VICTIM BLAMING: FAILURE TO PROTECT LAWS AS A LEGISLATIVE ATTACK ON MOTHERS

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ABSTRACT

A mother's intuition is said to give mothers the innate ability to know exactly how to best care for their child. But what happens when a judge decides that a mother's intuition was wrong? Failure to protect cases deal with harrowing facts: an abusive parent who harms the child they are supposed to care for, a non-abusive parent who stepped in too late. The statutes allow courts to charge the non-abusive parent with the abuser's crime. The original purpose was to secure the child's wellbeing and encourage non-abusive parents to leave dangerous situations. Instead, failure to protect laws disproportionally target non-abusive mothers, holding them to an impossibly high standard of care, and removing children from a loving parent in the process. The statutes allow for mothers—who are often facing insurmountable obstacles and doing the best they can for their children—to be deprived of the very thing they are seeking to protect: their motherhood.

This paper will review the history and application of failure to protect laws through a reproductive justice framework. Only by reviewing the totality of the mother's experience, and not just the presupposed cultural narrative that surrounds her as a survivor of intimate partner violence, can the law begin to appreciate the mother's legal rights as well as the child's best interests. This paper will determine that parenting is a fundamental right under the 14th Amendment and argue that any laws infringing on such a right must be reviewed under strict scrutiny. Failure to protect laws falsely presume that removal is a narrowly tailored means to achieve the state's interest in protecting the child, and therefore violate the 14th Amendment. The process of evaluating failure to protect laws must more adequately consider the mother's legal rights as a parent as well as the child's interest in remaining with a stable, loving mother. This paper seeks to reframe the narrative around failure to protect laws so that they can better prevent harm to children as they were intended to do. This paper will provide some suggestions and

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recommendations as to how the interests of the state, the mother, and the child can all be secured.

INTRODUCTION

In February of 2019, Marion Phillips received a copy of the petition to terminate her rights as a parent—not because she had injured her children, but for "exposing them to unapproved males" under Florida's failure to protect law.[1] Specifically, Child Protective Services was concerned about the men Marion let into her life and her children's lives, finding that her ex-partner had a history of drug use and of beating Marion.[2] Marion's story is not only that of a parent in an abusive relationship, but a story of a court selectively using evidence of a parent's own trauma to justify deeming her unfit to parent.[3] Marion had experienced abusive relationships before: her longtime partner Jim Cullen had a record of drug use and violent behavior, her mother whipped her with switches and beat her with extension cords, and her brother assaulted her.[4] However, Marion was never aggressive with her children; she escaped multiple abusive households, and eventually rented out an apartment for her family and worked a steady job at the Family Dollar.[5] Despite Marion's work to improve her family's circumstances, the state removed Marion's children to foster homes across the county while she began the lengthy legal process to prove her right to parent.[6] In order to prove to the court that she was a capable and loving mother, Marion spent $200 per month traveling to court dates and visiting her four children, who were spread out over three counties by the foster system's placement program.[7]

1. Daphne Chen, *Her Boyfriend Spanked Her Child. For Five Years, She's Been Paying the Price*, USA TODAY (Dec. 16, 2020, 9:04 PM), https://www.usatoday.com/in-depth/news/2020/12/16/florida-mother-fought-kids-couldnt-please-child-welfare-execs/3810041001/.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*

The court used the challenges Marion faced, some of which were created by the state's intervention, as evidence of her inability to parent. She worked forty-hour weeks and was late to some child visits, which the court saw as inattention and further neglect.[8] She fell behind on rent because of the costly court fees, and this was seen as evidence of her poor financial management.[9] After four days of hearings, the court determined that, in the eyes of the law, Marion was no longer a mother—all because she had been in an abusive relationship. Despite the court's declaration, Marion's daughters often steal moments to text her that they love her and to tell her that to them she will always be their mother.[10] Marion has since filed an appeal of the termination of her parental rights and is awaiting results, with court proceedings delayed by the pandemic.[11] Unfortunately, failure to protect laws, such as the Florida law that led to the termination of Marion's parental rights, operate across the nation, pitting abuse survivors against their children and against the state.

