note 12; Davidson, *The Impact of Domestic*

the need for coordinated, community-based approaches to the problem of children's exposure to domestic violence, grounded in the collaboration of the various service systems that encounter these children and their families.¹⁸ Less clear, however, is how lawmakers should respond, and what types of policy initiatives will promote these children's well-being.

There have been a variety of responses by state legislatures. Certain statutory trends are lauded by a broad range of constituencies, whereas others engender substantial controversy. For example, almost all states have adopted statutory language directing family court judges to consider parental perpetration of domestic violence as a factor in custody decisionmaking, and several states have enacted a statutory presumption against a child's placement with a perpetrator of domestic violence.¹⁹ In the past few years, several states have passed laws allowing or mandating sentencing "upgrades" for domestic violence offenses perpetrated "in the presence of a child,"²⁰ and other states are considering such legislation presently.²¹ Although the passage and implementation of these custody and criminal statutes has not been completely free from controversy,²² the most vociferous debate has been reserved for proposals to expand the juvenile court's dependency jurisdiction to include children exposed to domestic violence.²³ Although several states have passed statutes that strive to promote child protective services and juvenile court involvement in domestic violence cases, the success of these statutes in achieving their asserted goals is mixed, at best. One statute was repealed and another one revised within a year of enactment, because of unintended negative effects.²⁴ Other statutes languish, unused, in the code books, as if they did not even exist,²⁵ while at least one state's

Violence on Children, *supra* note 13; NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: EMERGING PROGRAMS FOR BATTERED MOTHERS AND THEIR CHILDREN (1998) [hereinafter EMERGING PROGRAMS]; NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, THE FIRST NATIONAL SUMMIT: EXPLORING EFFECTIVE INTERVENTIONS IN DOMESTIC VIOLENCE & CHILD MALTREATMENT (Sept. 2000) [hereinafter FIRST NATIONAL SUMMIT]; OJJDP, *supra* note 16.

18. Thus, for example, these approaches envision that hospital emergency room staff, child protection and domestic violence workers, school personnel, police, and others would work together in identifying and responding to children exposed to domestic violence. See THE GREEN BOOK, *supra* note 12, at 16-26; Carter et al., *supra* note 2, at 7-10.

19. See *infra* notes 29-47 and accompanying text.

20. See *infra* notes 48-66 and accompanying text.

21. See *infra* note 49 and accompanying text.

22. See *infra* notes 37-47, 61-66 and accompanying text.

23. See *infra* notes 98-151 and accompanying text.

24. See *infra* notes 454-77 and accompanying text discussing events relating to passage and repeal of statutes in Minnesota and Florida.

25. See *infra* notes 439-53 and accompanying text.

statutory reform seems off to a promising start.²⁶ In this Article, I seek to understand these diverse findings and to identify the components of successful and effective statutory reform in this area.

The focus of this Article is an examination of statutes that characterize children's exposure to domestic violence as a form of child abuse or neglect *for the purpose of triggering child protective investigations and services, and if deemed necessary, juvenile court proceedings.*²⁷ I evaluate the soundness of this child protection strategy from theoretical and practical standpoints, and make recommendations as to the types of policy initiatives that are most likely to achieve their stated goals while minimizing unintended negative consequences.

First, in order to clarify how the statutes that are the focus of this Article fit into the landscape of state policies seeking to protect children from such exposure, I discuss the various categories of pertinent statutes. I then focus on statutes that expand the reach of the juvenile court and child protective services by characterizing children's exposure to domestic violence as a form of child abuse or neglect. In addition, I address the policy arguments that have been advanced in support of and against inclusion of such exposure as an independent ground for juvenile court jurisdiction.

In Part II, I examine the history and development of our country's present-day legal responses to child maltreatment. This Part underscores that identification of child maltreatment as a social problem requiring legal intervention results from complex interactions of social, economic, and political forces. It traces traditions of care and control of our country's "dependent" and "victimized" children from precolonial to modern times, examining some of those forces that have influenced varied legal responses at particular points in our nation's history.

In Part III, I address whether children's exposure to domestic violence should be considered a form of child maltreatment. The first section of this Part focuses particular attention on the philosophy, jurisdictional bases, and interventions of the juvenile court in child maltreatment cases, and explores emerging concepts of psychological maltreatment and their use to authorize juvenile court dependency jurisdiction. The second Section of Part III describes what is meant by "exposure" to domestic violence, summarizes empirical research as to the effects of such exposure on children, and examines whether inclusion of these cases is consistent, theoretically and practically,

26. See *infra* notes 478-522 and accompanying text.

27. See *infra* notes 69-71 and 254-66 and accompanying text for discussions of the distinctions between civil and criminal child maltreatment investigations, services, and proceedings.

with the juvenile court's traditional roles and actual functioning. In so doing, I discuss the case law of two states, New York and California, which have interpreted existing child maltreatment statutes to incorporate domestic violence exposure cases. In this Part, I conclude that the scientific data are strong enough to justify a legislative finding that *certain* exposures of children to domestic violence create a substantial likelihood of psychological and physical harm to children, and thus should be brought within the juvenile court's dependency jurisdiction.

In Part IV, I evaluate how child maltreatment statutes addressing children's exposure to domestic violence are working in those jurisdictions that have adopted them. I identify factors that contribute to their success, or lack thereof. In addition, I examine what is happening in states that have *not* enacted new statutes formally defining childhood exposure to domestic violence as child maltreatment. Some states, such as Massachusetts, have actively sought to create change "from the inside out." That is, they have reformed internal child protective services' policies and procedures in dealing with cases of childhood exposure to domestic violence. In other states, such as New York, the courts have interpreted existing statutes to encompass childhood exposure to domestic violence. Yet, no system-wide initiatives have introduced state-of-the-art policies, procedures, or programs into the handling of cases involving domestic violence.

Finally, in Part V, I present a blueprint for legal reform. I conclude that a statute explicitly bringing children exposed to domestic violence within the dependency jurisdiction of the juvenile court offers the promise of interrupting the violence that places these children's psychological well-being at risk. I emphasize, however, that in order to improve these children's lives, legislation must be narrowly-drawn and must set forth a clear philosophy of intervention, consistent with the guidelines set forth by the National Council of Juvenile and Family Court Judges, American Bar Association, and others, as described within this Article.²⁸ In addition, the state must build its capacity to respond to these cases, through development of a variety of training, screening, and intervention initiatives. In order to maximize success, the state must insure that all of its statutes, including criminal and child custody statutes, work together in responding to domestic violence. Furthermore, coordination among different courts and agencies is necessary to an effective state response.

States that expand the juvenile court's jurisdiction to encompass cases of childhood exposure to domestic violence must calculate the

28. See *infra* notes 566-92 and accompanying text.

funding necessary for effective implementation and program evaluation, and must appropriate such funds. Systematic program evaluation will allow legislators to determine whether their enactments are having the intended effects. Despite the challenges inherent in conducting research of this type, states must strive to examine the impact of their policies, for only when armed with such information can we begin to understand whether children who are exposed to domestic violence are indeed "better off" as a result of the state's intervention in their families.

I. Recent Statutory Approaches to Protecting Children from Exposure to Domestic Violence

In the past several years, a number of states have passed statutes with the explicit purpose of protecting children exposed to domestic violence. These statutes vary, however, in language and scope, and with respect to the mechanisms they employ to achieve their stated and apparent purposes.

A. Types of Statutes

There are three primary categories of statutes, each type targeting different facets of the family's interactions with the legal system, addressing somewhat different legal issues, and making available different types of state intervention. One group of laws addresses statutory criteria for the determination of child custody in private disputes between parents, usually in the context of divorce. A second category includes criminal laws that create penalty "upgrades" for certain domestic violence crimes when committed "in the presence of a child." Third, states have passed laws that construe childhood exposure to domestic violence as a type of child maltreatment.

(1) Child Custody Disputes between Private Parties

As policymakers have become more knowledgeable about the risks to children of exposure to domestic violence, they have attempted to provide guidance to family court judges charged with determining children's best interests for the purpose of private custody contests between parents.²⁹ Some statutes require or

29. Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991); Family Violence Project of the Nat'l Council of Juvenile & Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197 (1995); Marjory D. Fields, *The Impact of Spouse Abuse on Children and Its Relevance in Custody and Visitation Decisions in New York State*, 3 CORNELL J.L. & PUB. POL'Y 221 (1994); Leigh Goodmark, *From Property to Personhood: What the Legal System Should Do for*

encourage judges to consider, when making custody decisions, the existence of domestic violence in the family or the impact of the domestic violence on the child.³⁰ Other statutes require the court to consider evidence of domestic violence and require a written justification if a child is placed in the custody of a parent who has perpetrated domestic violence.³¹ Still other statutes, consistent with a model code developed by the National Council of Juvenile and Family Court Judges,³² explicitly create a rebuttable presumption against custodial placement with a perpetrator of domestic violence.³³

Children in Family Violence Cases, 102 W.VA. L. REV. 237 (1999); Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALB. L. REV. 1345, 1350 n.38 (1997) (reporting that forty-four states and District of Columbia have statutes or case law requiring or recommending that evidence of domestic violence be considered in child custody cases); Nancy K.D. Lemon, *Custody and Visitation Trends in the United States in Domestic Violence Cases*, in CHILDREN EXPOSED TO DOMESTIC VIOLENCE: CURRENT ISSUES IN RESEARCH, INTERVENTION, PREVENTION, AND POLICY DEVELOPMENT 329 (Robert A. Geffner et al. eds., 2000) [hereinafter CHILDREN EXPOSED TO DOMESTIC VIOLENCE]; Amy B. Levin, *Child Witnesses of Domestic Violence: How Should Judges Apply the Best Interests of the Child Standard in Custody and Visitation Cases Involving Domestic Violence?* 47 UCLA L. REV. 813 (2000).

30. See, e.g., IDAHO CODE § 32-717 (A)(7) (Michie 1999) (stating in pertinent part that "The court shall consider all relevant factors which may include: . . . Domestic violence as defined in section 39-6303, Idaho Code, whether or not in the presence of the child."). See also, 750 ILL. COMP. STAT. ANN. 5/602(a)(6) (West 2001).

31. See, e.g., DEL. CODE ANN. tit. 13. § 706A (1999) (requiring the court, after considering "[a]ny evidence of a past or present act of domestic violence, whether or not committed in the presence of the child" to "make specific written findings in support of the decision" if it awards a domestic violence perpetrator sole or joint custody).

32. See MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 401 (Nat'l Council of Juvenile & Family Court Judges 1994) ("In every proceeding where there is at issue a dispute as to the custody of the child, a determination by the court that domestic or family violence has occurred raises a rebuttable presumption that it is detrimental to the child and not in the best interests of the child to be placed in sole custody, joint legal custody, or joint physical custody with the perpetrator of family violence.").

33. See, e.g., CAL. FAM. CODE § 3044(a) (West Supp. 2001). This statute, passed in 1999, states: "Upon a finding by the court that a party seeking custody of a child has perpetrated domestic violence against the other party seeking custody of the child . . . within the previous five years, there is a rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child." *Id.* The presumption may be rebutted by various types of evidence relating to the perpetrator's rehabilitation or other factors. *Id.*

Arguably, codifying a presumption against a child's sole or joint custody with a domestic violence perpetrator has several benefits for the child. The most obvious benefit is protecting the child from contact with a violent parent. Research findings reveal that exposure to domestic violence is detrimental to the child's psychological well-being, see *supra* notes 3-4 and accompanying text, and that it may engender similar conduct in the child's own future relationships. See *supra* note 5 and accompanying text. In addition, given the co-occurrence of domestic violence and direct physical abuse, a child placed in the custody of a domestic violence perpetrator may be at risk for direct victimization. See

Some states incorporate a presumption against *joint custody* where there is evidence of domestic violence, in recognition of the problems inherent in requiring a domestic violence victim to have ongoing contact with her batterer for the purpose of sharing childrearing decisionmaking and caregiving.³⁴ A recent survey indicates that forty-four states and the District Columbia have included language in their child custody statutes relating to domestic violence,³⁵ and that thirteen have adopted a rebuttable presumption against joint or sole custody with the domestic violence perpetrator.³⁶

Initially, there was relatively little controversy about the benefits to children and domestic violence victims of statutes such as these, and very little question about the appropriateness of the state's role in enacting such statutes.³⁷ In custody disputes between private parties,³⁸ the state has already been "invited" into the dissolving

supra note 7 and accompanying text. Joint custody orders present particular dangers to children and adult domestic violence victims, in that they require frequent and continuing contact between the adult victim and perpetrator, increasing the risk of future violence. See Levin, *supra* note 29, at 838. Furthermore, the likelihood of violence between the perpetrator and victim increases substantially when a victim leaves the batterer, as is the case when she seeks a marital separation or divorce. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 64-65 (1991). This phenomenon of escalating violence, which is often lethal, has been referred to by Professor Martha Mahoney as "separation assault," *id.*, and has been documented by many researchers. See, e.g., Angela Browne et al., *Homicide Between Intimate Partners: A 20-Year Review*, in HOMICIDE: A SOURCEBOOK OF SOCIAL RESEARCH 149, 159-60 (M. Dwayne Smith & Margaret A. Zahn eds., 1999); Carolyn Rebecca Block & Antigone Christakos, *Intimate Partner Homicide in Chicago Over 29 Years*, 41 CRIME & DELINQUENCY 496, 506 (1995); Margo Wilson & Martin Daly, *Spousal Homicide Risk and Estrangement*, 8 VIOLENCE & VICTIMS 3 (Spring 1993). See also Glenda Kaufman Kantor & Jana L. Jasinski, *Dynamics and Risk Factors in Partner Violence*, in PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 1, 33 (Jana L. Jasinski & Linda M. Williams eds., 1998). Finally, incorporating a rebuttable presumption against a child's custody with a batterer may make it easier for a domestic violence victim to leave the batterer. Commentators note that some domestic violence perpetrators persuade their victims to stay by threatening to wage and win a successful child custody fight. See Goodmark, *supra* note 29, at 253. Creating a statutory presumption against a child's custody with a domestic violence perpetrator may reduce the potential impact such threats have on the victim's decisions about staying with, or leaving, the perpetrator.

34. See Levin, *supra* note 29, at 829.

35. See Kurtz, *supra* note 29, at 1348.

36. See Goodmark, *supra* note 29, at 255.

37. Even the United States Congress unanimously passed a resolution supporting state statutory presumptions against children's custody with domestic violence perpetrators. See Lemon, *supra* note 29, at 330-31.

38. It is important to distinguish custody disputes between private parties, such as divorcing parents, from custody disputes between the *state* and parents. In the former case, divorcing parents or other private parties with claims to custody of a child cannot resolve their disagreements regarding such custody. Here, the state's involvement in the case takes the form of private dispute settlement. In the latter case, the state's concern about the welfare of the child triggers intervention. As such, the state pits itself against

family by litigants unable to resolve their private dispute. Traditionally, the family court judge determines each child's best interests with guidance from statutorily-enumerated factors.³⁹ Adding to that list a factor that we now know is detrimental to children's best interests has not generated opposition. Creation of a statutory presumption against custody with a batterer is, of course, a more dramatic change in the law. It shifts the burden of proof in a custody case, requiring a domestic violence perpetrator to overcome the presumption,⁴⁰ and limiting the family court judge's discretion in making custody determinations.⁴¹

In 1998, the Supreme Court of Massachusetts issued the first appellate court analysis of the constitutionality of statutory rebuttable presumptions against a child's custody with a domestic violence perpetrator.⁴² The Massachusetts legislature was deliberating about a proposal to create such a presumption, and requested that its state supreme court formally address whether "the resulting shifting of the burden of proof... violate[s] the Due Process Clause of the Fourteenth Amendment to the United States Constitution or Article 10 of the Massachusetts Declaration of Rights."⁴³ The Court responded, "No," concluding that the "risk of error is greatly outweighed by the children's interest in being free from abuse and neglect, and the State's interest in promoting the welfare of its children."⁴⁴ Given the recency of state laws creating statutory presumptions against batterers' custody of their children, it is too early to assess whether other jurisdictions will follow suit, although there seems to be increasing acceptance of such an approach.⁴⁵

the parent(s) or other legal custodians as it seeks to vindicate the child's interests in safety and well-being. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

39. See, e.g., CAL. FAM. CODE § 3011 (West Supp. 2001); UNIF. MARRIAGE AND DIVORCE ACT § 402 (West 1970 & Supp. 1998). See generally, Linda Whobrey Rohman et al., *The Best Interests of the Child in Custody Disputes*, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE 59 (Lois A. Weithorn ed., 1984).

40. See, e.g., CAL. FAM. CODE § 3044 (West Supp. 2001).

41. Some might argue that limiting the discretion of family court judges in child custody adjudications is a positive development because there is so much unguided discretion in these cases. For a discussion of the problems of indeterminacy in child custody adjudication, see Mnookin, *supra* note 38.

42. Opinion of the Justices to the Senate, 691 N.E.2d 911, 916-17 (Mass. 1998).

43. *Id.* at 913.

44. *Id.* at 917.

45. But see Deborah Ahrens, *Not in Front of the Children: Prohibition on Child Custody as Civil Branding for Criminal Activity*, 75 N.Y.U. L. REV. 737 (2000) (arguing that use of presumptions against custody with an alleged domestic violence perpetrator in civil cases serves to stigmatize the parent for acts more appropriately dealt with in criminal contexts, and does not successfully protect children from harm).

As these statutes are implemented, however, jurisdictions may encounter unexpected problems. For example, one year after the effective date of California's pertinent statute, family courts are struggling with questions such as what types of evidence constitute a finding of domestic violence for the purpose of that statute, and whether findings of domestic violence in other courts and proceedings should have a *res judicata* effect in applying the presumption.⁴⁶ Given the constitutional implications of custodial decisions,⁴⁷ states must hammer out these challenging issues so that any such presumptions can be applied with consistency and fairness, providing safeguards of parental rights, while retaining the primary focus on the best interests of the child.

(2) Criminal Sentencing

A rapidly-growing number of states have enacted statutes authorizing or mandating enhanced criminal penalties or sentencing "upgrades" for domestic violence perpetrators if their act is committed "in the presence of a child."⁴⁸ And, at the time of this writing, additional states are considering such statutory changes.⁴⁹

46. In a workshop at a conference sponsored by the California Judicial Council's Center for Families, Children & the Courts, panelists discussed some of the challenges encountered in the first year during which California's statutory presumption was in effect. Implementing Family Code Section 3044: One Year Later, Workshop at the Conference on Family Violence and the Courts: A Coordinated Response, Los Angeles, CA., May 17-18, 2001 (discussing implementation of CAL. FAM. CODE § 3044 (2000)). Panelists raised several difficulties, such as: what types of evidence can constitute a finding of domestic violence under Section 3044; whether or not the issuance of a civil protective order against an alleged batterer can trigger the presumption; and whether judges in California will be reluctant to issue civil protective orders if these orders have *res judicata* effect on Section 3044 determinations. For a general discussion regarding the construction of state custody statute provisions addressing domestic violence, see Jack M. Dalglish, Jr., *Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R. 5th 241 (1997).

47. See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (asserting that the rights to "raise one's children have been deemed 'essential' . . ."); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . .").

48. See, e.g., ALASKA STAT. § 12.55.155(c)(18)(C) (Michie 2000); ARIZ. REV. STAT. ANN. § 13-702(C)(17) (West 2001); CAL. PENAL CODE § 1170.76 (West 2001); FLA. STAT. ANN. § 921.0024(1)(b) (West 2001); HAW. REV. STAT. § 706-606.4(1)(c) (2000); IDAHO CODE § 18-918 (7)(b) (Michie 1998 & Supp. 2000); OKLA. STAT. ANN. tit. 21, § 644 (West Supp. 2001); OR. REV. STAT. § 163.160(3)(c) (1999); WASH. REV. CODE ANN. § 9.94A.390(2)(h)(ii) (2001).

49. See, e.g., 1999-2000 R.I. Pub. Laws H.B. 5883 (creating criminal offense with mandatory prison sentences ranging from ten days to ten years, depending upon various factors, for misdemeanor domestic violence offenses committed in a child's presence); 2001 S.C. Acts H.B. 3056 (creating the offense of criminal domestic violence in the presence of a minor and specifying penalties including certain mandatory minimum

California's statute, added to its Penal Code in 1997, characterizes a child's exposure to an incident of domestic violence as an aggravating circumstance in sentencing.⁵⁰ Idaho's statute explicitly "doubles" the penalties for domestic violence crimes that occur in the presence of a child.⁵¹ Oregon's law establishes a new category of criminal offense of "domestic violence in the presence of a minor," for which specified penalties are available.⁵²

Statutes that authorize or enhance criminal penalties for defendants convicted of domestic violence crimes in the presence of minors are an increasingly common response to evidence of the negative effects of children's exposure to domestic violence. Those commentators who support this trend point to several potential benefits to defining children as direct victims of domestic violence based on their exposure to it: (1) children may have increased access to various sources of crime victim compensation funds and programs to address the health and mental health needs that result from the domestic violence incidents;⁵³ (2) law enforcement officials will be more likely to focus on the presence of children at the scene of domestic violence incidents, again increasing the possibilities that these children's psychological, medical, and other needs may be addressed;⁵⁴ (3) such focus may increase referrals to child protective services for screening;⁵⁵ (4) if children are identified as direct victims of domestic violence crimes, civil protective orders can be issued on their behalf;⁵⁶ (5) prosecutions of offenders may have a greater

sentences).

50. Specifically, California Penal Code § 1170.76 indicates that if an assault or attempted assault "contemporaneously occurred in the presence of, or was witnessed by" a minor, where the defendant is or has been a household member or relative of the minor or victim, and the victim is the minor's natural, adoptive, step- or foster parent, the minor's presence is "considered a circumstance in aggravation of the crime in imposing" a sentence. CAL. PENAL CODE § 1170.76 (West Supp. 2001).

51. IDAHO CODE § 18-918(7)(b) (Michie 1998 & Supp. 2000).

52. OR. REV. STAT. § 163.160 (1999). In defining "Assault in the fourth degree," Oregon's code specifies that a "Class A misdemeanor" assault becomes a "Class C felony" assault if any of several conditions are met. One of the conditions is: "The assault is committed in the immediate presence of, or is witnessed by, the person's or the victim's child or stepchild or a minor child residing within the household of the person or victim." OR. REV. STAT. § 163.160(3)(c) (1999).

53. DEBRA WHITCOMB, CHILDREN AND DOMESTIC VIOLENCE: CHALLENGES FOR PROSECUTORS, NAT. INSTITUTE OF JUSTICE REPORT vi, 78-86 (2000).

54. Brian K. Holmgren, Child Abuse and Domestic Violence: The Interconnection 42-44, (2000) (unpublished manuscript, on file with the Hastings Law Journal).

55. *Id.*; WHITCOMB, *supra* note 53, at vi. This potential consequence is a "double-edged sword," in that the nature and consequences of child protective services' involvement in domestic violence cases is highly controversial, as the remainder of this Article underscores.

56. WHITCOMB, *supra* note 53, at vi.

likelihood of going forward, even if the adult victim chooses not to testify;⁵⁷ (6) the state is empowered to act more decisively in bringing the penalties of the criminal justice system to bear against domestic violence perpetrators who endanger children, including imposing longer sentences;⁵⁸ (7) this type of statute has the potential for certain important symbolic and practical effects, making public statements about society's intolerance of domestic violence and the attendant harms to children;⁵⁹ (8) these statutes shift the traditional focus from the purported liability of the adult domestic violence victim for failure to protect her child to the liability of the domestic violence perpetrator, holding him accountable for his acts.⁶⁰

Several objections to these statutes have been lodged, as well. Some in the field have expressed concerns that these statutes will increase the criminal justice system's use of children as witnesses.⁶¹ The process of testifying against a family member, or even against a stranger in an abuse-related case, can be very traumatic for a child.⁶² An initial investigation of the implementation of these criminal statutes reveals that these statutes have not substantially increased the use of children as witnesses in criminal proceedings.⁶³ Others have expressed concern that expanding a batterer's criminal liability may have the indirect and unintended effect of expanding the adult victim's liability as well, through doctrines that hold her criminal liable for failure to protect her child.⁶⁴ To date, there is no evidence of this latter consequence.⁶⁵ Finally, some may be concerned that

57. Holmgren, *supra* note 54, at 42-44; Audrey E. Stone & Rebecca J. Fialk, *Criminalizing the Exposure of Children to Family Violence: Breaking the Cycle of Abuse*, 20 HARV. WOMEN'S L.J. 205, 213 (1997).

58. See Stone & Fialk, *supra* note 57, at 222-24.

59. Stone & Fialk, *supra* note 57, at 210-11. See *infra* notes 147-50 and accompanying text for further discussion of the notions of the expressive or symbolic functions of public policies.

60. Stone & Fialk, *supra* note 57, at 210-12.

61. Jeffrey L. Edleson, Bridging Research, Policy, and Practice, Remarks at the Institute of Medicine/National Research Council Workshop on Children and Domestic Abuse, Washington D.C. (April 10, 2000) (transcript at 241), *transcript available from National Academy of Sciences* [hereinafter Edleson, Bridging Research]; see WHITCOMB, *supra* note 54, at 79-80.

62. See WHITCOMB, *supra* note 54, at 79-80; Goodmark, *supra* note 29, at 291-94.

63. In a study funded by the National Institute of Justice examining the implementation of recently enacted criminal statutes addressing children's exposure to domestic violence, the investigators concluded that: "prosecutors in the jurisdictions studied rarely ask children to testify in domestic violence cases against their mothers' wishes." WHITCOMB, *supra* note 53, at 79.

64. See WHITCOMB, *supra* note 53, at vii.

65. *Id.* at 80-82. Based on her field research examining the implementation of these statutes in five jurisdictions (Dallas County, Texas; Houston County, Georgia; Multnomah County, Oregon; Salt Lake County, Utah; and San Diego County, California), Whitcomb reports that women were not charged with these offenses unless they were the primary

these statutes send us down a slippery slope by expanding the categories of persons who can be construed as *direct* victims of violent crimes to any of those who merely witness an offense. Although all expansions of criminal liability must be carefully considered, it seems unlikely that these statutes will start a trend that will extend beyond the instant context. Parents and other legally recognized caregivers owe their charges a special duty of care, and thus bear a higher level of responsibility for violence that they perpetrate in the child's presence and against that child's parent or caregiver.⁶⁶

(3) *State Intervention in Child Abuse or Neglect*

Finally, a few states have sought to protect children exposed to domestic violence through use of child maltreatment statutes. The child maltreatment statutes in question fall into several categories: (1) *reporting* statutes; (2) statutes that guide or dictate the *processing* of maltreatment cases; (3) statutes that invoke the state's *criminal* jurisdiction over child maltreatment cases; and (4) statutes that invoke the state's *civil* or *dependency* jurisdiction over maltreatment cases.

Definitions of what constitutes child abuse or neglect can be found in any or all of the above statutes. Reporting statutes set forth the types of parental conduct or harms to children that must be reported to authorities by specified mandated reporters.⁶⁷ Statutes governing the *processing* of cases often articulate the ways in which state personnel and others are expected to respond to cases, and may indicate what categories of responses are mandatory versus

aggressor. *Id.* She found that reports alleging that adult domestic violence victims had failed to protect their children from the perpetrator's behavior did not increase, nor did maternal loss of custody, solely on the basis of the children's exposure to domestic violence. *Id.*

66. See Stone & Fialk, *supra* note 57, at 213. The expansion of criminal liability in domestic violence cases to the parties' witnessing children may bear some conceptual relationship to tort liability for the claims of emotional distress by witnessing bystanders. Yet, in this latter instance, state law has typically limited the relevant causes of action to close family members. See, e.g., Dillon v. Legg, 441 P.2d 912 (Cal. 1968) (en banc). It is unlikely that these new criminal statutes signal a trend in broadening criminal liability to new classes of witnessing victims. Although states vary with respect to the precise relationships they consider to fall within the category of close family members, states generally do not expand liability outside of this category. Compare Dunphy v. Gregor, 642 A.2d 372 (N.J. 1994) (permitting an accident victim's unmarried cohabitant, who was also his fiancée, to bring a cause of action, analogizing her relationship to the victim to that of a spouse) with Elden v. Sheldon, 758 P.2d 582 (Cal. 1988) (en banc) (refusing to extend California's doctrine to permit an unmarried cohabitant, whose relationship with accident victim was "akin to a marital relationship," to bring a cause of action for emotional distress).

67. See *infra* notes 72–79, 102–03 and accompanying text.

discretionary.⁶⁸ In addition, definitions of child maltreatment also exist in statutes outlining the jurisdiction of the criminal justice system and juvenile justice system with respect to suspected abuse or neglect. All of these statutes interrelate, however.

For example, definitions of maltreatment in the reporting statutes determine the types of cases that will be referred to the juvenile justice system, the criminal justice system, or both. Statutes delineating procedures and the roles of state actors further determine which cases are dismissed, handled informally, or remain in the system for formal adjudication. Furthermore, criminal justice and juvenile court jurisdiction in child maltreatment cases overlap. Each system has the authority to intervene in most child abuse and neglect cases, sharing with the other system a concern for the protection of the child from current and future harm.⁶⁹ Yet, these systems' mandates and procedures diverge from that point on. State penal codes empower law enforcement and court personnel to investigate cases, to prosecute alleged offenders, and to sentence those found guilty of violating these laws. Punishment may seek to achieve any or all of the traditional criminal justice system goals: deterrence, retribution, incapacitation, and rehabilitation. By contrast, civil child maltreatment statutes trigger child protective services investigation and intervention, and the potential involvement of juvenile court. The primary goals of such intervention are remediation of parental or family problems identified as causing the maltreatment, preservation of the family unit when possible, and planning for the long-term safety and stability of the child.⁷⁰ There are provisions and procedures in most states that require or permit workers in each system to cross-refer and share in certain types of information.⁷¹ Typically, the explicit and implicit directives in statutes, the internal policies of the various governmental agencies involved, the facts of individual cases, and the discretion of state employees determine whether particular cases are processed and pursued in one system or the other, or both. Because of the interrelationships between criminal justice and juvenile justice handling of child maltreatment

68. See *infra* notes 80-85 and accompanying text.

69. See, e.g., Donald J. Besharov, *Child Abuse: Arrest and Prosecution Decision-Making*, 24 AM. CRIM. LAW REV. 315, 315-24 (1986) [hereinafter *Child Abuse*] (discussing trends in civil versus criminal handling of child maltreatment cases); CLIFFORD K. DORNE, *CHILD MALTREATMENT: A PRIMER IN HISTORY, PUBLIC POLICY, AND RESEARCH* 1-4 (2d ed. 1997). See also notes 254-66 *infra* and accompanying text.

70. Despite the obvious differences between the goals of the two systems, criminal justice system interventions in maltreatment cases sometimes attempt rehabilitation, and juvenile justice system interventions in maltreatment cases can appear punitive (e.g., use of contempt sanctions to enforce parental cooperation with the court's requirements). See *infra* notes 254-66 and accompanying text.

71. See, e.g., CAL. PENAL CODE § 11166(h) (West Supp. 2001).

cases, statutory changes focusing on either criminal or civil child maltreatment jurisdiction are likely to have direct or indirect implications for the caseload, and perhaps even processing, of cases in the other system.

In the past several years, states have enacted statutes that address reporting, processing, and jurisdiction of cases in which children are exposed to domestic violence.

(a) Reporting statutes

It is well-known that family violence tends to be treated as a "family secret."⁷² Children are unlikely to initiate reports about the family's domestic violence problems to people outside of the family, because of their dependence upon, trust of, and often also fear of, abusive adult caregivers.⁷³ With the guidance of the federal government, all states have enacted child abuse reporting statutes in order to assist authorities in identifying those families in which children were maltreated.⁷⁴ These statutes require that persons in particular professions, such as those who work closely with children, those who are in a position to evaluate children physically or emotionally, and those who may obtain information about the existence of child abuse or neglect in a family,⁷⁵ report their suspicions about child maltreatment to the designated authorities.⁷⁶ Because

72. See Einat Peled, "Secondary" Victims No More: Refocusing Intervention with Children, in FUTURE INTERVENTIONS WITH BATTERED WOMEN AND THEIR FAMILIES 125, 128-31 (Jeffrey L. Edleson & Zvi C. Eisikovits eds., 1996). Dr. Peled notes that:

Many children of battered women cannot be identified by service providers because they live in a secret. The emotional, physical, and sexual violence children witness may be kept as a secret by abuser, or victim, or both. Parents may try to hide the violence from the outside world, from their families, from their children, and, sometimes, from themselves.

Id. at 128-29.

73. *Id.*; Betsy McAlister Groves, *Mental Health Services for Children who Witness Domestic Violence*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 122, 124 (1999), available at <http://www.futureofchildren.org/dvc/index.htm>.

74. See, e.g., KALICHMAN, *supra* note 9, at 12-18.

75. For example, in California, the following persons, as well as statutorily enumerated others, are mandated to report "reasonable suspicion" of abuse or neglect that they have obtained in the course of one's professional duties or employment: teachers, administrators and aides in instructional settings, day care center employees, summer camp or youth recreation program personnel, health practitioners (physicians, psychologists, dentists, nurses, optometrists, paramedics, counselors, coroners), employees of child protective agencies, child visitation monitors, commercial film and photographic print processors. CAL. PENAL CODE § 11166 (West 2000).

76. Typically statutes designate police or child protective services as the authorities who receive these reports, see, e.g., CAL. PENAL CODE § 11165.9 (West 2001) ("Reports of suspected child abuse or neglect shall be made by mandated reporters to any police department or sheriff's department, . . . or the county welfare department."), and may make provisions for cross-referrals between these two agencies. See, e.g., CAL. PENAL

family violence is such a "private" occurrence, the advent of mandated reporting laws allows society to pierce through the barriers that hide these children's experiences from public view. Arguably, one advantage of including children exposed to domestic violence within the ambit of reporting and juvenile court jurisdictional statutes is the possibility that the millions of such children who are not known to law enforcement and helping professionals will be identified, so that the system can begin to assist them. In 1999, Minnesota passed a statute incorporating childhood exposure to domestic violence into the definition of *neglect* in the state's child maltreatment reporting law.⁷⁷ In so doing, it mandated that statutorily-designated persons report suspicions of such phenomena to child protective services or the police. Thus, depending upon the case and the policies of protective services and law enforcement agencies, these cases might be investigated by one or other system, or both, and ultimately could be processed in either criminal or dependency court, or both. This statute was repealed in April of 2000.⁷⁸ The circumstances surrounding the repeal will be discussed below.⁷⁹

(b) Statutes regulating the processing of child maltreatment cases

In 1999, Florida passed a statute⁸⁰ in response to several highly-publicized child abuse cases resulting in the death of several children.⁸¹ The new statute addressed the way in which child maltreatment cases involving domestic violence were processed,

CODE §11166(h)-(i) (West 2001).

77. MINN. STAT. ANN. § 626.556(c)(8) (1999) (repealed 2000):

Neglect means . . . that the parent or other person responsible for the care of the child: (i) engages in violent behavior that demonstrates a disregard for the well-being of the child as indicated by action that could reasonably result in serious physical, mental, or threatened injury, or emotional damage to the child; (ii) engages in repeated domestic assault [as defined in specified criminal provisions]; (iii) intentionally inflicts or attempts to inflict bodily harm against a family or household member . . . that is within sight or sound of the child; or (iv) subjects the child to ongoing domestic violence by the abuser in the home environment that is likely to have a detrimental effect on the well-being of the child.

78. 2000 Minn. Sess. Law Serv. Ch. 401, § 1(West).

79. See *infra* notes 454-71 and accompanying text.

80. 1999 Fla. Sess. Law Serv. 99-193 (West) (effective July 1, 1999 and codified at FL. STAT. § 39.301(8)(b)), repealed and revised June 5, 2000 pursuant to 2000 Fla. Sess. Law Serv. 2000-217 (West).

81. Although several cases triggered the legal changes, the most celebrated case was that of Kayla McKeon, the child whose name has been used in referring to the new statute. Lenny Savino, *Kayla Law Tough Act to Follow: Investigators Say More Child Abuse Complaints and Tough New Requirements Have Made their Jobs Almost Impossible*, ORLANDO SENTINEL, Jan. 9, 2000, available at 2000 WL 3571172. Six-year-old Kayla McKeon was killed by her father, "[d]espite four warning calls to the state's child abuse hotline alleging abuse." *Id.*

removing discretion from various state personnel regarding whether to file a dependency petition.⁸² The statute mandated such a filing in certain “high-risk” cases, such as cases involving domestic violence.⁸³ State officials had not been prepared for the overflow of cases that would follow, and the statute was amended in 2000,⁸⁴ after compliance with it nearly paralyzed the state’s ability to respond to any maltreatment cases.⁸⁵

(c) Criminal child abuse statutes

In 1999 and 1997, respectively, Georgia⁸⁶ and Utah⁸⁷ passed statutes that characterized perpetration of acts of domestic violence by one household member on another within *the presence of a child* as a form of *criminal* child abuse. Both statutes provide for a range of criminal penalties, depending upon various circumstances, including whether the offense is the first or subsequent violation of that type.

82. 1999 Fla. Sess. Law Serv. 99-193 (West) (repealed and revised 2000). The relevant portion of the 1999 statute read:

If it is determined that the child is in need of the protection and supervision of the court, the department shall file a petition for dependency. A petition for *dependency shall be filed in all cases classified by the department as high-risk cases, including, but not limited to, cases involving parents or legal custodians of a young age, the use of illegal drugs, or domestic violence.*”

Id. (emphasis added).

83. *Id.*

84. The new section listed domestic violence as one of several “[f]actors that the department *may consider* in determining whether a case is high-risk.” FLA. STAT. ANN. § 39.301(8)(b) (West 2001) (emphasis added).

85. See Savino, *supra* note 81.

86. Georgia Code section 16-5-70, reads in pertinent part:

(c) Any person commits the offense of cruelty to children in the second degree when: (1) Such person, who is the primary aggressor, intentionally allows a child under the age of 18 to witness the commission of a forcible felony, battery, or family violence battery; or (2) Such person, who is the primary aggressor, having knowledge that a child under the age of 18 is present and sees or hears the act, commits a forcible felony, battery, or family violence.

GA. CODE ANN. § 16-5-70(c) (1999).

87. Utah indicates that a person is guilty of criminal child abuse if he:

(a) commits or attempts to commit criminal homicide . . . against a cohabitant in the presence of a child or (b) intentionally causes serious bodily injury to a cohabitant or uses a dangerous weapon . . . or other means of force likely to produce death or serious bodily injury against a cohabitant, in the presence of a child; or (c) under circumstances not amounting to a violation of [the above subsections] commits an act of domestic violence in the presence of a child [under certain other specified circumstances].

UTAH CODE ANN. § 76-5-109.1(2) (2000).

(d) Dependency court jurisdictional statutes

Although it has only been in the past several years that American states have begun to incorporate childhood exposure to domestic violence into statutory definitions of child abuse and neglect, six of ten Canadian provinces have had such laws for many years.⁸⁸ In the years spanning from 1978 through 1990, these provinces passed statutes that place certain cases in which children are exposed to domestic violence within the reach of the juvenile court.⁸⁹ More information about Canada's use of these statutes is provided below.⁹⁰

In the United States, however, interest in such legislation is far more recent. In 1998, Alaska incorporated children's exposure to domestic violence into its statute governing the grounds for the juvenile court's dependency jurisdiction.⁹¹ As part of a fairly extensive reworking of the statute's definition of "mental injury,"⁹² the legislature authorized the juvenile court to proceed with any of the interventions and dispositions available to it in cases where children are exposed to domestic violence. This statute permits juvenile court jurisdiction in cases where parental perpetration of domestic violence creates a "substantial risk" of emotional harm to

88. The six provinces are: Alberta, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, and Saskatchewan. See *infra* note 439 and accompanying text.

89. For example, Alberta's Child Welfare Act states that:

a child is emotionally injured (i) if there is substantial and observable impairment of the child's mental or emotional functioning that is evidenced by a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development, and (ii) there are reasonable and probable grounds to believe that the emotional injury is the result of . . . (C) exposure to domestic violence or severe domestic disharmony

Child Welfare Act, R.S.A., ch. C-8.1, § (3)(a) (1984) (Alberta, Can.)

90. See *infra* notes 439-53 and accompanying text.

91. ALASKA STAT. § 47.10.011 (Michie 2000):

[T]he court may find a child to be a child in need of aid if it finds by a preponderance of the evidence that the child has been subjected to . . . (8) conduct by or conditions created by the parent, guardian, or custodian have . . . (B) placed the child at substantial risk of mental injury as a result of . . . (ii) exposure to conduct by a household member, as defined in [pertinent Alaska domestic violence statutes] against another household member, that is a crime under [Alaska statutes criminalizing murder, assault, and sexual assault], an attempt to commit an offense [listing same statutes above]; or (iii) repeated exposure to conduct by a household member, as defined in [pertinent Alaska domestic violence statutes], against another household member that is a crime under [Alaska statutes criminalizing offenses that have not necessarily already caused physical injury, such as reckless endangerment, and stalking].

Id.

92. See *infra* notes 340-47 and accompanying text for additional information about Alaska's new "mental injury" statute.

children in the family.”⁹³ In 1998, Florida amended its juvenile court jurisdictional statute to include within the definition of “harm” circumstances “when any person . . . engages in violent behavior that demonstrates a wanton disregard for the presence of a child and could reasonably result in serious injury to the child.”⁹⁴ Two other states, Connecticut⁹⁵ and Kentucky,⁹⁶ have authorized their juvenile courts to

93. ALASKA STAT. § 47.10.011(8)(B) (Michie 2000).

94. FLA. STAT. ANN. § 39.01(30)(i) (West 2001). The statutory definition of abuse includes “any willful act or threatened act that results in any physical, mental, or sexual injury or harm that causes or is likely to cause the child’s physical, mental, or emotional health to be significantly impaired . . .” FLA. STAT. ANN. § 39.01(2) (West 2001). “Harm” is defined further in Subsection 30 of Section 39.01, with the domestic violence provision listed as one of over a dozen specified categories of potentially harmful conduct. FLA. STAT. ANN. § 39.01(30) (West 2001). Florida appellate courts have decided two cases interpreting Subsection 30 in which they have limited the juvenile court’s jurisdiction on this ground to cases where the “the child sees or is aware of the violence occurring.” *See D.D. v. Dep’t of Children & Families*, 773 So. 2d 615, 617-18 (Fla. Dist. Ct. App. 2000); *D.H. v. Dep’t of Children & Families*, 769 So. 2d 424, 427 (Fla. Dist. Ct. App. 2000). *See also*, *K.R. v. Dep’t of Children & Families*, 784 So. 2d 594, 597 (Fla. Dist. Ct. App. 2001) (implicitly considering the relevance of Section 39.01(3)(i) in stating “There was no evidence of physical violence other than the father pushing the mother onto the bed, which occurred over a year prior and was not witnessed by the child,” and citing to *D.H.*, 769 So. 2d at 427).

95. CONN. GEN. STAT. ANN. § 17a-106b (West 2001):

(a) The state of Connecticut finds that family violence can result in abuse and neglect of the children living in the household where such violence occurs and that the prevention of child abuse and neglect depends on coordination of domestic violence and child protective services. (b) The Commissioner of Children and Families may consider the existence and the impact of family violence in any child abuse investigation and may assist family members in obtaining protection from family violence.

Id. There exists only one published case applying Connecticut’s statute, and it is not clear from that case whether the statute creates a separate jurisdictional basis for juvenile court intervention. *See In re Crystle W.*, 2000 WL 726842, at *4 (Conn. Super. Ct. May 15, 2000). In this case, the court noted that the children were exposed to domestic violence and states: “Our General Assembly has stated the nearly obvious point that ‘family violence can result in abuse and neglect of the children living in the household where such violence occurs.’” *Id.* at *4. It then stated additional grounds for the finding of neglect, such as the mother’s failure to take her child to a pediatrician after sexual abuse was discovered. *Id.*

96. KY. REV. STAT. ANN. § 620.023 (1) (Michie 2000):

Evidence of the following circumstances if relevant shall be considered by the court in all proceedings conducted pursuant to [the state code chapter authorizing state intervention in cases of dependency, neglect, and abuse] in which the court is required to render decisions in the best interest of the child: . . . (d) A finding of domestic violence and abuse as defined in KRS 403.720, whether or not committed in the presence of the child.

KRS 403.720(1) defines domestic violence as “physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.” KY. REV. STAT. § 403.720(1) (Michie 1999). Kentucky has no published cases

“consider evidence” of the children’s exposure to domestic violence in the various stages of the proceedings. In 1998, the Utah legislature considered legislation that would have included “commission of domestic violence in the presence of a child” in all civil definitions of child abuse, but these provisions were stricken from the bill at some point before the final language was enacted.⁹⁷

B. Rationales for Defining Childhood Exposure to Domestic Violence as Child Maltreatment

There is substantial disagreement in the field as to whether such exposure should be treated as a form of child maltreatment for the purposes of triggering child protective services and the dependency court involvement.⁹⁸ In order to set the stage for the analysis of current statutes in Part III, I briefly summarize the policy arguments asserted *in favor of* such expansions of juvenile court jurisdiction, as well as the counter-arguments lodged *against* the expansions. The potential benefits of expanding juvenile court jurisdiction to incorporate children’s exposure to domestic violence include: an enhanced ability to identify children exposed to domestic violence; greater opportunities to protect children exposed to domestic violence from continued exposure through child protective intervention; promotion of consistency in handling of domestic violence cases among the various agencies involved; and, the opportunity to “send a message” (to domestic violence perpetrators, their victims, their children, and the community) that domestic violence is harmful to children and that our society will not tolerate its continuance. By contrast, opponents of statutory expansion of child protection’s reach in cases involving domestic violence fear that such expansion will deter battered women from seeking services from professionals (e.g., workers at domestic violence shelters) who will

interpreting the statute as yet.

97. Compare the version of House Bill 239 passed by the Utah House, H.B. 239, 52nd Utah Leg., Reg. Sess. (Feb. 20, 1998), with the version enacted, H.B. 239, 52nd Utah Leg., Reg. Sess. (Mar. 21, 1998).

98. For discussions of this controversy, see, for example, JAFFE ET AL., *supra* note 3, at 103; Janet E. Findlater & Susan Kelly, *Child Protective Services and Domestic Violence*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 84, 84-88 (1999), available at <http://www.futureofchildren.org/dvc/index.htm>; Peled, *supra* note 72, at 134-36; Susan Schechter, *The Battered Women’s Movement in the United States: New Directions for Institutional Reform*, in FUTURE INTERVENTIONS WITH BATTERED WOMEN AND THEIR FAMILIES 53, 62-63 (Jeffrey L. Edleson & Zvi C. Eisikovits eds., 1996). For an articulate statement of a position against such expansion of child maltreatment statutes, see Jeffrey L. Edleson, *Should Childhood Exposure to Adult Domestic Violence be Defined as Child Maltreatment Under the Law?, temporarily available at* <http://www.mincava.umn.edu/link/shouldch.asp> (last visited Sept. 30, 2001) [hereinafter Edleson, *Is Exposure Maltreatment?*].

become mandated reporters of child maltreatment under state reporting statutes. In addition, opponents claim that child protective involvement in cases of childhood exposure to domestic violence typically has not served the best interests of children or their abused caregivers. Opponents argue that such intervention traditionally has been ineffective, discriminatory, and destructive, endangering the safety of adult victims and their children, blaming battered women for their children's exposure, and reflexively removing children from their abused parent's custody. Finally, opponents argue that *not all* children exposed to domestic violence are harmed by their exposure, and thus intrusive government intervention and its negative concomitants will be extended to many families where such intervention is unnecessary. These various issues are discussed below.

(1) *Bringing Children Exposed to Domestic Violence to the Attention of Authorities*

One clear purpose of these new statutes is to increase the likelihood that cases involving children's exposure to domestic violence come to the attention of authorities.⁹⁹ By characterizing children's exposure to domestic violence as child maltreatment, those individuals legally mandated to report child maltreatment become obligated to report cases of domestic violence in families with children. Because family violence typically occurs "behind closed doors," authorities often are unable to assist children who have been harmed or are at risk of harm, unless other adults intercede to bring children's circumstances to light.¹⁰⁰ This problem is magnified with respect to children exposed to domestic violence because, even if authorities or service providers learn that one adult in the family is violent toward another adult, the harms experienced by the children may not receive attention if they are not physical. For this reason, writers refer to children who are exposed to domestic violence as "invisible," "hidden," or "silent" victims.¹⁰¹

99. See Tompkins et al., *supra* note 3, at 179-80 (arguing that explicit inclusion of children exposed to domestic violence into child maltreatment statutes would make it more likely that such exposure "would be reported—and useful interventions provided . . .").

100. See *supra* notes 72-74 and accompanying text. "Until the secret of violence is broken by a family member or others who are aware of it and decide to report or intervene, it may not be possible to individually help children in [families characterized by domestic violence]." See Peled, *supra* note 72, at 129. Dr. Peled and others who address the secretive nature of domestic violence also warn, however, that expanding protective services access to domestic violence cases will not necessarily serve children's best interests unless the child protective services response to families incorporates additional knowledge and sensitivity to the special needs of domestic violence victims and their children. *Id.* at 134-36.

101. See, e.g., JOY D. OSOFSKY, *Children who Witness Domestic Violence: The Invisible*

As one might suspect, broadening the scope of mandated reporting in child abuse and neglect cases is a controversial proposition. Throughout the past three to four decades during which reporting statutes have been in effect,¹⁰² professionals such as physicians, psychotherapists, and counselors have struggled with how to balance these legal obligations against their ethical and legal duties to protect the privacy and confidentiality of their patients and clients.¹⁰³ Expansion of maltreatment statutes to include children exposed to domestic violence may create reporting obligations for at least three additional groups of professionals who typically come into contact with domestic violence cases. First, law enforcement personnel answering domestic violence calls would be on notice to obtain information about the presence of children in the family, and to refer the cases to child protective services. Second, emergency room physicians and other medical professionals treating abused women would be required to report cases when there is a child in the family. Third, domestic violence workers at shelters and nonresidential counseling centers might also incur obligations¹⁰⁴ to report the cases of all of their clients with children.

In all of these situations, it is possible that the knowledge that her contact with one of the above professionals will be reported to child protective services will deter or discourage mothers from calling the police, seeking medical treatment for her injuries, or using domestic violence services.¹⁰⁵ Given that abused women often are fairly

Victims, 9(3) SOCIAL POLICY REPORT: SOCIETY FOR RESEARCH IN CHILD DEVELOPMENT 3 (1995); Groves, *supra* note 73, at 124.

102. See, e.g., Kalichman, *supra* note 9, at 12-17.

103. See, e.g., *id.* at 30-33, 43-63. See also Murray Levine, *A Therapeutic Jurisprudence Analysis of Mandated Reporting of Child Maltreatment by Psychotherapists*, 10 N.Y.L. SCH. J. HUM. RTS. 711 (1993) (providing an insightful analysis of how reporting obligations affect psychotherapists' relationships with their clients, and identifying many potential consequences that are applicable to other categories of mandated reporters as well).

104. Whether these workers would actually be required to report might hinge on several factors. Some states require certain categories of professionals to report (e.g., physicians, psychologists, social workers, nurses, and so forth). If domestic violence workers are professionals who do not fit into any designated profession, or if they are "volunteers," they may not be obligated to report. Other states, however, deal with the situation somewhat differently, by specifying that professionals working in certain settings are obligated to report. Domestic violence workers could be included or excluded from that list. In addition, at least one state has enacted a statutory exception to domestic violence workers' duties to report suspicions of child maltreatment under specific circumstances. See, e.g., discussion of Alaska's statutory exception, *infra* note 494 and accompanying text. See generally Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 294-97 (1995).

105. JAFFE ET AL, *supra* note 3, at 103; Peled, *supra* note 72, at 135 (noting that domestic violence victims may choose not to disclose their abuse because they are concerned this will lead to their losing custody of their children). In addition, battered

isolated from others in the community, commentators have expressed concern that expanded reporting obligations may have a chilling effect on these women's willingness to seek out any kind of help, a result that will be to the detriment of the children involved.¹⁰⁶

Of course, reporting requirements will only have such a chilling effect if reports to child protective services are viewed negatively by battered mothers. Unfortunately, at present, the history and "reputation" of child protective services involvement in domestic violence cases is anything but positive.¹⁰⁷ Domestic violence advocates often characterize child protective services as misunderstanding the dynamics of domestic violence, and assert that child protective services typically: blames mothers who are domestic violence victims for their own victimization; blames these women for any negative ramifications of their abuse for their children; removes children from their mothers' custody when doing so is not necessary for the child's protection; fails to hold the abuser accountable for his conduct; and fails to provide any services that contribute to the short- or long-term well-being of the child or the nonabusive parent.¹⁰⁸ There is evidence that many child protective systems have operated in this manner, as well as for the ineffectiveness of the traditional child protection interventions for adult domestic violence victims and their children.¹⁰⁹ More productive than mandating inclusion of cases of childhood exposure to domestic violence into the protective services

women may fear, legitimately, that disclosure of the abuse may threaten their safety or the safety of their children if the abuser learns that they have discussed the abuse with a professional, or—if they have left the abuser—if the disclosure leads to the abuser's discovery of their location. See also Zorza, *supra* note 104.

106. Peled, *supra* note 72, at 135.

107. See, e.g., The "Failure to Protect" Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 854-56 (2000) [hereinafter Failure to Protect Working Group] (citing the policies of child protective services to remove children from domestic violence victims on the basis of "neglect", i.e., "failure to protect" the children from exposure to the domestic violence, without providing appropriate services to the victims or children); Findlater & Kelly, *supra* note 98, at 87 (indicating that protective service workers "have often misunderstood [the dynamics of domestic violence] and held battered mothers responsible for ending it"); Schechter, *supra* note 98, at 62 (noting that there is a fear that the "family preservation" philosophy of child protective services will "push women to stay with abusive partners as a way of preserving the family").

108. See, e.g., Sandra K. Beeman & Jeffrey L. Edleson, *Collaborating on Family Safety: Challenges for Children's and Women's Advocates*, in CHILDREN EXPOSED TO DOMESTIC VIOLENCE, *supra* note 29, at 345, 348-51; Failure to Protect Working Group, *supra* note 107, at 854-56; Findlater & Kelly, *supra* note 98, at 87; Schechter, *supra* note 98, at 62; Peled, *supra* note 72, at 134-36.

109. See, e.g., Carole Echlin & Larry Marshall, *Child Protection Services for Children of Battered Women: Practice and Controversy*, in ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 170, 173-78 (Einat Peled et al. eds., 1995).

caseload, opponents argue, would be providing greater access for domestic violence victims and their children to a range of important *voluntary* services.¹¹⁰ Encouraging victims to seek such services, provided *confidentially*, is likely to be more effective than requiring community personnel to refer the case to state child protection authorities, opponents assert.¹¹¹

Commentators have also expressed concern that increasing the flow of referrals to child protective services will paralyze the already over-burdened and underfunded child protective services system by flooding it with cases.¹¹² There are countless horror stories about caseworkers with so many children under their watch that they can not responsibly monitor even the most serious and dangerous situations.¹¹³ It has been argued that adding all children in families with domestic violence to the caseload would paralyze a system that

110. For an articulate statement of this position, see Edleson, *Is Exposure Maltreatment?*, *supra* note 98, manuscript at 18-19. For a description of the types of voluntary services available from community-based domestic violence agencies, see Amy J. Saathoff & Elizabeth Ann Stoffel, *Community-Based Domestic Violence Services*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 97 (1999), available at <http://www.futureofchildren.org/dvc/index.htm>.

111. See, e.g., Pamela Whitney & Lorna Davis, *Child Abuse and Domestic Violence in Massachusetts: Can Practice Be Integrated in a Public Child Welfare Setting?* 4 CHILD MALTREATMENT 158, 163-64 (1999). In characterizing the concerns expressed by shelter workers, one group of authors has noted that: "Shelters also worry that general knowledge of a close working relationship between themselves and child protective services may discourage battered women in the community from even seeking safety for fear their children may be taken from them." JAFFE ET AL., *supra* note 3, at 103.

112. See Echlin & Marshall, *supra* note 109, at 179-80; Edleson, *Is Exposure Maltreatment?*, *supra* note 98, manuscript at 18-19.

113. See, e.g., *DeShaney v. Winnebago County Dep't of Soc. Serv.*, 489 U.S. 189 (1989) (adjudicating claim that child protective services failed to protect two-year-old Joshua DeShaney from his father's violence when protective services did not intervene effectively after receiving multiple reports of the abuse that ultimately left Joshua permanently brain damaged). The newspapers are filled with stories about children who continued to experience severe or lethal abuse at the hands of their parents even after their abuse was known to child protective services. See e.g., Savino, *supra* note 81 (describing the case of six-year-old Kayla McKeon, who was killed by her father, "[d]espite four warning calls to the state's child abuse hotline alleging abuse"); *Opinion: Help for Hurt Children*, SALT LAKE TRIB., Dec. 22, 1994 (describing cases of severe abuse or neglect resulting in children's deaths, in which child protective services was alerted, but failed to act).

In 1991, the National Commission on Children stated: "If the nation had deliberately designed a system that would frustrate the professionals who staff it, anger the public who finance it, and abandon the children who depend on it, it could not have done a better job than the present child welfare system." Mary B. Larner et al., *Protecting Children from Abuse and Neglect: Analysis and Recommendations*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 4, 5 (1998) (citing the Nat'l Comm'n on Children, *Beyond Rhetoric: A New American Agenda for Children and Families* 293 (1991)), available at http://www.futureofchildren.org/information2826/information_show.htm?doc_id=75334 (last visited Sept. 28, 2001).

already limps along. Some have projected that doing so would double or triple child protective services' current caseloads.¹¹⁴ Failure to anticipate this result led to the repeal of Minnesota's statute¹¹⁵ and the revision of Florida's statute.¹¹⁶

A final argument against including children exposed to domestic violence within state definitions of maltreatment is that a sizable proportion of children exposed to domestic violence do not appear to be harmed, and thus do not require state protection through intrusive intervention into the family.¹¹⁷ Clearly, not all children exposed to domestic violence are harmed in a manner justifying intrusive governmental intervention. In fact, as the summary of data on the effects of domestic violence on children below reveals, there is substantial heterogeneity in the effects on children of such exposure.¹¹⁸ Yet, the absence of prospective longitudinal studies examining effects of domestic violence exposure on children over time leaves us with many unanswered questions about the long-term consequences of such exposure.¹¹⁹ There is a growing body of empirical knowledge which, I propose, together with the combined wisdom gleaned from the experience of domestic violence and child protection workers, that can help policymakers target those children whose exposure places them *at risk* of substantial harm.¹²⁰ Thus, while strongly rejecting the concept of sweeping *all* children exposed to domestic violence within the reach of the dependency system (or characterizing childhood exposure to domestic violence as *per se* maltreatment), I support a cautious inclusion of exposed children who are *already manifesting* psychological symptomatology, *as well as those who* appear to be *at substantial risk* for suffering *serious emotional harm* in the immediate future. It is always challenging to predict which children are indeed at risk of future harm and which are not.¹²¹ Yet, this determination is not substantially different from the

114. See, e.g., Whitney & Davis, *supra* note 111, at 164-65; Laudan Y. Aron & Krista K. Olson, *Efforts by Child Welfare Agencies to Address Domestic Violence: The Experiences of Five Communities*, Ch. VI. (1997), at <http://www.urban.org/welfare/aron3.htm>.

115. See Edleson, *Is Exposure Maltreatment?*, *supra* note 98, manuscript at 18-19. See *infra* notes 454-71 and accompanying text.

116. News agencies reported a 300 percent rise in child-abuse caseloads in the year following the passage of the Kayla McKeon Child Protection Act in Florida. See John Kennedy, *Schools, Taxpayers Gain in Bush Budget: Democrats were Quick to Assail Business-Friendly Language in the State's First-ever E-Budget*, ORLANDO SENTINEL, Jan. 20, 2000, available at 2000 WL 3573475. See also *supra* notes 82-85, and accompanying text.

117. See Edleson, *Is Exposure Maltreatment?*, *supra* note 98, manuscript at 21-22.

118. See *infra* notes 375-407 and accompanying text.

119. See *infra* note 377 and accompanying text.

120. See *infra* note 436 and accompanying text.

121. See *infra* notes 438, 566-77 and accompanying text.

predictions made with respect to other potential harms falling under the jurisdiction of the dependency system. It is essential, however, that if expanding child protection's jurisdiction to include domestic violence exposure cases, we heed the criticisms discussed immediately below regarding the ineffective, and sometimes destructive, ways in which services have been provided to families in such cases.

(2) *Making Available the Resources and Interventions of the Child Protection System*

Another important legislative goal in bringing children exposed to domestic violence within the reach of the dependency system is that doing so will make the resources and interventions of the system available to these children and their families. The system's interventions seek to insure children's immediate safety, provide remedial services to the parents in the hope of preserving the family system, provide support services to help children cope with the abuse they have suffered, and plan for permanency. In the past several years, however, authors have articulated a range of concerns about the appropriateness and efficacy of the intervention strategies used by protective services in domestic violence cases.¹²²

There is little disagreement on the part of knowledgeable persons that children exposed to domestic violence are at risk physically and psychologically.¹²³ And, increasingly, there is agreement among experts as to the principles of intervention that are most likely to promote children's safety and well-being in domestic violence situations.¹²⁴ Yet, despite increasing unanimity among those who serve on policy-making boards and committees, and those who publish articles, "traditional" patterns of intervention persist in most jurisdictions.¹²⁵ Protection system authorities often remove children

122. See *supra* note 98 and accompanying text.

123. There remain, however, many unanswered questions, such as what proportion of exposed children are likely to have negative outcomes. For a discussion of this issue, see *infra* notes 372-407 and accompanying text.

124. See, e.g., THE GREEN BOOK, *supra* note 12, at 50-72; OJJDP, *supra* note 16; SUSAN SCHECHTER & ANNE L. GANLEY, DOMESTIC VIOLENCE: A NATIONAL CURRICULUM FOR CHILD PROTECTIVE SERVICES (Janet Carter et al. eds., 1996), available from Family Violence Prevention Fund, 383 Rhode Island Street, Suite 304, San Francisco, California 94103 (415) 252-8900 [hereinafter A NATIONAL CURRICULUM]; Janet Carter & Susan Schechter, *Child Abuse and Domestic Violence: Creating Community Partnerships for Safe Families—Suggested Components of an Effective Child Welfare Response to Domestic Violence*, FAMILY VIOLENCE PREVENTION FUND (1997), available at <http://www.mincava.umn.edu/link/fvpfl.htm> (last modified Jan. 10, 2001); Susan Schechter & Jeffrey L. Edleson, *In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies* (1994), available at <http://www.mincava.umn.edu/papers/wingsp.htm> (last modified Jan. 28, 2000).

125. See Echlin & Marshall, *supra* note 109; Failure to Protect Working Group, *supra*

from the custody of both the abusive and nonabusive parent, citing the nonabusive parent's "failure to protect" the child from either direct abuse by her batterer, or from exposure to the domestic violence.¹²⁶ The reflexive use of such policies as a primary approach to families affected by domestic violence has been strongly rejected by the National Council of Juvenile and Family Court Judges,¹²⁷ the American Bar Association's Center for Children and the Law,¹²⁸ the U.S. Department of Justice's Office of Juvenile Justice and Delinquency Prevention ("OJJDP"),¹²⁹ as well as scores of scholars and practitioners.¹³⁰

For many decades, child protection policies have aimed, at least in theory, to "preserve" (or at least "reunite" children with their) families in abuse and neglect cases.¹³¹ This aim reflects not only a respect for parental rights to rear their own children,¹³² but also a

note 107. A recent survey of state child protective services administrators revealed that half of the respondent agencies did not have a written policy for their agency's responses to domestic violence. Findlater & Kelly, *supra* note 98, at 89 (citing an unpublished report of a survey conducted in 1998 by M. Montminy-Danna). For a discussion of a federal lawsuit claiming that New York City agencies' policies and practices of removing children from their battered mothers without proper investigation, findings, or due process are unconstitutional, see *infra* notes 555-560 and accompanying text.

126. Over two dozen articles have been published in recent years, criticizing the tendencies of protective services workers and prosecutors to frame civil and criminal child abuse cases in this manner. 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 (1996); Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect: A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287 (1998); Failure to Protect Working Group, *supra* note 107; Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 27 (2000); Randy H. Magen, *In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect*, 4 CHILD MALTREATMENT 127 (1999); Melissa A. Treppicione, *At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?*, 69 FORDHAM. L. REV. 1487 (2001).

127. Recommendation 22 in the Green Book specifically states that "Child protection services should avoid strategies that blame a nonabusive parent for the violence committed by others." THE GREEN BOOK, *supra* note 12, at 66.

128. See, e.g., AM. BAR ASS'N, *supra* note 13, at 17 ("Child PROTECTIVE service agency personnel [and others] are urged to exercise care so that their interventions do not become unintentional bludgeons used against children and their battered parents.").

129. OJJDP, *supra* note 16 ("Principle 4: Make mothers safe to keep children safe").

130. See e.g., *supra* note 98 and accompanying text.

131. For a discussion of "family preservation" and "family reunification" theories in child welfare, see generally HOWARD ALTSTEIN & RUTH G. MCROY, DOES FAMILY PRESERVATION SERVE A CHILD'S BEST INTERESTS: CONTROVERSIES IN PUBLIC POLICY (2000); Jacquelyn McCroskey & William Meezan, *Family-Centered Services: Approaches and Effectiveness*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 54 (1998), available at <http://www.futureofchildren.org/pcn/>.

132. See *infra* note 267 and accompanying text, discussing constitutional protection for

general appreciation that, from the perspective of a child, parents are not fungible commodities. In most instances, there is a bond between parents and children that is not easily replaced.¹³³ In addition, empirical research suggests that a strong positive relationship with a nonabusive caregiver can promote the psychological well-being of children exposed to violence, increasing their ability to cope effectively.¹³⁴ Thus, most policy-making groups that have recently tackled these issues assert that it is *the obligation of the child protection system to assist the nonabusive parent in creating safety for the child if she is unable to protect her child from exposure to domestic violence, or from direct abuse by the offending parent.*¹³⁵ Some of the

the parent-child relationship.

133. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 9-28 (1973) [hereinafter GOLDSTEIN ET AL., BEST INTERESTS] (discussing the notion of the "psychological parent" and the importance to children's well-being to maintaining that relationship without external interference).

134. Joy D. Osofsky, *The Impact of Violence on Children*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 33, 38-39 (1999), available at <http://www.futureofchildren.org/dvc/index.htm>.

135. See, e.g., THE GREEN BOOK, *supra* note 12, at 62-67. "Child protection workers should develop service plans and referrals that focus on the safety, stability, and well-being of all victims of family violence and that hold domestic violence perpetrators accountable." Principle X, *id.* at 62; OJJDP, *supra* note 16, at 28-34. The OJJDP report states:

Historically, women who are victims of domestic violence often have been held responsible for batterers' violence against them and their children. They have been blamed for being abused, for exposing their children to abuse, for not leaving the perpetrator, or for not stopping his violence.

....

A battered woman cannot change or stop a perpetrator's violence by herself; if she does not have adequate support, resources, and protection, leaving him may simply make it worse for her children. In many instances, making mothers safe . . . does make children safer and offers them their best hope for stability. Therefore, child welfare administrators and juvenile court personnel should seek to keep children affected by maltreatment and domestic violence in the care of their nonoffending parent whenever possible.

OJJDP, *supra* note 16, at 30-31.

There are many obstacles battered mothers face in trying to create safety for themselves and their children, such as an increased risk of physical harm from the abuser when attempting or following separation, and concern that the criminal justice system will not protect them; poverty and homelessness; fear that their abuser may succeed in abducting or otherwise harming the children; difficult legal contests for child custody with the batterer and/or child protective services. For discussions of some of the obstacles confronting women trying to leave their batterers, see, for example, Carole Echlin & Bina Osthoff, *Child Protection Workers and Battered Women's Advocates Working Together to End Violence Against Women and Children*, in CHILDREN EXPOSED TO DOMESTIC VIOLENCE, *supra* note 29, at 207, 212-15; Failure to Protect Working Group, *supra* note 107, at 858-62; Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, COLO. LAW, Oct. 1999, at 19. For a discussion of the phenomenon of "separation assault," see Mahoney, *supra* note 33; see also *supra* note 31. For discussions of the

interventions suggested include use of community services, such as those provided by domestic violence organizations and shelters, to help domestic violence victims and children to reach safety; use of civil protective orders, issued by the juvenile court, to remove the *batterer* from the home; and use of the criminal justice system to intervene decisively with domestic violence offenders.¹³⁶

As noted above, the philosophical differences and history of mistrust that characterize the relationships between child protective services and community-based domestic violence programs have been the subject of much commentary.¹³⁷ Whereas child protective services is criticized for misunderstanding the dynamics of domestic violence and taking a punitive role in working with domestic violence victims, domestic violence workers are charged with failing to act in the best interests of victims' children by refusing to report cases of child abuse and neglect to authorities.¹³⁸ And, indeed, to the extent that either accusation is grounded in truth, there is cause for concern. Legal intervention in domestic violence cases may unintentionally increase the dangers faced by victims, if implemented in the absence of a working understanding, for example, of how batterers manipulate the legal system to control their victims.¹³⁹ In addition, however, there are

relationships among domestic violence, women's poverty, welfare receipt, and homelessness, see, for example, Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237 (1994); Jody Raphael & Richard M. Tolman, *Trapped by Poverty, Trapped by Abuse: New Evidence Documenting the Relationship Between Welfare and Domestic Violence* (report from the Project for Research on Welfare, Work, and Domestic Violence (1997)), at <http://www.ssw.ucmich.edu/trapped/pubs.html>.

There has been much written in recent years to help explain why not all battered women manage to leave their abusers. Some commentators find it perplexing that so many observers ask "Why do women stay?" rather than "Why do abusers continue to abuse their partners and their children?" See, e.g., Echlin & Osthoff, *supra* at 212-13. Others have suggested that the expectation that the *victim* of battering leave the family home is the ultimate concession to the batterer and his control over the family members' lives. See Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1888 (1996) (citing Natalie Loder Clark, *Crime Begins at Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 281-282 (1987)) [hereinafter Hanna, *No Right to Choose*].

136. See THE GREEN BOOK, *supra* note 12, at 54-55; AM. BAR ASS'N, *supra* note 13, at 3-4; OJJDP, *supra* note 16, at 35-40; Carter et al., *supra* note 2, at 11-14. See Saathoff & Stoffel, *supra* note 110, at 99-104 for a discussion of the types of services provided by domestic violence organizations.

137. See *supra* note 98 and accompanying text.

138. Schechter, *supra* note 98, at 62 (describing the mutual mistrust that has sometimes characterized the perceptions of child protection and domestic violence workers vis-à-vis each other).

139. As noted below, where "the word is out" that child protection agencies typically remove children from the custody of battered women once the family becomes known to the agency, batterers are empowered to "threaten" their victims' that such removal will likely follow the victims reports of the abuse to authorities. See *infra* note 553 and

circumstances when the interventions offered by domestic violence agencies may not succeed in protecting a child from imminent harm.¹⁴⁰

accompanying text.

140. For example, given the high co-occurrence of domestic violence and physical child maltreatment, many children who are exposed to domestic violence also are direct victims of physical abuse or neglect. See *supra* note 7. Depending upon the duration and extent of the abuse suffered by the adult victim, she may be paralyzed by fear, substance abuse, or other factors, and may not be able to protect the child from the violence. This appeared to have been the case for Hedda Nussbaum, a battered woman who, together with her common law husband, Joel Steinberg, raised a little girl named Lisa who was unrelated to either of them. See *Primetime Live: A Journey to Tragedy: Hedda Nussbaum Tells Her Disturbing Story* (ABC television broadcast, Apr. 2, 1997), available at 1997 WL 15362260. Ms. Nussbaum was subjected to ongoing physical torture and psychological manipulations by Mr. Steinberg, rendering her virtually incapable of taking action to protect herself or Lisa. *Id.* Ultimately, Lisa died at the age of six, at Joel Steinberg's hands. *Id.* In some instances, temporary state custody of a child may be the only way to provide immediate safety for the child, while child protective services and domestic violence agencies seek to help the adult victim recover from the debilitating effects of the abuse. See Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 360-69 (1995). For arguments regarding specific circumstances when the state should intervene with removal of the child from the battered parent's custody, see Thomas D. Lyon, *Are Battered Women Bad Mothers? Rethinking the Termination of Abused Women's Rights for Failure to Protect*, in NEGLECTED CHILDREN: RESEARCH, PRACTICE, AND POLICY 237, 258 (Howard Dubowitz ed., 1999).

And, in some instances, mothers may be perpetrators of their children's maltreatment. Researchers have disagreed as to precisely how much and what types of the child maltreatment result from maternal abuse or neglect of their children. See Candace Kruttschnitt, *Gender and Interpersonal Violence*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE: SOCIAL INFLUENCES 293, 310-11 (Albert J. Reiss, Jr., & Jeffrey A. Roth eds., 1994). Some investigators report that mothers perpetrate more physical aggression than do fathers, generally, as well as in families characterized by domestic violence. See, e.g., RICHARD J. GELLES, *THE VIOLENT HOME* 55 (1987); Murray A. Straus, *Ordinary Violence, Child Abuse, and Wife Beating: What Do they Have in Common?*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN FAMILIES 403, 407-09 (Murray A. Straus & Richard J. Gelles eds., 1995). Others critique the research methods used to support this assertion, and conclude that men perpetrate the overwhelming proportion of physical child maltreatment occurring in families characterized by domestic violence. See, e.g., Lee H. Bowker et al., *On the Relationship Between Wife Beating and Child Abuse*, in FEMINIST PERSPECTIVES ON WIFE ABUSE 158 (Kersti Yllo & Michele Bograd eds. 1988); Edleson, *The Overlap*, *supra* note 7, at 143; Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L. J. HEALTH SERVS. 97 (1988) (discussing, and critiquing, protective services' judgments of child maltreatment by mothers). Recent research suggests that although some battered mothers "do engage in aggressive behavior toward their children," they do not do so to a greater extent than mothers in matched control groups. George W. Holden et al., *Parenting Behaviors and Beliefs of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE: THEORY, RESEARCH, AND APPLIED ISSUES 289, 326 (George W. Holden et al. eds., 1998) [hereinafter CHILDREN EXPOSED TO MARITAL VIOLENCE]. See also Cris M. Sullivan, et al., *Beyond Searching for Deficits: Evidence that Physically and Emotionally Abused Women Are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51 (2000) (presenting data

Without question, a partnership between the two organizations, grounded in mutual respect and shared knowledge, is most likely to serve the interests of children and their battered mothers. And indeed, there is a growing consensus that both agencies have much to offer domestic violence victims and their children, and that effective services for this population will require interagency cooperation and collaboration.¹⁴¹ Thus, whether or not a jurisdiction uses a statutory approach to respond to children's exposure to domestic violence, a careful examination of the policies and procedures used in domestic violence cases, with reference to recently-promulgated guidelines for effective intervention,¹⁴² is likely to benefit children and their battered parents.

(3) *Promoting Consistency in Interagency Handling of Domestic Violence Cases Involving Children*

Inclusion of certain children exposed to domestic violence within the definition of maltreated children, if accompanied by language that sets forth a specific agency approach to these cases, may promote more *consistent* child protection responses to domestic violence cases. In most jurisdictions, there is no clear mandate regarding how to

countering the proposition that battered mothers, as a group, may be less emotionally available to, and more likely to use punitive discipline with, their children). And, consistent with the research cited above, *supra* note 2, on gender differences in perpetration of intimate partner violence, research strongly indicates that "the most dangerous and potentially injurious acts [of child maltreatment] are performed more by men than by women," Kruttschnitt *supra*, at 311, and that men are overwhelmingly responsible for child abuse homicides, Edleson, *The Overlap*, *supra* note 7, at 143-44.

Although the frequency and severity of direct child abuse perpetrated by battered women against their children may be less than previously presumed, battered women may put their children at risk in some limited subset of cases, by engaging in potentially harmful conduct, or failing to provide adequate care. See Judith Martin, *Maternal and Paternal Abuse of Children: Theoretical and Research Perspectives*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 293 (David Finkelhor et al. eds., 1983); Holden et al., *supra*. In such cases, state intervention, including removal from maternal custody, may be necessary to protect a child from imminent harm. See Lyon, *supra*. Clearly, however, the types of services and interventions offered to a domestic violence victim must reflect an understanding of her victimization, must address a key source of the problem (i.e., the violence by the domestic violence perpetrator), and must help her remediate any conditions (e.g., substance dependency) that affect her parenting. For discussions of some of the challenges to feminists in addressing child abuse and neglect by mothers, see Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993); Carolyn Kott Washburne, *A Feminist Analysis of Child Abuse and Neglect*, in *THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH* 289 (David Finkelhor et al. eds., 1983).

141. See *supra* note 124 and accompanying text; see *infra* notes 144-45 and accompanying text.

142. See *supra* notes 12-13, 16 and accompanying text.

respond to domestic violence cases.¹⁴³ In addition, the lines of communication across agencies are not always open, nor are there clear guidelines for cross-reporting and making referrals. Thus, an effective statute must guide child protection workers, judges, and other agencies in a coordinated and consistent approach to these cases.

Some jurisdictions have achieved more uniform and coordinated handling of these cases through implementation of internal protocols guiding assessment and intervention, in the absence of statutory inclusion of children exposed to domestic violence into the definition of maltreated children.¹⁴⁴ In fact, jurisdictions have attained interdepartmental and interagency collaboration and cooperation through a variety of initiatives.¹⁴⁵ Thus, it is clear that inclusion of children exposed to domestic violence within the statutory definition of maltreated children is not a necessary precondition to realization of these goals.

And, without question, statutory enactments alone, without explication of practice guidelines and decision rules, could do more harm than good.¹⁴⁶ Statutes placing childhood exposure to domestic violence within the definition of child maltreatment must not only target the subpopulation within the larger group for which state intervention is necessary, but must articulate a philosophy of intervention, consistent with our state of knowledge as to what constitutes effective intervention. And, the statutes must also provide concrete guidance to workers, through training, assessment instruments, and other tools, to promote the appropriate handling of these cases.

(4) *"Sending a Message" to Domestic Violence Perpetrators and Others*

Many assert that enactment of a statute defining childhood exposure to domestic violence as a form of child maltreatment will *educate* the public, professionals, batterers, victims, and children

143. Echlin & Marshall, *supra* note 109, at 175.

144. Janet E. Findlater & Susan Kelly, *Reframing Child Safety in Michigan: Building Collaboration Among Domestic Violence, Family Preservation, and Child Protection Services*, 4 CHILD MALTREATMENT 167 (1999); Whitney & Davis, *supra* note 111 (describing the successful integration of domestic violence and child protective services expertise in the Massachusetts Department of Social Services). *See also* Aron & Olson, *supra* note 114, at Ch. I-VI (for a description of such programs in Michigan, San Diego County, Oregon, and Hawaii, as well as Massachusetts).

145. For descriptive summaries of many such creative approaches to service delivery, see generally EMERGING PROGRAMS, *supra* note 17; FIRST NATIONAL SUMMIT, *supra* note 17.

146. *See, e.g., supra* notes 80-85, 98 and accompanying text; *infra* notes 454-77 and accompanying text.

affected by domestic violence.¹⁴⁷ Such statutes “send a message” to those in the community that domestic violence is harmful to children and that exposing children to domestic violence falls below socially-accepted standards of parenting. As such, these statutes would invoke the “symbolic” or “expressive” function of law,¹⁴⁸ and may

147. See, e.g., JAFFE ET AL., *supra* note 3, at 104. Dr. Peter Jaffe and his colleagues assert,

Recognizing the fact that children who are exposed to violence may be in need of protection also sends a clear message to the community about the life conditions of battered women and their children. It changes wife abuse from being a private family matter between consenting adults to a dangerous situation that may have serious physical and emotional consequences for battered women and their children.

Id. In her analysis of policies mandating domestic violence victims’ participation in prosecution of their batterers, Professor Cheryl Hanna underscores a more fundamental point that is applicable here as well. Hanna, *No Right to Choose*, *supra* note 135, at 1865 (1996). Articulating the position of advocates of aggressive criminal prosecution of domestic violence perpetrators, she states:

They . . . argue that because domestic violence is a *public* crime, [aggressive state intervention] . . . communicates and follows through on the message that the state will not tolerate violence of any sort. These arguments are rooted in the feminist principle that, when the state refuses to intervene under the rationale that domestic violence is a private family matter, the state not only condones, but, in fact, promotes such violence.

Id. (emphasis added).

148. Professor Carol Weisbrod discusses the perspective that law has the potential to influence our attitudes and behavior:

Professor Glendon’s argument, in part, is that law has both strong educational functions and significant expressive components. Law is a play, a story, a message, a thing that is shaped by culture and in turn shapes the culture. To the extent law shapes culture we should use it to send messages . . .

....

Recognition of law as expressive, as a source of symbols and values, has been common in America for some time.

Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV., 991, 991-93 (1989) (citing MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987)). In her essay, Professor Weisbrod points out some of the complicating factors in the notion of law as an expressive or symbolic medium. For example, “law” is often a complex and disparate mass of often contradictory messages and it is not always clear what “messages” the public “receives.” *Id.* at 995-1004.

Professor Robert Scott provides a useful summary of current theories about law’s expressive functions:

In recent years, the social norms literature has shown that law can also have indirect effects on incentives. Thus, for example, a legal ban on smoking in public places or a “pooper-scooper” law can motivate citizens not to smoke in certain areas or to clean up after their dogs even when the state has no resources invested in direct (or first order) enforcement. By empowering neighbors and other citizens to use public ridicule as an enforcement technique, these laws can influence behavior by imposing informal (or second order) sanctions, such as shaming. Similarly, these laws can have self-sanctioning (or third order) effects to the extent that citizens internalize the legal rule and are deterred by the

result in the changing of public attitudes toward the phenomenon of domestic violence and of children's exposure thereto. Some argue that some perpetrators of domestic violence might be motivated to change their conduct if they realized their children were being hurt.¹⁴⁹ And, public condemnation of domestic violence may help exposed children challenge their beliefs about the place of violence in intimate relationships.¹⁵⁰ It may also help women who are victims to appreciate that society and its institutions condemn their abusers' actions, and are available to support them and their children as they attempt to extricate themselves from these relationships.

Opponents of these statutes do not challenge the power and potential benefits of statutory enactments in sending this type of social message. Rather, they would argue that there are other mechanisms to communicate such messages, and that the potential negative consequences of such statutes outweigh these potential benefits. In recent years, many professionals and community workers have developed a range of public education programs and prevention programs for youth.¹⁵¹ Regardless of the position one takes on the types of statutory enactments discussed here, proliferation of such

prospect of guilt. These latter effects require that legal rules be mediated through social phenomena—social norms and human emotions—that are highly complex and only imperfectly understood. In the case of a shaming sanction, the law must rely on existing normative structures to influence in predictable ways the “expression” or social meaning of the disfavored (or favored) action. In the case of self-sanctions, the law must rely on the even more complex phenomenon of internalization of normative behavior.

Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1603-04 (2000). For thoughtful examinations of various theories of the expressive or symbolic functions of law, and for criticisms of these theories see, for example, Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U. PA. L. REV. 1363 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 249 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996). See generally Symposium, *The Legal Construction of Social Norms*, 86 VA. L. REV. 1577 (2000).

149. Jeffrey L. Edleson, *Men Who Batter as Parents*, in EMERGING PROGRAMS, *supra* note 17, at 150. See also David J. Mathews, *Parenting Groups for Men Who Batter*, in ENDING THE CYCLE OF VIOLENCE: COMMUNITY RESPONSES TO CHILDREN OF BATTERED WOMEN 106, 116-17 (E. Peled et al. eds., 1995) (indicating that many perpetrators of domestic violence “deny” the effects of their conduct on their children).

150. Cf. Stone & Fialk, *supra* note 57, at 210. Assertions that “[c]riminal sanctions send a message to [children exposed to domestic violence] that the violence they observe in their homes is a criminal act that brings negative consequences to the perpetrator and should not serve as a model for their future relationships,” *id.*, pertain as well to statutes that characterize exposure as child maltreatment. In both cases, society is labeling the abusive conduct as unacceptable.

151. David A. Wolfe & Peter G. Jaffe, *Emerging Strategies in the Prevention of Domestic Violence*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 133 (1999), available at <http://www.futureofchildren.org/dvc/index.htm>.

educational programs may be an important weapon to combat domestic violence and the phenomenon of children's repetition, as adults, of patterns of violence they learned in their families of origin.

II. The History and Current Status of "Child Protection" in the United States

Any analysis of statutes that seek to alter or reinforce the mandate of state child protection agencies and the juvenile court must be grounded in an understanding of the nature and philosophical justifications of our country's traditions of state intervention in families to protect children from alleged child maltreatment. Thus, in this Part, I provide an historical overview of the American social and legal response to child maltreatment, followed by Part III, which focuses specifically on modern American legal responses, and in particular, the roles of the juvenile court and child protective services in promoting children's safety and well-being.

A. Child Maltreatment as a Social Problem

Public concern about and coordinated social responses to the plights of maltreated children reflect relatively "modern" perspectives about children, families, and family-state relationships. Settlers, colonists, and early Americans did not recognize child maltreatment as a problem requiring public attention. Mechanisms, typically informal, existed to deal with orphaned, abandoned, and other dependent children. Corporal punishment was routine as the recommended practice for promoting children's obedience and moral development. The prerogatives of parents, guardians, and other adults to use discretion in the discipline and training of children within their charge were rarely questioned.

Slowly, attitudes changed, as did a range of social and economic realities of American life. New conceptions of childhood developed throughout the nineteenth century, culminating in images of young people as vulnerable beings whose future well-being could be highly influenced by their childhood experiences and the environments in which they grow up. Immigration, industrialization, and urbanization throughout the century resulted in conditions that caught the attention of social reformers, whose *parens patriae* concern for the welfare of children perceived to be at risk was commingled with a desire to control the upbringing of children from less desirable segments of the nation's population. Challenges to the previously impenetrable privacy of the family increasingly were tolerated, particularly if the parents in question appeared unsuited to the task of raising our country's future citizens. Although developments specific to child protection did not evolve through the nineteenth and

twentieth centuries in a linear fashion, the reforms generally tracked broader societal themes and movements that related to *de jure* and *de facto* child and family policy in America. By the second half of the twentieth century, child protection had become an important component of state and federal social agendas, ultimately resulting in the complex network of criminal and civil policies and agencies that now regulate various aspects of family relationships.

The identification of a phenomenon as a social problem arousing public condemnation and triggering formal legal intervention results from complex interactions of social, economic, and political forces, some of which may be related only incidentally to the focal issue.¹⁵² As such, the goals and effects of the child protection movement at various points in history must be examined with this perspective in mind, and with attention to the contexts in which various legal responses developed. Many writers cite the 1874 case of Mary Ellen Wilson¹⁵³ as the watershed event that announced the emergence of child protection as a legitimate focus for public attention.¹⁵⁴ Others focus on the "discovery" of child abuse that followed the 1962 publication of physician Henry Kempe's landmark study of the medical records of hundreds of "battered children."¹⁵⁵ Yet, although these events reflected initial changes in our society's readiness to scrutinize and intervene in the ways in which some families raised their children, they did not necessarily correlate with shifts in the prevalence of child maltreatment.¹⁵⁶

Children across America had been subjected to horrific maltreatment¹⁵⁷ at the hands of their parents, guardians, teachers,

152. See, e.g., LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 1-6 (1988) [hereinafter GORDON, *HEROES*] (arguing that it is public concern about, and visibility of, family violence that has changed over time in this country, rather than the incidence of family violence); D. Kelly Weisberg, *The "Discovery" of Sexual Abuse: Experts' Role in Legal Policy Formulation*, 18 U.C. DAVIS L. REV. 1, 3-6 (1984) (analyzing the evolution of public concern about, and legal responses to, sexual abuse of children in the United States). On the construction of social problems more generally, see THEODORE R. SARBIN & JOHN I. KITSUSE, *CONSTRUCTING THE SOCIAL* (1994); MALCOLM SPECTOR & JOHN I. KITSUSE, *CONSTRUCTING SOCIAL PROBLEMS* (Rev. 2001); Joseph W. Schneider, *Social Problems Theory*, 11 ANN. REV. SOC. 209 (1985).

153. See *infra* notes 185-97 and accompanying text.

154. DORNE, *supra* note 69, at 22-23; VINCENT J. FONTANA & DOUGLAS J. BESHAROV, *THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN; A MEDICAL, LEGAL AND SOCIAL GUIDE* 4 (5th ed. 1996); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 69-73 (1987).

155. See C. Henry Kempe et al., *The Battered Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962). See *infra* notes 227-33 and accompanying text.

156. GORDON, *HEROES*, *supra* note 152, at 2.

157. The term maltreatment, as used here, refers to conduct that falls within the four

masters,¹⁵⁸ employers, and others,¹⁵⁹ since the early days of the colonies and territories.¹⁶⁰ In fact, there is widespread consensus that maltreatment of children, as judged by modern standards, has always

primary categories recognized today: physical abuse, neglect (and its extreme form, abandonment), sexual abuse, and emotional or psychological maltreatment. As noted below, determinations of what constitutes acceptable and unacceptable treatment of children are socially-, culturally-, and historically-relative. See *infra* notes 158-253, 273-77 and accompanying text. Therefore, the application here of modern categories and terminology imposes a somewhat artificial lens on events that occurred in prior eras. Despite this fact, I will evaluate these historical phenomena according to modern standards, since such standards provide the most accessible and useful yardstick by which to judge adult practices toward children.

158. Use of the term “master” refers to two distinct sets of relationships between adults and children. First, the enslavement of generations of African-Americans subjected millions of children to socially- and legally-sanctioned maltreatment on a daily basis. MARY ANN MASON, *FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* 39-46 (1994); STEVEN MINTZ & SUSAN KELLOGG, *DOMESTIC REVOLUTIONS* 67-68 (1988); Brian D. Gallagher, *A Brief Legal History of Institutionalized Child Abuse*, 17 B.C. THIRD WORLD L.J. 1, 14-19 (1997). Enslaved children were not spared from the brutalities and indignities forced upon their parents. Beatings, sexual abuse, coerced labor under severe conditions of physical hardship, malnutrition, unsanitary living quarters, and dehumanizing and degrading psychological treatment were among the hallmarks of a slave child’s existence. MINTZ & KELLOGG, *supra* at 67-77. And, slave children were often separated permanently, and without warning, from their parents, if doing so seemed financially advantageous to the “owners.” *Id.* at 70; MASON, *supra* at 43-46; Gallagher, *supra* at 17-18. The institutional nature of slavery in America places the maltreatment of these children in a class by itself in American history, and it is not possible here to do justice to the suffering of children raised in bondage.

The second context in which the term “master” applies involves circumstances in which children became the indentured servants or apprentices of adults who, in turn, provided them with food and lodging, and ideally, with training in a trade. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* 259-68 (1985); MASON, *supra* at 30-39. In these situations, the “masters” assumed an *in loco parentis* relationship toward the child and, like parents, could command obedience, and use various methods of “correction,” with minors, as would a child’s own parents. GROSSBERG, *supra* at 259-68. Depending upon the nature and circumstances of the servitude, masters might have greater or lesser autonomy in how they treated their wards, and the extent to which they were required to provide children with vocational training. MASON, *supra* at 30-39.

159. Children, together with slaves and servants, were sometimes initial research subjects in medical experiments. Susan E. Lederer & Michael A. Grodin, *Historical Overview: Pediatric Experimentation*, in *CHILDREN AS RESEARCH SUBJECTS: SCIENCE, ETHICS & LAW* 3, 4-5 (Michael A. Grodin & Leonard H. Glantz eds., 1994). Medical researchers reportedly tested vaccinations on their own children, but more commonly, sought subject pools of children for medical research from orphanages, poorhouses, and other institutional settings. *Id.* at 4-9.

160. See, e.g., DORNE, *supra* note 69, at 16; PLECK, *supra* note 154, at 44-48; Paul A. Gilje, *Infant Abandonment in Early Nineteenth Century New York City: Three Cases*, in *GROWING UP IN AMERICA: CHILDREN IN HISTORICAL PERSPECTIVE* 109 (N. Ray Hiner & Joseph M. Hawes eds., 1985).

been a feature of human societies.¹⁶¹ Most attempts at historical reconstruction focus on Western nations and the civilizations that preceded them. There is less information about maltreatment of children in non-Western societies,¹⁶² although there is strong evidence of cultural variations in the prevalence of behaviors that would be perceived to constitute child maltreatment by modern Western criteria.¹⁶³

Scholars disagree, however, as to the nature and prevalence of various forms of child maltreatment in particular segments of

161. See OLA W. BARNETT et al., *FAMILY VIOLENCE ACROSS THE LIFESPAN: AN INTRODUCTION* 6 (1997); DORNE, *supra* note 69, at 15-18; FONTANA & BESHAROV, *supra* note 154, at 3 (citing myths, legends, literature, and historical accounts of infanticide, murder, human sacrifice, mutilation, abandonment); Samuel X. Radbill, *Children In a World of Violence: A History of Child Abuse*, in *THE BATTERED CHILD* 3 (Ray E. Helfer & Ruth S. Kempe eds., 4th eds., 1987) (reviewing a range of abusive practices throughout history, including lethal abuse, child labor, sexual abuse, abandonment, and neglect).

162. The lack of such information may be due, in part, to the orientation on the part of anthropologists to study "normative" rather than culturally-deviant practices in the society of interest. Jill E. Korbin, *Child Abuse and Neglect: The Cultural Context*, in *THE BATTERED CHILD* 23, 23-24 (Ray E. Helfer & Ruth S. Kempe eds., 4th ed. 1987).

163. *Id.* at 25-35. Of course, cross-cultural comparisons are complicated by the obvious role that cultural values and practices play in the definition of what constitutes unacceptable conduct of adults vis-à-vis children. *Id.*

This said, however, anthropologist Jill Korbin, indicates that virtually all societies have social norms and standards regarding what types of adult conduct toward children are harmful. *The Cultural Context of Child Abuse and Neglect*, 4 *CHILD ABUSE & NEGLECT* 3, 4-5 (1980). Despite the inherent complexities of evaluating conduct in other cultures as abusive or neglectful to children, international standards have been promulgated, articulating certain basic, and arguably universal, values in adult treatment of children. See, for example, the United Nations Convention on the Rights of the Child, adopted by the General Assembly of the United Nations in 1989, which speaks to the rights of children to be free from sexual exploitation and sexual abuse, as well as torture or other cruel, inhuman or degrading treatment or punishment. *Children's Rights in America: U.N. Convention on the Rights of the Child Compared with United States Law*, in *AM. BAR ASS'N CENTER ON CHILDREN & THE LAW* xi-xxxiii (Cohen & Davidson eds., 1990).

There is also evidence that particular forms of abuse, as judged by modern Western standards, prevailed in particular times and places, clearly influenced by a range of social and economic forces. Child labor practices in nineteenth and early twentieth century America can be characterized in this way. See, e.g., Caroline G. Trinkley, *Child Labor in America: An Historical Analysis*, 13 *IN PUB. INTEREST* 59, 69-71 (1993). Likewise, social and economic factors clearly played a role in the rise in infanticide of female children in the People's Republic of China in response to the "one child per family" population control policy. See *Caught Between Tradition and the State: Violations of the Human Rights of Chinese Women*, 17 *WOMEN'S RTS. L. RPTR.* 285, 295 (1996) (stating that approximately five percent of China's female babies are "missing," due to infanticide, selective abortion, neglect, and abandonment, in response to China's population control policies). See generally Xiaorong Li, *License to Coerce: Violence Against Women, State Responsibility, and Legal Failures in China's Family-Planning Program*, 8 *YALE J.L. & FEMINISM* 145 (1996).