2019 also marked the end of Tondalao Hall's fifteen-year prison sentence in Oklahoma for failing to protect her children from her partner's abuse.[12] Like Marion, Tondalao never hit her children or endangered them directly. She was the sole breadwinner for her family, working to provide for her children and putting money aside for a future apartment away from her abusive partner, Robert Braxton.[13] A frequent target of abuse, Tondalao placed herself in Robert's warpath to protect her children from his violence. However, her efforts were limited, blinded in part by her own struggle with Robert's rage.[14] Eventually, a hospital visit revealed that Braxton "had been hitting her children," bruising her son's leg while she was at work, and the hospital staff called Child Protective Services (CPS).[15] Braxton pled guilty to child abuse, received a ten-year-suspended sentence, and served two years before being released on probation.[16] Meanwhile,

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8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. Stephanie K. Baer, *A Battered Woman Who Was Imprisoned for 15 Years for Failing to Protect Her Kids from Abuse Has Been Freed*, BUZZFEED (Nov. 8, 2019, 7:21 PM), https://www.buzzfeednews.com/article/skbaer/tondalo-hall-abuse-release-prison-oklahoma.

13. Sharyn Alfonsi, *Failure to Protect: How an Oklahoman Child Abuse Law Treats Women Differently Than Men*, CBS (June 7, 2020), https://www.cbsnews.com/news/failure-to-protect-oklahoma-child-abuse-law-60-minutes-2020-06-07/.

14. Reis Thebault, *She Went to Prison Over Her Boyfriend's Child Abuse. Thirteen Years After He Got Out, She's Free*, WASH. POST (Nov. 8, 2019), https://www.washingtonpost.com/nation/2019/11/08/she-went-prison-over-her-boyfriends-child-abuse-thirteen-years-after-he-got-out-shes-free/; *see also* Nicole Chavez, *Her Boyfriend Admitted Child Abuse but Didn't Go to Prison. She Spent 15 Years in Prison for Not Reporting Him*, CNN (Nov. 8, 2019), https://www.cnn.com/2019/11/08/us/tondalao-hall-sentence-commuted-trnd/index.html; Alfonsi, *supra* note 13.

15. Transcript of Jury Trial Proceedings at 8–9, Oklahoma v. Hall, No. 2007-6403 (Dist. Ct. Okla. 2007) [hereinafter *Testimony of Ms. Hall*]; Aimee Ortiz, *Mother Is Freed After 15 Years in Prison for Father's Abuse*, N.Y. TIMES (Nov. 8, 2019), https://www.nytimes.com/2019/11/08/us/tondalao-hall-oklahoma-commutation.html.

16. Ortiz, *supra* note 15.

Tondalao pled guilty to enabling child abuse, earning her a sentence of thirty years in prison.[17]

The COVID-19 pandemic impacts failure to protect cases. Domestic abuse often occurs within the home without intervention.[18] Without children in school, there are fewer opportunities for outside interactions with abuse survivors.[19] Meanwhile, abuse within the home occurs with greater frequency and with less recourse for self-help.[20] COVID-19 also complicates the already difficult challenges that domestic violence survivors face in leaving their partners.[21] With COVID-19 restrictions lifting, greater protections for abuse survivors and their children are necessary to address the danger they were subjected to under shelter in place orders. However, for states that rely on failure to protect laws, the survivors of intimate partner violence may face more challenges ahead.

State failure to protect laws allow prosecutors to charge the non-abusive parent, often mothers, with a sentence equal to that of the abuser—charging them as if they had committed the abuse themselves. Often, sentences result in removal and termination of parental rights.[22] Failure to protect laws were enacted to protect children from traumatic experiences and ensure the best and safest childhood possible; however, execution of these laws has decidedly punished survivors of abuse.[23] Children have a "right to be free from abuse and neglect,"[24] but parents also have a right to receive the full protection of the law regarding their legal rights as parents.

This paper will use a reproductive justice framework to argue that failure to protect laws wrongly presume that termination of a parental relationship is in the benefit of the child and that this presumption deprives parents of their substantive due process rights under the Fourteenth Amendment. This paper argues that the right to parent is fundamental and deserving of strict scrutiny, and that failure to protect statutes do not advance the state's interest in the welfare of the child

17. *Id.*

18. *Id.*

19. Megan L. Evans et al., *A Pandemic Within a Pandemic—Intimate Partner Violence during Covid-19*, 383 N. ENGL. J. MED. 2302, 2302 (2020).

20. *Id.*

21. *Id.*

22. *See* Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N. Y.U. L. REV. 272, 277–78 (2001). Some states allow for life sentences of incarceration in failure to protect cases, which have similar effects as terminating parental rights in how it affects the children's relationship.

23. *See* Elizabeth Brico, *State Laws Can Punish Parents Living in Abusive Households*, TALKPOVERTY (Oct. 25, 2019), https://talkpoverty.org/2019/10/25/failure-protect-child-welfare/; *see generally* LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION, 9–11 (2017) (explaining that reproductive justice is a framework for activism that reviews the history and circumstances surrounding women's fertility rights in assessing whether those rights—to not have a child, to have a child, and to raise a child in a healthy and safe environment—are truly being secured).