Western society throughout the past millennium.¹⁶⁴ Whereas some posit a linear evolution in the treatment of children, increasingly approaching modern humane ideals during this period, others dispute this characterization.¹⁶⁵ The diverse perspectives converge, however, in supporting the conclusion that maltreatment of children, as defined by current mores, is not a new phenomenon, and that it certainly preceded popular attention to child maltreatment as a social problem. By the end of the twentieth century, four general categories of child maltreatment had been identified: physical child abuse, physical child neglect, sexual abuse, and psychological maltreatment. In examining the "history" of child maltreatment policy in the United States, we can trace social awareness about each of these categories, which attracted public attention at different points in time. Furthermore, an historical review reveals the seeds of modern legal approaches to child maltreatment, which now incorporate both criminal and civil responses.

B. The Development of Early Child Welfare and Child Protection Policies

(1) Care and Control of "Dependent" Children

Prior to the American Revolution, communities responded informally to dependent persons, such as children who had been orphaned or abandoned, as well as the poor, the infirm, or the "insane."¹⁶⁶ Parental death was common in the new world, and orphaned children typically joined extended families that contained a

164. DORNE, *supra* note 69, at 15-18 (for a summary and analysis of divergent viewpoints).

165. Compare, e.g., Lloyd deMause, *The Evolution of Childhood, in THE HISTORY OF CHILDHOOD 1* (Lloyd deMause ed., 1974) (characterizing the "history of childhood [as] a nightmare from which have only recently begun to awake. The further back in history one goes, the lower the level of child care, and the more likely children are to be killed, abandoned, beaten, terrorized, and sexually abused."), with PHILIPPE ARIES, *CENTURIES OF CHILDHOOD: A SOCIAL HISTORY OF FAMILY LIFE* 47, 261-68 (Robert Baldick trans., 1962) (positing that between the fourteenth and seventeenth centuries, discipline of children became increasingly humiliating, degrading, and corporal, and that such patterns of adult treatment of children persisted into the eighteenth and nineteenth centuries in some Western societies). Providing further contrast, Linda Pollock challenges the analyses and conclusions of deMause, Aries, and others, as "dramatic generalizations" [sic] grounded in part on sloppy research and inaccurate factual data. LINDA A. POLLOCK, *FORGOTTEN CHILDREN: PARENT-CHILD RELATIONS FROM 1500-1900* 263, 268 (1983). Her investigations lead her to conclude that "the majority of children were not subjected to brutality [and] that cruelty to children was not as widespread as has been claimed" during the four centuries covered by her research. "A large section of the population—probably most parents—were not 'battering' their children." *Id.* at 268.

166. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 187 (1973); DAVID J. ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 31 (rev. 2d ed. 1990) [hereinafter *DISCOVERY OF THE ASYLUM*].

complex mixture of half- and step-siblings, cousins, and wards, often headed by older siblings, aunts, uncles, or other relatives serving in parental roles.¹⁶⁷ Dependent children who had no extended families were cared for by neighbors or became the responsibility of the community-at-large, typically as indentured servants.¹⁶⁸

Not until the nineteenth century did institutions for dependent and "deviant" individuals develop in the United States. Ultimately almshouses, orphanages, and houses of refuge became the more common response to those whose families had died, abandoned them, or seemed unable to care for them.¹⁶⁹ Orphan asylums, the predecessors of modern child welfare institutions, had flexible admission policies, and did not limit their residents to children without parents.¹⁷⁰ Children could be removed from parents seen as providing inadequate supervision, moral training, or financial support to safeguard against the likelihood that they would otherwise become "pests to society" or future "tenants of . . . prisons."¹⁷¹ The first "house of refuge" was established in 1824 in New York to serve juvenile delinquents and other wayward, disobedient, neglected, and dependent children and, in the next decades, other such houses were founded in many major cities.¹⁷²

Appalled by the growing institutionalization of America's dependent children, Charles Loring Brace, a New York City minister, took a different approach.¹⁷³ He created the Children's Aid Society, which sought to save "homeless, ragged, hungry children prowling the streets of New York City" by sending them to live with Christian families in the rural Midwest.¹⁷⁴ Reportedly, over 150,000 such children were sent by train to live and work on family farms.¹⁷⁵ In the late nineteenth century, rural states also developed programs for

167. Ross W. Beales, Jr., *The Child in Seventeenth-Century America*, in *AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK* 15, 20 (Joseph M. Hawes & N. Ray Hiner eds. 1985).

168. *DISCOVERY OF THE ASYLUM*, *supra* note 166, at 31, 36; MASON, *supra* note 158, at 31-36.

169. *DISCOVERY OF THE ASYLUM*, *supra* note 166, at 79-154, 180-236. *See also*, Patricia A. Schene, *Past, Present, and Future Roles of Child Protective Services*, 8 *THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT* 23, 25 (1998), available at <http://www.futureofchildren.org/pcn/>.

170. The predominant philosophy was to avoid "penalizing an unfortunate child for the fact of his parents' survival." *DISCOVERY OF THE ASYLUM*, *supra* note 166, at 207.

171. *Id.* at 210.

172. *Id.* at 76-77, 209; DORNE, *supra* note 69, at 19.

173. Priscilla Ferguson Clement, *The City and the Child, 1860-1885*, in *AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK* 235, 257, 259-62 (Joseph M. Hawes & N. Ray Hiner eds., 1985).

174. Schene, *supra* note 169, at 25.

175. *Id.*

reimbursing farm families for caring for state wards.¹⁷⁶ These models were precursors to modern concepts of foster care.

The nineteenth century witnessed the development of increasingly aggressive policies of intervention in the lives of children viewed as needing rescue from their otherwise unfortunate lots in life. This phenomenon was an important component of the Progressive Movement, which had its greatest influence toward the end of the nineteenth century and the early twentieth century.¹⁷⁷ Middle- and upper-class Americans were alarmed at the plight of inner-city, lower-class, and immigrant children, and a breed of Progressive reformers or “child savers” gained growing influence and legitimacy in social policy formation. Professor Michael Grossberg characterizes social reforms of this era as propelled by a kind of “moral panic”—that is, fear “that urbanization, industrial capitalism, and massive immigration were undermining the nation’s homes and thus, the republic itself.”¹⁷⁸ Historian Ronald Cohen notes that “[a]dults worried about children—everyone’s children, not just their own—for their own sake and also out of fear for the country’s future.”¹⁷⁹ Whereas some observers emphasize the humanitarian underpinnings of the Progressive ideology, others argue that the primary motive for this focus on children was the desire for social control over growing population subgroups viewed as dependent, different, or deviant.¹⁸⁰

These efforts culminated in the creation of the juvenile justice system, which authorized state involvement in children’s lives as a “superparent” that substituted itself in the rearing of those children

176. *Id.*

177. Historians have generally referred to the period of time between 1885 through 1915 as the Progressive Era. During these years, “reformers” expressed pervasive concerns about social and economic conditions in the United States, and particularly those that affected children, and sought comprehensive social and legal change. For a thoughtful and balanced historical analysis of this era, see Ronald D. Cohen, *Child-Saving and Progressivism, 1885-1915*, in *AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK* 273 (Joseph M. Hawes & N. Ray Hiner eds., 1985). See also Hamilton Cravens, *Child Saving in Modern America, 1870-1990s*, in *CHILDREN AT RISK IN AMERICA: HISTORY, CONCEPTS, AND PUBLIC POLICY* 3-31 (Roberta Wollons ed., 1993).

178. Michael Grossberg, *Balancing Acts: Crisis, Change, and Continuity in American Family Law, 1890-1990*, 28 *IND. L. REV.* 273, 275 (1995).

179. COHEN, *supra* note 177, at 274.

180. It is not possible here to disentangle the various impulses underlying twentieth century social movements and legal reforms affecting children and families, although it is likely that some mix of motives influenced these shifts. *Id.* at 273-81; GORDON, *HEROES*, *supra* note 152, at 27-30; Schene, *supra* note 169, at 25. Critics of the social, cultural, and economic biases of the modern child welfare system contend that the system still operates as a mechanism of social control by certain classes and segments of society over others. See, e.g., LELA B. COSTIN ET AL., *THE POLITICS OF CHILD ABUSE IN AMERICA* 3-11 (1996) [hereinafter *POLITICS OF CHILD ABUSE*].

whose parents were viewed as harmful or inadequate.¹⁸¹ These reforms incorporated a "treatment" philosophy, emphasizing the needs of the child, rather than on the act that triggered the court's authority.¹⁸² Significantly, the three populations under juvenile court jurisdiction—delinquents, status offenders,¹⁸³ and the dependent/neglected—could, and often did, receive similar dispositions. Children from within any of these categories could be sent to a foster home, an institution for the dependent or neglected, or an institution for juvenile delinquents.¹⁸⁴

2. Protecting "Endangered" Children from "Cruelty"

In April 1874, a jury convicted Mary Connolly of assault and battery against Mary Ellen Wilson, a ten-year-old child who had been placed in her care by the Department of Charities eight years prior.¹⁸⁵ Mrs. Connolly had assaulted Mary Ellen with a pair of scissors on one instance, had repeatedly beat her with a rawhide whip and a cane, and caused numerous bruises and scars on Mary Ellen's face and body.¹⁸⁶ The abuse against Mary Ellen served as a rallying point for a nascent social movement against cruelty to children, initiating the use of the criminal justice system as a weapon in the movement's armamentarium, and stimulating the founding of the first society against cruelty to children. The case was ground-breaking for several reasons.

181. LaMar T. Empey, *Introduction: The Social Construction of Childhood and Juvenile Justice*, in *THE FUTURE OF CHILDHOOD AND JUVENILE JUSTICE* 1-34 (LaMar T. Empey ed., 1979). Most writers cite 1899 as the date of the juvenile justice system's creation, since in this year, the Juvenile Court Act in Illinois became effective, marking the first formal appearance of the juvenile court model in a state statute. See ANTHONY M. PLATT, *THE CHILD SAVERS: THE INVENTION OF DELINQUENCY* 9-10 (2d ed., 1977); DAVID J. ROTHMAN, *CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA* 215 (1980) [hereinafter *CONSCIENCE AND CONVENIENCE*]; Julian W. Mack, *The Juvenile Court*, 23 *HARV. L. REV.* 104, 107 (1909).

182. See, e.g., Mack, *supra* note 181, at 107; *CONSCIENCE AND CONVENIENCE*, *supra* note 181, at 215.

183. Status offenders are minors brought to the attention of juvenile court for acts of truancy, disobedience to their parents, running away from home, and other forms of 'incurable' troublesome behavior.

184. PAUL LERMAN, *DEINSTITUTIONALIZATION AND THE WELFARE STATE* 107, 113-14 (1982). For example, in 1923, 50% of the minors in secure detention facilities in this country were labeled "dependent." The author of a 1923 census noted: "The dividing line between dependency and delinquency is often so vague that in practice both types of children may be found in the care of organizations intended primarily for the care of a single class." *Id.* at 114.

185. PLECK, *supra* note 154, at 69-73. For a collection of New York Times articles and other press accounts of the case and related events, see 2 ROBERT H. BREMNER ET AL., *CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY* 185-93 (1971). For a critical examination of the "legend" of Mary Ellen Wilson, see *POLITICS OF CHILD ABUSE*, *supra* note 180, at 51-75.

186. BREMNER, *supra* note 185, at 185-89.

Corporal punishment was then a fixture in American society, in families, in institutions, in schools, and in places of employment,¹⁸⁷ and outsiders did not second-guess adults' methods of instilling discipline and obedience in children who were their charge.¹⁸⁸ Family privacy and parental autonomy, while not yet constitutionalized, were paramount values in American society, discouraging scrutiny of the internal affairs of families. Children were viewed as parental property at common law.¹⁸⁹ In addition, children were politically and legally powerless in American society. Without advocates or legal representatives, it was nearly impossible to imagine a diminution of the deference to parental authority that negated extrafamilial intrusion into childrearing.

And yet, as noted above, the nineteenth century was a period characterized by increasing concern on the part of social reformers about the childrearing practices of various subsets of the American populace.¹⁹⁰ Mary Ellen's case first came to public attention as the philosophies characterizing the Progressive Movement began to gain a foothold in the United States.¹⁹¹

Reportedly, a charity worker whose husband was a journalist learned of Mary Ellen's plight and managed to persuade the Society for the Prevention of Cruelty to Animals ("SPCA"), to assist her in finding a way to remove Mary Ellen from the Connolly home.¹⁹² The legal counsel of the SPCA, Elbridge Gerry, filed a writ to secure

187. PLECK, *supra* note 154, at 34-47.

188. MASON, *supra* note 158, at 12. In some locales, however, such as parts of New England, children treated too harshly could be removed from their parents and indentured to another family. *Id.* And, in some areas, masters' punishment of their indentured servants was also scrutinized. *Id.* The Quakers were noteworthy as a group that espoused, and sought to put into effect, non-physical methods of child discipline. PLECK, *supra* note 154, at 37-39. In general, though, parents, guardians, and other adults were given substantial leeway in using corporal methods to supervise children.

189. See generally, MASON, *supra* note 158. Some authors suggest that the vestiges of this heritage continue to influence American family law. See, e.g., Barbara Bennett Woodhouse, "Who Owns the Child?" *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992). In her analysis of the constitutionalization of the doctrine of family privacy in *Meyer v. Nebraska*, 262 U.S. 390 (1923), and *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925), Professor Woodhouse asserts that: "Alongside notions of children as individuals and national assets, Americans cherished deeply etched images of children as their God-given, inalienable property; treasures, to be sure, but private treasures under the control and custody of their parents." *Id.* at 1067.

190. See *supra* notes 177-84 and accompanying text.

191. POLITICS OF CHILD ABUSE, *supra* note 180, at 52, 57-67.

192. *Id.* at 51-67; PLECK, *supra* note 154, at 69-79. Commentators have been intrigued by the irony that, at this point in our country's history, a philanthropic establishment existed to protect animals, but one did not exist to protect children. POLITICS OF CHILD ABUSE, *supra* note 180, at 60-61 (discussing press reports and other evidence of public perceptions about the relationships between organized movement to protect children and to protect animals).

Mary Ellen's freedom from the Connollys' custody.¹⁹³ He filed criminal charges against Mrs. Connolly, ultimately leading to Mary Ellen's courtroom and *in camera* testimony of her abuse, which was covered by the newspapers.¹⁹⁴

Gerry used this case as the springboard with which to form the New York Society for the Prevention of Cruelty to Children ("NYSPCC").¹⁹⁵ In this relatively hospitable social climate, a movement was born, and "[f]orty years later, there were 494 such anticruelty societies in the United States."¹⁹⁶ These private societies, hailed as the precursors of today's public child protective services, increased public awareness of and concern about the dangers some children experienced at the hands of their caregivers; they promoted the passage of criminal child abuse statutes; they filed actions in court against suspected perpetrators; and, most significantly, they challenged the autonomy of parents in the interest of child protection to a greater extent than had other organized social agencies.¹⁹⁷

The juvenile court movement, which transferred formal jurisdiction for the broad range of dependent youth to the state, including those neglected and abused, expanded the social weapons available to combat cruelty to children.¹⁹⁸ Yet, the social reforms of the Progressive Era were so highly influenced by socioeconomic, cultural, and class struggles, that the anticruelty efforts ultimately succumbed to the influence of these broader crusades. The practical effects of this phenomenon included a focus on the welfare of limited subgroups of children perceived to be endangered, many of whom were not those at greatest risk for physical harm. Reformers typically focused more on child "neglect" than "abuse," often sweeping

193. *Id.* at 52-55. The writ filed was a writ *de homine replegiando*, a precursor of the modern action for habeas corpus. BLACK'S LAW DICTIONARY 382 (7th ed. 1999).

194. BREMNER ET AL., *supra* note 185, at 185-93.

195. PLECK, *supra* note 154, at 72-73; POLITICS OF CHILD ABUSE; *supra* note 180, at 62-67.

196. PLECK, *supra* note 154, at 69, 72-73.

197. Schene, *supra* note 169, at 26-27. Yet, despite these gains, some analysts suggest that the anticruelty societies did not have a significant impact on the day-to-day lives of abused children. See, e.g., PLECK, *supra* note 154, at 70. Elizabeth Pleck concludes that:

The law enforcement rhetoric of the SPCC was considerably stronger than their actions. There is thus considerable confusion between the stated goal of the societies—the prevention of cruelty to children—and their actual work . . . Measured against all previous attempts at family violence reform, the work of the anticruelty societies was distinctive in placing protection of children ahead of the goal of preserving the family. Still, in hoping to maintain proper parental authority in the family, the agents of these societies often sided with cruel parents at the expense of the child's safety.

Id. at 70. In addition, without reporting laws of the type on state statutes today, most cases of child abuse remained hidden from public view.

198. MASON, *supra* note 158, at 102.

broadly within immigrant and lower-class populations, failing to distinguish between “willful mistreatment of children and poverty or cultural difference.”¹⁹⁹

C. Child Labor as Child Maltreatment

Although the United States Supreme Court first railed against “the crippling effects of child employment” in its 1944 opinion in *Prince v. Massachusetts*,²⁰⁰ the movement to protect children from hazardous employment conditions had commenced over a century earlier. Yet, it was not until the mid-twentieth century that regulation of child labor became a fixture of American life, after many decades of bitter struggle.

Children had engaged in productive labor since the early days of the American colonies, typically within the context of the family farm or business, or as an indentured servant to a master who promised to train and support the minor in exchange for the child’s labor.²⁰¹ During the colonial period, child employment was viewed quite positively, as instilling a sense of responsibility, duty, and discipline in children, while preparing them for adult obligations.²⁰² The often-idealized American traditions of work in the context of family and apprenticeship did not always shield children from abuse and injuries, nor were all of these experiences necessarily accompanied by some form of enriching education.²⁰³ Children were, however, “protected” to some extent in family and apprenticeship contexts, in that the supervising adults acknowledged legal, financial, and moral responsibility for the welfare of their working minor charges.²⁰⁴

Gradually, throughout the nineteenth century, the locus of employment shifted from the more sheltered settings of home, farm, and small business to the impersonal context of large and often-

199. *Id.* at 100-08.

200. 321 U.S. 158, 168 (1944). Ironically, the vehicle for the Supreme Court’s formal rebuke of the “evils” of certain types of child labor, *Prince v. Massachusetts*, was not, technically-speaking, a case addressing regulation of children in the work force. The case concerned the constitutionality of the state’s child labor laws, as enforced against a nine-year-old child’s legal custodian, who allowed the child to distribute religious literature on street corners. *Id.* at 161-64.

201. GROSSBERG, *supra* note 158, at 259.

202. VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 66-68 (1985); Trinkley, *supra* note 163, at 69-71 (1993). Arguably, these attitudes were, in part, a rationalization for the practice by England of “shipping” poor children to the American colonies to avoid financial and social responsibility for these children while addressing the need in the colonies for additional laborers. *Id.* at 63-67.

203. GROSSBERG, *supra* note 158, at 259-68.

204. *Id.*

exploitative corporations²⁰⁵ and to the city streets.²⁰⁶ The widespread industrialization of the nineteenth century brought new concerns about the welfare of children in the workplace.²⁰⁷ Long hours, paltry wages, and highly dangerous conditions typically characterized the work in factories, mills, mines, and other corporate settings. Industrial accidents, exposure to harmful substances, and physical abuse by employers were common incidents to children's employment.²⁰⁸ In the late 1800s and early 1900s, as the conditions in the workplace became increasingly hazardous, the proportion of children between the ages of ten and fifteen entering the labor force rose sharply.²⁰⁹

Muckraking reporters exposed some of the conditions in factories, mills, and mines, revealing circumstances dangerous for full-grown adults, and thus all the more perilous for the young.²¹⁰ Furthermore, full-time child labor had no place in the society that Progressive reformers sought to craft, nor did any type of labor that interfered substantially in children's educational or socioemotional development.²¹¹ Yet, critics of child labor laws assailed reforms as intrusions upon parental autonomy.²¹² The battle to use the legal system to protect children from dangerous and exploitative working conditions confronted strong opposition.²¹³ By the 1940s, however,

205. Trinkley, *supra* note 163, at 67-72.

206. In urban areas, some children became involved in selling various items on the streets, such as food, clothing, newspapers, and so on. Clement, *supra* note 173, at 249. The streets brought their own dangers, as alluded to by the Supreme Court in *Prince v. Massachusetts*, 321 U.S. 165, 168 (1944): "Among the evils most appropriate for [state action for the protection of children] are . . . the possible harms arising from . . . the diverse influences of the street."

207. STEPHEN B. WOOD, CONSTITUTIONAL POLITICS IN THE PROGRESSIVE ERA: CHILD LABOR AND THE LAW 3 (1968).

208. Trinkley, *supra* note 163 at 59, 69-71. "No matter how exhausted they were from the drudgery of the previous day, factory children were obliged to keep pace with machinery that never tired." *Id.* at 67-68. Trinkley reports accidents such as children losing or injuring fingers, falling down elevator shafts, and tumbling into vats of hot chemicals. *Id.* at 70.

209. For example, census figures and Department of Labor data reveal a sharp increase between 1870 and 1910. WOOD, *supra* note 207, at 3-4. See also David Stern et al., *How Children Used to Work*, 39 LAW & CONTEMP. PROBS. 93, 98-99 (1975).

210. Cohen, *supra* note 177, at 288.

211. As the Supreme Court ultimately opined in *Prince*, in upholding Massachusetts' child labor statute in 1944: "It is the interest of the youth itself, and of the whole community, that children be both safeguarded from abuses and given opportunities for growth into free and independent, well-developed men and citizens," necessitating children's participation in developmentally-appropriate educational tasks, and their protection from "evils" such as "the crippling effects of child employment." 321 U.S. at 165, 168.

212. ZELIZER, *supra* note 202, at 69-70.

213. Those opposing child labor reforms included employers, legislators, ZELIZER,

the reformers prevailed: courts stopped invalidating child labor legislation and, after World War II, children's employment in the United States ultimately was restricted to part-time work under suitable conditions, as long as this work does not interfere with the children's education.²¹⁴ Whether the triumph of child labor legislation resulted from general humanitarian concerns, changing social notions about children, the changing demands of the workplace,²¹⁵ or other political factors,²¹⁶ child labor no longer presents a threat to the health and well-being of the overwhelming majority of American children.²¹⁷

D. Development of the Child Protection System in the Twentieth Century

Several developments in twentieth century converged to create the modern child protection system. Among the most significant are the increasing involvement of federal and state government in the regulation of children's lives in a variety of spheres; the growth of government "welfare" programs to provide support to impoverished families; new "scientific" understandings of child abuse via the dissemination of methods to diagnose "the battered child syndrome" through radiological and other medical techniques; the subsequent

supra note 202, at 64-66, and parents of employed youth, asserting their "desperate need . . . for additional income" in order to make ends meet. See Selma Berrol, *Ethnicity and American Children*, in AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 343, 349-50 (Joseph M. Hawes & N. Ray Hiner eds., 1985). See also ZELIZER, *supra* note 202, at 69-70.

214. Not until 1941, in *United States v. Darby Lumber*, 312 U.S. 100 (1941), did the U.S. Supreme Court uphold a comprehensive federal labor law, the Fair Labor Standards Act of 1938, as a constitutional exercise of congressional power to regulate interstate commerce. And even in the face of this victory for reformers, child employment rates rose again, during World War II, as the nation sought the labors of those who were not serving in the military (i.e., women and children). MINTZ & KELLOGG, *supra* note 158, at 166.

215. Leroy Ashby, *Partial Promises and Semi-Visible Youths: The Depression and World War II*, in AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 489, 493 (Joseph M. Hawes & N. Ray Hiner eds., 1985). See also ZELIZER, *supra* note 202, at 62-63.

216. Some assert that the success of child labor reform relates can be partially attributed to the convergence of the interests of children's advocates and organized labor. Ashby, *supra* note 215, at 493; Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L. J. 1, 6 (1986). The latter group joined forces in the movement to restrict child labor because doing so was expected to improve the bargaining position of adult employees by constricting the pool of available workers. *Id.*

217. Some writers argue that, even in the United States today, there is continuing exploitation and endangerment of children in certain employment contexts. For exceptions to restrictions on child labor, see, for example, Davin C. Curtiss, *The Fair Labor Standards Act and Child Labor in Agriculture*, 20 J. CORP. L. 303 (1995); Rachelle Propson, *A Call for Statutory Regulation of Elite Child Athletes*, 41 WAYNE L. REV. 1773 (1995); Marc R. Staenberg & Daniel K. Stuart, *Children as Chattels: The Disturbing Plight of Child Performers*, 32 BEVERLY HILLS BAR ASS'N J. 21 (1997).

passage of child abuse reporting laws in the fifty states; and in the last three decades of the twentieth century, the enactment of a series of federal statutes providing policy leadership and funding to the states in the effort to protect maltreated children. And, as is often the case when the major policy changes “sweep” the nation, these transformations have been followed by criticism and reassessment of the philosophies, methods, and goals that constitute modern responses to concerns about endangered children.

During the twentieth century, federal and state governments became increasingly involved in supporting and regulating families. The proliferation and enforcement of compulsory schooling laws and policies restricting child labor, and the creation and growth of the juvenile court system provide salient examples of expanding state involvement in the regulation of childhood.²¹⁸ In the twentieth century, the government also became involved in providing financial support to families, and offering various human services. The passage of the Social Security Act of 1935, which established the Aid to Dependent Children program,²¹⁹ signaled the federal government's entry, by means of substantial financial commitment, into the bastion of child welfare. In that this program, like its successors, funded *state* child welfare programs, providing incentives to the states to implement federally-endorsed welfare policies, the program marked the birth of federal and state bureaucracies charged with addressing the well-being of children in America.²²⁰ This program was also noteworthy in that it marked the federal government's adoption of the then-emerging philosophy that it was better for children from destitute families to be raised by their own families than placed in institutions.²²¹ The 1935 Act and its successors provided for financial assistance to the impoverished families, obviating the “need” to remove otherwise “dependent” children from the home. Throughout

218. See *supra* notes 181-84, 205-14 and accompanying text.

219. 42 U.S.C. §§ 601-687 (repealed 1996). In 1962, this program was renamed Aid to Families with Dependent Children, to reflect a broadened focus on providing support to the parents or other relatives caring for the child. Public Welfare Amendment of 1962, Pub. L. No. 87-543, § 104(a)(1), (3), 76 Stat. 185 (1962).

220. Although the Children's Bureau had been established in 1912, following the first White House Conference on Children, the Bureau was not empowered to do much more than gather and disseminate information relevant to children's well-being. See Hamilton Cravens, *Child-Saving in the Age of Professionalism, 1915-1930*, in AMERICAN CHILDHOOD: A RESEARCH GUIDE AND HISTORICAL HANDBOOK 415, 416-17, 462 (Joseph M. Hawes & N. Ray Hiner eds., 1985). In addition, although the 1920s saw the beginnings of federal involvement in child welfare through grants to community groups addressing health issues such as improved prenatal care, the 1935 Act created the blueprint that still prevails today, albeit with substantially less funding than in prior decades.

221. See Ashby, *supra* note 215, at 495-496.

the 1930s and 1940s, as the Depression and World War II tested our country's resilience, the federal government provided aid to its citizens, including families with children, through a wide variety of public assistance measures.²²² Many of these programs, particularly those targeting mothers and children, continued in one form or another until the 1990s, when the federal government sought to "end welfare as we know it."²²³

Second, during the mid-twentieth century, state child welfare agencies increasingly took over the functions that had been handled previously by groups such as the Societies for Prevention of Cruelty to Children. In the 1950s, thirty-five states and the District of Columbia enacted statutes placing the responsibility for child welfare services in public agencies.²²⁴ Reportedly, between 1956 and 1977, the number of child welfare workers employed by state agencies rose from 5,628 nationwide to 30,000.²²⁵ In the 1960s, when the "battered child syndrome" was identified, and child abuse reporting statutes passed,²²⁶ these administrative agencies began their transformation into modern-day child protective services.

National attention became riveted on the issue of child abuse with the 1962 publication of a now-famous article entitled "The Battered Child Syndrome" in the *Journal of the American Medical*

222. See generally *id.*

223. In 1996, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996), codified as amended at 42 U.S.C. §§ 601-603, which repealed the AFDC provisions that had become a fixture in welfare policy throughout the latter two-thirds of the twentieth century. For a comparison of the provisions of the prior and present welfare policy as it relates to children and families, see generally Sylvia A. Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 471 (1997); Stephen D. Sugarman, *Financial Support of Children and the End of Welfare As We Know It*, 81 VA. L. REV. 2523 (1995). The phrase "ending welfare as we know it," which has been adopted in the scholarly and lay press to highlight the end of an era, derives from statements made by President Bill Clinton, when campaigning, in speeches once in office (including the State of the Union address), and when signing the Personal Responsibility and Work Opportunity Reconciliation Act. See, e.g., President Bill Clinton, Remarks to Officials at Missouri (June 14, 1994), available at 1994 WL 258369; Laura W. Morgan, *A Shift in the Ruling Paradigm: Child Support As Outside the Contours Of "Family Law,"* 12(5) DIVORCE LITIG. 77, at n.60; Noelle M. Reese, *Workfare Participants Deserve Employment Protections Under the Fair Labor Standards Act and Workers' Compensation Laws*, 31 RUTGERS L.J. 873, 911 (2000) (citing Francis X. Clines, *Clinton Signs Bill Cutting Welfare; State in New Role*, N.Y. TIMES, Aug. 23, 1996). Some observers predict that the reduction of financial support to impoverished families with children may result in increases in serious child neglect and abuse. See, e.g., Mary Jo Bane & Richard Weissbourd, *Welfare Reform and Children*, 9 STAN. L. & POL'Y REV. 131, 134 (1998).

224. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 19-20 (1994).

225. *Id.*

226. See *infra* notes 233-35 and accompanying text.

*Association.*²²⁷ Using X-ray technology and other medical assessment techniques, physician C. Henry Kempe and his colleagues reported hundreds of cases in which children had been brought to hospitals repeatedly for various injuries, and in which parental explanations for injuries diverge from the diagnostic picture. Other medical writers had speculated about the possible relationship between parental abuse and children's injuries previously, but their writings received little attention.²²⁸

Kempe's research literally changed the entire landscape of child protection. Several factors may account for this impact. First, his article reported a national research study, which imbued the concept of the battered child syndrome with the stamp of scientific veracity. Second, Kempe and his colleagues provided very clear guidance to physicians regarding how to diagnose the syndrome. This meant that it was possible for physicians throughout the country to put his recommendations into practice. Third, Kempe's narrative was haunting and powerful, features not typically the hallmarks of research reports. For example, in the section on the clinical manifestations of the syndrome, Kempe and colleagues speak to the import of certain radiological findings: "To the informed physician, the bones tell a story the child is too young or too frightened to tell."²²⁹ In addition, Kempe and his colleagues spoke directly to their physician audience, tapping into the physicians' own emotional reactions to children whose clinical picture suggests the syndrome: "[T]here is a reluctance on the part of many physicians to accept the radiologic signs as indications of repetitive trauma and possible abuse. This reluctance stems from the emotional unwillingness of the physician to consider abuse as the cause of the child's difficulty . . ."²³⁰ Finally, Kempe's report implored physicians to overcome their hesitance to intervene, implying that it was a physician's duty to act to protect children from the "expected repetition of trauma."²³¹ The article leaves no doubt that the protective action involved would be legal in nature, such as reporting the cases to police or child

227. Kempe et al., *supra* note 155.

228. For a discussion of prior medical writings, see DORNE, *supra* note 69, at 33-37; FONTANA & BESHAROV, *supra* note 154, at 5.

229. Kempe et al., *supra* note 155, at 106.

230. *Id.*

231. *Id.* at 112.

Physicians, because of their own feelings and their difficulty in playing a role that they find hard to assume, may have great reluctance in believing that parents are guilty of abuse. They may also find it difficult to initiate proper investigations so as to assure adequate management of the case. Above all, the physician's duty and responsibility to the child requires a full evaluation of the problem and a guarantee that the expected repetition of trauma will not be permitted to occur.

Id.

protective services, and that such action is necessary in order to prevent "further tragic injury or death" to the child.²³²

The response to Kempe's article was dramatic. Model reporting statutes were drafted by several groups within the next few years.²³³ By 1967, all states had enacted statutes that mandated physicians to report suspected child maltreatment.²³⁴ In the years that followed, the statutes were broadened, mandating reporting by a range of other professionals who work with children or their parents, and expanding the definitions of what constitutes reportable maltreatment. In 1974, the federal government took a leadership position with the Child Abuse Prevention and Treatment Act of 1974 ("CAPTA"),²³⁵ the first in a series of legislative efforts to encourage states to adopt various statutory provisions in order to qualify for federal child protection funds. The model promoted by CAPTA was that of a coordinated national response to the problem of child maltreatment, implemented through state protective services agencies and criminal justice authorities. In addition, CAPTA provided mechanisms for the collection of child maltreatment data nationwide.

Yet, as is often the case, government intervention proved not to be the panacea policymakers had hoped for. CAPTA was amended over the years, and Congress passed other legislation relating to abuse and neglect.²³⁶ Each decade brought with it new emphases, each attempting to respond to updated understandings of the phenomena of child maltreatment,²³⁷ or to promulgate shifting philosophies of child protective services intervention,²³⁸ or to respond to criticisms of the ways in which child protection policy was implemented.²³⁹

232. *Id.* at 111-12.

233. Kalichman, *supra* note 9, at 15.

234. Donald J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J. L. & PUB. POL'Y 539, 542 (1985) [hereinafter "Doing Something"].

235. Pub. L. No. 93-247, 88 Stat. 4 (1974), codified as amended at 42 U.S.C. §§ 5101-5120 (2000).

236. For a summary of such legislation, see DORNE, *supra* note 69, at 66-70; Schene, *supra* note 169, at 28.

237. For example, increasing concern about sexual abuse and sexual exploitation of children led to federal and state legislation in the 1970s and 1980s. See DORNE, *supra* note 69, at 66-67; D. Kelly Weisberg, *supra* note 152, at 31-50.

238. For a discussion of the shifting philosophical movements reflected in federal child abuse legislation, see DORNE, *supra* note 69, at 67-71; POLITICS OF CHILD ABUSE, *supra* note 180, at 117-32; Robert M. Gordon, *Drifting through Byzantium: The Promise and Failure of the Adoption and Safe Families Act*, 83 MINN. L. REV. 637, 641-57 (1999); Larner et al., *supra* note 113, at 8-9.

239. For a discussion of the criticisms leveled at the child protection system for failures in implementing its mandates, see POLITICS OF CHILD ABUSE, *supra* note 180, at 135-65; Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care,*

Federal and state law succeeded in bringing more cases of child maltreatment to the attention of government authorities. Reports of suspected child maltreatment virtually skyrocketed over the following years and decades.²⁴⁰ Whether these figures reflect actual increases in the prevalence of child maltreatment or merely increases in *reporting* of cases,²⁴¹ growing numbers of children and families came within the jurisdiction of those authorities empowered to respond. During the 1960s and 1970s, the child welfare agencies focused increasingly on investigating and intervening in cases of reported child maltreatment, leading to their transformation into the child protective services agencies we are familiar with today.²⁴² Sadly, modern child protection agencies are, to some extent, “driven” by their mandate to investigate reported cases, with the result that “investigation often seems to occur for its own sake, without any realistic hope of meaningful treatment to prevent the recurrence of maltreatment or to ameliorate its effects, even if the report of suspected maltreatment is validated.”²⁴³ In addition, the U.S. Advisory Board on Child Abuse and Neglect observed that child protection policy in the United States is “largely unplanned; it has consisted primarily of ad hoc responses to crises.”²⁴⁴ In 1990, the Board asserted that “the *system* the nation has devised to respond to child abuse and neglect is *failing*.”²⁴⁵

and Termination of Parental Rights, 28 STAN. L. REV. 625, 636-37 (1976) [hereinafter Wald (1976)].

240. Various estimates have been published. For example, according to one source, reports of child abuse had increased from 10,000 annually in 1962 to almost three million in 1992. LINDSEY, *supra* note 224, at 8. According to another, the number of children reported nationally rose by over 347% between 1976 and 1993. Schene, *supra* note 169, at 29.

241. Although we can speculate as to whether these figures reflect actual increases in the prevalence of child maltreatment rather than merely increases in reporting, it is not possible to determine which factor accounts for what proportion of the increase.

242. LINDSEY, *supra* note 224, at 97.

243. See U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., NEIGHBORS HELPING NEIGHBORS: A NEW NATIONAL STRATEGY FOR THE PROTECTION OF CHILDREN 9-10 (1993), *available from* Superintendent of Documents, U.S. Government Printing Office.

244. U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CREATING CARING COMMUNITIES: BLUEPRINT FOR AN EFFECTIVE FEDERAL POLICY ON CHILD ABUSE AND NEGLECT xi (1991), *available from* the Superintendent of Documents, U.S. Government Printing Office.

245. U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT: CRITICAL FIRST STEPS IN RESPONSE TO A NATIONAL EMERGENCY vii (1990) (emphasis in original), *available from* the Superintendent of Documents, U.S. Government Printing Office. Among the Advisory Board's conclusions were that “child abuse and neglect in the United States now represents a national emergency,” in part because “in spite of the nation's avowed aim of protecting its children, each year *hundreds of thousands* of them are still being starved and abandoned, burned and severely beaten, raped and sodomized, berated and belittled.” *Id.*

One source points out that approximately thirty to fifty percent of the children who die from maltreatment by parents each year had been "previously reported to child protection agencies,"²⁴⁶ reminding us that reports of child maltreatment are meaningless if not followed by an effective response. Despite all of the effort that has been expended to bring maltreated children to the attention of authorities, very little emphasis has been placed on how to intervene effectively with affected families.²⁴⁷ Interpretation of the limited empirical research conducted on the efficacy of traditional child welfare responses to reported cases of child maltreatment has been mixed, at best, leaving scientific observers with uncertainty as to whether formal intervention by child protective services makes a difference in the lives of children and families, or whether one approach used by child protection agencies is superior to another.²⁴⁸ The mammoth bureaucracy that has become the nation's web of child protective services agencies has been the target of criticisms for its overly-zealous intervention in families as well as its failure to intervene in other instances, for casting its net too broadly as well as for focusing on too limited a segment of children at risk, for its ignorance of and bias against the cultural traditions of non-white segments of our nation's population and its prejudice against racial and ethnic minorities, for the inefficacy of its interventions, and for a host of other problems.²⁴⁹

And yet, despite these criticisms, it is difficult to find commentators who suggest dismantling the system.²⁵⁰ Now that our

at vii. The Board underscored the absence of effective preventive and intervention strategies. *Id.* at xii-xv (emphasis in original).

246. POLITICS OF CHILD ABUSE, *supra* note 180, at 116-17 (quoting Douglas Besharov, *Contending With Overblown Expectations*, PUBLIC WELFARE, Winter 1987, at 7-8).

247. LINDSEY, *supra* note 224 at 96-126; POLITICS OF CHILD ABUSE, *supra* note 180, at 117-132. See also *infra* notes 619-53 and accompanying text.

248. For arguments that there are insufficient data to conclude that formal child protection intervention makes a difference in the lives of maltreated children, see LINDSEY, *supra* note 224, at 96-126; POLITICS OF CHILD ABUSE, *supra* note 180, at 116-32; Gary B. Melton et al., *Empirical Research on Child Maltreatment and the Law*, 24 J. CLINICAL CHILD PSYCHOL. 47 (1995); Ross A. Thompson & Brian L. Wilcox, *Child Maltreatment Research: Federal Support and Policy Issues*, 50 AM. PSYCHOL. 789 (1995). For the position that reporting laws and the subsequent state intervention lead to a decline in child abuse, particularly child-abuse related deaths, see DONALD J. BESHAROV, *RECOGNIZING CHILD ABUSE* 10-11 (1990).

249. One set of commentators unsympathetically dubbed child protective services with the "dubious distinction of being among the most maligned public agencies." Larner et al., *supra* note 113, at 5.

250. Critics of the current system lean instead to proposing changes in the system's structure and functioning. See, e.g., POLITICS OF CHILD ABUSE, *supra* note 180, at 171-89 (proposing "restructuring" of the system); Larner et al., *supra* note 113, at 9-19 (proposing "focusing and strengthening" of the system).

nation has assumed responsibility to protect children from the harm that might befall them while in the care of adults, it is almost unthinkable that we would abandon that mission. That said, however, substantial disagreement remains as to how, and in what instances, child protective services should intervene in families to protect children's safety and well-being. Over the years, the child protection movement has experienced various shifts in philosophy, focusing on family reunification, then family preservation, and presently on striving to balance these approaches with timely termination of parental rights and adoption.²⁵¹ Within the last decade, spearheaded by the efforts of the U.S. Advisory Board on Child Abuse and Neglect in the Department of Health and Human Services, new community-based philosophies have emerged in a valiant attempt to assist children and families at risk, and to overhaul the agencies designated to assist them.²⁵²

Yet, as we consider newer philosophies, and evaluate the efficacy of various approaches, children remain at risk. "[B]ecause children's lives are at stake, [the child protection system] cannot stop its work while the public debates its mission, or while researchers discover which interventions might help which families. This plane must be fixed while it flies through the air."²⁵³ In the sections that follow, I describe the network of policies and agencies that constitute that plane, as it flies today, with particular reference to the handling of cases involving domestic violence. And then, this Article discusses whether it is possible, and if so how, to navigate and repair the plane in its journey to transport children exposed to domestic violence to a position of safety from domestic violence's harmful impact on their lives.

III. Children's Exposure to Domestic Violence as a Form of Child Maltreatment

In this Part, I focus on our legal system's current responses to child maltreatment, emphasizing the role of the juvenile court and child protective services. I consider whether inclusion of childhood exposure to domestic violence within statutory definitions of child

251. See, e.g., Howard Davidson, *Child Protection Policy and Practice at Century's End*, 33 FAM. L.Q. 765 (1999).

252. See *supra* notes 243-45 and accompanying text; TOWARD A CHILD-CENTERED, NEIGHBORHOOD-BASED CHILD PROTECTION SYSTEM (Gary B. Melton et al. eds.) (forthcoming); PROTECTING CHILDREN FROM ABUSE AND NEGLECT: FOUNDATIONS FOR A NEW NATIONAL STRATEGY (Gary B. Melton & Frank D. Barry eds., 1994). For a thoughtful analysis of the problems confronting present-day child protective service systems, and a proposed ten-point agenda for reform, see Davidson, *supra* note 251, at 772-81.

253. Larner et al., *supra* note 113, at 5.

maltreatment is consistent, philosophically, with traditional juvenile court dependency jurisdiction. In addition, I discuss recent trends in New York and California, where courts have interpreted existing child maltreatment statutes as providing the authority to reach cases of childhood exposure to domestic violence.

A. Current Legal Responses to Child Maltreatment Cases

As noted above, two systems with overlapping jurisdiction have authority to intervene in child abuse and neglect cases: the criminal justice system and juvenile court system.²⁵⁴ Child abuse statutes exist in state penal codes, empowering law enforcement and court personnel to investigate cases, prosecute alleged offenders, and sentence those found guilty. Offenders are provided with the full panoply of due process protections as they move through the criminal justice system. The state must prove its case beyond a reasonable doubt. Those offenders found guilty can be sentenced to prison,²⁵⁵ which may satisfy the criminal justice system's goals of deterrence, incapacitation, and retribution.²⁵⁶

By contrast, the state's *parens patriae* authority to act in children's best interests authorizes the juvenile court's jurisdiction in child maltreatment cases, leading to a different philosophy of intervention. Here, the state intervenes with the dual goals of protecting children from harm and remediating parental deficits. In the hope of preserving the family unit, the juvenile court system seeks to offer education, treatment, and rehabilitation to parents.²⁵⁷ Given this posture in approaching the family, and consistent with the civil traditions that characterize juvenile court proceedings, evidentiary standards and due process requirements are "relaxed" in dependency

254. See *supra* notes 69-71 and accompanying text. See generally, DORNE, *supra* note 69, at 1-4; Josephine A. Bulkley et al., *Child Abuse and Neglect Laws and Legal Proceedings*, THE APSAC HANDBOOK ON CHILD MALTREATMENT 271 (J. Briere et al. eds., 1996); *Child Abuse*, *supra* note 69, at 315-324 (1986).

255. See, e.g., CAL. PENAL CODE § 273a(a) (West 2000) (authorizing sentences of up to six years for certain child abuse offenses).

256. There are, however, alternative dispositions for offenders who fall into some categories, providing for mandated participation in "treatment" and "rehabilitative" programs directed at changing the objectionable behavior that led to the conviction. See, e.g., CAL. PENAL CODE § 273a(c) (2000) (authorizing as an alternative to imprisonment, probation during which participation in certain treatment programs is required). For an excellent review of the issues relevant to the choice of punitive versus rehabilitative responses to domestic violence, see Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505 (1998) [hereinafter Hanna, *The Paradox of Hope*].

257. Jacquelyn McCroskey & William Meezan, *Family-Centered Services: Approaches and Effectiveness*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 54, 62-64 (1998), available at <http://www.futureofchildren.org/pcnl/>.

court, as contrasted with proceedings in the criminal justice system.²⁵⁸ Most determinations made by the juvenile court in maltreatment cases require proof by the preponderance of evidence standard.²⁵⁹ Termination of parental rights, which permanently severs a parent and child's legal relationship, and which is arguably the most severe disposition available to the juvenile court in maltreatment cases, must be based on clear and convincing evidence.²⁶⁰

In general, the juvenile court relies on parents' desires to retain or regain custody of their children to motivate parental compliance with the court's or child protective services' directives. For example, if the court allows a child to remain in the parents' custody, such a disposition may be conditional upon parental participation in one or another treatment program and with full cooperation with child protection personnel. Thus, if parents are unmotivated to retain or regain custody of their children, the system's ability to effectuate changes in the family is minimal. In addition, if the offender in question is not a legal parent, but a cohabitant or companion of a parent, the system may be less able to motivate compliance and a change in the conditions that brought the child to the state's attention. The juvenile court does have at its disposal certain more "coercive" remedies, such as the issuance of civil protective orders²⁶¹ and "contempt" sanctions,²⁶² in order to restrain or compel certain conduct.²⁶³

There are some cases of abuse and neglect that are so severe, the system will abandon hope of reunification, determining that there are no circumstances in which returning the child to the parents could be in the child's best interests.²⁶⁴ But, in most instances, the system tries

258. See Bulkley et al., *supra* note 254, at 275, 284.

259. *Id.* at 275.

260. *Santosky v. Kramer*, 455 U.S. 745 (1982).

261. Civil protective orders permit the court to restrain the offender from contact with certain persons, such as a maltreated child or an adult domestic violence victim, including evicting him from the residence and restricting his access to the victim. ROBERT D. GOLDSTEIN, *CHILD ABUSE AND NEGLECT: CASES AND MATERIALS* 488-492 (1999) [hereinafter GOLDSTEIN, *CHILD ABUSE*]. One author suggests that this remedy is underutilized in child abuse and neglect cases. *Id.*

262. See, e.g., Hon. Arthur L. Burnett, Sr., *What of the Future? Envisioning an Effective Juvenile Court*, 15 CRIM. JUST. 6, 12 (Spring 2000) (citing D.C. CODE ANN. § 16-2320 (c)(3) (1997)).

263. These latter remedies may be particularly useful, for example, in cases where an unrelated adult member of a household is perpetrating abuse against the child or that child's parent, and the court seeks to preserve the family unit consisting of the nonabusive parent and child(ren). In these cases, the court may issue these orders so as to protect that parent-child unit from the abusive individual. See Findlater & Kelly, *supra* note 98, at 90.

264. VA. CODE ANN. § 16.1-283(B)(1)(2) (Michie 1996) (authorizing termination of parental rights upon several findings, including:

The neglect or abuse suffered by such child presented a serious and substantial

to make "reasonable efforts" to help the parents rectify the problems that brought their child to the state's attention.²⁶⁵ Only if those efforts are unsuccessful, or the parents show little interest in improving the situation, will the state seek to terminate the parents' rights to the child permanently.²⁶⁶

B. The Juvenile Court's Dependency Jurisdiction

The juvenile court is authorized, by state statute, to intervene in the family in certain specified situations. In defining the grounds or bases for the court's jurisdiction, state statutes identify what types of parental conduct, what living situations, or what types of observed harm experienced by a child constitute child maltreatment. The determination that certain parental behaviors, certain circumstances, or certain child outcomes constitute child maltreatment is a *policy* decision infused with social values and goals.

Because maltreatment statutes authorize state intervention into the family, they must delicately balance parental rights to discretion in childrearing²⁶⁷ with state *parens patriae* and police power interests in protecting children from harm,²⁶⁸ and giving children the best chance for a future as constructive members of society.²⁶⁹ Constitutional precedent is unequivocal in its recognition that any analysis of potential state intervention in the family must *start* with recognition of the primacy of parents' rights to control the upbringing

threat to his life, health or development; and [i]t is not reasonably likely that the conditions which resulted in such neglect or abuse can be substantially corrected or eliminated so as to allow the child's safe return to his parent or parents within a reasonable period of time.

265. See, e.g., David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139, 171-75 (1992) (reviewing statutes with "reasonable efforts" requirements).

266. See, e.g., GOLDSTEIN, *CHILD ABUSE*, *supra*, note 261, at 820 (identifying general standards for termination of parental rights including: "Despite the social service agency's 'reasonable efforts,' the parent has failed to rectify the cause of the child's being removed from the home . . .").

267. See *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

268. See, e.g., *Parham*, 442 U.S. at 603 ("[W]e have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized"); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("the family itself is not beyond regulation in the public interest . . . Acting to guard the general interest in the youth's well being, the state as *parens patriae* may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways").

269. "A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies." *Prince*, 321 U.S. at 168.

of their children.²⁷⁰ Whereas the contours of the term "upbringing" have never been fully explicated, there is no question that it encompasses most aspects of childrearing, and is limited only in specific, identified situations.

State intervention into the family is typically characterized as a conflict between parents and the state. Yet, some jurists have also articulated children's interests: interests in safety, health, and well-being; interests in the preservation of their family without unnecessary separation from their caregivers; and interests in stability, continuity, and permanence in their lives.²⁷¹ Whereas the constitutional status and parameters of children's independent interests are not clear, children's interests clearly have not acquired the same level of constitutional protection as have those of their parents.²⁷²

270. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."); *Parham*, 442 U.S. at 602 ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); *Yoder*, 406 U.S. at 232 ("The primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Prince*, 321 U.S. at 166 ("It is cardinal with us that the custody, care and freedom of the child reside with the parents..."); *Pierce*, 268 U.S. at 534-35 (referring to "the liberty of parents and guardians to direct the upbringing and education of children under their control" as "fundamental").

271. See, e.g., *Santosky*, 455 U.S. at 760 ("[U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); *id.* at 788-89 (Rehnquist, J., dissenting) ("A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being"); *In re Juvenile Appeal*, 455 A.2d 1313, 1319 (Conn. 1983) ("The child, however, has two distinct and often contradictory interests. The first is a basic interest in safety; the second is the important interest . . . in having a stable family environment." (emphasis in original)).

272. This conclusion is aptly demonstrated by the opinion for the Court in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), in which the Court dismissed the claim that an eight-year-old girl had a constitutionally-protected liberty interest in maintaining a relationship with her biological father. In doing so, the Court stated that it has "never had occasion to decide whether a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship," and that it did not intend to decide the matter that day. 491 U.S. at 130. In addition, children's interests are often presumed to be coextensive with those of their parents. Cf. *Parham*, 442 U.S. at 631 (Brennan, J., dissenting) (asserting that the parent-child conflict that manifests itself as parents surrendering custody of their child to a state mental institution undercuts the presumption that the parents' and child's interests are the same); *Yoder*, 406 U.S. at 243-44 (Douglas, J., dissenting) (arguing that Amish adolescents have an interest in continuing their public education, independent of their parents' rights to withdraw them from public school). Many scholars have argued that children's voices are typically absent in determinations of what is in children's best interests. See, e.g., Wendy Anton Fitzgerald, *Maturity, Difference, And Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11 (1994); Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": The Child's Voice in Defining the Family, 8 BYU J. PUB. L. 321 (1994).

The grounds enumerated in those statutes authorizing juvenile court jurisdiction reflect our society's judgments as to what is harmful to children.²⁷³ Whereas some of these judgments seem fairly objective (e.g., inflicting physical harm nonaccidentally, resulting in serious injury), even fairly objective categories may be "qualified" by social judgments. Thus, for example, in an attempt to balance state and parental interests, a statute may exempt the infliction of nonaccidental physical harm from liability if that infliction constitutes "reasonable" discipline.²⁷⁴ Or, a statute may exempt from its definition of medical neglect certain decisions by parents to reject medically-recommended treatments if the parents' decisions were motivated by religious beliefs.²⁷⁵ In addition, the ways in which statutes are interpreted and applied also reflects social judgments. Abuse and neglect statutes have been used, over the years, as

273. Professor Michael Wald noted the limitations in our "knowledge regarding childrearing and the ways to effect long-term change in a given child's development." Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 992 (1975) [hereinafter WALD (1975)]. He observed further that:

No national consensus exists concerning what constitutes a 'healthy' adult. Even more importantly, we really know very little about how to raise a child to make him "healthy"—however 'healthy' may be defined. The few longitudinal studies of child development conclude that the prediction of future behavior from observation of childrearing practices is extremely difficult.

Id. These observations still hold true, twenty-five years later. Wald emphasized, however, that state intervention in families for the purpose of child protection should not seek "to regulate all aspects of childrearing," but should instead focus on "basic harms from which we wish to protect all children." *Id.* at 993.

274. For example, the pertinent California statute exempts from its reach "reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious physical injury." CAL. WELF. & INST. CODE § 300(a) (West 2001).

275. CAL. WELF. & INST. CODE §300(b) (West 2001):

Whenever it is alleged that a minor comes within the jurisdiction of the court on the basis of the parent's or guardian's willful failure to provide adequate medical treatment or specific decision to provide spiritual treatment through prayer, the court shall give deference to the parent's or guardian's medical treatment, nontreatment, or spiritual treatment through prayer alone in accordance with the tenets and practices of a recognized church or religious denomination, by an accredited practitioner thereof, and shall not assume jurisdiction unless necessary to protect the minor from suffering serious physical harm or illness. In making its determination, the court shall consider (1) the nature of the treatment proposed by the parent or guardian, (2) the risks to the minor posed by the course of treatment or nontreatment proposed by the parent or guardian, (3) the risk, if any, of the course of treatment being proposed by the petitioning agency, and (4) the likely success of the courses of treatment or nontreatment proposed by the parent or guardian and agency. The minor shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the minor from risk of suffering serious physical harm or illness.

instruments to express social disapproval of certain lifestyles,²⁷⁶ or of the way in which particular cultures raise their children.²⁷⁷

Ideally, policy decisions as to what constitutes child maltreatment consider the likelihood that the protective and rehabilitative interventions available to the juvenile court will advance the minors' best interests. The circumstances of children who spend their minority "drifting" back and forth between their parents and a series of foster care placements have become all too familiar in the past several decades.²⁷⁸ Although recent federal initiatives seek to provide greater permanency and stability for children who enter the protective services system,²⁷⁹ it is not at all clear whether these

276. See, e.g., *Roe v. Conn.*, 417 F. Supp. 769 (M.D. Ala. 1976) (holding Alabama's child maltreatment statute unconstitutionally vague in a case where a child was removed from the custody of his Caucasian mother because she was living with an African-American man in a neighborhood that was populated primarily by African Americans).

277. During hearings in the 1970s, Congress considered data indicating "that 25 to 35% of all Indian children had been separated from their families and placed in adoptive families, foster care, or institutions," as a result of the intervention of state child welfare authorities. See *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989) (citing *Indian Child Welfare Program: Hearing Before Subcomm. of the S. Comm. on Interior Insular Affairs*, 93d Cong., 3d Sess. (1974) (statement of William Byler)). Furthermore, the evidence revealed that the "adoption rate of Indian children was eight times that of non-Indian children. Approximately 90% of the Indian placements were in non-Indian homes." *Id.* at 33. Congress enacted the Indian Child Welfare Act in 1978, 25 U.S.C. §§ 1901-1963 (2000), in an attempt to shield Indian parents from the intervention of child protection workers who are unfamiliar with Indian culture and childrearing traditions. *Id.* at 34-35. The statute's goal was to promote tribal sovereignty in decisionmaking over the welfare of Indian children.

278. *Smith v. Org. of Foster Families for Equal. & Reform (OFFER)*, 431 U.S. 816, 835-36 (1977) (noting that "children often stay in 'temporary' foster care for much longer than contemplated by the theory of the system," and that "many children apparently remain in this 'limbo' indefinitely"). See David L. Chambers & Michael S. Wald, *Smith v. OFFER*, in *IN THE INTEREST OF CHILDREN: ADVOCACY, LAW, REFORM, AND PUBLIC POLICY* 67, 71-74 (Robert H. Mnookin ed., 1985); Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Wald (1976), *supra* note 239, at 644-646. Howard Davidson, director of the American Bar Association's Center on Children and the Law, observes that despite reforms in the 1980s and 1990s to reduce the phenomenon of "foster care limbo," there remains "justifiable congressional concern that too many children [still languish] in foster care" at the end of the twentieth century. Davidson, *supra* note 251, at 771.

279. In 1997, Congress passed the Adoption and Safe Families Act, in an attempt to minimize children's extended placements in foster care. Pub. L. No. 105-89, 111 Stat. 2115 (1997). The Act contains several provisions creating financial incentives for states to act more quickly in child maltreatment cases to establish permanency for children. For example, in order to continue to receive federal funding for child welfare services, states must hold termination of parental rights hearings in cases of children who have been in foster care for fifteen of the preceding twenty-two months. 42 U.S.C. § 675(5)(E) (2001). For a thoughtful discussion of AFSA, see Gordon, *supra* note 238. For an empirically-based policy analysis of child welfare policies and the extended stays of children in foster care, see IRA M. SCHWARTZ & GIDEON FISHMAN, *KIDS RAISED BY THE GOVERNMENT*

approaches will, ultimately, improve the lives of the children in question.²⁸⁰ Before making the threshold decision that the state is entitled to disturb family integrity for the purpose of securing the well-being of a minor, policymakers should have reasonable expectations that the interventions available to the juvenile court will achieve its goals.

This requirement is of particular concern when the families in question are affected by domestic violence. The child protective system has come under fire repeatedly for its handling of these cases.²⁸¹ Only in recent years, and in some model and pilot programs, have professionals in these two systems established some highly successful collaborative strategies for handling these difficult cases.²⁸² Thus, the legislature should consider carefully what tools it has available to assist these families, and how likely its strategies will be to lead to a measurable improvement in children's lives.

In determining the appropriateness of expanding juvenile court jurisdiction to include domestic violence exposure, it is also useful to compare this phenomenon with the more "traditional" grounds for juvenile court dependency jurisdiction. Most state abuse and neglect statutes contain language identifying several primary bases for juvenile court jurisdiction: physical abuse, sexual abuse, neglect, and emotional or psychological harm.²⁸³ Albeit with variations, these categories reflect our modern communities' conclusions as to what types of parental conduct or omissions, or what types of indicia of "harm" justify state action. Statutes vary, however, in how they define these categories, whether they provide specific examples within categories, and what factors must be shown in order to trigger the court's intervention.

(1999).

280. See Gordon, *supra* note 238, at 673-699. See also Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care Or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141 (1999); Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121 (1995). For a discussion of the challenges in assessing the efficacy of child protection interventions, see MICHAEL S. WALD ET AL., *PROTECTING ABUSED AND NEGLECTED CHILDREN* 181-200 (1988).

281. The interagency tensions and mistrust between child protective workers and domestic violence workers is well-known in the field, and has created many barriers to productive cooperation between these two groups. The differences in philosophies, approaches, and available interventions of these two service systems are quite significant. See *supra* note 98 and accompanying text.

282. See *infra* notes 523-44 and accompanying text.

283. See DORNE, *supra* note 69, at 4-10; KALICHMAN, *supra* note 9, at 20-26.

(1) *Grounds for Juvenile Court Intervention: Required Elements*

Grounds for intervention often require some form of disapproved parental conduct or failure to act *and* resultant indicia of "harm" suffered by the child. As such, statutes may require proof of certain parental actions or omissions, observed harm to a child, and a *nexus* between parental conduct and the child's state, indicating that the "harm" *was caused by* the challenged parental conduct or omission.²⁸⁴ Yet, all of these requirements are not present in all statutes. For example, most state statutes are broad enough to encompass circumstances in which the challenged parental behavior creates a "likelihood" of harm, even if no harm has already occurred.²⁸⁵ Thus, certain types of parental conduct are deemed by society to be sufficiently dangerous to children that they serve as a basis for intervention, even in the absence of *actual* harm. If a parent leaves a child locked in a car while shopping on a hot day, and that child is discovered before any harm has occurred, the parental action alone is likely to be a sufficient basis for jurisdiction, given the likelihood that harm could have occurred from such conduct.

Some types of parental conduct or omission create a jurisdictional basis without requiring a showing of harm or even of a likelihood of harm. Jurisdiction in sexual abuse cases, for example, typically does not require such showings.²⁸⁶ Proof that a parent engaged in certain acts is sufficient. Why is parental conduct alone sufficient in this instance? Is it that we *presume* that there is such a strong likelihood of harm, that we need not make a showing?²⁸⁷

284. See, e.g., *In re Rocco M.*, 2 Cal. Rptr. 2d 429, 433 (1991) (requiring "three elements" in making out a prima facie case of neglect: "(1) neglectful conduct by the parent in one of the specified forms; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness").

285. See, e.g., pertinent California statutes defining abuse and neglect. "The minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm inflicted nonaccidentally . . ." CAL. WELF. & INST. CODE § 300(a) (West 2000); "The minor has suffered, or there is a substantial risk that the minor will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the minor . . ." CAL. WELF. & INST. CODE § 300(b) (West 2000).

286. CAL. WELF. & INST. CODE §300 (d):

The minor has been sexually abused, or there is a substantial risk that the minor will be sexually abused, as defined in Section 11165.1 of the Penal Code, by his or her parent or guardian or a member of his or her household, or the parent or guardian has failed to adequately protect the minor from sexual abuse when the parent or guardian knew or reasonably should have known that the minor was in danger of sexual abuse.

287. Interestingly, even though short- and long-term negative effects of sexual abuse on children is generally assumed among the public and in the legal community, there is a dearth of good empirical data delineating the effects. See Penelope K. Trickett & Frank W. Putnam, *Developmental Consequences of Child Sexual Abuse*, in VIOLENCE AGAINST

Perhaps. More likely, however, the absence of such a requirement stems from our society's moral and cultural prohibitions of sexual contact between parents and their minor children.²⁸⁸ These statutes seek to send a strong message to parents that sexual contact with their children is impermissible *under any circumstances*.

Policymakers have struggled, as well, with what resultant indicia of harm constitute sufficient grounds for intervention without evidence that the specific parental behaviors or failures to act caused the observed conditions. A version of the doctrine of *res ipsa loquitur* may be applied in some instances, whereby the mere existence of certain outcomes creates a rebuttable presumption of some deficit in parental functioning.²⁸⁹ Use of this doctrine might be appropriate when a child is found to have cigarette burns all over his body. In such a case, the court's jurisdiction need not hinge on proof that the parents engaged in the specific acts causing the injuries, or on facts supporting the allegation that the parents were negligent or reckless in allowing someone else access to the child. One might argue that the fact that such injuries occurred while the child was in parental custody *speaks for itself*. In our society, parents are expected to protect their children from such assaults—period—and only in exceptional situations are parents relieved from liability from such occurrences.²⁹⁰

CHILDREN IN THE FAMILY, *supra* note 3, at 39, 50-51. There are indications, however, from the limited empirical work, that children who are sexually abused do evidence certain physiological and psychological abnormalities in development and functioning, such as high levels of the stress hormone cortisol, acting-out and behavioral problems, and poorer educational and occupational attainment as adults. *Id.* See also Lucy Berliner & Diana M. Elliot, *Sexual Abuse of Children*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 51 (J. Briere et al. eds., 1996); Kathleen A. Kendall-Tackett et al., *Impact of Sexual Abuse on Children: A Review and Synthesis of Recent Empirical Studies*, 113 PSYCHOL. BULL. 164 (1993) (concluding from a review of 45 studies that children who are sexually abused demonstrate more psychological symptomatology than nonabused children, and finding variability in the types of symptoms displayed).

288. Although definitions of what type constitutes incest varies from one culture to the next, bans against sexual contact between parent and child exist in some form in virtually all societies. See, e.g., Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1502 (1998); Michelle Murray, *Problems with California's Definition of Incest*, 11 J. CONTEMP. LEGAL ISSUES 104, 104-05 (2000).

289. The tort doctrine of *res ipsa loquitur* permits an inference of negligence or creates a rebuttable presumption of negligence, depending upon the jurisdiction, in the absence of specific evidence of the negligent conduct asserted to have caused the harm. See, e.g., JAMES A. HENDERSON ET AL., THE TORTS PROCESS 236-242 (5th ed. 1999). In cases of child maltreatment, the factfinder may infer or presume that a parent is liable for harm to a child, even absent proof of causality, because the child is in the parent's custody and control. See William Wesley Patton, *Evolution in Child Abuse Litigation: The Theoretical Void Where Evidentiary and Procedural Worlds Collide*, 25 LOY. L.A. L. REV. 1009, 1017 n.37 (1992).

290. For example, if parents take reasonable actions to protect their children from

Relaxation of requirements regarding proof of actual harm or the allegedly causative parental behavior may be more troubling when we are dealing with child outcomes alleged to result from the parents' *emotional* or *psychological* interactions with their children. For example, if a child is diagnosed as having a condition referred to as nonorganic "failure to thrive," which presents as delayed physical development for which there is no medical explanation, together with various emotional abnormalities, a court may presume that the condition resulted from emotional neglect, which is frequently correlated with the disorder's occurrence.²⁹¹ Given the subtlety of the parental conduct in question, the permissibility of an inference as to the cause of the child's problems may be the only way to obtain jurisdiction in such cases. Perhaps because of these proof problems, many statutes require that in cases of psychological maltreatment, the court must find that the minor has already suffered *actual* harm, and that the harm be *directly attributable* to particular deficits in parental conduct.²⁹²

As noted above, most of the harms posited to follow from children's exposure to domestic violence are psychological in nature. Thus, the traditions of protecting children from psychological or emotional harm through the juvenile court's dependency jurisdiction are particularly relevant to our analyses of statutory approaches to protecting children who are exposed to domestic violence.

(2) *Juvenile Court Jurisdiction in Cases Involving Alleged Psychological Maltreatment or Harm*

Abuse and neglect cases in which the sole ground justifying state intervention is psychological maltreatment are relatively uncommon.²⁹³ The reasons are several. First, these cases tend to raise more problematic proof issues than do cases of purely physical maltreatment.²⁹⁴ Whereas there are few "innocent" explanations for cigarette burn marks on a child's body, there may be many alternative

danger, but despite this a third party is able to harm the child, the parents would not be held responsible for the injuries.

291. For a description of the "failure to thrive" syndrome as it relates to abuse and neglect determinations, see Ruth S. Kempe & Richard B. Goldbloom, *Malnutrition and Growth Retardation ("Failure to Thrive") in the Context of Child Abuse and Neglect*, in *THE BATTERED CHILD* (Ray E. Helfer & Ruth S. Kempe eds., 4th ed. 1987).

292. Janet Corson & Howard Davidson, *Emotional Abuse and the Law*, in *PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH* 185, 186-92 (Marla R. Brassard et al. eds., 1987).

293. GOLDSTEIN, *CHILD ABUSE*, *supra* note 261, at 207; Corson & Davidson, *supra* note 292, at 185; Gary B. Melton & Howard A. Davidson, *Child Protection and Society: When Should the State Intervene?* 42 AM. PSYCHOL. 172, 173 (1987).

294. GOLDSTEIN, *CHILD ABUSE*, *supra* note 261, at 217-24.

explanations for observed psychological symptoms.²⁹⁵ Demonstrating that particular types of parental conduct *caused* certain psychological problems in a child may be more complicated than demonstrating causality in cases of physical harm.

Second, statutes articulating what are acceptable versus unacceptable *psychological* interactions between parent and child may open a “Pandora’s box” with respect to state intervention in the family. Our constitutional traditions celebrate diversity in childrearing; “standardizing” children is antithetical to our democratic tradition.²⁹⁶ If we begin to regulate how parents interact psychologically with their children, how tempting might it be for overzealous child protective services personnel to begin “micro-managing” family relationships?²⁹⁷ The brief, but controversial, history of child protective services has demonstrated all too often that the system has serious difficulty refraining from intervention in families whose ethnic, cultural, or religious traditions differ from those of society-at-large.²⁹⁸ Perhaps more specifically, is there any

295. GOLDSTEIN ET AL., *BEST INTERESTS*, *supra* note 133, at 75-76.

What appears to be a similar behavior, whether as a symptom of illness or a sign of health, may for different persons be a response to a wide range of different and even opposite psychic factors. And the same deep-seated emotional disturbance may lead to the most diverse manifestations in a child’s behavior.

Id. We know now, for example, that many psychological conditions, such as certain types of psychosis and depression, previously thought to be the product of one’s life experiences, have genetic bases. Life experiences interact with genetics, and there is significant individual variability in how, when, and why psychological disorders or symptoms manifest. For an illuminating examination of the “nature—nurture” debate in psychology, see Gregory A. Kimble, *Evolution of the Nature—Nurture Issue in the History of Psychology*, in *NATURE—NURTURE AND PSYCHOLOGY 3* (Robert Plomin & Gerald E. McClearn eds., 1993). In addition, there is a growing body of empirical research in child development examining a phenomenon referred to as “resilience.” See, e.g., Ann S. Masten, *Ordinary Magic: Resilience Processes in Development*, 56 *AM. PSYCHOL.* 227 (2001). Data reveal that various life challenges encountered by children, such as poverty or physical abuse, are experienced differently by different children. See generally, *STRESS, RISK, AND RESILIENCE IN CHILDREN AND ADOLESCENTS: PROCESSES, MECHANISMS, AND INTERVENTIONS* (Robert J. Haggerty et al. eds., 1996) [hereinafter *STRESS, RISK, AND RESILIENCE*]. Despite exposure to similar “harmful” or even “traumatic” influences, some children emerge relatively unscathed whereas others have very poor psychological outcomes. *Id.*; Masten, *supra*. Research is beginning to identify some of the variables that help explain the discrepancies in outcomes. Suffice to say, the variability in children’s responses to the same “challenging” life experiences makes it harder to generalize about the consequences of certain types of parental conduct.

296. See, e.g., *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925) (“The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . .”).

297. See, e.g., Professor Wald’s caution regarding the limitations of our knowledge about what childrearing practices promote “healthy” psychological development, *supra* note 273. See *supra* note 273 and accompanying text.

298. See *supra* notes 177-84, 266-67 and accompanying text.

way in which legal criteria defining psychological maltreatment can be developed so as to avoid the problems of unconstitutional vagueness and overbreadth, and discriminatory application?

If the lines between unacceptable and acceptable parental practices are difficult to draw when speaking of *physical* harms to children, how will we consistently and predictably draw the lines between unacceptable and acceptable practices relating to the *psychological* interactions of parents and children? Some forms of spanking are permissible as a methods of childrearing, despite disagreement among reasonable people as to whether corporal punishment is morally proper or effective, and perhaps even harmful to children.²⁹⁹ How can we reliably discriminate between unacceptable *psychological* conduct by parents toward children, and those types of conduct which, although they appear cruel and hurtful to some observers, might be judged as appropriate disciplinary responses by others?

There are not, as yet, any answers to these questions. CAPTA,³⁰⁰ passed in 1974, included "mental injury" as one of the forms of child maltreatment falling within the scope of the Act,³⁰¹ yet failed to define the term. Several states attempted to flesh out the concept in their statutes, but no consistent understanding of the terms has developed across jurisdictions.³⁰² Since 1980, when a pamphlet on the subject was first published by the National Committee for Prevention of Child Abuse, several theorists and behavioral scientists have sought to bring rigor and clarity to the somewhat nebulous endeavor of defining and describing what constitutes psychological maltreatment, and identifying what categories of parental conduct and family

299. For an example of one state's treatment of corporal punishment in its juvenile court jurisdictional statute, see CAL. WELF. & INST. CODE § 300(a) (West 2000) (qualifying what is meant by "serious physical harm" to exempt "reasonable and age-appropriate spanking to the buttocks where there is no evidence of serious injury"). For a review of legal issues relating to corporal punishment in the United States, see, for example, David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147 (1998). Murray Straus and other experts in the field of family violence indicate that empirical data strongly supports a relationship between corporal punishment in childhood, and the perpetration of adult violence. See, e.g., Murray A. Straus & Carrie L. Yodanis, *Corporal Punishment by Parents: Implications for Primary Prevention of Assaults on Spouses and Children*, 2 U. CHI. L. SCH. ROUNDTABLE 35 (1995).

300. Pub. L. 93-247, 88 Stat. No. 5 (1974) (codified as amended at 42 U.S.C. §§ 5101-5120 (2000)). See *supra* notes 235-36 and accompanying text.

301. The CAPTA amendments of 1984 defined the forms of "child abuse or neglect" as "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment." *Nicholson v. Williams*, 2001 WL 951716 (E.D.N.Y. Aug. 16, 2001) (citing 42 U.S.C. §§ 5101-5106(a)).

302. For an excellent summary of state law provisions on "mental injury" or "psychological abuse" through 1987, see Corson & Davidson, *supra* note 292.

interaction create a substantial risk of harm to children's psychological well-being.³⁰³

The pamphlet proposed the following classification of types of parental conduct that might be classified as emotional maltreatment: rejecting, ignoring, terrorizing, isolating, and corrupting.³⁰⁴ In addition, it discussed some of the effects on children and some of the psychological mechanisms by which such parental conduct promotes those effects.³⁰⁵ In 1983, the term psychological maltreatment was further defined:

Psychological maltreatment of children and youth consists of acts of omission and commission which are judged by community standards and professional expertise to be psychologically damaging. Such acts are committed by individuals, single or collectively, who by their characteristics (e.g., age, status, knowledge, organizational form) are in a position of differential power that renders a child vulnerable. Such acts damage immediately or ultimately the behavioral, cognitive, or physical functioning of the child. Examples of psychological maltreatment include acts of rejecting, terrorizing, isolating, exploiting and mis-socializing.³⁰⁶

In 1986, James Garbarino, one of the leaders in the study of child maltreatment, published *The Psychologically Battered Child*, which substantially elaborated upon the earlier work and significantly influenced the direction of theoretical formulations in the area of psychological maltreatment.³⁰⁷

More recent writings have focused on generating greater definitional clarity,³⁰⁸ reporting the findings of a growing empirical data base examining the relationships between various categories of

303. See, e.g., JAMES GARBARINO & ANNE C. GARBARINO, NAT'L COMM. FOR PREVENTION OF CHILD ABUSE, EMOTIONAL MALTREATMENT OF CHILDREN (rev. 1986) (1980); JAMES GARBARINO ET AL., THE PSYCHOLOGICALLY BATTERED CHILD: STRATEGIES FOR IDENTIFICATION, ASSESSMENT, AND INTERVENTION (1986); PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH, *supra* note 292; Dante Cicchetti & Barry Nurcombe, eds., 3(1) DEVELOPMENT AND PSYCHOPATHOLOGY (1991) (special journal issue devoted to "Defining Psychological Maltreatment"); Stuart N. Hart et al., *Psychological Maltreatment*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 72 (John Briere et al., eds., 1996) [hereinafter Hart et al., APSAC HANDBOOK].

304. GARBARINO & GARBARINO, *supra* note 303, at 12-13.

305. *Id.*

306. B.B. Robbie Rossman & Mindy S. Rosenberg, *Psychological Maltreatment: A Needs Analysis and Application for Children in Violent Families*, in VIOLENCE AND SEXUAL ABUSE AT HOME: CURRENT ISSUES IN SPOUSAL BATTERING AND CHILD MALTREATMENT 245, 246-47 (Robert Geffner et al. eds., 1997) (citing Office for the Study of the Psychological Rights of the Child, Proceedings of the International Conference on Psychological Abuse of Children and Youth, 1983).

307. GARBARINO ET AL., *supra* note 303.

308. See, e.g., Cicchetti & Nurcombe, *supra* note 303.

parental conduct and psychological outcomes in children,³⁰⁹ and identifying important areas for future research.³¹⁰ For example, Rossman and Rosenberg suggest the following general formulation: “[P]sychological maltreatment can be understood as parental and socialization practices in which a child’s fundamental psychological needs are unmet or met in a deviant fashion, and which require the child to develop unhealthy adaptive strategies to meet those needs.”³¹¹ Synthesizing prior theoretical and empirical work in the field by Garbarino and others, Stuart Hart and his colleagues described the following typologies of psychological maltreatment, which are defined in Table 1: spurning, terrorizing, isolating, exploiting/corrupting, denying emotional responsiveness; and mental health, medical, and educational neglect.³¹² As noted in Table 1, in each case, a “repeated pattern or extreme incident(s)” of the interaction types described is necessary for the conditions to rise to the level of psychological maltreatment.³¹³ Empirical data reviewed by Hart and colleagues reveals consistent findings that children who are exposed to repeated patterns of the conditions described in Table 1 may develop a range of disturbances of thoughts and feelings (such as anxiety, depression, low self-esteem, suicidal feelings or behavior); of emotional functioning (e.g., emotional instability, anger, poor impulse control, non-compliance, lack of emotional responsiveness, physical self-abuse); and/or of social functioning (e.g., aggressive conduct, low social competency, attachment problems).³¹⁴ Children may also develop learning problems, physical health difficulties, and may abuse alcohol or drugs, or may ultimately engage in delinquent or criminal conduct.³¹⁵ Data also suggest that, in some cases, psychological

309. See, e.g., Stuart N. Hart et al., *Evidence for the Effects of Psychological Maltreatment*, 1 J. EMOTIONAL ABUSE 27 (1998) [hereinafter Hart et al., *Evidence*].

310. PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH, *supra* note 292; Mindy S. Rosenberg, *New Directions for Research on the Psychological Maltreatment of Children*, 42 AM. PSYCHOL. 166 (1987). There is now a tradition of increasingly-sophisticated empirical research and theory on this subject of psychological maltreatment. In 1998, a new journal, the *Journal of Emotional Abuse* was launched.

311. Rossman & Rosenberg, *supra* note 306, at 247-48. Another set of authors offers the following “generic” definition of psychological maltreatment: “[T]he repeated pattern of behavior that conveys to children that they are worthless, unloved, unwanted, only of value in meeting another’s needs, or seriously threatened with physical or psychological violence.” Hart et al., APSAC HANDBOOK, *supra* note 303, at 73.

312. Hart et al., APSAC HANDBOOK, *supra* note 303, at 73-74, Table 4.1. Table 1 is at pages 154-56 of this Article. Table 1 can also be found in Hart et al., *Evidence*, *supra* note 309, at 32-33. For a discussion of the conceptual difficulties with the categories that appear in Table 1, see Robin A. McGee & David A. Wolfe, *Psychological Maltreatment: Toward an Operational Definition*, 3 DEV. & PSYCHOPATHOLOGY 3, 8-10 (1991).

313. Hart et al., APSAC HANDBOOK, *supra* note 303, at 73-74.

314. Hart et al., *Evidence*, *supra* note 309, at 30-47.

315. *Id.*

maltreatment can have more deleterious effects on children than physical maltreatment.³¹⁶

Several authors have asserted that the “core component” of all forms of child abuse or neglect is psychological.³¹⁷ Hart and colleagues have suggested that “[p]sychological maltreatment is embedded in all other forms of child maltreatment” as well as existing on its own.³¹⁸ Yet, there is some conceptual cloudiness in these discussions. At times, it appears that the authors suggest that psychological maltreatment typically *accompanies* other forms of maltreatment (i.e., verbal abuse often goes hand in hand with physical abuse; physically-neglected children generally are also neglected psychologically). At other times, it appears they suggest that other forms of maltreatment typically have psychological *effects* (i.e., that a child who is physically abused becomes fearful and anxious, and develops feelings of worthlessness and rejection). There is support for both propositions in the research literature.³¹⁹

316. Byron Egeland & Martha Farrell Erickson, *Psychologically Unavailable Caregiving*, in PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH, *supra* note 292, at 110, 113-15. Egeland and Erickson found that children whose parents were “emotionally unavailable” evidenced more serious impairments in functioning than children who were physically abused. In summarizing their empirical comparison of the functioning of children whose mothers were either physically abusive, hostile/verbally abusive, neglectful, or psychologically unavailable, Egeland and Erickson report that whereas:

children in all maltreatment groups functioned poorly from infancy through the preschool years . . . [t]he psychologically unavailable pattern was particularly devastating to the child’s development. The sharp decline in the intellectual functioning of these children, their attachment disturbances and subsequent lack of social/emotional competence in a variety of situations is cause for great concern.

Id.

317. See, e.g., Elizabeth L. Navarre, *Psychological Maltreatment: The Core Component of Child Abuse*, in PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH, *supra* note 292, at 45; Hart et al., APSAC HANDBOOK, *supra* note 303, at 72; Hart et al., *Evidence*, *supra* note 309, at 31, 48-50.

318. Hart et al., APSAC HANDBOOK, *supra* note 303, at 72.

319. See, e.g., Angelika H. Claussen & Patricia M. Crittenden, *Physical and Psychological Maltreatment: Relations Among Types of Maltreatment*, 15 CHILD ABUSE AND NEGLECT 5 (1991). In a well-designed study using multiple measures to assess the presence of physical and psychological maltreatment in a sample consisting of a community control group and cases reported to protective services, Claussen and Crittenden examined the association and relationships of these two general categories of maltreatment in the two groups. The investigators found that physical maltreatment rarely occurred in the absence of psychological maltreatment, and that both were usually present in the cases reported to protective services. *Id.* at 13-14. By contrast, psychological maltreatment was often found alone in the community sample. *Id.* at 14. Whereas the investigators do not recommend child protective services involvement in these latter cases, they do recommend increased availability of voluntary psychological services to assist community families. *Id.* at 14-15.

McGee and Wolfe distinguish between physical versus psychological parental *conduct* on the one hand, and physical versus psychological *effects* on the child, on the other hand.³²⁰ With a two-by-two grid, one can isolate these variables into four cells: physical maltreatment causing physical effects (e.g., a beating causing a broken bone); physical maltreatment causing psychological effects (e.g., a beating leading to fearfulness or aggressive conduct with peers); psychological maltreatment causing physical effects (e.g., consistent failure to respond emotionally to a child leading to nonorganic "failure to thrive" syndrome;³²¹ angry tirades at a child causing psychogenic gastrointestinal upset); and psychological maltreatment causing psychological effects (repeated belittling of a child leading to poor self-esteem).³²² Addressing the *effects* of child maltreatment, Hart and his colleagues assert that: "Presently available analysis of child maltreatment impact data for physical abuse, sexual abuse, and physical neglect suggest that the vast majority of the negative consequences of maltreatment are psychological in nature."³²³ This position seems logical, when one considers that, even after broken bones have healed, children who have been abused physically suffer with the emotional ramifications of their experiences.³²⁴

The original formulations of psychological maltreatment were directed to clinicians³²⁵ and researchers.³²⁶ Using this body of knowledge to help troubled families who seek services in a voluntary clinical context, or to focus and stimulate empirical research, differs substantially from using the definitional categories to determine grounds for state intervention in the family. Initially, consistent with this distinction, most writers were cautious about importing the theoretical and empirical work into the legal setting.³²⁷ Furthermore,

320. Robin A. McGee & David A. Wolfe, *Psychological Maltreatment: Toward an Operational Definition*, 3 DEV. & PSYCHOPATHOLOGY 3, 4-5 (1991).

321. See *supra* note 291 and accompanying text.

322. See Hart et al., *Evidence*, *supra* note 309, at 43-44.

323. *Id.* at 48.

324. Research reveals that children who are abused physically experience a range of cognitive, social, and behavioral problems. See, e.g., PANEL ON RESEARCH ON CHILD ABUSE AND NEGLECT, NATIONAL RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 208-23 (1993).

325. GARBARINO ET AL., *supra* note 303, at x-xi (indicating that the book was written for "practitioners in child mental health, family therapy, parent counseling, child development, and parent-child relations" primarily to assist them in their work in promoting healthy family functioning).

326. PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH, *supra* note 292, at xi (indicating that it is the "intention of the editors and authors of this book to" guide and stimulate scientific research on psychological maltreatment, which to date, had been given "very little consideration").

327. Most authors writing in this area do not explicitly address the question of legal

some writers have provided thoughtful examinations of complex policy and practical issues relating to the use of concepts of psychological maltreatment in the legal child protection context.³²⁸

Yet, with the 1995 publication of *Practice Guidelines: Psychosocial Evaluation of Suspected Psychological Maltreatment in Children and Adolescents* by the American Professional Society on the Abuse of Children ("APSAC"),³²⁹ the theoretical formulations and empirical findings of these scholars was moved one step closer to use in courtrooms or by legislators. The APSAC Guidelines, which adopt the classification system and definitions presented in Table 1, were developed to assist "professionals evaluating children to determine whether they are or have been victims of psychological

intervention, although the use of legal terms of art, such as "maltreatment," "battering," and "abuse" implies that the writers believe these phenomena to be at least *related to*, if not *synonymous with*, circumstances formally triggering civil or criminal legal intervention. In one recent publication, three of the leading writers in the area of psychological maltreatment, Stuart Hart and his colleagues, Marla Brassard and Henry Karlson, address directly the question of child protection system intervention. Recognizing the poor track record that has characterized such interventions in physical abuse, neglect, and sexual abuse cases, the authors question the advisability of adding all cases of psychological maltreatment to child protective services caseloads. Hart et al., APSAC HANDBOOK, *supra* note 303, at 81-82. Hart and his colleagues indicate that the typical coercive interventions offered by child protective services are unlikely to alter the types of psychological interaction patterns falling into the major categories of psychological maltreatment. Therefore, they suggest that, for most families who engage in psychologically abusive or neglectful conduct towards their children:

[P]reventive, educational, and mental health approaches are preferable to coercive CPS intervention. However, when psychological maltreatment of high frequency, intensity, and duration or developmental salience occurs and is predicted to produce serious harm to the child, mandatory societal intervention may be justified. This is particularly true when perpetrators resist offered help.

Id. at 82. See also Claussen & Crittenden, *supra* note 319, at 15. But see, Egeland & Erickson, *supra* note 316, at 115. Reporting the poor outcomes of children with emotionally-unavailable mothers as compared with physically-abused and other maltreated groups, Egeland and Erickson suggest that we may need to broaden legal definitions of child maltreatment to incorporate such problematic parent-child relations. *Id.* ("These findings must lead us to a careful reexamination of our society's definition of child abuse and a consideration of means for early identification and intervention to help prevent the cumulative, malignant effects of this form of maltreatment.").

328. See, e.g., Corson & Davidson, *supra* note 292, at 185; James Garbarino, *Not All Bad Developmental Outcomes are the Result of Child Abuse*, 3 DEV. & PSYCHOPATHOLOGY 45 (1991); Jeanne Giovannoni, *Social Policy Considerations in Defining Psychological Maltreatment*, 3 DEV. & PSYCHOPATHOLOGY 51 (1991); Melton & Davidson, *supra* note 293, at 172-75 (1987); Gary B. Melton & Ross A. Thompson, *Legislative Approaches to Psychological Maltreatment: A Social Policy Analysis*, in PSYCHOLOGICAL MALTREATMENT OF CHILDREN AND YOUTH, *supra* note 292, at 203.

329. AM. PROF'L SOC. ON THE ABUSE OF CHILDREN (APSAC), PRACTICE GUIDELINES: PSYCHOSOCIAL EVALUATION OF SUSPECTED PSYCHOLOGICAL MALTREATMENT IN CHILDREN AND ADOLESCENTS (1995) [hereinafter APSAC GUIDELINES].

maltreatment [for the purposes of] case planning, legal decisionmaking, and treatment planning.”³³⁰ The document states further that: “The guidelines apply primarily to forensic assessments of psychological maltreatment.”³³¹ The Guideline material even provides advice about testifying in court.³³² Thus, the intended application of the APSAC Guidelines to the child protection context is clear. What is less clear, however, are the ramifications of importing the clinical and research definitions into the legal context. Many experts in the field of child maltreatment point out that there exist differential “premises, objectives, and . . . foci” of medical-diagnostic, sociological, legal, and research definitions of child abuse.³³³ In particular, Lawrence Aber and Edward Zigler observe that “different sets of definitions” are necessary to pursue the different “social aims” of legal, clinical, and research definitions.³³⁴ Whereas legal definitions set forth the circumstances justifying state intervention in the family, and clinical definitions guide professionals in providing voluntary services, research definitions assist scientists in discovering the relationships among variables.³³⁵

The APSAC Guidelines and the categories they delineate have the potential to take on “a life of their own” in the definition of legal criteria for psychological maltreatment. It remains the role of policymakers to determine whether and how to import into the legal arena any, some, or all, of the criteria these psychologists have developed initially for clinical and research contexts. Ideally, policymakers balance the rights and interests of the parties and of society-at-large in determining whether the magnitude and certainty of the harms to children relating to these categories of parental conduct are great enough to justify state intrusion into the family through juvenile court interventions. In importing the scientific formulations into the legal context, policymakers must be careful to assess each category, sub-category, and definitional criterion to insure that the policy concerns are appropriately balanced.³³⁶ In a powerful

330. *Id.* at 1.

331. *Id.*

332. *Id.* at 11.

333. J. Lawrence Aber III & Edward Zigler, *Developmental Considerations in the Definition of Child Maltreatment*, 11 NEW DIRECTIONS FOR CHILD DEV. 1, 12 (1981).

334. *Id.*

335. *Id.*

336. In addition, however, policymakers must realistically assess the capabilities of the systems, agencies, and professionals whose tasks it will be to apply and implement these criteria. As noted above, child protective agencies are typically understaffed, underfunded, and overloaded with cases. Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 104, 107-08 (1998), available at <http://www.futureofchildren.org/dvc/index.htm>. Thus, when venturing into areas such as redefinitions of psychological

reminder to his behavioral scientist colleagues that they must not overreach by seeking to set forth legal policy, James Garbarino asserts:

Maltreatment is a social judgment regarding the appropriateness and likely outcome of parental behavior, a *community's* assertion of *minimal standards of care*. It is a social judgment that arises as a kind of negotiated settlement between "culture" (as represented by community standards that are articulated through a political process) and "science" (as made incarnate in "professional expertise").

....

Social scientists can offer their attempts to articulate the current status of this negotiated settlement and can try to influence its direction. They cannot unilaterally announce what is and what is not child maltreatment.³³⁷

Garbarino goes further to suggest that the phenomenon of psychological maltreatment is intrinsically difficult to define, and that researchers' efforts to bring definitional clarity must "navigate a course between the rock of the real world and the hard place of social science research,"³³⁸ and must not usurp the role of the community in setting standards for what constitutes legally-actionable maltreatment of children.³³⁹

maltreatment, policymakers must insure that there is adequate support, particularly with respect to training and caseload, to enable workers to implement the new standards as the legislature, or other policymakers, intended.

337. Garbarino, *supra* note 328, at 45.

338. *Id.* at 50. The APSAC Guidelines state that: "Professionals should be aware of legal definitions of psychological maltreatment that are applicable in their community. . . . Definitions specific to a particular state will generally be found in one or more of its civil or criminal statutes." APSAC GUIDELINES, *supra* note 329, at 2. Garbarino emphasizes the historical, social, developmental, and situational relativity that combine to lead to a determination of what constitutes psychological maltreatment, and underscores that this relativity prevents specification "*in concrete detail . . . in advance*" of what is psychological maltreatment, because psychological maltreatment "is defined by what a 'reasonable person' would judge to be an appropriate response to a child, a response that is appropriate to the child's age and developmental level" in the context of one's culture, historical era, and so on. Garbarino, *supra* note 328, at 49. The APSAC Guidelines, in the section on "Levels of Severity," instruct clinicians to consider a range of factors pertaining to the alleged maltreatment, including "[s]aliency of the maltreatment given the developmental period(s) in which it occurs . . ." APSAC GUIDELINES, *supra* note 329, at 8.

339. It is not clear whether the APSAC Guidelines adequately "navigate this course." Professionals applying these Guidelines can avoid overreaching by focusing primarily on *describing* their findings relative to the psychological functioning, conduct, and interactions of the parties, and refraining from asserting opinions as to the "ultimate legal issue" of whether these factors rise to the level of legally-defined psychological maltreatment. Cf. Lois A. Weithorn & Thomas Grisso, *Psychological Evaluations in Divorce Custody: Problems, Principles, and Procedures*, in PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS: KNOWLEDGE, ROLES, AND EXPERTISE 157, 159-161 (L.A.

Some policymakers have already indicated a willingness to adopt the psychological maltreatment definitions offered by social scientists. For example, one state has adopted a version of the APSAC Guidelines in its child maltreatment statute.³⁴⁰ In 1998, the Alaska legislature revised its child abuse and neglect statutes, particularly relating to its formulations of "mental injury."³⁴¹ It imported the categories of psychological maltreatment from the psychological literature discussed above—specifically Garbarino's writings in the 1980s.³⁴² The relevant provisions of Alaska's statute read as follows:

[T]he court may find a child to be a child in need of aid if it finds by a preponderance of evidence that the child has been subjected to . . . (8) conduct by or conditions created by the parent, guardian, or custodian [that] have . . . (A) resulted in mental injury to the child; or (B) placed the child at substantial risk of mental injury as a result of (i) a pattern of rejecting, terrorizing, ignoring isolating, or corrupting behavior that would, if continued, result in mental injury³⁴³

Alaska's new statute represents a fairly dramatic departure from "traditional" juvenile court jurisdiction in psychological maltreatment cases. Whereas like other states, Alaska's statute provides for juvenile court jurisdiction in cases where there is evidence that psychological harm *has resulted from* specific parental conduct.³⁴⁴ In addition, however, the statute also provides for juvenile court jurisdiction in cases where a parent has engaged in one or more types of interpersonal conduct viewed as creating a "substantial risk" of emotional harm to children.³⁴⁵ As such, evidence of the objectionable parental conduct alone is sufficient for jurisdiction, if the court finds that the pattern of behavior, if continued, would result in mental injury.³⁴⁶ The statute does not indicate how courts should determine whether the continuation of specific patterns of behavior will result in

Weithorn ed., 1987) (cautioning that mental health professions who provide evaluations for the courts should refrain from invading the domain of the court by offering opinions on what are essentially *legal* questions); see also John Monahan, WHO IS THE CLIENT? REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON THE ROLE OF PSYCHOLOGY IN THE CRIMINAL JUSTICE SYSTEM 9 (1980) ("Since it is not within the professional competence of psychologists to offer conclusions on matters of law, psychologists should resist pressure to offer such conclusions."). The APSAC Guidelines do not caution against evaluators' drawing conclusions as to the existence of "psychological maltreatment" in their assessments. APSAC GUIDELINES, *supra* note 329, at 10.

340. See *infra* notes 341-47 and accompanying text.

341. ALASKA STAT. §47.10.011(8) (Michie 2000).

342. See *supra* notes 303-07 and accompanying text.

343. ALASKA STAT. §47.10.011(8)(A), (B)(i) (Michie 2000).

344. ALASKA STAT. §47.10.011(8)(A) (Michie 2000).

345. ALASKA STAT. §47.10.011(8)(B)(i) (Michie 2000).

346. *Id.*

mental injury.³⁴⁷ Likewise, child protection workers, who investigate reports of suspected child maltreatment, and decide which cases to refer to dependency court, must also struggle with such issues. In the next several years, as cases using these new “mental injury” provisions make their way through the courts, it will be particularly interesting to see how these provisions are applied, and how they withstand constitutional attack.

C. Children’s Exposure to Domestic Violence as Child Maltreatment

(1) *What is Meant by “Exposure” to Domestic Violence?*

The term “exposure” to domestic violence attempts to capture the full range of experiences that confront children living in these families.³⁴⁸ Initially, authors writing about children exposed to domestic violence spoke about children who *witness* domestic violence, emphasizing children’s contemporaneous visual, and perhaps also auditory, observation of violent acts between their parents or between one parent and that parent’s intimate partner.³⁴⁹ Those state statutes that explicitly criminalize children’s exposure to domestic violence typically refer to the offense as “domestic violence

347. There are other potential problems with the Alaska statute. Rather than adopting the more recent formulations of categories developed by Hart and colleagues, and incorporated into the APSAC Guidelines, the Alaska legislature selected the older formulation. The terminology in that formulation, particularly in the absence of the detailed definitions, may sweep too broadly. For example, one could argue that there are no circumstances that would justify parental “terrorizing” or “exploiting” of children. Yet the terms “ignoring,” and possibly also “rejecting,” without clarification, could include types of parental conduct that occur occasionally in all families. In fact, parents may be advised by pediatricians and child care experts to “ignore” their children’s tantrums so that the children will not use this form of behavior to manipulate their parents. Although “rejecting” is certainly not a childrearing strategy recommended by experts, it is a form of parental interaction which also occurs in forms that are unlikely to have consequences for children’s well-being justifying state intervention. Even the terms “terrorizing” and “exploiting” can be subject to diverse interpretations. Is a farm family’s requirement that their children perform certain chores a type of “exploitation”? Finally, the term “corrupting,” by virtue of its link with concepts of morality, is highly subjective. Although the statute seeks to limit its reach by specifying that the conduct in question must have caused “mental injury” or placed the child at “substantial risk” of “mental injury,” the undefined terms may lead to a wide range of interpretations by those required to report suspicions of maltreatment. Discussions with persons working within Alaska’s state government, however, report that there has not been a net-widening effect following the implementation of this statute. Rather, like the domestic violence provisions in Alaska’s 1998 revisions of the juvenile court jurisdictional statute, the provisions simply allow for proper categorization and more effective processing of cases that have already been reported to child protective services. See *infra* notes 510-16 and accompanying text.

348. Carter et al., *supra* note 2, at 15 n.3.

349. See *id.*; INTERPARENTAL VIOLENCE, *supra* note 3, at 1; Edleson, *Children’s Witnessing*, *supra* note 3, at 840-41.

in the *presence* of a child,³⁵⁰ and may incorporate any type of contemporaneous experience of the violence, even if the children are not in the room where the violence occurs.³⁵¹

Arguably, the term “witness” is too narrow to characterize the nature of these children’s lives amidst adult partner violence.³⁵² Whereas research reveals that children frequently do “witness” domestic violence,³⁵³ children may be “closer” to the violence that the term “witness” suggests. A child may be in his mother’s arms or lap at the time of an attack.³⁵⁴ A child may be caught in the crossfire, figuratively, or literally, as their mother is brutalized with and without weapons.³⁵⁵ A domestic violence perpetrator may force a child to watch the attack upon his parent,³⁵⁶ or may require a child to play a role in an abusive incident or its aftermath.³⁵⁷ A child may even side with the batterer.³⁵⁸

350. See *supra* notes 48-52 and accompanying text.

351. See also *supra* note 94, discussing how Florida courts have interpreted their juvenile court jurisdictional statute’s reference to domestic violence exposure as requiring that the child has actually *witnessed* the violence.

352. Goodmark, *supra* note 29, at 243-45.

353. In a recent telephone survey of battered women, 83% reported that their children had overheard the abuse from another room, at least occasionally, and 44% reported that their children, at least occasionally, watched an entire abusive incident. Jeffrey L. Edleson et al., *How Children are Involved in Adult Domestic Violence: Results from a Four City Telephone Survey*, Minnesota Center Against Violence & Abuse (Feb. 15, 2001), temporarily available at <http://www.mincava.umn.edu/link/children/asp> [hereinafter Edleson et al., *How Children are Involved*].

354. See, e.g., N. Zoe Hilton, *Battered Women’s Concerns about their Children Witnessing Wife Assault*, 7 J. OF INTERPERSONAL VIOLENCE 77, 80-81 (1992). As described by one mother: “He’s coming at me. I guess I had the kid in my arm, and he’s bucking me up against the doorframe.” *Id.* at 81. “A four-year-old sat weeping in her mother’s lap as the father threatened with a knife.” Wolak & Finkelhor, *supra* note 3, at 79 (quoting M. HYDEN, WOMAN BATTERING AS MARITAL ACT 123 (1994)).

355. See, e.g., Wolak & Finkelhor, *supra* note 3, at 79 (“A seven-month baby girl lay in her crib in the living room when an explosive fight broke out. It ended with the mother getting beaten and landing on top of the little girl.”).

356. See, e.g., *People v. Liberta*, 474 N.E.2d 567, 569 (N.Y. 1984) (A domestic violence perpetrator violently raped his estranged wife in the presence of their three-year-old son, and forced her “to tell their son to watch what the defendant was doing to her.”), *cert. denied*, 471 U.S. 1020 (1985).

357. Six-year-old Lisa Steinberg, who died tragically at the hands of Joel Steinberg (a man who “illegally” adopted Lisa) in 1987, was used as a “go-between” in the domestic violence Joel perpetrated upon his common-law wife, Hedda Nussbaum. *Primetime Live: A Journey to Tragedy: Hedda Nussbaum Tells Her Disturbing Story* (ABC television broadcast, Apr. 2, 1997), available at 1997 WL 15362260. For more information about the proceedings following Lisa’s death, see *People v. Steinberg*, 595 N.E.2d 845 (N.Y. 1992). In another incident, after a father forced his wife’s head under a hot water tap, broke her nose and perforated her eardrum, he pulled their 16-year-old son from his bed and “ordered him to clean up his battered and bleeding mother.” Echlin & Osthoff, *supra* note 135, at 209-210.

358. One battered mother reports that after she was severely beaten by her husband,

Some children try to interrupt the violence. One study revealed that children made 10% of 911 calls reporting domestic violence incidents in the sample.³⁵⁹ Another study found that, during incidents of domestic violence against their mothers, 21% of children, at least occasionally, “called someone else for help,” while 52% yelled from another room, and 23% became physically involved in the incident.³⁶⁰ There are frequent reports of children physically positioning themselves between the batterer and victim, including accounts of children who have stepped in front loaded guns aimed at the mothers.³⁶¹ Children may attack the abuser, in an effort to protect their mother, such as a three-year-old who started hitting his father while his father was assaulting his mother, crying “No, Daddy, No,”³⁶² or older children who shout things like “Daddy, don’t kill Mommy!”³⁶³ There are also reported cases of children who go as far as to kill the abusive parent.³⁶⁴

In addition, there is a high rate of co-occurrence of domestic violence and physical abuse of children.³⁶⁵ Reports suggest that incidents of domestic violence and child abuse are sometimes linked temporally, with a mother’s attempt to protect an abused child leading to her own injuries, with a child’s attempt to protect her mother leading to the child’s injuries, or with the abuser lashing out at several family members simultaneously.³⁶⁶ In one study, 20% of

her five-year-old son told her, “mommy, if you just did what daddy told you, he would not have to beat you.” Oliver J. Williams et al., *Fatherhood and Domestic Violence: Exploring the Role of Men Who Batter in the Lives of their Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 3, at 157, 175.

359. John W. Fantuzzo & Wanda K. Mohr, *Prevalence and Effects of Child Exposure to Domestic Violence*, 9 THE FUTURE OF CHILDREN: DOMESTIC VIOLENCE AND CHILDREN 21, 26 (1999), available at <http://www.futureofchildren.org/dvc/index.htm>.

360. Edleson et al., *How Children are Involved*, *supra* note 353.

361. See, e.g., Edleson, *Children’s Witnessing*, *supra* note 3, at 840; Williams et al, *supra* note 358, at 175 (describing an incident in which a child was shot when she intervened in her father’s violence against her mother).

362. Wolak & Finkelhor, *supra* note 3, at 79 (quoting L.A. HOFF, BATTERED WOMEN AS SURVIVORS 204 (1990)).

363. Hilton, *supra* note 354, at 80.

364. See, e.g., *Jahnke v. Wyoming*, 682 P.2d 991 (Cal. 1984) (a sixteen-year-old boy claimed that his shooting of his father was a form of self-defense because of his father’s ongoing abuse of him, his sister, and his mother).

365. Jeffrey L. Edleson, *Studying the Co-occurrence of Child Maltreatment and Domestic Violence in Families*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 3, at 91; Edleson, *The Overlap*, *supra* note 7, at 136. See *supra* note 7 and accompanying text.

366. Researchers are just beginning to confront the complex questions relating to the co-occurrence of spousal and child abuse. Whereas models depicting the directionality and interactions of these two phenomena have been proposed, available data do not allow us to draw conclusions as to how these two phenomena interrelate. See, e.g., Anne E. Appel & George W. Holden, *The Co-occurrence of Spouse and Physical Child Abuse: A*

domestic violence victims indicated that "children somehow influenced the onset of the violent incident."³⁶⁷ One mother reported how her abuser assaulted her and her two children in the same incident: "He got down and started kicking me . . . He grabbed Amy by the neck and broke Bobby's arm."³⁶⁸

The term "exposure" goes even further, however. It also implies that even if a child *is not present* during violent incidents, that child may still be detrimentally affected by the violence. Children live with the aftermath of and context surrounding violent incidents. Even children who do not contemporaneously observe violent incidents may still be affected deleteriously by these occurrences.³⁶⁹ The domestic violence victim may have bruises and other injuries, perhaps some severe enough to require hospitalization or create disability. "One adult son told his mother, 'You know, Mom, I can remember more than you think I can. I can remember the ambulance carrying you away covered in blood.'"³⁷⁰ The victim may be frightened,

Review and Appraisal, 12 J. FAM. PSYCHOL. 578 (1998). In a study examining the presence of domestic violence in families who were referred by Yale-New Haven Hospital staff on suspicion of child abuse or neglect, the researchers draw the following conclusions:

Not only are the children of battered mothers more likely to be physically abused than neglected, for instance, but the batterer also appears to be the typical source of child abuse, not a mother 'overwhelmed with problems.' The data shed little light on the dynamics of child abuse in battering homes. Again, however, the battering clearly predates the child abuse . . .

Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. OF HEALTH SERVS. 97, 107 (1988).

367. Fantuzzo & Mohr, *supra* note 359, at 26.

368. Wolak & Finkelhor, *supra* note 3, at 79 (quoting M. HYDEN, WOMAN BATTERING AS MARITAL ACT 113-14 (1994)).

369. Specifically, in a ground-breaking study that examined the relationship between weapon use in domestic violence incidents and children's adjustment, researchers found that children who observed the presence of knives or guns in domestic violence incidents evidenced more behavioral problems than children exposed to domestic violence situations where no such weapons were present. Ernest N. Jouriles et al., *Knives, Guns, and Interparent Violence: Relations with Child Behavior Problems*, 12 J. FAM. PSYCHOL. 178, 190 (1998) [hereinafter Jouriles et al., *Knives, Guns*]. One of the most interesting findings, however, was that children who did not report observing a weapon, but whose mothers indicated that a weapon *was* present during the incident, did not differ significantly with respect to behavioral problems from children who had personally observed weapons. *Id.* The investigators conclude that "the occurrence of interparent weapons violence, rather than children's observation of it, marks increased risk for child behavior problems." *Id.* One may conclude, cautiously, that there are some factors, such as the presence of weapons during domestic violence incidents, that signal an escalation in conflict sufficient to engender behavioral and adjustment difficulties in children, even if the children are not aware of the weapon's presence. These data lend support to the conclusion that children may be affected detrimentally by the climate of a home characterized by domestic violence, whether or not they perceive, or are aware of, all dimensions of the violent incidents.

370. Hilton, *supra* note 354, at 80.

distraught, depressed, or emotionally unavailable to the children.³⁷¹ The child may experience absences from one parent or the other, and may be moved about as the victim seeks to escape the violence, if the perpetrator is apprehended by law enforcement authorities, or if the perpetrator is barred from contact with the family by a civil protective order. All of these factors suggest that childhood exposure to domestic violence is multifaceted, and there are many different ways in which it might have an impact upon children's health and well-being.

(2) *What Are the Effects of Children's Exposure to Domestic Violence?*

As is demonstrated by the summary in the preceding subsection, the literature is replete with examples, presented by mothers, children, therapists, domestic violence workers and others, recounting children's experiences with domestic violence. Yet, what is the impact of those experiences on the children? Certainly, at the time of the incident, children may be severely frightened, fearing for their own welfare as well as that of their caregivers. They may cry, scream, try to get help or intervene, hide, try to ignore the events, become numb or frozen with fear, or cooperate with the abuser in an attempt to end the incident. In addition to these immediate reactions to the incidents, exposure to domestic violence places children at risk for physical harm from the violence, as bystanders or from involvement in the incident.³⁷² And, as noted previously, children living in homes where domestic violence occurs are at risk for direct physical or sexual victimization in the family.³⁷³ Yet, even if children are not physically harmed, living with domestic violence places them at risk for a range of effects on their emotional, social, and cognitive functioning.³⁷⁴

371. Alytia A. Levendosky & Sandra A. Graham-Bermann, *Trauma and Parenting in Battered Women: An Addition to an Ecological Model of Parenting*, in CHILDREN EXPOSED, *supra* note 108, at 25, 25-26; Osofsky, *supra* note 134, at 41. But see Cris M. Sullivan, et al., *Beyond Searching for Deficits: Evidence That Physically and Emotionally Abused Women Are Nurturing Parents*, 2 J. EMOTIONAL ABUSE 51 (2000).

372. Edleson, *Children's Witnessing*, *supra* note 3, at 841; Wolak & Finkelhor, *supra* note 3, at 82.

373. Research reveals that in approximately 45% to 70% of the families in which domestic violence or child abuse is discovered, the other type of abuse exists as well. See, e.g., Margolin, *supra* note 3, at 60-61; see also Edleson, *The Overlap*, *supra* note 7, at 136-44. Early research reports suggest that the co-occurrence of domestic violence and physical child abuse presents a particularly salient risk factor for subsequent child homicide perpetrated by the domestic violence offender. *Id.* at 143-44. Margolin, *supra* note 3, at 60; Edleson, *Children's Witnessing*, *supra* note 3, at 861-862. For a discussion of the issues relevant to the functioning of children who have been victimized by more than one type of violence, see generally MULTIPLE VICTIMIZATION, *supra* note 8.

374. INTERPARENTAL VIOLENCE, *supra* note 3, at 11-32; JAFFE ET AL., *supra* note 3, at

One team of researchers, evaluating the findings of over fifty studies, summarizes the findings as follows:

[S]tudies that examined differences across groups in [externalizing] behaviors revealed that children exposed to domestic violence tended to be more aggressive and to exhibit behavior problems in their schools and communities ranging from temper tantrums to fights. Internalizing behavior problems included depression, suicidal behaviors, anxiety, fears, phobias, insomnia, tics, bed-wetting, and low self-esteem. The few studies that assessed problems related to cognitive and academic functioning found [that] children exposed to domestic violence demonstrated impaired ability to concentrate, difficulty in their schoolwork, and significantly lower scores on measures of verbal, motor, and cognitive skills.³⁷⁵

The precise impact that exposure to domestic violence will have on any given child is difficult to predict. The effects of exposure to domestic violence on children are “multifaceted and diverse”,³⁷⁶ a particular child’s responses to these experiences may manifest as any of a variety of childhood symptoms. Some children do not reveal any psychological symptomatology.³⁷⁷ Others experience short-term negative effects that improve with time and/or intervention, whereas others experience both short-term and long-term effects.³⁷⁸ Increasingly, researchers are examining “clusters” of symptoms that seem to occur together, creating certain subcategories of adjustment difficulties (e.g., “acting out” or behavior problems, internal

32-73; Edleson, *Children’s Witnessing*, *supra* note 3, at 846-61; Margolin, *supra* note 3, at 62-77.

375. Fantuzzo & Mohr, *supra* note 359, at 27.

376. Margolin, *supra* note 3, at 62.

377. Honore M. Hughes & Douglas A. Luke, *Heterogeneity of Adjustment Among Children of Battered Women*, in CHILDREN EXPOSED TO MARITAL VIOLENCE, *supra* note 140, at 185. Subsequent research further supports the observation that a notable subgroup of children living in battered women’s shelters (i.e., about 30%) do not evidence maladjustment at that time. See, e.g., John H. Grych et al., *Patterns of Adjustment Among Children of Battered Women*, 68 J. CONSULTING & CLINICAL PSYCHOLOGY 84, 92 (2000). Investigators caution, however, that the absence of measurable symptoms at that point does not rule out the subsequent development of problems. *Id.* These children may remain at greater risk than non-exposed peers for future difficulty, and “may be experiencing difficulties in areas not assessed” by present research. *Id.* Further research is needed to understand the longitudinal impact of domestic violence on these and other children, and to parcel out those factors that may allow some children to emerge from these early experiences with higher levels of psychological adjustment than others who were also exposed to domestic violence in the home.

378. See INTERPARENTAL VIOLENCE, *supra* note 3, at 22-23, and Honore M. Hughes & Sandra A. Graham-Bermann, *Children of Battered Women: Impact of Emotional Abuse on Adjustment and Development*, 1 J. EMOTIONAL ABUSE 23, 36-37 (1998), for discussions of research findings that the psychological functioning of many children improves as time passes after the cessation of domestic violence.

emotional distress, self-esteem problems, and two clusters with minimal or mild problems).³⁷⁹

Research reveals that symptoms associated with post-traumatic stress disorder ("PTSD"), have been diagnosed in 13 to 51% of children exposed to domestic violence.³⁸⁰ PTSD is marked by emotional changes such as agitation and irritability, numbing of feelings or withdrawal from activities, problems in social or academic functioning, and a "reexperiencing" of the traumatic event (through nightmares, inability to stop thinking about it or, as with children, reenacting it through play).³⁸¹ For example, one author reports the case of a four-year-old girl who reenacted her mother's murder by making stabbing motions at a pillow, crying "Daddy pushed mommy down."³⁸² Even infants and toddlers display symptoms consistent with post-traumatic stress disorder, such as "excessive irritability, immature behavior, sleep disturbances, emotional distress, fears of being alone, and regression in toileting and language."³⁸³ In addition, researchers have observed that children who reveal PTSD symptoms undergo certain physiological changes that correlate with their psychological symptomatology³⁸⁴ and may have long-term effects on their behavior and functioning.³⁸⁵

Presently, researchers are studying those factors that may explain the variable influence of the experiences to domestic violence on children. Some of the factors relevant to such analyses relate to the child's experiences with the violence (i.e., the nature and severity of

379. Hughes & Graham-Bermann, *supra* note 378, at 36-37. See also *infra* note 391 and accompanying text.

380. INTERPARENTAL VIOLENCE, *supra* note 3, at 37.

381. See AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL, Volume IV (DSM-IV), Diagnostic Code 309.81(1994).

382. Edleson, *Children's Witnessing*, *supra* note 3, at 840 (citing R.S. Pynoos & S. Eth, *The Child as a Witness to Homicide*, 40 J. SOC. ISSUES 87, 100 (1984)).

383. Osofsky, *supra* note 134, at 36.

384. See, e.g., INTERPARENTAL VIOLENCE, *supra* note 3, at 35-39; Wanda K. Mohr & John W. Fantuzzo, *The Neglected Variable of Physiology in Domestic Violence*, in CHILDREN EXPOSED, *supra* note 108, at 69; B.B. Robbie Rossman & Joyce Ho, *Posttraumatic Response and Children Exposed to Parental Violence*, in CHILDREN EXPOSED TO DOMESTIC VIOLENCE, *supra* note 29, at 85; Wolak & Finkelhor, *supra* note 3, at 82-83.

385. See INTERPARENTAL VIOLENCE, *supra* note 3, at 37; Mohr & Fantuzzo, *supra* note 384; Rossman & Ho, *supra* note 384, at 86-90; Wolak & Finkelhor, *supra* note 3, at 82-83. See, e.g., Kym L. Kilpatrick & Leanne M. Williams, *Post-Traumatic Stress Disorder in Child Witnesses to Domestic Violence*, 67 AM. J. ORTHOPSYCHIATRY 639 (1997); Robert S. Pynoos, *Post-Traumatic Stress Disorder in Children and Adolescents*, in PSYCHIATRIC DISORDERS IN CHILDREN AND ADOLESCENTS 48 (Barry D. Garfinkel et al. eds., 1990). For a review of the available clinical and research data, see INTERPARENTAL VIOLENCE, *supra* note 3, at 50-53.

the violent incident(s),³⁸⁶ the nature of the child's exposure to or involvement in those incident(s), the frequency of exposure,³⁸⁷ and whether the child is multiply victimized);³⁸⁸ the impact of the violence on the adult victim (i.e., degree to which the violence physically or emotionally harms, incapacitates, or renders unavailable, the battered parent); the child's relationship with the batterer;³⁸⁹ the child's age and stage of psychological development;³⁹⁰ the child's gender;³⁹¹ the presence of additional "risk" factors (e.g., poverty, parental substance abuse, multiple victimization of the child);³⁹² the presence of

386. For example: Was the violence potentially life-threatening? Were weapons involved? Did serious or life-threatening injuries result? In one study, researchers examined the "severity," or potential lethality, of the violent incidents, operationalizing "severity" for the study as the presence of knives or guns during the violent incident. Jouriles, et al., *Knives, Guns, supra* note 369, at 179. The investigators found that the presence of weapons during domestic violence incidents was related to the development of more serious behavioral problems in exposed children. *Id.* at 190.

387. Research studies reveal that "children in families characterized by frequent physical marital violence display more behavior problems than do children in families characterized by less frequent violence." Jouriles, et al., *Knives, Guns, supra* note 369, at 179.

388. See Wolak & Finkelhor, *supra* note 3, at 90-93.

389. In initial examinations of this variable, Professor Cris Sullivan and colleagues have found relatively complex differences in the impact of domestic violence exposure on children depending upon whether their mothers' batterer is or is not their biological father versus a stepfather or non-father figure. Cris M. Sullivan, et al., *How Children's Adjustment is Affected by Their Relationships to their Mothers' Abusers*, 15 J. INTERPERSONAL VIOLENCE 587, 598-99 (2000).

390. Researchers have recently underscored the importance of bringing a developmental perspective to studies on the effects of domestic violence on children. See, e.g., Fantuzzo & Mohr, *supra* note 359, at 28-29.

The developmental perspective seeks to identify changes in children's functioning as they grow, and examines how children's life experiences influence child outcomes. Using the developmental approach, the impact of child exposure to domestic violence can be assessed by measuring a child's performance of age-appropriate physiological, cognitive, and emotional tasks. The developmental-epidemiological framework examines children's functioning as they grow while analyzing how environmental influences affect child outcomes.

Id. at 28.

391. Some studies have revealed that, consistent with research that examines gender differences in children's adjustment difficulties more generally, boys exposed to domestic violence are more likely to exhibit "externalizing" symptoms (i.e., behavioral or conduct problems such as aggression and disobedience), whereas girls are more likely to experience "internalizing" symptoms (i.e., emotional states such as anxiety and depression). Wolak & Finkelhor, *supra* note 3, at 89-90. Yet, contradictory findings and methodological limitations indicate that drawing generalized conclusions about gender differences in this population is premature. *Id.* at 90. In addition, Grych, et al., *supra* note 377, at 91, found that a large percentage of affected children experience *both* internalizing and externalizing symptoms.

392. Fantuzzo & Mohr, *supra* note 359, at 26-27.

“protective” factors that promote the child’s “resilience”³⁹³ (e.g., coping skills, social support and social networks,³⁹⁴ a strong and capable parent or parental figure,³⁹⁵ the existence of a place in the child’s world where she can escape the violence and feel safe³⁹⁶), and the roles that psychological,³⁹⁷ social,³⁹⁸ or legal interventions³⁹⁹ may play.⁴⁰⁰

393. In the past two decades, researchers in psychology have increasingly focused on understanding what personal and contextual variables promote individuals’ abilities to achieve positive psychological adjustment and functioning, despite difficult or traumatic life experiences. For a general discussion of the current status conceptual and empirical understanding of resilience in behavioral research, see Anne S. Masten, *Ordinary Magic: Resilience Processes in Development*, 56 AM. PSYCHOL. 227 (2001); STRESS, RISK, AND RESILIENCE, *supra* note 295.

394. See Sandra K. Beeman, *Critical Issues in Research on Social Networks and Social Supports of Children Exposed to Domestic Violence*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 3, at 219; Osofsky, *supra* note 134, at 38-41.

395. Researchers emphasize how important it is to the child’s well-being that their battered parents be supported and strengthened by the services provided to the family. See *supra* note 394 and accompanying text.

396. Osofsky, *supra* note 134, at 39.

397. Various crisis-oriented, short-term and longer-term therapeutic interventions have been developed to assist children and adults who have been victims of domestic violence. See, e.g., INTERPARENTAL VIOLENCE, *supra* note 3, at 107-38 (providing a summary of therapeutic interventions); EMERGING PROGRAMS, *supra* note 17, at 119 (describing a collaboration between the Yale University Child Study Center and the New Haven, Connecticut police department, whereby the child study staff provides “immediate clinical guidance to police officers and critical intervention services to children in the aftermath of children’s traumatic experiences”); Groves, *supra* note 73 (describing a range of short- and longer-term group and individual psychotherapeutic services available to children exposed to domestic violence).

398. Community-based domestic violence organizations have been providing a range of supportive services to domestic violence victims and children since the 1970s, providing shelter, safety-planning, and assistance in creating a new life free from violence. For a description of these organizations and the services they provide, see Saathoff & Stoffel, *supra* note 110. Shelter programs pioneered group interventions for children exposed to domestic violence that focus on helping children to: “break the silence” that has surrounded the violence in their families, label that violence and learn that such violence is neither normal or healthy in family and intimate relationships, develop strategies to plan for their own safety, and learn alternate ways to deal with anger and other feelings. See, e.g., EINAT PELED & DIANE DAVIS, *GROUPWORK WITH CHILDREN OF BATTERED WOMEN: A PRACTITIONERS’ GUIDE* (1995).

399. Law enforcement personnel, child protective workers, and juvenile and family court judges have been severely criticized for their responses, and lack thereof, in cases of domestic violence. Depending upon the nature of the response, legal interventions have the potential to promote the adult victims’ and children’s safety, to make no difference, to further endanger the victims, or to create additional difficulties for the adult victims and their children. See *supra* notes 32, 112-22 and accompanying text; *infra* notes 549-63 and accompanying text. For example, if law enforcement and court personnel intervene aggressively to protect the nonabusing family members (through arrest and prosecution of the abuser, through issuance and effective enforcement of civil protective order), children may feel safer and perhaps even empowered by these interventions. By contrast, if the

Researchers caution, however, that future research is needed to clarify how "particular types or frequencies of domestic violence" affect children, and "how children with specific characteristics are affected across time."⁴⁰¹ In particular, the data base lacks prospective studies that follow children beyond an initial assessment point. In fact, studies that follow children and their families for six months or a year are considered "long-term!"⁴⁰² Although there is evidence that exposure to domestic violence has deleterious effects on some children that persist into adolescence or adulthood, the retrospective reports on which such studies are based may limit the validity of the findings.⁴⁰³

Clearly, researchers have only scratched the surface in elucidating the myriad of variables that coalesce to determine how a particular child will fare when exposed to domestic violence. A new generation of empirical research seeks to apply what we know about the limitations of previous studies.⁴⁰⁴ Despite shortcomings in the

primary response of the authorities is to separate the children from the battered parent, when doing so is not essential to protect the children, the trauma children may experience from domestic violence exposure may be compounded by the distress that follows separation from their primary caregivers.

400. Also relevant to the ultimate effects that domestic violence exposure may have on children's psychological adjustment are the events surrounding and following the *cessation* of violence. Were the child and mother forced to leave their home and support networks to attain safety from the abuser? Did the departure alter their economic circumstances, leading to dependence on public assistance or homelessness? Do the adult victim and child(ren) remain fearful that they would be found and hurt by the batterer even after their departure?

401. Fantuzzo & Mohr, *supra* note 359, at 27. See also INTERPARENTAL VIOLENCE, *supra* note 3, at 28-30; Hughes & Graham-Bermann, *supra* note 378, at 26-28.

402. INTERPARENTAL VIOLENCE, *supra* note 3, at 23-24.

403. See Edleson, *Children's Witnessing*, *supra* note 3, at 860-61; Margolin, *supra* note 3, at 63-64; McNeal & Amato, *Parents' Marital Violence*, *supra* note 5, at 123. See also Gerald T. Hotaling et al., *Intrafamily Violence and Crime and Violence Outside the Family*, in PHYSICAL VIOLENCE IN AMERICAN FAMILIES 431 (M.A. Straus & R.A. Gelles eds., 1990). Despite the repeated observation that children exposed to violence are more likely to engage in such acts as adolescents and adults, some investigators urge caution because the empirical findings rely substantially on retrospective self-reports, a methodological approach that has limitations. See, e.g., OLA W. BARNETT ET AL., FAMILY VIOLENCE ACROSS THE LIFESPAN 14 (1997); Widom, *supra* note 5.

404. Adequate controls did not characterize much of the first wave of empirical research. For example, early studies focused primarily on samples in battered women's shelters, because of the accessibility of the affected mothers and children. Hughes & Graham-Bermann, *supra* note 378, at 37. Some studies did not use comparison groups at all. Some studies that did compare these families to control groups, did not include a comparison group of exposed children *not* living in shelters. Researchers are now in agreement that battered women and their children living in shelters are not representative of the general population of women and children affected by domestic violence. John W. Fantuzzo & Carol Ummel Lindquist, *The Effects of Observing Conjugal Violence on Children: A Review and Analysis of Research Methodology*, 4 J. FAM. VIOLENCE 77, 89

research literature, the findings of the deleterious impact of childhood exposure to domestic violence are quite robust.⁴⁰⁵ There is a clear consensus in the field that exposure to domestic violence places children of all ages at risk for a range of psychological concomitants and sequelae, which run the gamut from temporary distress to longer-term psychological dysfunction and psychopathology.⁴⁰⁶ One team of researchers, applying a highly critical lens to the methodological shortcomings of many studies in the data base, still draw the following conclusions: "To date, research on the effects of child exposure to domestic violence indicates that this exposure has an adverse impact across a range of child functioning, produces different effects at different ages [and] increases the risk for child abuse . . ."⁴⁰⁷

(1989). According to some researchers, children in shelters demonstrate *greater* psychological difficulties than exposed children living in the community, *see, e.g.,* Fantuzzo & Mohr, *supra* note 359, at 28, perhaps explained by the additional trauma of abandoning their homes and "hiding out" in a group setting that is characterized by high emotional intensity. Presently, there is increased awareness that the design and interpretation of research findings must consider the shelter versus community residence of the subjects.

Other methodological challenges faced early researchers, who had difficulty controlling for the children's own experiences as direct victims of physical or sexual abuse. *See, e.g.,* INTERPARENTAL VIOLENCE, *supra* note 3, at 16-17; Edleson, *Children's Witnessing*, *supra* note 3, at 844-45; Hughes & Graham-Bermann, *supra* note 378, at 34-35; Margolin, *supra* note 3, at 60-61. Given the high co-occurrence of exposure to domestic violence and direct child maltreatment, it is difficult to sort out the relative effects of each phenomenon on children's adjustment without careful attempts to isolate these variables. In addition, definitional inconsistency plagued the research in this field, with studies differing with respect to what was considered domestic violence and "exposure." INTERPARENTAL VIOLENCE, *supra* note 3, at 26; Fantuzzo & Lindquist, *supra* at 87-88; Hughes & Graham-Berman, *supra* note 378, at 38.

In general, studies have paid insufficient attention to developmental factors (i.e., how a child's age and stage of development affects the impact of the domestic violence exposure on their psychological functioning), *see, e.g.,* Fantuzzo & Mohr, *supra* note 359, at 28-29; Margolin, *supra* note 3, at 77-79, as well as to what factors seem to "mediate," "moderate," or interact with, the violent experiences to lead to different effects. For a discussion of the research on factors mediating the effects of domestic violence on children, *see generally* INTERPARENTAL VIOLENCE, *supra* note 3, at 36-64, and Margolin, *supra* note 3, at 77-90.

There has been very little "theory-driven" research in this field. Such research posits and tests theoretical models explaining why particular occurrences or patterns of domestic violence have the observed effects. More recently, however, several researchers have set forth such models. *See, e.g.,* INTERPARENTAL VIOLENCE, *supra* note 3, at 65-83; Sandra A. Graham-Bermann & Honore M. Hughes, *The Impact of Domestic Violence and Emotional Abuse on Children: The Intersection of Research, Theory, and Clinical Intervention*, 1 J. EMOTIONAL ABUSE 1 (1998); Rossman & Rosenberg, *supra* note 319, at 250-56.

405. *See supra* notes 2-7 and accompanying text.

406. *See, e.g.,* INTERPARENTAL VIOLENCE, *supra* note 3, at 15; Fantuzzo & Mohr, *supra* note 359, at 26-27; Hughes & Graham-Bermann, *supra* note 378, at 28-33; Margolin, *supra* note 3, at 62-77.

407. Fantuzzo & Mohr, *supra* note 359, at 26-27.

(3) *Is Exposure to Domestic Violence a Form of Child Maltreatment?*

There are several bases on which the juvenile court *might* find jurisdiction in cases of children exposed to domestic violence: (1) provisions addressing psychological maltreatment or harm; (2) provisions addressing nonaccidental physical harm or likelihood of harm; and (3) provisions addressing parental failure to protect their children from deleterious influences.

(a) Psychological maltreatment

As noted above, children who are exposed to domestic violence are significantly more likely than are non-exposed children to develop a range of serious psychological or emotional problems.⁴⁰⁸ Thus, if psychological symptoms are already manifest in a child's functioning, the court may be able to rely on the statutory ground defining *psychological* or *emotional harm*, which typically requires findings of actual harm *and* causative parental conduct. Some statutes may permit jurisdiction if a caregiver was responsible for circumstances that created a *substantial likelihood* that the child would suffer *psychological* or *emotional harm*. Given the psychological research on the effects of domestic violence exposure to children, engaging in such violence in the children's presence might fall within the scope of such statutes.

Many writers in the field have addressed the relationship between childhood exposure to domestic violence and psychological maltreatment. In its Report on Violence and the Family, the American Psychological Association's Presidential Task Force on Violence and the Family stated unequivocally that: "Witnessing or other exposure to abuse of a parent is a form of psychological maltreatment."⁴⁰⁹ If one uses the APSAC Guidelines as a framework from which to evaluate potential psychological abuse, there are several categories that appear particularly relevant to children's exposure to domestic violence. The Guidelines define one category of psychological maltreatment, *terrorizing*, as including "caregiver behavior that threatens or is likely to physically hurt, kill, abandon, or place the child *or child's loved ones* . . . in recognizably dangerous situations."⁴¹⁰ Among the examples of such terrorizing, the guidelines specify: "threatening or perpetrating violence against a child's loved

408. See *supra* notes 372-407 and accompanying text.

409. AM. PSYCHOL. ASS'N, *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY* 50 (1996). The Report goes on to adopt the formulations of psychological maltreatment set forth in the APSAC Guidelines and the theoretical and empirical writings that led to their development. *Id.*

410. APSAC GUIDELINES, *supra* note 329, at 7 (emphasis added).

ones.”⁴¹¹ Most acts of domestic violence would fall within this definition. Writers suggest that children exposed to domestic violence may be psychologically maltreated according to the APSAC Guidelines in other ways as well.⁴¹² *Spurning* may occur as the abuser engages in verbal patterns of degradation and devaluation against the domestic violence victim and the child, or “about” the child.⁴¹³ It is well-known that perpetrators of domestic violence frequently *isolate* the victim and child, limiting outside contacts.⁴¹⁴ The environment in a family affected by domestic violence may be characterized by “tension and coercion,” perhaps leading to a range of negative patterns of “hostility or withdrawal” affecting the child.⁴¹⁵ One writer asserts: “Marital abuse creates a chaotic, dangerous, and frightening family environment.”⁴¹⁶

Yet, as noted above, most state statutes do not permit a finding under the psychological maltreatment jurisdictional basis without a showing of *actual* harm.⁴¹⁷ Thus, despite the strong data base indicating that children who are exposed to domestic violence have a substantial likelihood of experiencing psychological distress, and developing adjustment problems, this jurisdictional ground may not be available in domestic violence cases, prior to the manifestation of observable psychological symptomatology in a child.

(b) Physical harm

Statutes defining the grounds for *physical harm* often do not require that *actual* physical harm be shown. As in California’s statute, the court may obtain jurisdiction based on the “substantial risk that the minor will suffer . . . serious physical harm inflicted nonaccidentally upon the minor by the minor’s parent or guardian.”⁴¹⁸

411. *Id.*

412. INTERPARENTAL VIOLENCE, *supra* note 3, at 5-7.

413. *Id.* at 5.

414. *Id.*

415. *Id.*

416. Margolin, *supra* note 3, at 86. Margolin suggests further: “Even if children growing up with marital violence do not experience obvious psychopathology, they still may be psychologically affected by this experience in terms of their self-respect and self-esteem and the extent to which they can trust and care for others.” *Id.*

417. See *supra* notes 291-92 and accompanying text. Legislative proposals by various governmental groups addressing standards for juvenile court jurisdiction in cases of psychological maltreatment emphasize “the need for proof that there has been *actual* measurable damage done to the child. Mere concern for what ‘might happen’ as a consequence of emotional maltreatment in the distant or foreseeable future is not enough.” Corson & Davidson, *supra* note 292, at 185, 196-98. But see discussion of ALASKA STAT. § 47.10.011(8)(A) & (B) (i) (Michie 2000), *supra* notes 340-47 and accompanying text.

418. CAL. WELF. & INST. CODE § 300(a) (West 2000).

The research literature reveals a high level of co-occurrence of physical child abuse and domestic violence, ranging between 45% to 70%.⁴¹⁹ Given these data, a court could find jurisdiction based on the probability that a pattern of domestic violence in the child's home creates a "substantial risk" that the minor might be a victim of direct and nonaccidental physical abuse in the foreseeable future. Whereas such jurisdiction is possible, it may be viewed as too speculative or attenuated to serve as a basis for state intervention in the family. There are no published cases in which this jurisdictional ground has been used in a case of a child's exposure to domestic violence.

(c) Neglect

Finally, neglect provisions offer a third jurisdictional basis for cases involving children's exposure to domestic violence. Generally, such provisions create parental liability where the child has either experienced actual harm, or is substantially likely to experience harm, because of the "willful or negligent failure of the minor's parent or guardian to adequately supervise or protect the minor from the conduct of the custodian with whom the minor has been left . . ."⁴²⁰ As such, this category is "flexible" enough to provide a jurisdictional ground for intervening in cases where parents have failed to prevent the child's exposure to circumstances, conditions, or situations that are substantially likely to lead to harm of a child. In domestic violence cases, the posited resultant harm could be *physical* (i.e., the child could be harmed, inadvertently, by the weapons or violent behaviors that characterize the spousal abuse) or *psychological* (i.e., the child may develop emotional or other difficulties as a result of the exposure).

One writer has asserted that "[a]llowing a child to live in a dangerous environment and to be exposed to acts of violence constitutes child endangerment and neglect . . ."⁴²¹ Consistent with this characterization, this jurisdictional basis is the one most commonly used in cases where children's exposure to domestic violence is the primary basis for court intervention. It is noteworthy, however, that the neglect formulation has been used not only to challenge the parenting practices of the domestic violence perpetrator, but also those of the adult victim of the domestic violence.⁴²² These latter applications of neglect provisions thus hold adult domestic violence victims responsible for their children's

419. See *supra* note 7.

420. CAL. WELF. & INST. CODE § 300(b) (West 2000).

421. Margolin, *supra* note 3, at 86.

422. See *supra* notes 107-09 and accompanying text; *infra* notes 545-63 and accompanying text.

exposure if they have not successfully prevented or escaped the violence. Not surprisingly, use of these statutes in this way is highly controversial.⁴²³

New York and California are two states in which appellate courts have published multiple cases in which children's exposure to domestic violence is identified as a primary basis for proceeding in child maltreatment cases.⁴²⁴ In neither state do the pertinent statutes explicitly mention exposure to domestic violence. In both states, despite the existence of separate statutory provisions allowing for jurisdiction in cases of psychological harm, the courts have applied the "neglect" provisions of the child maltreatment statutes in domestic violence exposure cases. For example, New York courts have relied on Section 1012(f)(i)(B) of New York's Family Court Act in finding jurisdiction in several cases in which the children's exposure to domestic violence was a primary concern.⁴²⁵ New York's statute defines a "neglected child" as one:

whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parent or other person legally responsible for his care to exercise a minimum degree of care . . . (B) [i]n providing the child with proper supervision or guardianship, by unreasonably inflicting or allowing to be inflicted harm, or substantial risk thereof, including [excessive corporal punishment, misusing alcoholic beverages] or by any other acts of a similarly serious nature requiring the aid of the court⁴²⁶

423. *Id.*

424. New York and California are not the only jurisdictions that have used "neglect" as a jurisdictional basis in cases of children's exposure to domestic violence. *See, e.g., S.S. v. R.S.*, 728 N.E.2d 1165, 1172 (Ill. App. Ct. 2000) ("[I]t is reasonable for a trial court to conclude continuing physical abuse by one parent of another will cause emotional damage to a child and thus constitutes neglect . . ."); *A.D.R. v. Rankin*, 542 N.E.2d 487, 490 (Ill. App. Ct. 1989).

425. *See, e.g., In re Lonell*, 673 N.Y.S.2d 116 (App. Div. 1998) ("[A] pattern of domestic violence between respondent parents in the presence of their children [is] sufficient to establish neglect under Family Court Act (FCA) § 1012, absent expert testimony that the parents' strife has caused specific harm to the children."); *In re Athena*, 678 N.Y.S.2d 11, 12 (App. Div. 1998) ("[E]vidence of acts of severe 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 becoming impaired within the meaning of Family Court Act § 1012(f)(i)(B), and indeed that the oldest child had already suffered actual emotional harm.").

426. N.Y. FAM. CT. ACT §1012(f)(i)(B) (McKinney 1998). New York courts have also applied the state's parallel penal code section as broad enough to encompass children's exposure to domestic violence. The pertinent code section reads: "A person is guilty of endangering the welfare of a child when He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old" N.Y. PENAL LAW § 260.10(1) (McKinney 2001). Most recently, New York's highest state court held:

Whereas Section 1012(f)(i)(B) requires only that the parent(s) place the child *at risk of harm* by engaging in interparental violence, the pertinent provision of New York's statute that refers to *psychological harm* requires evidence of observable emotional or behavioral problems in the child, and that the observed psychological harms "be clearly attributable" to inadequate parental conduct.⁴²⁷

California courts have also interpreted the statutory section defining "neglect" as a basis for jurisdiction in domestic violence exposure cases⁴²⁸ and have typically not used the section defining "emotional damage" for this purpose.⁴²⁹ This latter provision requires

The adverse effects of domestic violence on children have been well documented over the past two decades and have been recognized by all branches of our government in New York. . . . [D]omestic violence causes great psychological and developmental damage to children even when they are not themselves physically abused. . . . To the extent that some courts have determined that section 260.10(1) requires that a defendant's conduct must be directly focused upon the child, or that evidence of a child witnessing a severe act of violence is insufficient as a matter of law to support a conviction under this statute, those decisions are not to be followed.

People v. Johnson, 740 N.E.2d 1075, 1077 (N.Y. 2000).

427. N.Y. FAM. CT. ACT §1012(h) defines an "impairment of emotional health" or "impairment of mental or emotional condition" as a circumstance where observed problems in the child's emotional, psychological, or behavioral functioning is "clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child."

428. See, e.g., *In re Heather A.*, 60 Cal. Rptr. 2d 315 (Cal. Ct. App. 1996), *review denied* March 12, 1997; cf. *In re Alysha S. v. Edward S.*, 58 Cal. Rptr. 2d 494, 497 (Cal. Ct. App. 1996), *review denied* Feb. 19, 1997 (indicating that "[a] father who repeatedly beats the mother in the presence of the child may well expose the child to emotional trauma and therefore, 'fail to protect' the child," but that in this particular case, the pleaded facts did not suggest that "the violence was perceived by or affected the child").

429. The pertinent section of the statute as it relates to emotional harm requires that the minor "is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian . . ." CAL. WELF. & INST. CODE § 300(c) (West 1998). A review of California cases turned up only one published case in which this ground appears to have been used relating to children's exposure to domestic violence. See *Edgar O. v. Superior Court*, 100 Cal. Rptr. 2d 540 (Cal. Ct. App. 2000). In this case, a father who had killed his children's mother was appealing the state's denial of reunification services under the pertinent statute. *Id.* at 541. (A refusal of reunification services in such cases signals the state's intention to seek a termination of parental rights. See *supra* note 264 and accompanying text.) In the court's description of the procedural background and facts of this case, it lists the bases for juvenile court jurisdiction in the court below. *Id.* at 541-42. The bases had included both the "neglect" and "emotional damage" provisions of the juvenile court jurisdictional statute. *Id.* The juvenile court's finding of jurisdiction had been grounded in the "pattern of domestic violence" that had characterized Edgar O.'s treatment of the children's mother (and which had ultimately resulted in her death). *Id.* The children had been present during repeated domestic violence incidents. *Id.* In addition, a therapist who evaluated the children diagnosed all three as suffering from post-

either a showing that “serious emotional damage” has already occurred, or a showing that certain psychological symptomatology was already present in the children’s functioning which indicated that “serious emotional damage” was substantially likely to occur.⁴³⁰ By contrast, use of the “neglect” ground allows courts to find jurisdiction without needing to demonstrate *actual* harm to the minor.

In the case of *Heather and Helen A.*, a California Court of Appeal panel rejected the contention that the state must prove the following “three elements” before finding parental liability under section 300(b) of the Welfare and Institutions Code: (1) that the parent had engaged in one of the forms of parental conduct specified in § 300(b); (2) that serious harm or illness to the minor had occurred or that substantial risk of serious harm or illness to the minor existed; *and* (3) that the parental conduct had *caused* the resultant harm.⁴³¹ The California court dispatched with the claim as follows:

It is clear to this court that domestic violence in the same household where children are living is neglect; it is a failure to protect Helen and Heather from the substantial risk of encountering the violence and suffering serious physical harm or illness from it. Such neglect causes the risk.⁴³²

As such, the California court, like the New York courts, characterized children’s exposure to domestic violence as *per se* child maltreatment, rejecting the contention that *actual* harm to the child must be proved in order for the court to have jurisdiction. And although a psychologist testifying in the California case addressed the possibility that the girls had suffered “secondary abuse,” a concept that relies primarily on the negative *psychological* effects children’s exposure to domestic violence can have, the court focused more on the father’s disregard of the girls’ *physical* well-being in engaging in violent conduct when they were present.⁴³³

The New York and California cases make clear that the wording of the some states’ child maltreatment statutes is sufficiently broad to encompass children’s exposure to domestic violence, even without explicit mention of such exposure as a jurisdictional basis. State attorneys and courts tackling these cases may therefore apply the *neglect* provisions in their statutes, rather than provisions addressing

traumatic stress disorder (“PTSD”) as a result of the domestic violence exposure. *Id.* at 542. Thus, the facts of this case are sufficient to justify a finding of “emotional damage” under Cal. Welf. & Inst. Code § 300(c), *supra*, since a diagnosis of PTSD clearly meets the statutory requirements that certain symptomatology be present. For a description of PTSD and its symptoms, *see supra* notes 380-85 and accompanying text.

430. CAL. WELF. & INST. CODE § 300(c) (West 1998).

431. 60 Cal. Rptr. at 321.

432. *Id.*

433. 60 Cal. Rptr.2d at 318.

psychological maltreatment, because neglect provisions typically do not require proof of *actual harm* to the exposed children. The presence of domestic violence in the children's family environment is viewed as a sufficient condition to permit a finding of neglect, in that it presents a *serious risk* of harm to children, whereas psychological maltreatment provisions tend to require showings of *actual* emotional harm. Yet, although it is possible for the juvenile court to find jurisdiction in domestic violence cases, in the absence of specific statutory language authorizing such jurisdiction, we must also evaluate whether such explicit language would have specific benefits.

Part IV argues that there are a range of benefits that might follow from such inclusion.⁴³⁴ In addition, Part IV underscores that the use of the neglect provisions in child maltreatment statutes risks negative repercussions affecting the welfare of the affected children and their nonabusive adult caregivers.⁴³⁵ In the absence of statutory guidance to the contrary, courts and child protective service workers conceptualize childhood exposure to domestic violence as a product of *omissions* in parental duty, rather than as a product of violent acts *committed* by domestic violence perpetrators. Such a perspective focuses excessive attention on the role that the domestic violence victim "should have played" in protecting her children, rather than on how child protective services and the state can intervene to protect children and adult victims from the domestic violence perpetrators. As the multitude of policy documents addressing effective intervention in these cases suggests, focusing on the "failures" of adult domestic violence victims does not typically serve the best interests of affected children. Explicit statutory language incorporating childhood exposure to domestic violence into the ambit of maltreatment statutes can directly communicate a philosophy of intervention that is more likely to serve children's needs. Thus, although existing state statutes *can* accommodate cases of children's exposure to domestic violence under existing language, there remain policy and practical arguments for enacting statutes explicitly placing such cases within the jurisdiction of dependency court.

(4) *A Framework for Construing Certain Cases of Children's Exposure to Domestic Violence as Child Maltreatment*

Blanket expansions of dependency jurisdiction to permit findings of psychological maltreatment *without* proof of actual harm open the door to intrusions into family relationships on the basis of speculative and unsubstantiated notions of what constitutes "good" and "bad" parent-child interactions. Such expansions risk imposing the

434. See *infra* notes 564-65 and accompanying text.

435. See *infra* notes 545-63 and accompanying text.

majoritarian middle- and upper-class establishment's vision of the family upon many whose children are not in danger. Although our understanding of the psychological factors that predict deleterious outcomes for children is growing, particularly as behavioral scientists focus their inquiries specifically on these questions, there remains substantial uncertainty regarding these phenomena. This said, however, the empirical data available regarding the effects of *particular* forms of parental conduct on children's psychological well-being may be sufficiently robust for us to conclude that certain specified acts are *substantially likely* to lead to subsequent emotional harm to a child. The empirical data demonstrating the detrimental effects of childhood exposure to domestic violence rise to this level. Although the findings are imperfect, and methodological limitations in the data base exist, the scientific evidence reveals an unequivocal relationship between such exposure and negative child outcomes, even though not all children exposed to domestic violence have been found to develop serious psychological symptoms.⁴³⁶ The risk of harm is clearly present.

Another factor distinguishes childhood exposure to domestic violence from a range of other phenomena that might be characterized as psychological abuse or neglect. Perpetration of domestic violence is illegal. State legislatures have determined that acts of domestic violence should be prohibited by criminal law. As such, incorporating children's exposure to these acts into definitions of child maltreatment places some limits on the degrees to which caseworkers' and judges' personal biases about what constitutes appropriate parenting will seep into the decisionmaking process. Of course, not all acts proscribed by criminal statutes are necessarily harmful to children or the appropriate subject matter for the juvenile court.⁴³⁷ I argue here that if there is strong empirical evidence that children's exposure to certain types of parental conduct leads to deleterious consequences for children, *and* the conduct in question also constitutes a violent criminal offense, the case for incorporating such conduct within the dependency jurisdiction of the juvenile court is stronger than if only one or the other factors exists alone.

The question still remains, however, as to which acts of domestic violence should be characterized as substantially likely to lead to

436. Fantuzzo and Mohr conclude that, despite the data base's methodological flaws, "research on the effects of child exposure to domestic violence indicates that this exposure has an adverse impact across a range of child functioning, produces different effects at different ages, increases the risk for child abuse, and is associated with other risk factors" Fantuzzo & Mohr, *supra* note 359, at 26-27.

437. For example, it is likely that many categories of nonviolent criminal acts would not be considered sufficiently harmful to children's well-being to justify state intrusion in the family.

deleterious psychological consequences for children. Definitions of domestic violence vary in the literature, some including primarily non-physical acts such as verbal abuse, threats of harm, and other forms of harassment.⁴³⁸ Should these acts be sufficient to trigger dependency jurisdiction? Is one act of violence sufficient to trigger jurisdiction, or must there be multiple incidents? How "severe" must an act be to trigger jurisdiction? Where should the lines be drawn for the purpose of child abuse and neglect statutes? These are not easy issues to resolve. The empirical literature provides some guidance, as does the collected experience of those professionals who have worked closely with these cases over the years. Decisions where to draw these lines are *policy* decisions, requiring that society consider the prospective benefits and costs of adopting such reforms. The experiences of those states that have experimented with such statutes can begin to inform us as to what some of the benefits, costs, and unintended consequences of particular statutory frameworks might be.

IV. Mobilizing State Protective Services Systems to Respond to Childhood Exposure to Domestic Violence: The Relative Efficacy of Various Approaches

What do we know about the efficacy of various strategies for using the child protection system to promote the best interests of children exposed to domestic violence? In this Part, I discuss how several different approaches appear to have succeeded. In particular, I examine jurisdictions that have enacted statutory language explicitly bringing children exposed to domestic violence within the reach of the juvenile court. Thus, I contrast the nonenforcement of several Canadian provincial statutes with the chaos created by a short-lived statute in Minnesota, and with the "promise" offered by a packet of Alaskan statutes. I also examine jurisdictions that have not enacted new statutes of this type. I consider how jurisdictions such as Massachusetts and Michigan have confronted the needs of these children and families in the absence of formal statutory change. And finally, I review the developments in New York, one among several jurisdictions that has used existing child maltreatment statutes to reach children exposed to domestic violence.

438. In recent years, legislatures have expanded their understanding of and sanctions against domestic violence, criminalizing certain categories of conduct, such as "stalking," even in the absence of a physical assault, in part because of evidence that such conduct can easily escalate into, or be accompanied by, physical violence. *See, e.g., Laurie Salame, A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67 (1993).

A. The “Early Returns”: The Impact of Statutes Defining Children’s Exposure to Domestic Violence as Child Maltreatment

The jurisdictions experimenting with statutes that define childhood exposure to domestic violence as child maltreatment are virtual laboratories. Yet, none of these experiments incorporates a program evaluation component, leaving us to rely on information about the statutes’ impact from a variety of other sources, such as subsequent statutory reform, case law, news accounts, and reports of those living with these laws on a day-to-day basis.

(1) *Nonenforcement: The Canadian Experience*

Between 1978 and 1990, six of the ten Canadian provinces passed statutes characterizing childhood exposure to domestic violence as child maltreatment (and one of those provinces altered the statutory language slightly in 1998).⁴³⁹ Given that these six statutes are still on the books, while two of the American statutes have been repealed or

439. See Child Welfare Act, R.S.A., ch. C-8.1, § (3)(a) (1984) (Alberta, Can.) (“a child is emotionally injured (i) if there is substantial and observable impairment of the child’s mental or emotional functioning that is evidenced by a mental or behavioural disorder, including anxiety, depression, withdrawal, aggression or delayed development, and (ii) if there are reasonable and probable grounds to believe that the emotional injury is the result of . . . (C) exposure to domestic violence or severe domestic disharmony . . .”); Child and Family Services and Family Relations Act, R.S.N.B., ch. C-2.1, Part III, § 31(1)(f) (1980) (New Brunswick, Can.) (“The security or development of a child may be in danger when the child is living in a situation where there is severe domestic violence”); Children and Family Services Act, R.S.N.S., ch. 5, § 22(2)(i) (1990) (Nova Scotia, Can.) (“A child is in need of protective services where the child has suffered physical or emotional harm caused by being exposed to repeated domestic violence by or towards a parent or guardian of the child, and the child’s parent or guardian fails or refuses to obtain services or treatment to remedy or alleviate the violence”); Family and Child Services Act, R.S.P.E.I., ch. F-2.1, § (2)(i) (1988) (Prince Edward Island, Can.) (“‘a child in need of protection’ means a child who is living in a situation where there is severe domestic violence”); Child and Family Services Act, S.S., ch. C-7.2, § 11(a)(vi) (1989-1990) (Saskatchewan, Can.) (“A child is in need of protection where as a result of action or omission by the child’s parent the child has been exposed to domestic violence or severe domestic disharmony that is likely to result in physical or emotional harm to the child.”). In the sixth province passing such a statute, Newfoundland, the pertinent statutory language changed in 1998. Child, Youth, and Family Services Act, Nfld. R.S., ch. C-12.1, § 14 (1998) (Newfoundland, Can.). Whereas the statute passed in 1981 incorporated “a child who is living in a situation where there is severe domestic violence” into the statutory definition of “child in need of protection,” An Act to Amend the Child Welfare Act, 1972, Nfld. R.S., ch. 54, § 2(a.1)(v) (1981), the 1998 amendments delete that language and indicate instead that “child in need of protective intervention” includes a child who “is living in a situation where there is violence.” Child, Youth, and Family Services Act, Nfld. R.S., ch. C-12.1, § 14(f) (1998) (Newfoundland, Can.). The change in language appears to *widen* the net of children who might be identified as needing state protection, in that the violence need not be “severe,” as required by the 1981 statute. In addition, the new language does not limit its reach to “domestic” violence. It is clear, however, that Newfoundland is still among those provinces that explicitly recognizes children exposed to domestic violence as being “in need of protection.”

amended less than a year after enactment,⁴⁴⁰ I was intrigued by the prospect that the Canadians had found a way to write and implement these statutes that really worked. It was, however, virtually impossible to find evidence of the enforcement of these statutes.

Despite lifespans that have extended between twenty-two and ten years, depending upon the province, these statutes have generated almost no case law. Reviews of Canadian appellate cases uncovered only two from among the six provinces with pertinent statutes.⁴⁴¹ Of course, the dearth of case law using these specific statutory provisions is not necessarily a reliable indicator of what is happening in the courts and child protective services investigations below. Yet, the limited published commentary regarding these statutes,⁴⁴² and communications with those professionals in Canada who have written on the subject of child protective services in these cases, support the conclusion that these statutes simply are not enforced.⁴⁴³

440. See *supra* notes 78, 84 and accompanying text.

441. *In re J., Lj., and T.*, 1999 Sask. D.J. 168, 1999 Sask. D. J. LEXIS 262 (Saskatchewan Q.B., 1999); *Children's Aid Society of Cape Breton v. S.(B.)*, 1997 ACWSJ LEXIS 96388, 1997 ACWSJ 139134; 76 A.C.W.S. 3d 1120 (Nova Scotia Ct. of Appeal, 1997). Ontario has one appellate case in which domestic violence exposure was a basis for juvenile court intervention, despite the absence of statutory language authorizing this as a separate jurisdictional ground. In *In re Elijah B., Clinton B., and Anita B.*, 1997 Ont. C.J.P. LEXIS 303, at *6 (Ontario Court, Provincial Div., 1997), the court found the children to be "in need of protection" under the statutory provision relating to "risk of physical harm," indicating that the father's extreme violence toward the mother placed the children at risk. "Although none of the children were directly harmed by the father, they were present during violent episodes between the parents and had indirectly been exposed to domestic violence." *Id.* at 2.

A 1999 publication of the Family Violence Prevention Unit of Canada's Department of Health indicated that Ontario was considering whether explicitly to incorporate exposure to domestic violence into the relevant statutory language. MARLIES SUDERMANN & PETER JAFFE, HEALTH CANADA, A HANDBOOK FOR HEALTH AND SOCIAL SERVICE PROVIDERS AND EDUCATORS ON CHILDREN EXPOSED TO WOMAN ABUSE/FAMILY VIOLENCE 21 (1999). Furthermore, in 1999, the Joint Committee on Domestic Violence, formed to advise the government of Ontario following a Coroner's inquest into a domestic violence victim's murder, issued a report to the Attorney General of Ontario. The report recommended, among other things, that "the Government of Ontario, in its five year review of *Child and Family Service Act*, proceed to enact the [proposal] that exposure to family violence be included as a separate ground for a protection finding." JOINT COMM. ON DOMESTIC VIOLENCE, WORKING TOWARD A SEAMLESS COMMUNITY AND JUSTICE RESPONSE TO DOMESTIC VIOLENCE: A FIVE YEAR PLAN FOR ONTARIO 83 (August 1999). In summarizing the uncertainty attendant to interpretations of current Ontario law, the Committee stated that "exposure to domestic violence may or may not fall within the definition of child abuse or a child being found in need of protection." *Id.*

442. See Echlin & Marshall, *supra* note 109, at 177.

443. Telephone Interview with Larry Marshall, M.S.W., Director of Intake Services, London & Middlesex Children's Aid Society (Oct. 18, 2000); Email from Peter G. Jaffe, Ph.D., Executive Director, Centre for Children and Families in the Justice System (Apr.

The Canadian experience suggests that mere passage of a statute conferring juvenile court jurisdiction in cases of childhood exposure to domestic violence does not necessarily lead to changes in practice. This may be particularly true when achieving the intended legislative goals requires substantial alterations in the way in which government agencies and their staffs process cases. One team of authors, Carole Echlin and Larry Marshall, who work in Canada's child protection system, attributes the statutes' lack of use to several factors, some fairly general, and some specific to these Canadian provinces.⁴⁴⁴

First, Echlin and Marshall conclude that there is no clear mandate for the child protective services role in these provinces, as well as in most U.S. states.⁴⁴⁵ Clear guidelines simply do not exist in most Canadian jurisdictions as to what circumstances justify child protective services involvement. The statutory definitions are not particularly helpful, in that they often require workers to speculate about the extent to which children's experiences in the family might lead to emotional harm.⁴⁴⁶ This problem leads to a range of inconsistent and sometimes inappropriate responses to these cases by child protection workers.⁴⁴⁷ Second, successful intervention in these cases typically requires substantial knowledge about the dynamics of domestic violence, and such expertise has not traditionally been a part of the training of child protection workers.⁴⁴⁸ Third, some of the statutory definitions require workers to prove that a child has experienced emotional harm that *was caused by* the exposure to domestic violence.⁴⁴⁹ As the experiences of New York and California reveal, the path of least resistance in these cases is to avoid using the jurisdictional bases relating to "emotional harm," because of the more challenging proof requirements.⁴⁵⁰ Fourth, Echlin and Marshall report that there has been a lack of judicial support for these statutes in some of the Canadian provinces, another factor that presents obstacles to these statutes' use.⁴⁵¹

2000). In addition, telephone conversations with a range of professionals in various Canadian provinces who work in the specialties of child protection, domestic violence, or family law supported the conclusion that these statutes were typically not used as a ground for juvenile court jurisdiction. In fact, many front-line workers in provinces with such statutes appeared not to be familiar with these statutes.

444. Echlin & Marshall, *supra* note 109.

445. *Id.* at 170-71.

446. *Id.* at 176.

447. *Id.* at 170-71, 173-75. See also Findlater & Kelly, *supra* note 98, at 84-88; Peled, *supra* note 72, at 134-36; Schechter, *supra* note 98, at 62-63.

448. Echlin & Marshall, *supra* note 109, at 175, 178; Peled, *supra* note 72, at 134-36; Findlater & Kelly, *supra* note 98, at 87-89.

449. Echlin & Marshall, *supra* note 109, at 177.

450. See *supra* notes 424-33 and accompanying text.

451. Echlin & Marshall, *supra* note 109, at 177.

Clearly, successful implementation of statutes bringing children exposed to domestic violence within the reach of the child protection system is an uphill battle. A jurisdiction is unlikely to mount an effective response in the absence of: (1) a clear statutory definition of the target population; (2) guidelines for implementation; (3) adequate training for personnel (e.g., child protection workers, the judiciary, and court staffs), and (4) a signal from their superiors, backed up by funding and adequate person-power, that consistent handling of these cases is a governmental priority.⁴⁵² Child protective systems are already overburdened. As such, they are unlikely to take on additional cases for which the mandate is unclear and their expertise limited. In addition, most professionals who work in child protection are aware that there are large numbers of families affected by domestic violence. It is not surprising that, without significant institutional support, they would hesitate to take on a mandate that could conceivably flood their system.⁴⁵³

(2) *Overloading the System: The Minnesota Experience*

Minnesota's short-lived experiment with statutory reform aimed at protecting children exposed to domestic violence was, by many accounts, an abject failure. Observers' worst nightmares came true: the child protection system was flooded with new cases, child protective intervention in domestic violence cases was overly intrusive, and such intervention was not targeted at families in greatest need of intervention.

Reportedly, Minnesota's statutory change was the result of an allegedly "well-meaning [state] Senator from Rochester, Minnesota [who] inserted in conference committee at one end, late at night, a change in the definition of child neglect in the State of Minnesota."⁴⁵⁴ The statute's effect was to bring children exposed to domestic violence within the scope of the state's child maltreatment *reporting* law. The statutory changes passed, and went into effect on July 1, 1999.

The statute specifically provided that, for the purposes of reporting suspected child maltreatment, the term neglect includes circumstances in which:

452. See THE GREEN BOOK, *supra* note 12, at 61-63. "Child protection services should develop screening and assessment procedures, information systems, case monitoring protocols, and staff training to identify and respond to domestic violence and to promote family safety." *Id.* at 61. "Child protection workers should develop service plans and referrals that focus on the safety, stability, and well-being of all victims of family violence and hold domestic violence perpetrators accountable." *Id.* at 62.

453. See, for example, the experience of Minnesota, *supra* notes 454-68 and accompanying text.

454. Edleson, Bridging Research, *supra* note 61 (transcript at 241-42).

the parent or other person responsible for the care of the child: (i) engages in violent behavior that demonstrates a disregard for the well-being of the child as indicated by action that could reasonably result in serious physical, mental, or threatened injury, or emotional damage to the child; (ii) engages in repeated domestic assault [as defined in by specified criminal provisions]; (iii) intentionally inflicts or attempts to inflict bodily harm against a family or household member [who] is within sight or sound of the child; or (iv) subjects the child to ongoing domestic violence by the abuser in the home environment that is likely to have a detrimental effect on the well-being of the child.⁴⁵⁵

These four provisions, taken together, are quite broad and, as a whole, encompass almost every conceivable scenario of domestic violence that occurs in a household in which children reside. None of the sections requires a showing of *actual* harm. Excepted from the reach of the statute would be one-time incidents that occurred when the child wasn't around. Yet, even some of those cases fit within the statute if the violence could "reasonably result in serious . . . injury, or emotional damage to the child,"⁴⁵⁶ which arguably might be inferred about any violence that left the child's mother injured, distraught, depressed, and so on. Thus, the statute, in effect, defined childhood exposure to domestic violence as "per se" neglect.

On November 30, 1999, the Minnesota Department of Human Services published a Bulletin to guide child protective services workers in implementing this legislation.⁴⁵⁷ The Bulletin directed social services personnel to scrutinize the actions of "non-offending adult caretaker[s]," who "also may be subject to a maltreatment determination under this provision."⁴⁵⁸ The term "non-offending

455. MINN. STAT. §626.556(2)(c)(8), *repealed by* 2000 Minn. Sess. Law Serv. Ch. 401 (S.F. 3410) (West 2000).

456. MINN. STAT. §626.556(2)(c)(8)(i), *repealed by* 2000 Minn. Sess. Law Serv. Ch. 401 (S.F. 3410) (West 2000).

457. Minnesota Dep't of Human Servs., *Laws Relating to Domestic Violence Involving Children, Including 1999 Amendments to Neglect Definition in Maltreatment of Minors Reporting Act*, BULL. #99-68-15 (Nov. 30, 1999), available at <http://www.dhs.state.mn.us/FMO/LegalMgt/Bulletins/pdf/1999/99-68-15.pdf>.

458. *Id.* at 4. The interpretation reads:

A non-offending adult caretaker who takes or sustains no reasonable steps to stop violence that is likely to have a detrimental effect on the child also may be subject a maltreatment determination under this provision. County social services must carefully consider what actions a non-offending parent took, or could have been reasonably expected, to take after the assessor considers all of the known dynamics of domestic violence. The purpose of the *Maltreatment of Minors Reporting Act* is to extend protection and services to children, not to unnecessarily label parents who may be victims themselves. However, public policy requires intervention when an adult caretaker does not take reasonable action to protect a child from ongoing violence that is detrimental to the child.

Id.

adult caretaker” euphemistically refers to the battering victim. The Bulletin, therefore, expressly authorized application of the statute to hold the domestic violence victim responsible for the potential harm to the child from exposure to the violence. As noted above, the use of child maltreatment statutes to find that a battering victim failed to protect her child by remaining in a violent situation is one of the most severely-criticized dependency system responses to domestic violence.⁴⁵⁹

Professor Jeffrey Edleson⁴⁶⁰ reports that, following the law’s enactment, there were at least two incidents in which the state sought names of women with children residing at battered women’s shelters in order to report these families under the new statute.⁴⁶¹ Apparently, in Hennepin County, the most populous county in the state, computer databases used for state reimbursement of domestic violence shelter expenses were accessed, permitting identification of mothers at the shelters for the purpose of reports of child maltreatment.⁴⁶² “In another county, the shelter was called and demanded from the child protection system to turn over a list of women with children in their shelter on a regular basis.”⁴⁶³ These events are precisely the type of occurrences that some in the field feared would result from passage of statutes defining children’s exposure to domestic violence as child maltreatment, and certainly might deter women from seeking any type of voluntary domestic violence services.

Professor Edleson reports that the state experienced “a one-hundred percent increase in child maltreatment reports.”⁴⁶⁴ In an “oversight” that tolled the death knell for the statute, the legislature had not appropriated any additional funding for this statutory change.⁴⁶⁵ An analysis conducted by the Minnesota Association of Community Social Service Administrators estimated the cost to the state of implementing the legislative changes to be approximately \$31 million per year.⁴⁶⁶ The survey that led to this estimate predicted that

459. See *supra* notes 107-08 and accompanying text.

460. Jeffrey Edleson is a professor at the University of Minnesota School of Social Work, and Director of Evaluation and Research at the Domestic Abuse Project in Minneapolis, and has published extensively in the area of children exposed to domestic violence. He is the co-author, with Susan Schechter, of “The Green Book.” See *supra* note 12.

461. Edleson, Bridging Research, *supra* note 61 (transcript at 266).

462. *Id.* (transcript at 266).

463. *Id.*

464. Edleson, Bridging Research, *supra* note 61 (transcript at 242).

465. *Id.* See also memorandum from Rob Sawyer, Olmstead County Community Services, to Minn. Ass’n. of County Social Serv. Adm’rs, Domestic Violence Fiscal Note (Feb. 23, 2000).

466. Sawyer, *supra* note 465.

full implementation of the statute would likely lead to a caseload increase of approximately 500% statewide.⁴⁶⁷

The legislature repealed the statute in April 2000; the controversial definitions were expunged, effective the day after the governor signed the bill.⁴⁶⁸ In a very revealing step, the legislature also passed a new statute addressing the same subject matter.⁴⁶⁹ The new act, Section 626.5552 of the Minnesota Statutes, would go into effect on July 1, 2001, *only if* funding is authorized for its implementation.⁴⁷⁰ As of the time of this writing, no funds have been appropriated for its implementation.⁴⁷¹

Section 626.5552 is substantially different from its predecessor. It provides guidance to protective services workers and the court in determining which cases of children exposed to domestic violence to pursue by identifying certain risk factors, such as whether the child has also been victimized directly, certain "protective factors," and "whether steps are or have been taken to exclude the abuser from the home of the child or [whether] the adult victim sought protective services such as shelters, counseling, or advocacy services, legal recourse, or other remedies."⁴⁷² This revision provides domestic

467. The survey was sent to Social Service Directors in all counties in Minnesota. The respondents were asked to provide data for the annual number of domestic violence assaults and civil protective orders (subtracting duplications) in their county in the 12-month period of 1-1-98 to 12-31-98 or 7-1-98 to 6-30-99. They were to perform certain other calculations, leading to the projection of the new child maltreatment reports that child protective services would be required to screen, as a result of the new law, in a year. The annual estimate for the state was 9,101 cases. The estimated number of cases that would have been screened using the categories in place prior to the new statute were 1,812. Sawyer, *supra* note 465.

468. 2000 Minn. Sess. Law Serv. Ch. 401 (S.F. 3410) (West).

469. 2000 Minn. Sess. Law Serv. Ch. 401, § 2 (S.F. 3410) (West).

470. 2000 Minn. Sess. Law Serv. Ch. 401, § 5 (S.F. 3410) (West).

471. Email from Ann Ahlstrom, Minnesota Department of Human Services (July 17, 2001); Telephone Interview with Brent Gustafson, Analyst, Minnesota Department of Finance (July 16, 2001).

472. 2000 Minn. Sess. Law Serv. Ch. 401, § 2 (b)(1), (b)(5) (S.F. 3410) (2000). The entire Section 2 reads as follows:

- (a) A child is considered to have been exposed to domestic violence when:
 - (1) a parent or other person responsible for the care of the child engages in violent behavior that imminently or seriously endangers the child's physical or mental health;
 - (2) a parent or other person responsible for the care of the child engages in repeated domestic assault that would constitute a violation of section 609.2242, subdivision 2 or 4;
 - (3) the child has witnessed repeated incidents of domestic violence as defined in section 518B.01; or
 - (4) a parent or other person responsible for the care of the child engages in chronic and severe use of alcohol or a controlled substance that adversely affects the child's basic needs and safety.
- (b) In determining the protective action to take and the services to be

violence workers and others in the community with the discretion to refrain from reporting cases in which adult battering victims are taking steps to extricate themselves and their children from the situation.

Importantly, the definitions of children exposed to domestic violence are far narrower in the repealed statute than in its predecessor. The new definitions require that the domestic violence either "imminently or seriously endangers the child's physical or mental health," that the domestic violence be repeated, or that the child has witnessed "repeated incidents of domestic violence."⁴⁷³ Thus, the scope of the reporting law, the mandate of the Department of Human Services, and the dependency jurisdiction of the juvenile court are thereby limited to a subsample of the cases falling within the scope of the original act.

In some respects, the new statute is like a postscript to this engrossing story. Minnesota learned a lesson that can perhaps guide future states as they try to walk a treacherous tightrope, seeking a balanced approach to child protective services and juvenile court involvement in domestic violence cases. One cannot solve the problems of children who are exposed to domestic violence with a few definitional changes in the state code. There are a lot of affected children out there, and the resources of the state and its overburdened human services systems are limited. States must make considered decisions in determining in which cases to intervene. The lessons of Minnesota's experience are that the system can probably only handle the most severe cases, and that families that are *already receiving voluntary help* are poor targets for those limited resources. And finally, it all takes money. Without the dollars to pay for the

offered to the child and family when a child has been exposed to domestic violence, the local welfare agency shall consider the safety and well-being of the child and the safety of a parent who is a victim of domestic violence. In determining whether there is a need for child protective services, the local welfare agency shall take into account the presence of protective factors in the child's environment. These factors include, but are not limited to:

- (1) whether the child is or has been the victim of physical abuse, sexual abuse, or neglect as defined in section 626.556, subdivision 2;
- (2) the age of the child;
- (3) the length of time since an incident of being exposed to domestic violence;
- (4) the child's relationship to the parent and the perpetrator of domestic violence; and
- (5) whether steps are or have been taken to exclude the abuser from the home of the child or the adult victim sought protective services such as shelters, counseling, or advocacy services, legal recourse, or other remedies.

Id. (codified at MINN. STAT. ANN. § 626.5552 (West. 2001)).

473. *Id.*

anticipated expansion in caseload, a service system already strained close to the breaking point may be overwhelmed.

Despite the failure of Minnesota's legislature to fund the revised statute, the state's Department of Human Services is proceeding to implement the philosophy expressed in that legislation. Some families are diverted to an Alternative Response program, which provides for voluntary assessment and service provision programs underway in the state.⁴⁷⁴ The Department is also developing "Guidelines for Responding to the Co-occurrence of Child Maltreatment and Domestic Violence," which assert that the "preferred way to protect children in most domestic violence cases is to join with the adult victim in safety planning and to hold the abusive partner accountable."⁴⁷⁵ The Guidelines incorporate use of a range of assessment tools and intervention strategies developed in other jurisdictions or by experts in the field, thus builds on existing expertise.⁴⁷⁶ Reportedly, federal grants flowing from Violence Against Women Act funding will fund training and implementation of these Guidelines in some portions of the state.⁴⁷⁷

(3) *A Promising Start: The Alaska Experience*

The story of Alaska's statute is quite different from those of the Canadian provinces and of Minnesota. In Alaska, the Department of Health and Social Services ("the Department") had been trying to meet the needs of children exposed to domestic violence, but had experienced some frustration in the process.⁴⁷⁸ One of the roadblocks was the absence of explicit statutory grounds for juvenile court jurisdiction in these cases. For example, the Assistant Attorney General for Human Services in Alaska reported that prior to the legislation's passage, litigating these cases was an uphill battle at times.⁴⁷⁹ Cases were squeezed into other jurisdictional categories, specifically "neglect," or "substantial risk of physical injury," and the

474. Email from Ann Ahlstrom, Minnesota Department of Human Services (July 17, 2001). See *Alternative Response Program: Reaching Out to Support Families, Fact Sheet* available at: <http://www.dhs.state.mn.us/newsroom/facts/ARFact.htm>.

475. Minnesota Dep't of Human Servs., Guidelines for Responding to the Co-occurrence of Child Maltreatment and Domestic Violence 3 (June 29, 2001)(draft).

476. See *id.*

477. Telephone Interview with Sara Klise, Program Consultant, Family and Children's Services Division, Minnesota Department of Human Services (July 13, 2001). Specifically, funds available under the Rural Domestic Violence and Child Victimization Enforcement Grant Program provisions of the Violence Against Women Act will permit training and implementation of the Guidelines in the rural sectors of Minnesota, with Professor Jeffrey Edleson of the Minnesota Institute as principle investigator. *Id.*

478. Telephone Interview with Susan Wibker, Assistant Attorney General, Human Services Section, Attorney General's Office, State of Alaska (Nov. 7, 2000).

479. *Id.*

state often had to expend significant resources proving harm or risk of harm, and contesting batterers' allegations in court that "the children haven't been injured."⁴⁸⁰

In 1997, the governor of Alaska, Tony Knowles, convened a Domestic Violence Summit to study a range of issues relating to the state's responses to domestic violence.⁴⁸¹ The state brought together personnel from various concerned groups, including Alaska's Network on Domestic Violence and Sexual Assault ("Network"),⁴⁸² the Council on Domestic Violence and Sexual Assault ("Council") (an office within the state's Department of Public Safety),⁴⁸³ representatives from the Governor's and Lieutenant Governor's offices, from the Division of Family and Youth Services in Alaska's Department of Health and Social Services, from the Department of Corrections, and from the state Attorney General's office; and members of the state judiciary. The participants worked together prior to and after the Summit, and collaborated with the legislature and other state officials and personnel, hammering out a package of statutes focusing on the welfare of children exposed to domestic violence and their mothers.⁴⁸⁴

A package of legislation resulted from these efforts and became effective on September 14, 1998.⁴⁸⁵ One statute explicitly placed

480. *Id.*

481. See Press Release, Knowles Convenes Alaska's First Domestic Violence Summit: A Hundred Delegates to Review Current Law and Policies, Focus on Reducing Domestic Violence in Alaska, #97-351 (Dec. 9, 1999), available at <http://www.gov.state.ak.us/press/pr120997a.html>. See also GOVERNOR'S DOMESTIC VIOLENCE SUMMIT, REPORT TO THE PEOPLE OF ALASKA: TWENTY-SIX POINT ACTION PLAN (Dec. 9 & 10, 1997) (copy on file with the Hastings Law Journal).

482. The Network is a community-based domestic violence organization, of the type described in Saathoff & Stoffel, *supra* note 110. Alaska's Network is particularly active in lobbying, and therefore, policymaking. For a description of Network philosophy and activities, see the Network website at <http://www.dps.state.ak.us/Cdvsa/>.

483. The Council on Domestic Violence and Sexual Assault, which operates within Alaska's Department of Public Safety, is charged with providing for "planning and coordination of services to victims of domestic violence or sexual assault and to perpetrators of domestic violence and sexual assault and to provide for crisis intervention and prevention programs." ALASKA STAT. §§ 18.66.010 et seq. (2000). The Network, together with Alaska's Department of Health and Human Services, developed and promoted the legislation creating and empowering the Council.

484. See Wibker, *supra* note 478; Telephone Interview with Cindy Smith, Director of Boards and Commissions, Office of the Governor of Alaska (July 16, 2001).

485. See Protecting Child's Health and Welfare—Adoption—Foster Care, 1998 Alaska Sess. Laws Ch. 99 (H.B. 375). The legislation addressed a wide range of issues relating to the intersection of domestic violence and child protection. *Id.* Four of these statutes bear directly on the subject of this Article. See ALASKA STAT. § 47.10.011 (Michie 2000) (incorporating children exposed to domestic violence within the statutory definition of "children in need of aid," i.e., children falling within the jurisdiction of the dependency court); ALASKA STAT. § 47.17.035 (Michie 2000) (setting forth the manner in which child

certain categories of children exposed to domestic violence within the dependency jurisdiction of the juvenile court, specifically providing that:

[T]he court may find a child to be a child in need of aid if it finds by a preponderance of evidence that the child has been subjected to . . . (8) conduct by or conditions created by the parent, guardian, or custodian [that] have . . . (B) placed the child at substantial risk of mental injury as a result of . . . (ii) exposure to conduct by a household member, as defined in [pertinent Alaska domestic violence statutes] against another household member, that is a crime under [Alaska statutes criminalizing murder, assault, and sexual assault], an attempt to commit an offense [listing same statutes above]; or (iii) repeated exposure to conduct by a household member, as defined in [pertinent Alaska domestic violence statutes], against another household member that is a crime under [Alaska statutes criminalizing offenses that have not necessarily already caused physical injury, such as reckless endangerment, and stalking].⁴⁸⁶

Thus, if alleged acts of domestic violence “placed the child at substantial risk of mental injury,” *and* it fit into one of the enumerated categories of offenses cross-referenced from Alaska’s criminal statutes, the court could find the child to be dependent.⁴⁸⁷ One difference between the Alaskan and Minnesota statutes is immediately apparent. Whereas Minnesota’s first statute defined almost all instances of domestic violence as “per se” child

protective services is to handle domestic violence cases that come within its purview); ALASKA STAT. § 47.17.020 (Michie 2000) (providing an exemption for domestic violence workers from the statutory duty to report child maltreatment in certain cases of children’s exposure to domestic violence); ALASKA STAT. § 47.10.013 (Michie 2000) (providing domestic violence victims with a “defense” in dependency court against claims that they have abandoned their children if they are fleeing the home because of domestic violence). *See also* GOVERNOR’S DOMESTIC VIOLENCE SUMMIT, *supra* note 481, at 16-19, for the analysis and goals of the Children and Youth Programs focus group of the Domestic Violence Summit, recommending these and other statutory changes, and accompanying training initiatives.

The 1998 legislation represented a continuation of Alaska’s commitment to combat domestic violence and its deleterious consequences for adults and children. In 1996, the legislature passed the Domestic Violence Prevention and Victim Protection Act, which substantially increased the legal protections for adult domestic violence victims and their children under both civil and criminal law, adopting many of the provisions set forth in the Model Code proposed by the National Council of Juvenile and Family Court Judges, *supra* note 32. *See* 1996 Alaska Sess. Laws Ch. 64 (H.B. 314). The legislation defined various domestic violence crimes; set forth specific mandatory arrest duties of law enforcement personnel; expanded the scope of, and domestic violence victim’s access to, civil protective orders; addressed child custody and visitation issues in domestic violence cases; required child protective services to develop procedures for screening for domestic violence; and more. *Id.*

486. ALASKA STAT. § 47.10.011 (Michie 2000).

487. *Id.*

maltreatment, Alaska's statute limited jurisdiction to a logical subset of cases. In addition, the Alaskan statute did not require a finding that actual harm had already occurred, which is typically a required element of psychological harm in dependency cases.⁴⁸⁸

The second statute in the group passed in September of 1998 identified the philosophy and procedures intended to guide protective services' handling of domestic violence cases.⁴⁸⁹ This statute mandates that child protective services adopt the intervention approach promulgated by pioneers in the field of collaborative child protective services and domestic violence strategies.⁴⁹⁰ One year later, the National Council of Juvenile and Family Court Judges published the Green Book,⁴⁹¹ followed by the U.S. Department of Justice's Safe From the Start Initiative,⁴⁹² both of which incorporate a similar philosophy. The statute: (a) *disfavors* removal of a child from the custody of the domestic violence victim; (b) makes protection of the domestic violence *victim*, as well as the child, a departmental mandate; (c) makes clear that if *anyone* is to be removed from the home, it should be the *domestic violence offender*, not the child; and (4) requires the state to make internal changes, providing training for its child protective services workers, developing protocols guiding case assessment and intervention, and building collaborative relationships with community domestic violence agencies.⁴⁹³

488. See *supra* note 292 and accompanying text.

489. ALASKA STAT. § 47.17.035 (Michie 2000).

490. See, e.g., SCHECHTER & GANLEY, *supra* note 124; Carter & Schechter, *Child Abuse and Domestic Violence: Creating Community Partnerships*, *supra* note 124; SUSAN SCHECHTER & JEFFREY L. EDLESON, in THE BEST INTEREST OF WOMEN AND CHILDREN: A CALL FOR COLLABORATION BETWEEN CHILD WELFARE AND DOMESTIC VIOLENCE CONSTITUENCIES (1994), available at <http://www.mincava.umn.edu/papers/wingsp.htm>.

491. See THE GREEN BOOK, *supra* note 12.

492. See OJJDP, *supra* note 16.

493. The statute sets forth that:

(a) In consultation with the Council on Domestic Violence and Sexual Assault, the department shall develop written procedures for screening reports of harm for abuse and neglect of a child to assess whether there is domestic violence occurring within the family. The procedures must include the following factors:

(1) inquiry concerning the criminal records of the parents or of the alleged abusive or neglectful person or the alleged perpetrator if not the parent of the child; and
(2) inquiry concerning the existence of protective orders issued or filed . . . involving either parent as a petitioner or respondent.

(b) If the department determines in an investigation of abuse or neglect of a child that

(1) the child is in danger because of domestic violence or that the child needs protection as a result of the presence of domestic violence in the family, the department shall take appropriate steps for the protection of the child; in this paragraph, "appropriate steps" includes

A third Alaskan statute revised the state's child maltreatment reporting law so that certain mandatory reporters, specifically domestic violence and sexual assault workers, do not have a duty to report domestic violence exposure cases where there is "reasonable cause to believe that the child is in safe and appropriate care and not presently in danger of mental injury as a result of exposure to domestic violence."⁴⁹⁴ This provision thus frees shelter workers and others from the duty to report cases of childhood exposure to domestic violence in which the adult domestic violence victim is making effective use of voluntary services. In addition, the statute reserves state intervention for situations when the reporter believes the child is in present danger. This provision, like the revisions in the Minnesota statute, focuses state efforts on the most severe cases, while minimizing coercive intervention in those situations where help is already underway.

The fourth statute sets forth the criteria for a finding of *abandonment* in dependency court, and specifically exempts from

(A) reasonable efforts to protect the child and prevent the removal of the child from the parent or guardian who is not a domestic violence offender;

(B) reasonable efforts to remove the alleged domestic violence offender from the child's residence if it is determined that the child or another family or household member is in danger of domestic violence; and

(C) services to help protect the child from being placed or having unsupervised visitation with the domestic violence offender until the department determines that the offender has met conditions considered necessary by the department to protect the safety of the domestic violence victim and household members.

ALASKA STAT. § 47.17.035 (Michie 2000). The Assistant Attorney General in the Human Services Section of the Attorney General's Office in Alaska reports that protective services staff have undergone training to give them the skills to implement this mandate, and that the legislature had specifically appropriated funding for such training. Telephone Interview with Susan Wibker, Assistant Attorney General (July 13, 2001). She reported that the state's protective services agencies are complying with the policies enumerated in Section 47.17.035, and that workers typically take the "least intrusive" approach to cases, using a variety of methods to assist the domestic violence victim and her children to become safe from the abuser. *Id.* In addition, child protective services coordinates their efforts with law enforcement, so that domestic violence perpetrators are held accountable for their actions. *Id.* Removal of the child from the mother's custody is a last resort, when all else has failed, and when such removal is essential to protect the child. *Id.* Even then, however, protective services typically continues to work with the nonabusive parent, to assist her in creating safety for herself and her child. *Id.*

494. Persons required to report . . .

(h) This section does not require a person required to report child abuse or neglect under (a)(6) of this section to report mental injury to a child as a result of exposure to domestic violence so long as the person has reasonable cause to believe that the child is in safe and appropriate care and not presently in danger of mental injury as a result of exposure to domestic violence.

ALASKA STAT. § 47.17.020 (h) (Michie 2000).

liability domestic violence victims who flee for their own safety or that of their children.⁴⁹⁵ In August of 2000, the Alaska legislature took an additional step to protect children who are exposed to domestic violence. It passed a criminal statute that treats presence of a child during the perpetration of a domestic violence offense as an aggravating factor in sentencing.⁴⁹⁶

Alaska did not stop with adding the statutory language to its state codes—it has invested substantial resources in implementation as well.⁴⁹⁷ For example, it has required all new protective services workers in the Department to attend what is referred to informally as “Social Work Academy,” which covers a range of issues, with handling of domestic violence cases highly emphasized.⁴⁹⁸ Those workers already with the Department also received specialized training in working with domestic violence cases,⁴⁹⁹ as did other community professionals, including persons who are mandated to report child abuse or neglect.⁵⁰⁰ Among other things, the training stresses the importance of screening for domestic violence in all cases brought to the attention of child protective services, and of working closely with other community agencies, and provides guidance in following the steps set forth in Section 47.17.035,⁵⁰¹ which details the duties of the Department in domestic violence cases.⁵⁰² Reportedly, the training seeks to equip caseworkers to implement these statutory guidelines, emphasizing the importance of providing supportive and

495. ALASKA STAT. § 47.10.013 (b) (Michie 2000) reads, in pertinent part:

[A] parent or guardian who is a victim of domestic violence, or who has a child in the parent's or guardian's care who is the victim of domestic violence, is considered to have justifiable cause to take an action or to fail to take an action that would otherwise be considered to be abandonment of a child under [this section] if the action or failure to act is necessary to protect the parent or guardian, or a child in the care of the parent or guardian from further acts of domestic violence

Id.

496. ALASKA STAT. § 12.55.155 (c) (18) (Michie 2000):

Factors in aggravation and mitigation . . . the offense was a felony . . . (C) specified in AS 11.41 that is a crime involving domestic violence and was committed in the physical presence or hearing of a child under sixteen years of age who was, at the time of the offense, living within the residence of the victim, the residence of the perpetrator, or the residence where the crime involving domestic violence occurred

497. See Wibker, *supra* note 478; Telephone interview with Deidre O'Connor, Division of Family and Youth Services, Department of Health and Human Services, State of Alaska (Oct. 23, 2000).

498. See Wibker, *supra* note 478.

499. *Id.*; O'Connor, *supra* note 497.

500. O'Connor, *supra* note 497.

501. See *supra* note 493.

502. See *supra* notes 489-93 and accompanying text summarizing ALASKA STAT. § 47.17.035 (Michie 2000).

safety-oriented services to the nonabusing parent and child, while reserving separation of the two as a last resort when the child's safety cannot be protected in any other way.⁵⁰³

Evidence as to the efficacy of the Alaskan statutes is limited, but positive. The statutes have not been repealed, and those in the state government who drafted the statutes and promoted their passage in the legislature are cautiously optimistic about the impact thus far, and the ongoing and future implementation.⁵⁰⁴ Reportedly, with the legislature's clarification that exposure to domestic violence can create a substantial likelihood of psychological harm, with clear statutory language guiding child protective services' responses to these cases, and with the additional expertise that staff members are developing, cases involving domestic violence are now handled more expeditiously.⁵⁰⁵ Caseworkers and state attorneys report an easier time getting jurisdiction in cases of childhood exposure to domestic violence because they no longer need to convince the judge that there is a nexus between domestic violence and emotional harm in the absence of direct physical injury to the children.⁵⁰⁶ Furthermore, officials report that cases involving children's exposure to domestic violence are often identified earlier, with child protective services delivering services more efficiently and appropriately to battered women and their children.⁵⁰⁷

All parties underscore, however, that the process of change is still ongoing, that it hasn't been easy, and that challenges still remain. They emphasize that it has been important to have statutes on the books that clearly set forth the state's policies. That alone, however, was not enough to lead to the changes sought. Without training, ongoing monitoring, and continuing collaborative efforts between protective services and the domestic violence Network, the words in the statute books would not have led to palpable systemic change.⁵⁰⁸

503. See O'Connor, *supra* note 497; Smith *supra* note 484; Wibker, *supra* note 478; Follow-up Telephone Interview with Susan Wibker, Assistant Attorney General, Human Services Section, Attorney General's Office, State of Alaska Office (July 13, 2001).

504. See O'Connor, *supra* note 497; Smith *supra* note 484; Wibker, *supra* notes 478, 5023.

505. O'Connor, *supra* note 497.

506. See Wibker, *supra* notes 478, 503.

507. See Smith *supra* note 484; Wibker, *supra* notes 478, 503. Ms. Smith points out that prior to the 1998 statutory changes, there was no formal use of a domestic violence screening protocol in child protective services assessments in child maltreatment cases. Because of the high rate of co-occurrence of domestic violence and child maltreatment, see *supra* note 7, such screening is an essential component to the provision of appropriate social services to these families.

508. See O'Connor, *supra* note 497; Smith, *supra* note 484; Telephone Interview with Kari Robinson, Director, Legal Advocacy Project, Alaska Network on Domestic Violence and Sexual Assault (Aug. 10, 2001).

And, as one official suggested, it takes time for caseworkers and others to *internalize* the new policies.⁵⁰⁹

Officials wrote the legislation in a manner that they hoped would not "flood" the child protection system.⁵¹⁰ Their perceptions are that they have been successful in avoiding substantial net-widening. That is, they sought to circumscribe the reach of the new statutes to address the most serious cases of childhood exposure to domestic violence, and to permit proper classification of cases that might have been fit more awkwardly into previously-existing jurisdictional grounds.⁵¹¹ Data on reports of child maltreatment collected by the state supports their impressions. A comparison of total reports of child maltreatment for the fiscal year periods preceding and following the statute's effective date of September 1988, reveal substantial stability over time.⁵¹² There was, however, a dramatic shifting of the numbers among the various categories of child maltreatment. The mental injury category, in which domestic violence cases are now placed, experienced a 244% rise between Fiscal Years 1998 and 1999, which was balanced by concomitant drops in use of the other categories, particularly neglect (which is typically where these cases had ended up before).⁵¹³ The Fiscal Year 2000 data reveal a

509. See O'Connor, *supra* note 497.

510. See O'Connor, *supra* note 497; Smith, *supra* note 484; Wibker, *supra* note 478.

511. *Id.*

512. See ALASKA DEPT OF HEALTH & SOC. SERVS., DIVISION OF FAMILY AND YOUTH SERVICES, CHILD REPORTS OF HARM BY HARM TYPE, FISCAL YEAR 1989 THROUGH FISCAL YEAR 2001, available at <http://www.hss.state.ak.us/dfys/Stats/Graphs/chart8.gif> [hereinafter CHILD REPORTS OF HARM] (last visited October 20, 2001). The total child maltreatment cases reported in Fiscal Year 1998 was 16,405; in Fiscal Year 1999 was 16,459, in Fiscal Year 2000 was 16,421, and in Fiscal Year 2001 was 17,347. *Id.* Alaska's fiscal year runs from July 1 through June 30, with the named year being the year in which the last six months of the period occurred. Email communication from MaryAnn VandeCastle, Research Analyst, Division of Family and Youth Services, Department of Health and Human Services, State of Alaska (July 9, 2001). Therefore, Fiscal Year 1998 concluded on June 30, 1998, several months before the September 1998 effective date of the legislation. The legislation was in place for nine of the twelve months of Fiscal Year 1999, which spanned from July 1, 1998 through June 30, 1999. As the numbers cited here reveal, there was a slight decrease in total reports of child maltreatment between Fiscal Years 1999 and 2000. In Fiscal Year 2001 there was a slight increase over the Fiscal Year 1998 figures. That increase, however, was quite small, measuring only 5.7%. This figure contrasts rather dramatically to the 100% increase observed following the passage of Minnesota's statute. See *supra* note 464 and accompanying text. Note that these data tabulate only "reports" of suspected maltreatment in Alaska. They do not tell us what proportion of the cases ultimately led to findings by the juvenile court that the children were in need of the state's protection. Such data by harm category are not presently available from the state.

513. In Fiscal Year 1998, there were 378 "mental injury" cases. In 1999, there were 923. The remaining figures for 1998 and 1999 were as follows: 1998 (abandonment = 9; sexual abuse = 2,129; physical abuse = 4,145; neglect = 9,744); 1999 (abandonment = 26; sexual

continuation of this trend, with a 389% rise in the mental injury category between 1998 and 2000,⁵¹⁴ climbing to an almost 500% increase in reports in the mental injury category over 1998 levels by Fiscal Year 2001. These increases were still accompanied by concomitant drops in most of the other maltreatment categories.⁵¹⁵ Caution in interpreting these data is warranted, however, because the mental injury category also contains other psychological maltreatment subcategories, in addition to the new domestic violence ground. Given that the legislature enacted changes in the mental injury category more generally, increases in reports of maltreatment in this category may not be attributable solely to use of the new domestic violence ground. Unfortunately, the state's data collection system does not distinguish subtypes of cases within each category. Despite this, however, those working within Alaska indicate that they believe that the shifts are due, primarily, to use of the new domestic violence ground.⁵¹⁶

In addition, one appellate case⁵¹⁷ addressing the dependency jurisdictional statute has been published. The decision appears to apply the statute as intended by its drafters. In *A.H. v. Alaska*, a father disputed the superior court's determination that his children should be adjudged dependent. He argued that two specified incidents of domestic violence were insufficient to constitute "repeated exposure" to domestic violence as required by the statute. In affirming the lower court's decision, the Alaska Supreme Court emphasized that, because exposure to domestic violence "has a 'devastating impact' on children, domestic violence need not be directed toward the child or signify a significant risk of physical harm to support" a finding of dependency.⁵¹⁸ The court noted that the record revealed "[t]he children were in extreme distress... screaming and in a complete state of shock for hours after" the domestic violence incident.⁵¹⁹ This decision was unanimous.

It is interesting to compare this decision with the only other published case of its type in Alaska addressing dependency court

abuse = 1,872; physical abuse = 4,110; neglect = 9,528). See CHILD REPORTS OF HARM, *supra* note 512.

514. The Fiscal Year 2000 breakdowns by category are as follows: abandonment = 17; mental injury = 1,471; sexual abuse = 1,892; physical abuse = 3,751; neglect = 9,290. See *id.* The Fiscal Year 2001 numbers are as follows: abandonment = 17; mental injury = 1,880; sexual abuse = 1,859; physical abuse = 4,034; neglect = 9,557. *Id.*

515. Comparing the Fiscal Year 2001 figures to the 1998 category totals, all other categories remain lower, except for abandonment, which increased from 9 to 16 in these three years. *Id.*

516. O'Connor, *supra* note 497; Wibker, *supra* note 478.

517. *A.H. v. Alaska*, 10 P.3d 1156 (Alaska 2000).

518. *Id.* at 1161-62 (quoting *In re J.A.*, 962 P.2d 173, 178 (Alaska 1998)).

519. *Id.* at 1162.

jurisdiction in a case of childhood exposure to domestic violence. In *In re J.A.*, which was decided by the Alaska Supreme Court in 1998 under the pre-reform dependency jurisdictional statute, two justices dissented from the majority's holding that the exposure to domestic violence in the case constituted a sufficient basis for state intervention in the family.⁵²⁰ A comparison of the sets of facts that characterize each case suggests that the domestic violence in *A.H.* was no more severe or threatening to the children's well-being than in *In re J.A.* One might cautiously conclude that the legislature's enactment of the 1998 package of statutes accounts for the increased unanimity on the court in *A.H.* The legislature has spoken loudly and clearly regarding its intent to include these cases within the juvenile court's jurisdiction, with a communication that cannot be misunderstood or ignored by the state's courts.

Whereas these initial findings of the statutes' efficacy are promising, they are woefully inadequate bases on which to draw conclusions about the success of a legislative initiative as far-reaching as the four-statute package passed by Alaska in 1998. It is unfortunate that no systematic program evaluation is in place examining the impact of these various statutory changes.⁵²¹ The limited data described here do not tell us if these statutes are making a difference in the lives of children who are exposed to domestic violence.⁵²²

520. *In re J.A.*, 962 P.2d 173, 179 (Alaska 1998) (Compton, J., dissenting) ("Today's opinion takes an unprecedented leap forward in permitting the State to unreasonably interfere in the lives of its citizens. The court holds for the first time that, as a matter of law, when parents have a prior record of irresponsible conduct not involving their children, an isolated incident in which they place their child in danger satisfies the probable cause standard necessary for the State to petition for temporary custody under our Child in Need of Aid statute. Since I cannot agree with this approach, I dissent.").

521. See *infra* notes 619-52 and accompanying text for a discussion of the potential benefits and challenges of conducting evaluations of public policy changes.

522. It is noteworthy, however, that Alaska is a pioneer among its sister states in applying state-of-the-art principles to reform in this area. Given this, the process by which these changes were adopted can serve as a model for other jurisdictions. All participants agree that, in the early stages of the reform process, the various interested agencies, had very different perspectives on the appropriate handling of and goals for domestic violence cases involving children's exposure. Despite this, however, *all* of these groups were intimately involved in the process of developing the new policies. See O'Connor, *supra* note 497; Smith, *supra* note 484; Wibker, *supra* notes 478, 503. The parties continued to collaborate, working through their differences and finding ways to address their agendas and the issues of mutual concern. It appears that none gave up. I was told that no one "bullied" constituencies with different perspectives from their own. Smith, *supra* note 484. The emerging set of statutes reflected hard-won compromises. Given that all of the concerned groups worked to develop the policies, each had a greater stake in the policies' implementation and enforcement.

In the many interviews I conducted with participants in this process, I was struck by the respect that each accorded leaders or representatives of the other agencies,

B. Changing the System from the Inside-Out: Achieving an Effective Child Protective System Response to Domestic Violence in the Absence of Explicit Statutory Authority

In some jurisdictions, pioneering transformations in child protection system responses to childhood exposure to domestic violence have originated within a state or county Department of Social Services, and have not been accompanied by specific legislative changes. The Massachusetts Department of Social Services ("MDSS") is the best-known program of such systemic reform.⁵²³ Prompted by a tragic case⁵²⁴ in which a small child was killed, the MDSS screened their case records, finding that 33% of the open cases revealed documented domestic violence.⁵²⁵ In order to better address the needs of battered mothers and their children, the MDSS mandated domestic violence training for all new caseworkers, and hired a battered women's advocate to serve as a consultant within their program.⁵²⁶ In addition, the state provided funding to community-based domestic violence service programs, such as shelters for battered women, to increase family-based services to battered women and their children.

The state pilot-tested the program, with four case teams consulting with the advocate. The impact of her presence was evaluated at the six-month period. The evaluation revealed that 71% of the cases referred to these teams involved domestic violence, and that prior to the consultation, the presence of domestic violence had not been recognized in 50% of those families.⁵²⁷ The advocate worked collaboratively with the case teams, "interview[ing] mothers,

constituencies, or bodies. Each person was generous in crediting others for the tone of the collaborative process, for developing the policies set forth in the statutes, and for writing language that reflected the group consensus. Mutual praise was given to the Governor, the Director of Boards and Commissions in the Governor's office, various legislators, key Network leaders, the Assistant Attorney General for the Human Services Section, the Council on Domestic Violence and Sexual Assault in the state's Department of Public Safety, and the leadership in the Division of Family and Youth Services in the state's Department of Health and Human Services. Whatever the obstacles Alaska has faced, and continues to face, in meeting the needs of children exposed to domestic violence, its success thus far can be attributed to the impressive abilities of these people and organizations to work together to address challenges of mutual concern.

523. For a description of the program and its history, see Aron & Olson, *supra* note 114, Ch. IV; Whitney & Davis, *supra* note 111.

524. In this case, a child was killed by her mother's boyfriend. Whitney & Davis, *supra* note 111, at 158. Post-mortem investigation by protective services revealed that the mother had been physically abused by the boyfriend for some time prior to the child's death. *Id.* Workers wondered whether they might have been able to protect the child if they had known about the man's violence toward the mother. *Id.*

525. Whitney & Davis, *supra* note 111, at 158.

526. *Id.*

527. *Id.* at 159.

assess[ing] risk to both children and their mothers, assist[ing] with safety planning, and link[ing] families to community resources.”⁵²⁸ The tenets that guided this program both initially, and as it developed, include:⁵²⁹ (1) “The primary goal of the teams [is] to promote the safety of mothers and children within the same household”; (2) “The safety and well-being of children in domestic violence cases is usually linked to the safety and well-being of the mother”; (3) “Offenders of domestic violence must be held accountable for their actions”; (4) “No one agency can accomplish these goals alone”;⁵³⁰ and (5) “Accurate identification of the problems and appropriate service provisions can decrease risk and prevent unnecessary out-of-home placement.”⁵³¹ A subsequent evaluation revealed that cases receiving services from joint child protection and domestic violence teams closed in about one-third less time when compared with the state average.⁵³² In 1994, the program received legislative funding to begin a statewide expansion, and in 1995, the staff formalized guiding principles and guidelines in a Domestic Violence Protocol, which instructs staff in how to screen reports of child maltreatment, how to conduct investigations and family assessments, how to engage in safety and service planning, and how to refer cases in a manner that takes into consideration the role that domestic violence may be playing in perpetuating the danger to the mother and child.⁵³³ The state’s program now employs fourteen domestic violence specialists, two coordinators, a clinical supervisor, a half-time policy analyst, a batterer intervention specialist, a shelter program monitor, a training coordinator, and a director.⁵³⁴

The co-founders of the Massachusetts Domestic Violence Unit, Pamela Whitney and Lorna Davis, point out that the “Massachusetts child abuse and neglect statute . . . does not mention domestic violence as a condition for abuse and neglect. There is no legal definition of the relationship between child abuse and domestic violence.”⁵³⁵ Acknowledging that this may mean that there is variability in the extent to which domestic violence cases are referred

528. *Id.*

529. *Id.* at 160.

530. This tenet refers to the need for collaboration among child protective services, domestic violence programs, as well as other agencies such as law enforcement.

531. In the first six months of the Massachusetts program, only one child in 59 cases was placed in foster care. Whitney & Davis, *supra* note 111, at 161.

532. Whitney & Davis, *supra* note 111, at 162.

533. *Id.* at 161-62. A copy of this protocol may be obtained from the Massachusetts Department of Social Services, Domestic Violence Unit, 24 Farnsworth Street, Boston, MA 02210. This document has served as a model for other jurisdictions. See *infra* notes 570 & 596 and accompanying text.

534. *Id.* at 162.

535. *Id.* at 163.

to child protective services under mandatory reporting statutes, Whitney and Davis argue strenuously against incorporating children's exposure to domestic violence into state definitions of child abuse.⁵³⁶ Their concerns are as follows:

[B]attered women may be deterred from seeking help for fear of losing their children, and all families do not require the level of intervention provided by the child protection system.

....

The danger in opening the "front door" [i.e., including all cases in which children are exposed to domestic violence in the child protection system caseload] is that DSS is not equipped to handle the volume of cases. Many of these families could be better served at the community level, if there were a seamless system of varying supports beyond shelter and the criminal justice system. In addition, a legal and clinical mind-set must shift toward holding offenders accountable. No amount of safety planning can be successful if the offender has continued access to the family.⁵³⁷

Whitney and Davis recommend including children exposed to domestic violence in the DSS caseload only where the child meets "current definitions of child abuse and neglect," such as: when a child is hurt in a domestic violence incident; when the batterer's conduct interferes with the child's basic needs for medical care, food, and so on; or when the child meets existing statutory emotional abuse provisions.⁵³⁸

In 1993, Michigan incorporated a domestic violence component into Families First, one of the divisions of its child protective services.⁵³⁹ Families First's mandate is to prevent children's removal from the home whenever possible by providing intensive in-home intervention services. Approximately 40% of the cases handled by child protective services in Michigan are referred to this program. The domestic violence component arose out of a liaison between Michigan's Domestic Violence Prevention and Treatment Board and Child Protection Services, which had not worked together in the past, despite being housed in the same building.⁵⁴⁰ In 1993, all Families First workers were trained with a domestic violence curriculum, and the collaboration was implemented through a demonstration project linking domestic violence shelters with child protection services in fourteen counties in the state, with the state providing Families First funding to shelters. Three years later, fourteen additional counties were included.

536. *Id.*

537. *Id.* at 163-64.

538. *Id.* at 164.

539. Aron & Olson, *supra* note 114, at Ch. VI.

540. *Id.*

Michigan staff from both the “domestic violence and child welfare sides” have “tentatively” concluded that:

not every domestic violence incident presents a serious risk to children. Therefore, not every domestic violence case requires [child protection system] involvement. Instead, domestic violence and child welfare staff prefer to look at each family’s situation and make a determination. . . . One administrator stated that it would be a strategic error to expand the caseload as an initial way of dealing with domestic violence; such expansion would create an additional caseload for whom appropriate services are not readily available. The Families First/ Domestic Violence Demonstration Project has been one way of targeting resources at families more appropriately than merely expanding the definition of child abuse. In general, state administrators in Michigan felt strongly that changes in service delivery can be made most effectively through changing policy and funding priorities at the agency level rather than through legislative changes.⁵⁴¹

Although Massachusetts and Michigan are the best-known programs to incorporate domestic violence expertise into the provision of child protection services, there are other programs that also report success at altering the traditional child protection system responses to families in which there is domestic violence.⁵⁴² Federal funding for implementation of the Green Book policies and Safe Start Initiatives will allow for the development of collaborative approaches to handling domestic violence and protective services cases in over two dozen additional communities.⁵⁴³ In addition, in Minnesota, despite the legislature’s failure to fund the “newer” statute, policy change has already begun “from inside out,” with its new policies guiding protective services guidelines for domestic violence cases.⁵⁴⁴

Generally, those programs that report success in reforming child protective services policies in domestic violence cases “from inside out” are those that: work to bridge the mistrust between child protective services and domestic violence services; provide training in domestic violence for child protective services workers; provide ongoing consultation between child protection system workers and domestic violence experts; provide protocols guiding case screening and management; change departmental policies so as to focus on the safety of the nonabusive parent and child as a unit; seek to hold the batterer accountable for perpetrating the violence; provide *appropriate* services to the family members; and receive funding

541. *Id.*

542. For a discussion of programs in San Diego County, East Hawaii, and the Oregon Department of Human Services, see Aron & Olson, *supra* note 114. See generally, EMERGING PROGRAMS, *supra* note 17.

543. See *supra* notes 12 & 16, respectively.

544. See *supra* notes 469-77 and accompanying text.

adequate to carry out these endeavors. These elements appear to constitute a *necessary* precondition to effective child protective services responses to domestic violence cases. This, of course, leads to the question of whether, on balance, there is anything to be gained by changing a state's statute to explicitly authorize child protection system involvement in all or some cases of childhood exposure to domestic violence.

The founders and administrators in the Massachusetts and Michigan programs vocalized their positions on this controversial question by noting that not all children exposed to domestic violence are in need of formal child protection services and that expanding the statutory definition of child maltreatment to incorporate *all* children exposed to domestic violence would overload the system. Furthermore, these professionals argue that such expansion is not necessary, since the needs of children exposed to domestic violence and their nonabusive parent can be met through internal policy and programmatic changes, together with adequate funding. Yet, states such as Massachusetts and Michigan are exemplary; they have found ways to transform an ineffective and often harmful child protective services response into one that appears to be meeting the needs of families affected by domestic violence. Although their efforts make clear that it is possible to change the system from "inside out" without explicit statutory mandates, there may be specific advantages to clear legislative directives, and there may also be risks to legislative silence. These are explored below.

C. The Risks of Interpreting Existing Child Maltreatment Statutes to Incorporate Childhood Exposure to Domestic Violence

In Part III, I observed that the courts in some states, most notably New York and California, have decided at least a handful of cases using the "neglect" provisions of the dependency court jurisdictional statute to reach children exposed to domestic violence.⁵⁴⁵ The relatively "malleable" language of neglect provisions can stretch to accommodate cases of childhood exposure to domestic violence when child protective services involvement appears warranted. In the absence of direct physical harm to the children, and with stringent requirements in the mental injury or psychological harm category, neglect may be the only pathway that allows state intervention in some of these cases.⁵⁴⁶

In addition, there is another reason why some courts use the neglect construction as a jurisdictional ground in these cases. Sometimes, the domestic violence perpetrator is not a parent or legal

545. See *supra* notes 424-33 and accompanying text.

546. See *supra* notes 417-33 and accompanying text.

guardian of the child.⁵⁴⁷ Because the juvenile court's jurisdiction in most states "is limited to those situations in which the child's parent or legal guardian has created, or failed to protect the child from, the conditions deemed by the court to be harmful to the child, [the state may not be able to] intervene in direct response to the conduct of" domestic violence perpetrators who do not stand in a legally-recognized caregiving relationship to the child.⁵⁴⁸ Searching for a way "into" the case, courts may ground jurisdiction on claims that adult domestic violence victims, who are typically the children's mothers, have failed to protect their children from exposure to the violence.

The use of the neglect provisions to reach children exposed to domestic violence is problematic, however. Such use requires that we contort our conceptualization of these cases in order to access the "back door" to juvenile court jurisdiction that the neglect provisions provide. Specifically, the neglect category is defined by parental *omissions* (i.e., "failures" to perform certain parental duties).⁵⁴⁹ And yet, the primary dangers to children in domestic violence cases are the violent and terrorizing acts *committed* by domestic violence perpetrators. Logically, primary liability for the effects of such acts upon exposed children should rest with the perpetrators of those acts, and the statutory provisions invoked should recognize the primacy of these acts of *commission*.⁵⁵⁰ Absent appropriate statutory provisions, however, state personnel use the "open door" provided by the neglect grounds, deflecting attention and intervention *away from* the actions of the domestic violence perpetrators, diverting it *to* the alleged absence of protective action by the adult domestic violence victims.

The use of neglect provisions reconstructs legal responsibility for the impact of the domestic violence exposure on children, shifting liability from those who create the hazardous conditions to the children's primary caregivers (typically, the children's mothers) who are generally expected to protect the children from dangerous circumstances.⁵⁵¹ The practical consequences of this policy are many,

547. See, e.g., Findlater & Kelly, *supra* note 98, at 90.

548. *Id.*

549. "Neglect is the breach [of the] parental duty, at least when that breach causes or risks injury to the child. Whereas physical abuse involves overt aggression, neglect consists of omissions that are potentially or actually harmful." GOLDSTEIN, CHILD ABUSE, *supra* note 261, at 96. Through their child maltreatment statutes, states seek to enforce parental duties to provide their children with food, clothing, shelter, health care, education, and protection. *Id.*

550. Alaska's statutory revisions are exemplary in moving away from the "neglect" approach by *explicitly* authorizing dependency jurisdiction for acts of *commission* by domestic violence perpetrators that place children at "substantial risk of mental injury." ALASKA STAT. § 47.10.011(8) (Michie 2000).

551. Scores of authors have observed and discussed our society's, and thus also our legal system's, lopsided tendency to focus almost exclusively on the responsibility and

and extend beyond individual cases. As one author has noted, "the word is 'out': if you report domestic violence in your home, your children might be removed; if you are a child and you make a report,

concomitant liability for children's well-being of mothers, as contrasted with fathers. See, e.g., Mary Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 15 (1995) (referring to "an unspoken and unconscious double standard for mothers and fathers"); Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 4-5 (1995) (asserting that juvenile courts are "'mother-blaming' institutions where fathers are absent and larger social forces are virtually invisible"); Catherine McBride-Chang et al., *Mother-Blaming, Psychology and the Law*, 1 S. CAL. REV. L. & WOMEN'S STUD. 69, 75 (1992) (noting that, despite psychological research findings that reveal that mothers are not to blame for a wide range of children's behavior problems, both mothers and fathers continue to view the mothers as responsible for these problems); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 709 (1998) (citing "juvenile courts' tendency toward 'mother-blaming' and the lack of accountability of fathers in those courts"); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1441-42 (1991) (identifying how Black mothers are "scapegoated" and held responsible for many of the difficulties confronted by Black Americans); Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVS. 97, 101-02 (1988) (describing policies that hold mothers responsible for fathers' abuse of children, while identifiable fathers remain "invisible" to lawmakers and government agencies). Our society and its legal system imagine mothers to be virtually omnipotent in their maternal roles—capable of protecting their children from a broad range of potential hazards and deleterious circumstances. See Naomi Cahn, *The Power of Caretaking*, 12 YALE J. L. & FEM. 177, 203-04 (2000); McBride-Chang et al., *supra* at 71. The logical corollary of this proposition is that mothers are seen as responsible for whatever happens to their children, for their children's conduct, and for their children's functioning as adults. See McBride-Chang et al., *supra* at 69 (noting that for "hundreds of years, mothers have been treated as scapegoats for children's problems which are multi-causal and over which mothers have limited control"); Cahn, *supra* at 203-04 (noting that mothers are typically presumed responsible when their children become juvenile delinquents or murderers, go on welfare, or develop mental disorders).

Absent from traditional legal analyses is recognition of the complexities inherent in human behavior. Professor Mary Becker asserts that here is a tendency in our culture and legal policy:

to view people as *either* agents or victims, though all human beings act at various times—and sometimes even at the same time to varying degrees—as free and independent agents and as passive or reactive 'victims' behaving in conformity with requirements imposed by others. This point is particularly true for battered women, who in their own lives are often agents—coping in impressive ways under terrifying conditions—and yet also victims.

Becker, *supra* at 16. For thoughtful analysis of the complex issues surrounding the victimization-agency distinctions, see Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 59 (Martha Albertson et al. eds., 1994); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993); Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520 (1992).

you may be placed in foster care or a group home.”⁵⁵² A savvy perpetrator of domestic violence is also aware of these practices, and may warn his victim that seeking help from law enforcement or other public agencies will result in her loss of custody of her children—a result that may terrify her even more than the battering she is experiencing. Furthermore, state policies that “blame” the victim for her own battering are eerily consistent with the psychological messages that domestic violence perpetrators send explicitly and implicitly to their victims,⁵⁵³ messages that she is inadequate, incompetent, and blameworthy. The Family Violence Prevention Fund describes a scenario that illustrates the problematic interactions between battered women and protective services that have become typical in many jurisdictions:

Sarah, a young mother in a physically abusive marriage, is frightened and worried. Three months ago, her four-year-old son was hit with an ashtray thrown at her by her husband during an episode of domestic violence. Trying to protect her son from harm, she instructed him to go outside in the future when his father becomes violent, and hide in the tool shed until it is safe to come in. Child Protective Services pays her a visit when a neighbor reports seeing the child cowering shoeless in the shed one freezing winter night. Fearing she will be charged with “failure to protect” and that her son will be taken away from her, Sarah denies there is violence in her home. Given no reasonable explanation for sending the boy outside, CPS charges Sarah with child abuse.⁵⁵⁴

At the time of this writing, the U.S. District Court of New York, Eastern District, is hearing a case challenging the constitutionality of certain practices by New York City agencies and officials.⁵⁵⁵ The

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

553. Dohrn, *supra* note 551, at 8.

554. FAMILY VIOLENCE PREVENTION FUND, CHILDREN AND DOMESTIC VIOLENCE (April 16, 2001), available at <http://www.fvpf.org/kids/>.

555. *Nicholson v. Williams*, No. 00-CV-2229, 2001 WL 951716 (E.D.N.Y. 2001), *sub nom Nicholson ex rel. Barnett v. Giuliani*, 2001 WL 218936 (E.D.N.Y. Feb. 28, 2001). See also *Holding Child Protection Accountable: A Suit to Watch*, reprinted from DOMESTIC VIOLENCE REPORT, Oct./Nov. 2000, available at http://www.mcadsv.org/products/nwl/cc01_01.html. In this case, the plaintiffs allege that the children of the lead plaintiff, Sharwline Nicholson, were removed from her custody after a domestic violence incident on January 27, 1999. Fourth Amended Complaint at 13-16 (filed July 12, 2001). The complaint alleges further that: Ms. Nicholson had been assaulted by the father of one of her children in her apartment while the children slept undisturbed in another room; Ms. Nicholson's assailant had never behaved violently to her before, and did not live with her at the time of the assault; Ms. Nicholson contacted police and paramedics after he left, received treatment on the scene, and was taken to the hospital by ambulance for further treatment; prior to going to the hospital, Ms. Nicholson arranged for her children to stay with the neighbor until she was released from the hospital; several hours later, police allegedly entered the neighbor's home with their guns drawn, awakened the sleeping

plaintiffs filed this suit as a class action, alleging that New York City's protective services and police departments, and various individuals supervising and working for those departments, have violated plaintiffs' constitutional rights by applying "a policy of removing and detaining children from mothers who are victims of domestic violence without probable cause to believe that continuing in the care of their mothers presents an imminent danger to the children's life or health, without due process of law, and based on constitutionally inadequate investigations."⁵⁵⁶ The presiding judge, Judge Weinstein of the United States District Court, Eastern District of New York, recently certified two subclasses consisting of battered women and their children, characterized, in part, by the following criteria: the children have been removed from their mother's custody by the Administration for Children's Services ("ACS," i.e., New York City's child protective services department) without court order, the children have not been physically harmed, and less intrusive methods of protecting the children have not been attempted by ACS.⁵⁵⁷ In the midst of the trial,

children, and took them to the police station.; the police reportedly did not allow Ms. Nicholson to have phone or direct contact with her children, and the children were subsequently transported to the Administration for Children's Services (ACS), which took custody of them. *Id.* The children were returned to Ms. Nicholson on February 18, 1999 (that is, three weeks later), but proceedings by ACS against Ms. Nicholson continued for six more months. *Id.* at 16-17. Allegedly, Ms. Nicholson was reported to the State's Central Register of Child Abuse and Maltreatment (the child abuse hotline) by one of the police officers involved in the case for "mistreat[ing] her children by engaging in domestic violence in their presence." *Id.* at 15.

556. *Id.* at 18. The plaintiffs cite *Tenenbaum v. Williams*, 193 F.3d 581 (2d Cir. 1999), *cert denied*, 529 U.S. 1098 (2000) (holding that removing a child from a parent without a hearing violates due process if the danger to the child is not so imminent that there is not reasonably sufficient time to seek prior judicial authorization for the child's removal). A line of U.S. Supreme Court cases enunciates now well-established parental rights to a range of due process protections prior to various forms of state intervention into their relationships with their children. *See, e.g., Santosky v. Kramer*, 455 U.S. 745, 753-54, 758-59 (1982) (concluding that "a natural parent's... right to the companionship, care, custody, and management of his or her children is an interest far more precious than any property right") (quoting *Lassiter v. Department of Social Services*, 452 U.S. 18, 27 (1981) (quoting *Stanley v. Illinois*, 405 U.S. 645, 651 (1972))); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (asserting that the right to "raise one's children [has] been deemed 'essential' . . .") (citation omitted); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . ."). The analogy between the instant New York case and *Stanley* is particularly strong because in *Stanley*, the Court excoriated the state's policy of presuming that unwed fathers were unfit as a class without making individualized determinations of parental competence. 405 U.S. at 649-58.

557. *Nicholson v. Williams*, 2001 WL 951716 at *2 (2001). Specifically, the classes are defined as follows:

Subclass A shall consist of:

All persons subject to domestic violence or its threat who are custodians of children, legally or de facto, if:

ACS has issued certain new internal policies,⁵⁵⁸ apparently in response to the lawsuit. In a memorandum, ACS explicitly condemns its “historical” usage of the phrase “engaging in domestic violence” to characterize the battered women’s involvement in the circumstances that serve as the basis for the children’s removal.⁵⁵⁹ Depending upon

1. the children reside or resided in a home where battering was said to have occurred, but where the children themselves have not been physically harmed or threatened with harm, or neglected by the non-battering custodian, and where protection of the children and their best interests can be accomplished by separation of the alleged batterer from the custodian and children or by other appropriate measures without removal of the children from the non-battering custodian; and if,
2. the children are sought to be removed or were removed by the New York City Administration for Children’s Services (ACS) or other governmental agency without court order (even if removal is ultimately approved by a court), in whole or in part because the children reside in a home where battering of the custodian was said to have occurred; or
3. the custodian is named as a respondent by ACS in child protective proceedings by ACS under Article 10 of the New York Family Court Act in which removal may be sought (even if removal is ultimately approved by a court), in whole or in part because the children reside in a home where battering of the custodian was said to have occurred; or
4. the custodian is denied adequate counsel;
 - a) in proceedings required by law before ACS which may confirm or lead to removal of a child or failure to promptly return a removed child; or
 - b) in court proceedings which may confirm or lead to removal of a child or failure to promptly return a removed child.

Subclass B shall consist of:

All children who are or were in the custody of a custodian in subclass A:

1. who have been or are likely to be removed by ACS or other governmental agency since December 16, 2000; or
2. who were removed prior to December 16, 2000 and continue to be in removed status after December 16, 2000; or
3. who have not been returned to the custodian as soon as possible after December 16, 2000 pursuant to a court order, where;
 - a) ACS has no discretion to delay the child’s return; or
 - b) ACS has discretion to delay or condition the child’s return, but delay or conditions are not necessary for the protection of the child.

Id. at *2.

558. *See, e.g.*, JOSEPH CARDIERI & WILLIAM BELL, MEMORANDUM CONCERNING USE OF “ENGAGING IN DOMESTIC VIOLENCE” LANGUAGE IN LEGAL PETITIONS AND CASE RECORDS, Division of Legal Services, Administration for Children’s Services, New York City (Aug. 14, 2001) (on file with the Hastings Law Journal).

559. *Id.* The Memorandum states that the phrase “engaging in domestic violence” had “historically” been used by ACS to refer to “a battered woman . . . who has been a victim of domestic violence and has not herself engaged in or initiated an act of violence. Because this usage misstates the nature of the victim’s role in the violence and relieves the primary aggressor of his/her responsibility for the violence, the phrase ‘engaging in domestic violence’ should never be utilized in reference to a client who has simply been a victim of domestic violence.” *Id.* The Memorandum also distinguishes self-defensive

the result in this case, policies that hold domestic violence victims strictly liable for failure to protect their children from exposure to the violence may be judged unconstitutional. Yet, independent of the holding in this case, there is growing consensus among experts in the field that a policy focusing on the liability of the domestic violence victim for failing to protect her children is not an effective response to the problem.⁵⁶⁰

The Family Violence Prevention Fund presents an “alternative” response to “Sarah’s” situation, one which does not hinge its intervention on the presumed liability of the domestic violence victim for failure to protect her child:

A CPS worker is called to Sarah’s home after a neighbor alerts the agency to potential child abuse. The worker makes a strength-based assessment of the situation, instead of a deficit-based one. She asks Sarah about domestic violence, telling her CPS is “here to help.” Because Sarah has heard from her neighbors that CPS is indeed a resource that can help her with family problems, she confides in her about the abuse. Together, they discuss ways Sarah can protect herself and her kids from the batterer, explore her options, make a safety plan for her and her child, and work with partnering domestic violence and social service agencies that can support her. Her batterer is held accountable for the violence, and Sarah is not charged.⁵⁶¹

In sum, in the absence of either legislative initiatives promoting state-of-the-art policies in response to childhood exposure to domestic violence, or innovative protective services approaches like those of Massachusetts and Michigan, protective service workers and judges are likely to fall back on ineffective modes of intervention which do not appear to serve the best interests of the children involved. Alaska’s statutory revisions are exemplary in moving away from this approach by *explicitly* authorizing dependency jurisdiction for acts of *commission* by domestic violence perpetrators that place children at “substantial risk of mental injury.”⁵⁶² As such, the juvenile court jurisdictional statute appropriately authorizes interventions that seek to protect children and adult domestic violence victims from the offending adults, while providing these victims with supportive intervention.

As noted above, it is sometimes difficult for child protective services to gain jurisdiction in cases where the domestic violence perpetrators are not related to the children, even though they have an ongoing relationship with the child’s caregiver. A recent statutory

conduct by a domestic violence victim from the conduct of the primary aggressor, and specifies that self-defensive actions should not be characterized as “mutual” violence. *Id.*

560. See *supra* notes 11-16, 108-09 and accompanying text.

561. See FAMILY VIOLENCE PREVENTION FUND, *supra* note 554.

562. ALASKA STAT. § 47.10.011(8) (Michie 2000).

change in Michigan attacks this obstacle head on, by allowing juvenile court jurisdiction and protective services intervention "in cases involving nonparent adults, whether or not such adults reside in the same household as the child."⁵⁶³ Yet, even in the absence of such statutes, strict enforcement of criminal domestic violence laws, as well as the availability and enforcement of civil protective orders, also provide the state with alternative ways to deter or incapacitate the domestic violence perpetrator in some situations, if they are appropriately enforced. Creative applications of existing laws, as well as passage of provisions such as Michigan's, should obviate the need to hold the adult domestic violence victim liable in order to gain dependency jurisdiction of the case.

D. Necessary and Sufficient Components of Effective Child Protective Services Responses to Domestic Violence Cases

Explicit statutory inclusion of children exposed to domestic violence in the definition of maltreatment is highly likely to create problems such as those experienced in Minnesota if the statutory language is too broad, and if there are not contingent changes in child protective services training, expertise, protocols, philosophy, services, and funding. In addition, the Massachusetts and Michigan scenarios suggest that statutory changes are not essential components to successful handling of domestic violence cases by the child protection system. Yet, statutory reform carries with it additional benefits, *if and only if*, such changes are accompanied by internal overhauling and renovation of the child protection system approach to domestic violence cases, along the lines suggested by groups like the National Council of Juvenile and Family Court Judges,⁵⁶⁴ the American Bar Association's Center for Children and the Law,⁵⁶⁵ and as implemented in several locales around the country, such as Massachusetts and Alaska. The legislative mandate makes processing of domestic violence cases more expeditious, clarifying that the court has jurisdiction in these cases. In addition, it explicitly grounds such intervention in the acts of *commission* by domestic violence perpetrators who endanger children's psychological and physical well-being. With such statutes on the books, child protective services workers and judges don't need to find a "back door" through which

563. Findlater & Kelly, *supra* note 98, at 90 n.27 (citing 1998 Mich. Pub. Act No. 530 and 1998 Mich. Pub. Act No. 531, codified at MICH. COMP. LAWS ANN. §§ 722.622, 712A.2 et seq. (West 2001)). The Michigan statute authorizes the juvenile court to "order the nonparent adult to participate in a service plan and/or to stay away from the child, and can punish violations of the court's orders with contempt sanctions that include imprisonment." *Id.* at n.27.

564. THE GREEN BOOK, *supra* note 12.

565. AM. BAR ASS'N, *supra* note 13.

to intervene with the family. They will be less likely to seek jurisdiction under the "neglect" ground, and are thus less likely to divert attention to the purported omissions of domestic violence victims. The need to use such a back door is further reduced by statutes like Michigan's which allow the juvenile court to reach domestic violence offenders who are unrelated to the children at risk. Finally, and importantly, explicit jurisdictional statutes offer the potential of educating the public, professionals, and domestic violence perpetrators, victims, and children, as to the nonacceptability of domestic violence in our society. The experiences of the Canadian provinces, Minnesota, and Alaska, however, reveal that statutory reform must be carefully conceived. In the next Part, I set forth the components of a blueprint for statutory reform.

V. Promoting Effective Protective System Intervention on Behalf of Children Exposed to Domestic Violence: Guidelines for Statutory Reform

A state statute bringing children exposed to domestic violence within the dependency jurisdiction of the juvenile court offers the promise of interrupting the violence that places these children's well-being at risk. It clarifies the juvenile court's jurisdiction, and offers the hope of protection and of remedial services. It sends a message to society-at-large, including domestic violence perpetrators, that exposing a child to domestic violence is not acceptable parental conduct. It underscores that the battering victim is not the only person harmed by domestic violence, and that even in the absence of physical scars, children's psychological well-being may be seriously compromised.

But, as the stories of the Canadian provinces and Minnesota reveal, a statute that merely expands the state's definitions of child maltreatment to include childhood exposure to domestic violence, without more, is unlikely to have the anticipated benefits, and may lead to unintended negative consequences. In order to maximize the chances of an effective child protective services response to domestic violence cases, such expansion must be part of a comprehensive scheme of policy reform. Several elements appear critical to successful reform: (1) clarifying the mandate (identifying which cases are the target of intervention; delineating the philosophy and principles of intervention); (2) developing an institutional capacity to respond to these cases (adopting protocols and policies for case screening and management; providing staff training; building appropriate collaborative relationships with other community agencies; developing appropriate services or relationships with agencies capable of delivering appropriate services); (3) coordinating

changes in maltreatment statutes with other pertinent statutes (e.g., criminal, child custody); (4) allocating adequate funds for capacity-building and ongoing implementation; and (5) designing and funding careful evaluation of the statute's effects.

A. Clarify the Mandate and Craft Statutory Language Accordingly

The legislature must identify *which* families are the target of state intervention, and must articulate a guiding philosophy and specific principles of intervention.

(1) Define the Target Families

Minnesota's experience argues against statutory language so broad that it brings within its reach virtually every conceivable case of domestic violence. There is tremendous variability in domestic violence cases and the risks they present to children. Defining exposure to domestic violence as "per se" child maltreatment is likely to overload the system and bring into protective services' reach many families for whom state intervention is neither needed or appropriate. In addition, constitutional considerations require minimizing state intervention in families where such intervention is not essential to protecting the children's welfare.⁵⁶⁶

Legislatures must focus state efforts on those cases where the risks to the children are most serious. If a child is already evidencing psychological symptoms that appear related to violence in the household, or if the nature of the violence and its context seem highly likely to cause psychological distress or dysfunctional behavior, a child protective services investigation may be appropriate. Alaska requires that the domestic violence in question "place[] the child at *substantial* risk of mental injury."⁵⁶⁷ Minnesota's revised statute limits intervention to those situations where the violent behavior "imminently or seriously endangers the child's physical or mental health."⁵⁶⁸

One may argue that judgments as to which domestic violence situations are serious enough to warrant state intervention are fraught with subjectivity and uncertainty. It is true that the elusive concept of the best interests of the child is often indeterminate, sometimes

566. See *supra* notes 267-72 and accompanying text.

567. ALASKA STAT. § 47.10.011(8)(B) (Michie 2000) (emphasis added).

568. MINN. STAT. § 626.5552 (2000). Criteria for assessing the impact of domestic violence on children are set forth in some of the protocols and training materials that have been developed by various professionals and localities. See, e.g., A NATIONAL CURRICULUM, *supra* note 124, at 230 (instructing interviewers to inquire about specific aspects of the children's physical and emotional health, social functioning, and the ways in which the domestic violence perpetrator and adult domestic violence victim are parenting the children).

requiring substantial speculation on the part of those empowered by law to make decisions about a child's welfare.⁵⁶⁹ We can, however, strive to *guide* those decisions, by setting forth standards and procedures for caseworkers and judges. Several jurisdictions have developed regulations, internal departmental policies, or screening and intervention protocols in order to provide such guidance to protective services workers.⁵⁷⁰ These protocols assist workers in assessing factors such as the potential impact of a particular domestic violence situation on a child, or the possible lethality of that situation. Professor Jeffrey Edleson lists certain criteria that may be pertinent, such as: "the presence of weapons; the proximity or actions of the child in violent situations; the presence of an alcohol or drug abusing caregiver; the history of the abusive partner including repeated or severe violence in the home."⁵⁷¹ He notes further, however, that:

569. See Mnookin, *supra* note 38, at 255-56, 261-64.

570. Such departmental policies, developed in Massachusetts, Michigan, and other jurisdictions have served as the guideposts to the field in outlining what considerations protective services personnel should evaluate in deciding whether and how to intervene. See *supra* notes 523-44 and accompanying text. For examples of such protocols, see, e.g., AMERICAN HUMANE ASSOCIATION, LINKING A RESPONSE: PROTOCOLS FOR A COLLABORATIVE APPROACH TO CHILD ABUSE AND DOMESTIC VIOLENCE (1997), available from American Humane Association, 303-792-9900; ARTEMIS CENTER FOR ALTERNATIVES TO DOMESTIC VIOLENCE, DOMESTIC VIOLENCE PROTOCOL: A GUIDE FOR CHILD PROTECTIVE SERVICE WORKERS AND DOMESTIC VIOLENCE ADVOCATES (1996), available from National Council of Juvenile and Family Court Judges, University of Nevada—Reno, P.O. Box 8970, Reno NV 89057 [hereinafter ARTEMIS CENTER GUIDE]; MASSACHUSETTS DEP'T OF SOC. SERVS., DOMESTIC VIOLENCE PROTOCOL FOR CPS (Feb. 13, 1995), available from Domestic Violence Unit, Massachusetts Department of Social Services, 24 Farnsworth Street, Boston, MA 02210; MINNESOTA DEPARTMENT OF HUMAN SERVICES, GUIDELINES FOR RESPONDING TO THE CO-OCCURRENCE OF CHILD MALTREATMENT AND DOMESTIC VIOLENCE (draft) (June 29, 2001).

571. Edleson, Is Exposure Maltreatment?, *supra* note 98, manuscript at 24. See also A NATIONAL CURRICULUM, *supra* note 124, at 236, listing the following "Criteria to Consider in Determining High Risk to Children in CPS Domestic Violence Cases":

In determining high risk and the need for immediate response, workers should consider the following as additional risk factors where domestic violence is present:

1. Domestic violence related injuries to an adult or child.
2. Severe or frequent domestic violence assaults or escalation of severity and frequency.
3. Display or use of weapons during domestic violence assault.
4. Perpetrator's threats to kill or seriously harm himself or others.
5. Perpetrator stalking of adult victim and/or children.
6. Menacing conduct of domestic violence perpetrator and risk to child of being assaulted or snatched.
7. Substance abuse problem in the family.
8. Non-abusive parent forced to flee and leave children with perpetrator or non-abusing parent and children have fled, without a place to go.
9. Adult victim unable to care for child due to the trauma of a recent assault or to

“What are badly needed in this field are empirical and practice-based criteria for deciding whether or not a child is at . . . heightened risk of harm [in domestic violence situations]. These criteria, once established, must be developed into effective and psychometrically tested screening and assessment instruments for use in the field.”⁵⁷² Increasingly, researchers are conducting such research,⁵⁷³ but substantially more work is needed.

When drafting a statute that incorporates children’s exposure into definitions of maltreatment, it is also important to clarify what is meant by “domestic violence.” A focus on the most serious cases might best be accomplished by limiting the statute’s reach to incidents which also constitute conduct proscribed by the state’s criminal statutes.⁵⁷⁴ A statute might specify that a single exposure to more serious domestic violence offenses, such as murder, attempted murder, aggravated assault, or sexual assault, is sufficient to trigger child protective services involvement, whereas *repeated* exposure is necessary in order to trigger such involvement in lesser assault crimes, or for conduct that has not resulted in physical injury.⁵⁷⁵

Finally, cases that are already receiving voluntary services from child protective services,⁵⁷⁶ domestic violence agencies, or other providers, can be excluded from the statute’s reach, unless there are circumstances that cause workers to believe that the child remains in danger.⁵⁷⁷ Exempting these families also addresses the complicated problem raised by the reach of mandatory reporting laws that would otherwise require domestic violence workers to report their clients who have children. Whereas domestic violence workers may still be obligated to report some of these families, workers will be permitted

the trauma from a series of multiple incidents.

10. Risk increases when the perpetrator has ongoing access to adult victim and/or children.

572. Edleson, *Is Exposure Maltreatment?*, *supra* note 98, manuscript at 25-26.

573. *See, e.g.,* Jouriles et al., *Knives, Guns*, *supra* note 369 and accompanying text.

574. *See supra* notes 436-38 and accompanying text.

575. *See, e.g.,* Alaska’s juvenile court jurisdictional statute, in permitting jurisdiction in cases involving a single exposure to domestic violence crimes such as murder, sexual assault, and certain other assaults, but requiring “repeated” exposure for offenses that have not necessarily caused physical injury as yet, such as reckless endangerment, and stalking. ALASKA STAT. § 47.10.011 (Michie 2000).

576. It is not uncommon for child protective services to provide “voluntary” services to families who come to its attention through reports of suspected child abuse or neglect. In these cases, the family’s cooperation obviates the need to proceed through the more coercive route of a dependency adjudication. As child protective services interventions in domestic violence cases become more “victim-friendly,” serving the domestic violence victim’s needs as well as the child’s, it may be increasingly common for victims to seek or acquiesce to such services.

577. *See* ALASKA STAT. § 47.17.020(h).

to exercise their professional judgment in determining which situations warrant such action.

(2) *Delineate the Philosophy and Principles of Intervention*

There is little empirical work systematically comparing the effects of different types of child protective services intervention with domestic violence cases.⁵⁷⁸ In recent years, initial empirical studies have demonstrated that interventions targeting the adult domestic violence victim's safety and functioning can achieve positive results for that victim.⁵⁷⁹ Some studies have also examined the children's functioning, and have shown that improvements in the children's well-being are also observed following these interventions.⁵⁸⁰ The literature is replete with anecdotal reports about the relative success of child protective services' interventions that promote the domestic violence victim's safety and well-being. Although these newer approaches have not been subjected to rigorous scientific scrutiny, there is enough evidence for their efficacy to justify their implementation in concert with careful and ongoing evaluation of their impact.⁵⁸¹ In addition, the community-based emphasis of these approaches complements the neighborhood-based approach proposed by the U.S. Advisory Board on Child Abuse and Neglect.⁵⁸²

Key national agencies have taken the position that the well-being of children who have been exposed to domestic violence is inextricably linked with the well-being of the parent who is the domestic violence victim.⁵⁸³ Some in the field assert that the absence of the domestic violence victim's safety and stability, it is unlikely that children can begin to recover from their traumatic experiences.⁵⁸⁴ The child protective system must adopt, as its mandate, the goal of

- 578. In fact, there is little empirical work addressing the efficacy of protective services interventions more generally. See *infra* notes 619-51 and accompanying text.

579. See, e.g., Cris M. Sullivan & Deborah I. Bybee, *Reducing Violence Using Community-Based Advocacy for Women with Abusive Partners*, 67 J. CONSULTING & COMMUNITY PSYCHOL. 43 (1999) [hereinafter Sullivan & Bybee, *Reducing Violence*].

580. See, e.g., Ernest N. Jouriles et al., *Breaking the Cycle of Violence: Helping Families Departing from Battered Women's Shelters* [hereinafter Jouriles et al., *Breaking the Cycle*], in CHILDREN EXPOSED TO MARITAL VIOLENCE, *supra* note 140, at 337.

581. Based on the informed experiences of a broad range of experts who have worked with children exposed to domestic violence, virtually every national organization and agency addressing these issues promotes these new approaches. See *supra* notes 11-16 and accompanying text.

582. See *supra* notes 243-45, 252 and accompanying text

583. See, e.g., OFFICE OF JUVENILE JUSTICE & DELINQUENCY PREVENTION, OFFICE OF JUSTICE PROGRAMS, DEPARTMENT OF JUSTICE, *SAFE FROM THE START: TAKING ACTION ON CHILDREN EXPOSED TO VIOLENCE* (2000), available at http://ncjrs.org/html/ojjdp/summary_safefromstart/chap3.html#d.

584. See, e.g., Groves, *supra* note 73, at 126.

assisting the adult domestic violence victim to protect herself and her children, and it must take an *active* role in preventing the domestic violence perpetrator from continuing his abuse. In some instances, the child protective system alone will be unable to provide adequate protection for the adult domestic violence victim and her children, in which case the appropriate community agencies, such as law enforcement, must intervene as well, in order to stop the violence.⁵⁸⁵ At the same time, the adult victim and child must receive a range of services that promote their immediate and long-term safety, and that help the adult victim function independently from her batterer.

Research has also revealed that the child's relationship with the nonabusive parent plays a critical role in that child's psychological well-being.⁵⁸⁶ A strong, positive relationship between the child and the nonabusive parent can promote and mediate the child's ability to cope with and recover from the exposures to violence. For these reasons, removal of a child from the custody of the domestic violence victim should be reserved for the small segment of cases in which such a response is the only way to protect the child from imminent harm.⁵⁸⁷ If it is necessary to remove anyone from the home to protect the child from harm, the domestic violence *perpetrator* should be removed, not the child.⁵⁸⁸

When the domestic violence victim's emotional functioning is impaired by her own fear, depression, anxiety, and other reactions to the violence, her parenting capacity may be impaired as well.⁵⁸⁹ At worst, the psychological toll of the abuse may interfere with her emotional or physical ability to meet her children's day-to-day needs. She may resort to substance abuse, and her own interactions with her children may rise to the level that would justify child protective services intervention. And, even the most highly-functioning victims may not be able to provide their children with certainty that they, and she, will be safe from the batterer. Whereas there clearly may be situations in which a protective services agency must use the neglect ground to proceed against a domestic violence victim for failures to

585. These approaches call for a community-wide collaboration among the various agencies and professions involved, including, child protection, domestic violence agencies, law enforcement and probation, health and mental health professionals, and courts addressing criminal, dependency, and custody issues, as well as civil protection orders. See, e.g., THE GREEN BOOK, *supra* note 12, at 28-31, 76-79, 103.

586. See, e.g., Osofsky, *supra* note 134.

587. See *supra* note 124 and accompanying text.

588. In order to accomplish this goal, the juvenile court can issue civil protective orders to restrain the abuser from approaching the house, the domestic violence victim, or the child. See *supra* notes 261-62 and accompanying text. In addition, an effective criminal justice system response can also incapacitate the offender.

589. *Id.* at 41; Levendosky & Graham-Bermann, *supra* note 371, at 27-28.

protect the child,⁵⁹⁰ these situations are far less frequent than agency practices suggest. More frequently, state intervention to protect and support adult victims and children together, and to promote their positive functioning, will create the most promising short- and long-term prospects for both. The information available regarding the efficacy of various state approaches to protecting children from domestic violence through the use of child maltreatment statutes reviewed above,⁵⁹¹ albeit limited, supports the philosophy and principles summarized here. Alaska's package of statutes, which embodies that philosophy and those principles, has proven the most "successful" among those reforms passed in the last several years.⁵⁹²

B. Develop An Institutional Capacity to Respond to Domestic Violence Cases

In addition to drafting an appropriately-narrow statute and articulating a guiding philosophy and principles of intervention, states must build the *capacity* to respond appropriately in order to implement the legislature's vision.⁵⁹³ Four primary steps are essential to building an institutional capacity within departments of social services to respond to cases involving domestic violence. Jurisdictions must: (1) adopt protocols and policies for case screening and management; (2) insure that child protection system staff have adequate expertise; (3) build collaborative relationships with other community agencies; and (4) develop appropriate services and referral sources.

The fiasco which resulted from the attempted implementation of Minnesota's 1999 statute⁵⁹⁴ cautions us not to expand statutory definitions of child maltreatment without first building an adequate capacity to respond appropriately to these cases. The development of an institutional capacity within the child protection system should *precede* the effective date of new statutory definitions of child maltreatment. Ideally, states should *stagger* the phases of implementation, providing for adequate time and resources to prepare the child protection system for its new mandate.

590. For a discussion of such instances, see Lyon, *supra* note 140, at 258.

591. See *supra* notes 504-44 and accompanying text.

592. Although, as noted below, formal evaluation has not been conducted to substantiate initial impressions that the Alaska statutes are achieving their goals. See *supra* notes 504-22 and accompanying text.

593. THE GREEN BOOK, *supra* note 12, at 38-41.

594. See *supra* notes 460-67 and accompanying text.

(1) *Adopt Protocols and Policies for Case Screening and Management*

Pioneering professionals, policymakers, and scholars have paved the way for jurisdictions that seek to improve their child protection system response to domestic violence. Numerous documents, providing step-by-step guidance, are available,⁵⁹⁵ including protocols developed for child protection system use in assessing and managing domestic violence cases.⁵⁹⁶

(2) *Acquire Adequate Expertise*

Mandatory training for all child protection system workers in the assessment, handling, and understanding of domestic violence cases can create the foundation for more effective intervention. In addition to intra-agency training, such as the "Social Work Academy" implemented by Alaska's social service department, "cross-training" models offer complementary approaches.⁵⁹⁷ Cross-training programs bring together professionals from the various disciplines and agencies that come into contact with exposed children (such as child protection workers, domestic violence workers, law enforcement personnel, health and mental health care providers, educators, and others). These professionals share expertise, perspectives, and information, while learning about each other's agencies. "Cross-training results in the personnel in each agency understanding the other agencies' mandates, roles, and strengths . . ." and allows agency staff to begin to overcome the mistrust and misunderstandings that may have plagued interagency relationships and communications in the past.⁵⁹⁸ As such, it can help participants bridge philosophical differences and disparate intervention models.

595. See, e.g., Carter & Schechter, *Child Abuse and Domestic Violence: Creating Community Partnerships*, *supra* note 124; JEFFREY L. EDLESON & SANDRA K. BEEMAN, RESPONDING TO THE CO-OCCURRENCE OF CHILD MALTREATMENT AND ADULT DOMESTIC VIOLENCE IN HENNEPIN COUNTY, THE LINK RESEARCH PROJECT, available at <http://www.mincava.umn.edu/link/finrport.asp>.

596. See, e.g., ARTEMIS CENTER GUIDE, *supra* note 570; MASSACHUSETTS DEP'T OF SOC. SERVS., DOMESTIC VIOLENCE PROTOCOL FOR CPS (Feb. 13, 1995), available from Domestic Violence Unit, Massachusetts Department of Social Services, 24 Farnsworth Street, Boston, MA 02210).

597. Recommendation 11 of the Green Book states: "Every community must cross-train its child welfare, domestic violence and juvenile court system personnel . . ." THE GREEN BOOK, *supra* note 12, at 39.

598. *Id.* In 1998, one program, co-sponsored by Boston Medical Center and the Massachusetts Attorney General's Office, brought together over 2,200 professionals, from a variety of professions and agencies, in 11 regional conferences throughout Massachusetts. See Saathoff & Stoffel, *supra* note 110, at 109 n.60 (citing CHILD WITNESS TO DOMESTIC VIOLENCE PROJECT, WORKING TOGETHER FOR CHILDREN WHO WITNESS DOMESTIC VIOLENCE: 1998 REPORT (unpublished report available from Office of the Attorney General, Commonwealth of Massachusetts, 617-727-2200)).

As Massachusetts, Michigan, and other jurisdictions have demonstrated, the opportunity to consult regularly with experienced domestic violence workers can also foster a more effective child protection system response in domestic violence cases. Thus, "acquiring adequate expertise" may require that an agency go beyond training its own staff, and hire or build consulting relationships with professionals whose expertise complements and balances the agencies' practices and approaches.

(3) *Build Interagency Collaboration*

In the handling of domestic violence cases involving children, the left and right hands are frequently unaware of what the other is doing, and may even be working at cross purposes. Interagency collaboration is critical if agencies are to respond and manage domestic violence cases involving children effectively:

Families affected by domestic violence touch all service systems and live in every community. Children exposed to domestic violence are in our schools, day-care centers, health care institutions, child welfare systems, and other agency settings. Law enforcement personnel have contact with children exposed to domestic violence through on-site police responses to domestic violence calls. Virtually every branch of our court system handles cases involving domestic violence.⁵⁹⁹

Interagency collaboration can be promoted by the development of effective communication and information-sharing policies regarding cases that other agencies should know about.⁶⁰⁰ Furthermore, each agency must develop procedures for cross-referring clients to other agencies as needed.

(4) *Expand and Support Appropriate Services and/or Referral Networks*

The traditional range of services available to a child protection system does not include many of the resources necessary to respond effectively to domestic violence. Domestic violence victims and their children need a place of safety where they can reside until the threat of further violence subsides or is neutralized by legal system or other intervention. Domestic violence shelters have served this function for battering victims and their children.⁶⁰¹ And yet, the availability of shelter beds is woefully inadequate to meet the needs of those families who seek them.⁶⁰² Shelter stays are crisis-oriented and brief,

599. Carter et al., *supra* note 2, at 4.

600. See, e.g., EMERGING PROGRAMS, *supra* note 17, at 89-91 (describing the San Diego Family Violence Project).

601. Saathoff and Stoffel, *supra* note 110, at 99-100.

602. See, e.g., Stacey B. Plichta, *Identifying Characteristics of Programs for Battered Women*, Presentation at the Commonwealth Fund Commission on Women's Health

often limited to thirty to sixty days. Victims require a range of services to help them survive in the community such as "safety planning," vocational counseling and training, transitional housing, medical and mental health care, assistance in promoting their children's adjustment to school and the community, and legal services to assist them, for example, in obtaining civil protective orders and public financial assistance,⁶⁰³ in addressing divorce and child custody issues, and so on. Child protection workers must have access to referral networks in which these families' needs can be met. Legislatures must recognize that child protection system involvement will be futile if the types of services needed to assist these families are not adequately funded.⁶⁰⁴

C. Create a Comprehensive State-Wide Response to Domestic Violence by Coordinating Changes in Child Maltreatment Statutes with Other Policies

In any given state, statutes that address domestic violence can work together powerfully to address children's exposure. As I noted in Part I of this Article, state legislatures have enacted several types of statutes aimed at protecting children from domestic violence.⁶⁰⁵ Some statutes address children's best interests in private custody disputes between parents,⁶⁰⁶ whereas others require the criminal justice system to focus on the presence of children during the commission of domestic violence offenses.⁶⁰⁷ States must also aggressively enforce pre-existing criminal statutes prohibiting

Symposium: Domestic Violence and Women's Health: Broadening the Conversation, New York, N.Y., Sept. 20, 1995, summarized in ADDRESSING DOMESTIC VIOLENCE AND ITS CONSEQUENCES: POLICY REPORT OF THE COMMONWEALTH FUND COMMISSION ON WOMEN'S HEALTH, Feb. 1998, at 45-47.

603. Research data reveals that women who are victims of domestic violence are substantially more likely than non-victims to need public assistance. Raphael & Tolman, *supra* note 135; Jody Raphael, *Domestic Violence and Welfare Receipt: Toward a New Feminist Theory of Welfare Dependency*, 19 HARV. WOMEN'S L.J. 201 (1996). Recognizing that women who are domestic violence victims are typically less able to obtain employment within the time constraints set forth by recent welfare reform policies, many jurisdictions have adopted a form of the Wellstone/Murray Amendment, which exempts domestic violence victims from some of these constraints. 42 U.S.C. §602 (1997). For a discussion of the issues relating to availability of welfare assistance for victims of domestic violence, see *Domestic Violence and Welfare Receipt*, 4 WELFARE REFORM NETWORK NEWS (rev. Apr. 11, 1997) (Mar. 31, 1997), available at <http://www.iwpr.org/wrnn4.htm>. Prospective recipients must apply for public benefits and exemptions available to domestic violence victims, however, and are likely to require legal assistance to learn about and benefit from policies specific to domestic violence victims.

604. See *infra* note 618 and accompanying text.

605. See *supra* notes 29-97 and accompanying text.

606. See *supra* notes 29-47 and accompanying text.

607. See *supra* notes 48-66 and accompanying text.

domestic violence.⁶⁰⁸ There are circumstances in which the only way to protect the child and domestic violence victim is to incarcerate the offender. In many situations, the interventions of the child protective system may not provide as effective deterrence as would a swift, certain, and strong response from the criminal justice system. And finally, coordinated, consistent responses from the criminal justice system and child protective system strengthen the educative value of these policies.⁶⁰⁹ Sending a clear message as to society's unwillingness to tolerate this conduct requires that one system not undercut the policy positions of the other by failing to take action against violent conduct within families.

Not surprisingly, effective responses to children's needs in the family court and criminal justice systems, like effective responses by the child protection system, require more than just appropriate statutory language. Staff must receive training that helps them understand the dangers to children posed by domestic violence and to assess and intervene in these situations to appropriately. As noted above, when a domestic violence victim leaves her abuser, she increases her risk of serious, and perhaps also lethal, assault, and domestic violence perpetrators may threaten to take the children through legal or illegal means.⁶¹⁰ Family court judges and mediators must recognize that it is often not in the interests of the children and their nonabusive caregivers to order or allow a domestic violence perpetrator to have unsupervised visitation with his child, since doing so presents him with frequent access to the adult victim and her children. In response, some agencies have developed "visitation centers," secure locations in which supervised visitation can occur between children and noncustodial parents, without requiring that victims and perpetrators have contact.⁶¹¹ In addition, police officers can play critical roles in promoting the well-being of children exposed

608. Some of the criminal justice system responses comprising such enforcement include: mandatory arrest of domestic violence perpetrators, *see e.g.*, Machaela M. Hootor, *Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California*, 85 CAL. L. REV. 643 (1997); mandatory prosecution of perpetrators and sometimes also mandatory victim participation in prosecutions, *see, e.g.*, Hanna, *No Right to Choose*, *supra* note 135, at 1849; use of traditional criminal penalties rather than "treatment" approaches in sentencing offenders, *see, e.g.*, Hanna, *The Paradox of Hope*, *supra* note 256, at 1505; and use of newer criminal statutes that permit early intervention in domestic violence cases, *see, e.g.*, Laurie Salame, *A National Survey of Stalking Laws: A Legislative Trend Comes to the Aid of Domestic Violence Victims and Others*, 27 SUFFOLK U. L. REV. 67 (1993). *See generally* EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE (2d ed. 1996).

609. *See supra* notes 147-50 and accompanying text.

610. *See supra* note 33 and accompanying text.

611. *See, e.g.*, EMERGING PROGRAMS, *supra* note 17, at 159-63 (discussing the Parents and Children Together Visitation Center).

to domestic violence. As the first ones to the scene of a violent incident, these professionals have a unique opportunity to assist affected children with their emotional needs. In one innovative program, the New Haven Department of Police Service and the Yale University Child Study Center collaborate in responding to domestic violence calls involving children.⁶¹² Police receive training from child development and mental health specialists to assist them in meeting the immediate needs of children on the scene. University personnel are on-call around the clock to consult with police, or to travel to the scene or the police station, to provide crisis intervention services to the children, as well as referrals for ongoing mental health services.

A statewide response to childhood exposure to domestic violence must address the problems of coordination among the various legal institutions encountering affected families. It is not uncommon for these families to have contact with all of the following: the criminal justice system, the child protection system, a different civil court issuing a civil protective order, and a family court adjudicating the private custody dispute.⁶¹³ Often, there is no formal mechanism promoting communication and coordination among these systems. Professionals in each system often operate in a vacuum, unaware of other legal proceedings, duplicating investigative work, and sometimes issuing inconsistent or conflicting orders.⁶¹⁴

In response, several types of programs have been developed.⁶¹⁵ The National Council of Juvenile and Family Court Judges has recommended that cases be assigned a domestic violence coordinator, who is specifically assigned to monitor the various legal proceedings relating to a particular family, "bridg[ing] these various systems . . . streamlining procedures[,] insuring adequate victim assistance[,] consolidating and/or coordinating court processes and case information[,] and serving as a liaison with law enforcement, treatment services, [protective services], victims assistance, advocates,

612. *Id.* at 119-23.

613. NAT'L COUNCIL OF JUVENILE & FAMILY COURT JUDGES, FAMILY VIOLENCE: IMPROVING COURT PRACTICE 39 (1990) [hereinafter IMPROVING COURT PRACTICE]; Carter, et al., *supra* note 2, at 10.

614. Thus, for example, a family court judge might require a parent who is a domestic violence victim to comply with permitting her ex-spouse visitation, with exchanges to occur at her home, while another court has already issued a civil protection order preventing the domestic violence perpetrator from approaching her residence.

615. See, e.g., ALASKA STAT. § 47.17.035 (Michie 2000) (requiring protective services to search for criminal records and protective orders that pertain to adult domestic violence victims and perpetrators). In one innovative program, the San Diego Family Violence Project pools the resources of the San Diego Children's Services Bureau (the child protective services agency) and the San Diego County Probation Department. EMERGING PROGRAMS, *supra* note 17, at 89-92.

probation departments, and other relevant agencies.”⁶¹⁶ Other jurisdictions are experimenting with specialized domestic violence courts, in which the various legal claims and disputes are consolidated.⁶¹⁷ There are many different models that can promote such coordination. What is critical, however, is that state legislatures recognize the problems, and devote attention to developing a response that best meets the needs of its legal system and its populace.

D. Allocate Adequate Funds to Pay for Capacity-Building and Ongoing Implementation

Although it might seem obvious that programs such as those described above require funding, it was not so clear to certain legislatures.⁶¹⁸ Costs will be the expenses incurred in training professionals, and adding staff with particular types of expertise. In addition, if the statutes in question expand the juvenile court’s jurisdiction by including cases that might not have been processed previously, the department’s budget must accommodate those increases. Clearly, the financial costs of these programs must be evaluated, together with the effects that these policy changes have for the children involved, the larger community, and the functioning of the legal system.

E. Incorporate and Fund an Evaluation Component

Program evaluation is something that everyone endorses. No one disagrees that program evaluation is important and that we need more of it. Unfortunately, however, often “lip service” is all that policymakers, administrators, practitioners, and others are willing to commit to carefully-designed and conducted evaluation research. Evaluation components are omitted from most policy reform

616. IMPROVING COURT PRACTICE, *supra* note 613, at 39 (recommendation C.7: “Every court system should employ a family violence coordinator”).

617. See, e.g., CENTER FOR COURT INNOVATION, DOMESTIC VIOLENCE COURT TECHNOLOGY APPLICATION (2000) (describing the use of innovative technologies in the Brooklyn Felony Domestic Violence Court and the Bronx Misdemeanor Domestic Violence Court, in New York City); Eve Buzawa et al., *The Response to Domestic Violence in a Model Court: Some Initial Findings and Implications*, 16 BEHAV. SCI. & L. 185 (1998) (evaluating the efficacy of a domestic violence court in Quincy, Massachusetts); The Honorable Randal B. Fritzler & Lenore M.J. Simon, *The Development of a Specialized Domestic Violence Court in Vancouver, Washington Utilizing Innovative Judicial Paradigms*, 69 UMKC L. REV. 139 (2000). See also SANFORD N. KATZ & JEFFREY A. KUHN, RECOMMENDATIONS FOR A MODEL FAMILY COURT: A REPORT FROM THE NATIONAL FAMILY COURT SYMPOSIUM (1991) (discussing the concept of unified family courts more generally, and providing recommendations under the auspices of the National Council of Juvenile and Family Court Judges).

618. See *supra* notes 464-68 and accompanying text.

packages. Presently, there is very little systematic evaluation of the statutory changes described in this Article, and the various innovative programs and approaches described here.⁶¹⁹

Knowledge that a statute hasn't been repealed and that the department of social services hasn't been flooded with cases to the point of paralysis constitute inadequate bases on which to make policy decisions. It is important to know that implementation of the statute hasn't or won't bankrupt the state's budget, and that officials in the state administration or personnel on the front lines feel the law is having its intended effects. Yet, this type of information is still not enough on which to evaluate the success of the reform. Case law may tell us if a statute is being applied as intended, but it doesn't tell us very much about how the people whose lives were supposed to be bettered by the law's enactment are faring; nor does it tell us precisely how the law is being applied by the front-line workers. All of these indicators are important sources of information. But, they are not enough. We need to know whether children and their nonabusive parents are better off because the state intervened in a different way than it would have prior to the policy reform. Obviously, making such a determination not only entails specifying precisely what variables are appropriate indices of "being better off," as well as how and when to measure these variables, how to construct a sample, whom to use as a comparison group, how to monitor for unintended negative consequences, and so on.⁶²⁰

619. For example, none of the jurisdictions in which the statutory changes have occurred has incorporated a formal program evaluation component. In addition, although there is an exciting evaluation component in the new federally-funded Green Book implementation project, *see supra* note 12, these projects are not focused on examining the impact of changes in a jurisdiction's *statutory* policies. Finally, the many wonderfully-innovative programs, such as those in Massachusetts and Michigan, and others summarized in EMERGING PROGRAMS, *supra* note 17, typically rely on minimal data as well as anecdotal information to determine efficacy.

620. For a range of perspectives on the challenges and strategies of conducting evaluation research on policy issues relating to child maltreatment and domestic violence, *see* COMM. ON THE ASSESSMENT OF FAMILY VIOLENCE INTERVENTIONS, BD. OF CHILDREN, YOUTH & FAMILIES, NAT'L RESEARCH COUNCIL & INST. OF MED., VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS 14-17 (Rosemary Chalk & Patricia A. King eds., 1998) [hereinafter ASSESSING PROGRAMS] (emphasizing that many interventions in widespread use have never been evaluated); POLITICS OF CHILD ABUSE, *supra* note 180, at 125 ("virtually all of the data on which child welfare policy was constructed are the products of rudimentary descriptive statistics; more discriminating experimental and survey research methods, though available, were not employed"); Sandra A. Graham-Bermann, *Designing Intervention Evaluations for Children Exposed to Domestic Violence: Applications of Research and Theory*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 3, at 237; Cris M. Sullivan & Nicole E. Allen, *Evaluating Coordinated Community Responses for Abused Women and Their Children*, in DOMESTIC VIOLENCE IN THE LIVES OF CHILDREN, *supra* note 3, at 269; Patrick H. Tolan & C. Hendricks Brown, *Evaluation Research on Violence*

First, let's consider why systematic program evaluation research is so important in the policy context. Without it, we cannot determine whether policy reforms are having their intended effects. Anecdotal, retrospective, and subjective judgment, in the absence of carefully-planned empirical evaluation, is notoriously unreliable in determining whether policy outcomes are consistent with program goals and expectations.⁶²¹ And, even careful descriptive information regarding a program's use is not particularly helpful in the absence of a comparison with alternatives. Without systematic empirical evaluation, "it is unlikely that improvements in violence prevention programs will flourish and that a sound public health strategy can be implemented."⁶²²

Second, the answer to the question of whether a program is "successful" rarely is a monolithic "yes" or "no."⁶²³ It is most likely that some interventions will be more or less successful in specific situations and/or with specific types of individuals or families.⁶²⁴ Absent systematic evaluation, observers may conclude that a particular intervention "doesn't work," or that there is "no difference" in the effects of two types of interventions. The reality may be, however, that sophisticated quantitative analysis is necessary in order to determine the interventions' relative effects for different subsets of clients.

Third, without formal evaluation, it may be difficult to monitor, detect, and understand unintended negative consequences that

Interventions: Issues and Strategies for Design, in VIOLENCE AGAINST CHILDREN IN THE FAMILY, *supra* note 3, at 439, 439-40 (addressing the "substantial gaps in knowledge" and limited body of evaluation data on the efficacy of violence prevention and intervention programs).

621. For example, Costin et al. review the discrepancies in prevailing assumptions (absent empirical data) about the efficacy of child protection policy when compared with subsequent empirical research in the 1980s and 1990s. POLITICS OF CHILD ABUSE, *supra* note 180, at 124-126. Specifically, they examine the overwhelming support for family reunification and family preservation ideologies and programs, in the absence of meaningful empirical data. Subsequent data collection challenged many prevailing assumptions, and began to provide a clearer picture as to which families are most successfully assisted by what types of programs under what types of circumstances. *Id.*

622. Tolan & Brown, *supra* note 620, at 442.

623. For example, in their comparison of foster care versus home placements, Wald and colleagues concluded that "the question 'Is home or foster care better?' must be refined by asking further, 'In terms of which aspects of development?' and 'For which children, under what conditions?'" For a discussion of the challenges in assessing the efficacy of child protection interventions, see WALD et al., *supra* note 280, at 181.

624. For example, Costin and colleagues report that certain family preservation services appear to be most successful when applied in families with "younger children who attend school and are not substance abusers." POLITICS OF CHILD ABUSE, *supra* note 180, at 125.

accompany policy changes.⁶²⁵ In considering whether states should define child maltreatment to include children exposed to domestic violence, one team of commentators cautioned that such policy initiatives require careful study before wide-scale dissemination.⁶²⁶

Fourth, from a practical standpoint, in an era of tight funding, it may become increasingly important to justify the benefits of particular programs and policies in order to insure their continuation.⁶²⁷ Professor Lela Costin and her colleagues point out that "virtually every federal agency that is responsible for the health of Americans uses experimental research methods before clearing new medical and pharmaceutical products for public use."⁶²⁸ They and others note that appropriate empirical research strategies from clinical research have been adapted and imported successfully into the field of child welfare by certain investigators, despite the challenges.⁶²⁹ Given this, Costin and her colleagues charge that the failure of the field of child welfare to evaluate prevailing policies is tantamount to "intellectual negligence," resulting in a "haphazard, hodge-podge nonsystem of services for kids and their families [which] drift[s] aimlessly."⁶³⁰

Given the strong reasons for incorporating program evaluation into policy reform initiatives, why isn't there more systematic research ongoing?

First, as many have observed, policymakers and scientists see legal change very differently. Professor Michael Saks comments:

When legislation is enacted, it is regarded by its authors as the solution to whatever problem needs to be solved. Little remains to do but celebrate. To an empirical researcher, however, the effective date of a new law marks the induction of the independent variable and the mid-point of the work of designing and conducting a study to gather the data to find out the extent to which the new law made the situation better or worse or stimulated new problems that need solving.⁶³¹

625. THE GREEN BOOK, *supra* note 12, at 47; Carter et al., *supra* note 2, at 14.

626. "In designing new laws to address the effects of childhood exposure to domestic violence, policymakers should assess the potential unintended negative consequences and weigh them against the benefits." Carter et al., *supra* note 2, at 14.

627. Tolan & Brown, *supra* note 620, at 441.

628. POLITICS OF CHILD ABUSE, *supra* note 180, at 125.

629. *Id.*; ASSESSING PROGRAMS, *supra* note 620, at 59-92, 271-73; THE GREEN BOOK, *supra* note 12, at 47; Tolan & Brown, *supra* note 620, at 459-60.

630. *Id.* at 125, 126. Consistent with this criticism, one researcher analyzed grant-funding patterns of the major federal agency funding child abuse and neglect programs, the National Center for Child Abuse and Neglect ("NCCAN"). Raymond H. Starr, Jr., *The Need for Child Maltreatment Research and Program Evaluation*, 5 J. FAM. VIOLENCE 311 (1990). His analysis of four years of funding revealed that most of the projects funded had no evaluation component. *Id.* at 314.

631. Michael J. Saks, *Legal Policy Analysis and Evaluation*, 44 AM. PSYCHOL. 1110,

Second, and at a more practical level, many note that it is difficult to conduct methodologically-sound empirical research in real-world policy contexts, particularly when the focus of the research involves a population as challenging as violent families.⁶³² Some claim that it is not possible to overcome “methodological and logistical problems” such as: “constructing and gaining access to appropriate sample[s]” that include control or comparison groups; finding or developing adequate assessment measures; maintaining subject participation for sufficient follow-up periods in spite of high attrition rates that typically characterize participation in family violence services.⁶³³ Although there is no question that research with violent families is difficult, “messy,” and often hard to control, empirical investigation must be attempted if we are to move forward to assist affected children.⁶³⁴ In addition, there are a range of creative methodological and statistical approaches that allow investigators to adapt strategies and techniques to such real-world settings.⁶³⁵ In one

1115 (1989).

632. See, e.g., ASSESSING PROGRAMS, *supra* note 620, at 14-17; Tolan & Brown, *supra* note 620, at 440-45. For an insightful discussion of the methodological and practical challenges of conducting and interpreting findings from an empirical comparison of foster versus home placements for a sample of maltreated children, see WALD ET AL., *supra* note 280.

633. ASSESSING PROGRAMS, *supra* note 620, at 14-15.

634. In his foreword to Michael Wald and Wald's colleagues' ambitious empirical comparison of foster care and home placements, James Garbarino presents a metaphorical story of a man who searches for his lost car keys on a dark street at night. He searches for them under a street light, despite the fact that he had dropped them “halfway across the darkened street.” His justification: “The light is better over here.” Garbarino analogizes this search to policy research because “the most important issues of policy that need researching are so very difficult to study in the times and places and with the people most relevant to those policy issues,” and are therefore like doing research “‘over there’ in the dark.” James Garbarino, *Foreword*, in WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN, at xv (1988).

635. See DONALD T. CAMPBELL & J.C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963); P.H. ROSSI & H. E. FREEMAN, EVALUATION: A SYSTEMATIC APPROACH (1985); Tolan & Brown, *supra* note 620, at 449-460; Allan W. Wicker, *Getting Out of Our Conceptual Ruts: Strategies for Expanding Conceptual Frameworks*, in METHODOLOGICAL ISSUES IN CLINICAL RESEARCH 41 (Alan E. Kazdin ed., 1992) See also ASSESSING PROGRAMS, *supra* note 620, at 304-05; POLITICS OF CHILD ABUSE, *supra* note 180, at 123-26. The recent body of research conducted by John Monahan, Henry Steadman, and their colleagues in the MacArthur Research Network on Mental Health and the Law, provides superb examples of how researcher ingenuity can overcome the challenges of conducting systematic research with violent individuals. See generally JOHN MONAHAN ET AL., RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE (2001); John Monahan & Henry J. Steadman, *Toward a Rejuvenation of Risk Assessment Research*, in VIOLENCE AND MENTAL HEALTH DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 1 (John Monahan & Henry J. Steadman eds., 1994); Henry J. Steadman et al., *Designing a New Generation of Risk Assessment Research*, in VIOLENCE AND MENTAL

such example, state policymakers, university researchers, and state mental health service providers collaborated to permit a program evaluation that was nothing short of a policy researcher's dream come true. In the early 1980s, the Virginia state legislature mandated the introduction and evaluation of a proposed statutory change in order to assess whether the new policy should be effected statewide.⁶³⁶ Using a "quasi-experimental design,"⁶³⁷ University of Virginia researchers identified several Virginia locales as the sites for the introduction of a new policy relating to procedures for pretrial forensic evaluations of criminal defendants. These locales were designated "experimental" jurisdictions, while in matched "comparison" locales, state forensic evaluation policies remained unchanged. Data were collected from both sets of jurisdictions throughout the experimental period. Compliance of personnel in the various jurisdictions with the project's requirements was legally-mandated by the legislature. The results of the study were reported to the legislature, which proceeded to pass a statute that implemented the experimental change throughout the rest of the state.⁶³⁸ Although opportunities for research with so much support within the state government may not occur very frequently, this project does provide a model of the types of strategies that may be used in evaluating the effects of statutory changes.

Third, service providers may be concerned that employing research methods will necessarily subvert the target populations'

DISORDER: DEVELOPMENTS IN RISK ASSESSMENT 297 (John Monahan & Henry J. Steadman eds., 1994). In the area of domestic violence, psychology professors Ernest Jouriles and Cris Sullivan, together with their research teams, have pioneered carefully-designed intervention studies, evaluating programs that provide services to battered women and their children. See, e.g., Jouriles et al., *Breaking the Cycle*, *supra* note 580; Sullivan & Bybee, *Reducing Violence*, *supra* note 579, at 43; Cris M. Sullivan et al., *Retaining Participants in Longitudinal Community Research: A Comprehensive Protocol*, 32 J. APPLIED BEHAV. SCI. 262 (1996); Cris M. Sullivan et al., *An Advocacy Intervention Program for Women with Abusive Partners: Six-Month Follow-Up*, 22 AM. J. COMMUNITY PSYCHOL. 101 (1994).

636. See GARY B. MELTON ET AL., COMMUNITY MENTAL HEALTH CENTERS AND THE COURTS (1984). The state gave a grant to University of Virginia researchers, and authorized the researchers to design a study comparing the efficacy and cost-effectiveness of community-based versus hospital-based pretrial forensic evaluations. Va. State Leg. House Joint Res. No. 22 (requesting the Commissioner of Mental Health and Mental Retardation to establish a Forensic Evaluation Training and Research Center); *id.* at 130-131. Ultimately, the study permitted an analysis of the effects of the proposed policy change. The resultant data were used by the legislature in passing a statute that mandated that this pioneering new policy be adopted throughout the state. *Id.* at 130-31.

637. DONALD T. CAMPBELL & J.C. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963).

638. See MELTON ET AL., *supra* note 636, at 139-45. The statutory sections passed following the study remain in the Virginia Code, essentially unchanged in the last twenty years. See, e.g., VA. CODE ANN. §§ 19.2-169.1.B & 19.2-169.5.B (2000).

clinical needs to the goals of the research endeavor, undermining the agency's ability to meet the needs of its clientele.⁶³⁹ There is no question that the use of a research design requiring random or other predetermined assignment of particular cases to particular groups will, for the duration of the study, limit the flexibility of practitioners in working with the families, as will requirements to follow particular intervention protocols and procedures. Yet, in the absence of information as to whether current practice versus proposed reforms are superior in achieving policy goals, it is difficult to sustain challenges based on these factors. Sadly, there is little evidence that reliance solely on the subjective judgment of caseworkers and child welfare administrators is effective in meeting the needs of the agencies' clientele.

Fourth, one may wonder whether using controlled research designs in child protection contexts will be ethically-problematic, constraining practitioners' abilities to respond as dictated by safety needs of their clients. Again, this is an important concern, and must be addressed directly and explicitly in the planning of the research. Service providers must have a "safety valve" to use if there is, indeed, a serious threat to a participants' well-being while participating in the project. Obviously, in a family violence context, a design would compare current or standard practice with the proposed reform, and would not assign any of those who need service to a "no treatment" or "waiting" group, as might be done in other types of studies. And, if as a study progresses, it appears that one form of intervention is superior to the other in advance of the predetermined date of completing, provisions may be made to terminate the ineffective intervention sooner than planned, and to offer the more effective intervention to all of the study participants.⁶⁴⁰

Another difficulty that may be encountered in conducting evaluation research is the need for the specialized expertise. It may be necessary that state and community agencies forge a partnership with, for example, university-based researchers.⁶⁴¹ Child protective services agencies and researchers have not yet developed a tradition of collaboration, although newer models and programs are breaking

639. Tolan & Brown, *supra* note 620, at 443-44.

640. For a discussion of the ethical considerations in determining whether to terminate a randomized clinical trial in medical research prior to completion, see TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 325-36 (5th ed. 2001).

641. *ASSESSING PROGRAMS*, *supra* note 620, at 305; Jeffrey L. Edleson & A.L. Bible, *Forced Bonding or Community Collaboration? Partnerships Between Science And Practice in Research on Woman Battering*, NATIONAL INSTITUTE OF JUSTICE JOURNAL (forthcoming).

new ground.⁶⁴² Interagency and cross-specialty cooperation is one of the primary themes of the emerging policy reform movement focusing on the needs of children exposed to domestic violence.⁶⁴³ The contributions that can be made by researchers based in universities, government agencies, in private “think tanks” or foundations must be a part of this inclusive strategy.

Ultimately, there may be disputes about who “owns” the data, for purposes of dissemination of results. Ethical questions may arise as to when empirical findings are sufficiently robust to be used to formulate public policy, such as: How many confirming studies are necessary, with what magnitude of findings, and with what levels of statistical significance?⁶⁴⁴ There are no hard and fast answers to these dilemmas. Most important is that the collaborative team seeks to address these questions prospectively.⁶⁴⁵

Some may be concerned that, in an era of tight finances, funding evaluation research is too costly. Yet, engaging in trial and error experimentation without accumulating evidence of efficacy is certainly less cost-effective than is obtaining a useful body of knowledge about the impact of legal changes. Meaningful findings will pay their own way in the long run.

There are a variety of ways to seek funding for policy research of the type proposed here. Most states have mechanisms through which a legislature can request and fund empirical research. Often the administrative agencies charged with implementing certain laws have the capacity to conduct internal research, or have grant-making divisions that can seek proposals from, select, and monitor the researchers outside of the organization.⁶⁴⁶ In addition, federal agencies have recently committed substantial dollars to funding work of the type described here,⁶⁴⁷ and some private foundations have made family violence research a priority.⁶⁴⁸

642. See *supra* notes 107-09, 122-24 and accompanying text.

643. THE GREEN BOOK, *supra* note 12, at 28-31.

644. Lois A. Weithorn, *Professional Responsibility in the Dissemination of Psychological Research in Legal Contexts*, in REFORMING THE LAW: IMPACT OF CHILD DEVELOPMENT RESEARCH 253, 259 (1987).

645. *Id.* at 258-63.

646. For example, in California, the Center for Families, Children and the Courts of the Judicial Council's Administrative Office of the Courts funds selected projects in areas related to family violence. See <http://www.courtinfo.ca.gov/programs/cfcc/aboutus/aboutus.html>; <http://www.courtinfo.ca.gov/programs/cfcc/programs/research.html>; <http://www.courtinfo.ca.gov/programs/cfcc/programs/FamViol.htm>.

647. See *supra* notes 12 and 16.

648. See, e.g., THE DAVID AND LUCILE PACKARD FOUNDATION, PROGRAM OVERVIEW 15 (2001) (discussing the Foundation's support for programs “that improve outcomes for children in the child protection system” with a goal of protecting “children from the harm of violence in their homes”).

Finally, some may argue that policymakers will not pay attention to research findings once the studies are completed. As Professor James White points out, the time frames required to complete empirical research studies are often out-of-sync with legislative agendas.⁶⁴⁹ Whereas legislators strive to act quickly in response to the demands of their constituencies, good research takes years to complete.⁶⁵⁰ And, as we all know, often a single headline-grabbing tragedy motivates a legislator or executive to take action against a newly-identified social problem.⁶⁵¹ Whether the child affected by the tragedy is Mary Ellen Wilson or Kayla McKeon, if the social climate is conducive, there may be political and public efforts to respond.

Yet, there is no question, as Lisbeth Schorr has underscored in her two recent books, that successful programs exist, and that despite empirical research demonstrating efficacy, the programs are not expanded beyond the initial model or pilot phases.⁶⁵² Whereas it is beyond the scope of this Article to analyze the challenges facing reformers seeking to apply empirical research findings in a policy context,⁶⁵³ there are some approaches that may be helpful. The most effective strategy in surmounting such obstacles is likely to be one that recognizes the challenges up front—be they political, financial, related to institutional inertia, bureaucratic obstacles, or other factors—and which works prospectively to avoid as many pitfalls as possible. To the extent that researchers and administrators can develop a good data base on the effectiveness of various policy approaches, perhaps when that opportune moment arrives, the forces of politics and science can join together to improve the lives of children affected by family violence.

649. James J. White, *Phoebe's Lament*, 98 MICH. L. REV. 2773, 2776 (2000).

650. *Id.*

651. *Id.* at 2778 (discussing the power of anecdotal information about a "single vivid example" when contrasted with "abstract data from multiple respondents"). For a sociological analysis of how individual cases picked up by the media influence child maltreatment policy, see John M. Johnson, *Horror Stories and the Construction of Child Abuse*, in IMAGES OF ISSUES: TYPIFYING CONTEMPORARY SOCIAL PROBLEMS 17 (Joel Best ed., 2d ed. 1995).

652. See LISBETH B. SCHORR, COMMON PURPOSE: STRENGTHENING FAMILIES AND NEIGHBORHOODS TO REBUILD AMERICA 1-21 (1997) [hereinafter COMMON PURPOSE]; LISBETH B. SCHORR, WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE (1988). See also Judith C. Meyers & Brian L. Wilcox, *Public Policy Applications of Research on Violence and Children*, in VIOLENCE AGAINST CHILDREN IN THE FAMILY, *supra* note 3, at 465, 468-70.

653. See generally COMMON PURPOSE, *supra* note 652. See also White, *supra* note 649, at 2774-79 (suggesting a range of explanations for the tendencies of legislatures to ignore empirical findings).

Conclusion

Domestic violence, like child maltreatment, has been around since the first settlers approached the shores of this nation, and well before that around the world. Yet, only in very recent years have we begun to recognize and direct attention to the relationship between these two phenomena. It is nothing short of startling that, until very recently, the co-occurrence of domestic violence and child maltreatment was not recognized by either the child protection workers whose charge it is to try to protect children from maltreatment, or in the scholarly literature.

Now that the relationship between domestic violence and child abuse and neglect is acknowledged, however, we are presented with a rare opportunity. To the extent that we have models for the effective handling of domestic violence cases involving children, which is between half and three-quarters of all cases of child abuse or neglect, the door may be open to greater success with a substantial portion of the traditional child protection system caseload. Against the backdrop of almost a half-century of child protection system interventions of questionable efficacy, a novel and viable philosophy and strategy of intervention may be within reach.⁶⁵⁴ This innovative way of looking at child protection cases has not yet been adequately tested, but it provides a glimmer of hope within a disappointing story of child protective services in the United States. The following case scenario, reported by Whitney and Davis as it relates to the impact of the Massachusetts domestic violence-child protection system collaboration, gives us a peek at that glimmer of hope:

A married pregnant mother of 12 children had been involved with DSS for over 9 years. Each child protection report alleged neglect of the children by their mother. During the life of the case, several children had been adopted, the majority had been in foster care, and three were left in her custody. Numerous services had been tried with marginal success. Many social workers came and went. No worker knew this woman was the victim of severe domestic violence. No worker knew she was raped after every beating by her husband. No one knew this woman's children were physically beaten with planks of wood for trying to protect her. No one knew she was beaten with planks of wood for trying to protect them. Ten years into the case, the mother was interviewed by a battered women's advocate for the first time. When she was asked if she was

654. I do not suggest that adoption of this strategy will cure all, or even most, of the problems confronted in the provision of child protection services. Many have noted that the system confronts numerous challenges, *see e.g., supra* notes 243-45 & 252, which extend far beyond the reach of the interventions proposed in Part V of this Article. I do suggest, however, that adoption of this strategy may open the doors to effective intervention with those seemingly intractable cases in which the perpetration of domestic violence has been a primary component.

safe in her relationship, she replied "Why do you care about me now?" Once the domestic violence was uncovered, the advocate was able to engage the mother in safety planning and work with the criminal justice system to decrease the father's access to the family. The mother left her husband and was able to regain custody of some of her children.⁶⁵⁵

In short, the new paradigm begins with an understanding that the safety and well-being of a child and her nonabusive parent are linked. Whether in response to a statutory mandate, internal changes in policy and procedures in the child protection system, new collaborative relationships between child protection and domestic violence agencies, or the enlightenment of individual professionals who come into contact with domestic violence victims and their children, this paradigm presents us with a chance to transcend past failures and work toward policies that are likely to promote the best interests of children exposed to domestic violence.

655. This scenario is reprinted verbatim from Whitney & Davis, *supra* note 111, at 159-60.

Table 1: Psychological Maltreatment Forms**

Six Major Types of Psychological Maltreatment Are Described Below and Further Clarified by Identification of Subcategories

A repeated pattern or extreme incident(s) of the conditions described in this table constitute psychological maltreatment. Such conditions convey the message that the child is worthless, flawed, unloved, endangered, or only valuable in meeting someone else's needs.

SPURNING (Hostile Rejecting/Degrading) includes verbal and non-verbal caretaker acts that reject and degrade a child. **SPURNING** includes the following:

- Belittling, degrading and other nonphysical forms of overtly hostile or rejecting treatment
- Shaming and/or ridiculing the child for showing normal emotions such as affection, grief or sorrow
- Consistently singling out one child to criticize and punish, to perform most of the household chores, or to receive fewer rewards
- Public humiliation

TERRORIZING includes caretaker behavior that threatens or is likely to physically hurt, kill, abandon, or place the child or child's loved ones or objects in recognizably dangerous situations. **TERRORIZING** includes the following:

- Placing a child in unpredictable or chaotic circumstances
- Placing a child in recognizably dangerous situations
- Setting rigid or unrealistic expectations with threat of loss, harm, or danger if they are not met
- Threatening or perpetrating violence against the child
- Threatening or perpetrating violence against a child's loved ones or objects
- Exploiting a child's fears and vulnerabilities by threatening to isolate, spurn, become emotionally unavailable, or exploit and corrupt

** SOURCE : Office for the Study of the Psychological Rights of the Child, Indiana University, Purdue University at Indianapolis, 902 West New York Street, Indianapolis, IN 46202-5155.

ISOLATING includes caretaker acts that consistently deny the child opportunities to meet needs for interacting or communicating with peers or adults inside or outside the home. **ISOLATING** includes the following:

- Confining the child or placing unreasonable limitations on the child's freedom of movement within his/her environment
- Placing unreasonable limitations or restrictions on the child's social interactions with the home
- Placing unreasonable limitations or restrictions on social interactions with peers or adults in the community

EXPLOITING/CORRUPTING includes caretaker acts that encourage the child to develop inappropriate behaviors (self-destructive, anti-social, criminal, deviant or other maladaptive behaviors). **EXPLOITING/CORRUPTING** includes the following:

- Modeling, permitting or encouraging antisocial behavior (e.g. prostitution, performance in pornographic media, initiation of criminal activities, substance abuse, violence to or corruption of others)
- Modeling, permitting, or encouraging developmentally inappropriate behavior (e.g., parentification, infantilization, living the parent's unfulfilled dreams)
- Encouraging or coercing abandonment of developmentally appropriate autonomy through extreme overinvolvement, intrusiveness, and/or dominance (e.g., allowing little or no opportunity or support for child's views, feelings, and wishes; micromanaging child's life)
- Restricting or interfering with cognitive development

DENYING EMOTIONAL RESPONSIVENESS (Ignoring) includes caretaker acts that ignore that child's attempts and needs to interact (failing to express affection, caring, and love for the child) and show no emotion in interactions with the child. **DENYING EMOTIONAL RESPONSIVENESS** includes the following:

- Being detached and uninvolved through either incapacity or lack of motivation
- Interacting only when absolutely necessary
- Failing to express affection, caring, and love for the child

MENTAL HEALTH, MEDICAL, AND EDUCATIONAL NEGLECT includes unwarranted caretaker acts that ignore, refuse to allow, or fail to provide the necessary treatment for the mental health, medical, and educational problems or needs of the child. **MENTAL HEALTH, MEDICAL, AND EDUCATIONAL NEGLECT** includes the following:

- Ignoring the need for, failing or refusing to allow or provide, treatment for serious emotional/behavioral problems or needs of the child
- Ignoring the need for, failing or refusing to allow or provide, treatment for serious physical health problems or needs of the child
- Ignoring the need for, or refusing to allow or provide, treatment for serious educational problems or needs of the child