24. Melissa A. Trepiccione, *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, 1512 (2001).

through narrowly tailored means. Terminating parental rights, or removal of a child from a loving parent, is not narrowly tailored and therefore is unconstitutional.[25] Fundamental rights, housed under the liberty interest of the Fourteenth Amendment, can only be infringed upon when the state has a compelling interest and the means used to advance that interest are narrowly tailored. Failure to protect laws take children away from survivors of abuse, many of whom are attempting to protect themselves and their children from harm.

ROADMAP TO SUBSTANTIVE DUE PROCESS VIOLATIONS UNDER FAILURE TO PROTECT STATUTES

This paper will begin with a brief history of failure to protect laws, noting the trends in domestic violence and child protection reform. This section will also give a background on the typical failure to protect laws currently active and the sentences they carry. Part II will discuss how failure to protect laws disproportionately impact women by failing to account for the systemic challenges mothers face during the judicial process. This section will introduce the reproductive justice lens used throughout this paper, particularly to interpret the case studies.[26] Part III will highlight the need for a substantive due process analysis when courts review paternal rights and demonstrate that failure to protect laws distract the state from considering less intrusive means to protect a child with a non-abusive parent. Finally, this paper will suggest less intrusive means by which to secure the child's interest and protect the mother's due process rights.

I. THE PURPOSE AND CURRENT STATUS OF FAILURE TO PROTECT LAWS IN THE UNITED STATES

A. BACKGROUND ON STATUTES

The purpose of failure to protect laws, stemming from child neglect legal theory, is to protect children from the trauma of experiencing, and in some cases

25. This paper will argue that, while the Court has treated the right to parent differently over time, since the Court has called the right "fundamental," and treated it as a right deserving more than rational basis review, the right to parent should be considered "fundamental," and therefore trigger strict scrutiny review. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interest recognized by this Court."); Meyer v. Nebraska, 262 U.S. 390, 399 ("Liberty thus guaranteed . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish and bring up children."); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) ("Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment.").

26. Through a reproductive justice framework, this paper will review not only the individual cases where charges under failure to protect are brought, but also the entire context of the mother's case and the systems, or lack thereof, that result in reproductive oppression. It is also important to note that while only a 2015 and a 1987 case are analyzed here, many more cases illustrating unjust applications of failure to protect laws unjustly exist. These two cases were chosen for their facts, the evidence provided at the time of writing this paper, and the assumptions articulated in the opinions.

witnessing, abuse.[27] The laws are intended to encourage parents to remove their children from abusive environments.[28] Failure to protect statutes are grounded in the notion that children have a right to be free from abuse and neglect, which can harm the children's development.[29] To review the history of failure to protect laws, this paper will first examine how abuse impacts children and then how this understanding has influenced the trajectory of failure to protect laws—including an in-depth look at the landmark case *Nicholson v. Scoppetta*.

1. Negligence Statutes Intended to Mitigate Traumatic Effects on Children

Both witnessing and being subjected to abuse will negatively impact a child for the rest of their life[30]—an outcome the state is right to actively avoid. On average, CPS receives three million referrals for child abuse and neglect, concerning around six million children, per year.[31] In 2011, over 670,000 children were victims of child abuse and neglect.[32] Children may witness violence in their home or experience violence directly. While this paper focuses on cases where children themselves are victims of abuse, it is vital to understand the full scope of harm children may suffer when their parents are victims of abuse within their own household.

A 2011 study conducted by the Department of Justice found that one in fifteen youths, or 6.6 percent of children, are exposed to some sort of physical assault between their parents.[33] It is estimated that over 15.5 million children are exposed to violence in the home and many of these instances are not reported.[34] In addition to the impacts of witnessing violence, children exposed to violence are in a heightened danger of experiencing abuse themselves.[35] Abuse comes in many

27. *See* Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 5–6 (2001); *see also* Trepiccione, *supra* note 24, at 1490.

28. Amanda Mahoney, *How Failure to Protect Laws Punish the Vulnerable*, 29 HEALTH MATRIX 429, 431 (2019).

29. Trepiccione, *supra* note 24, at 1512.

30. CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., IMPACT ON CHILDREN AND YOUTH, https://www.childwelfare.gov/topics/systemwide/domviolence/impact/children-youth/ [https://web.archive.org/web/20201101000418/https://www.childwelfare.gov/topics/systemwide/domviolence/impact/children-youth/] (last visited Oct. 23, 2021).

31. Brigid Schulte, *Effects of Child Abuse and Neglect, if Untreated, Can Last a Lifetime, Study Finds*, WASH. POST (Sept. 12, 2013), https://www.washingtonpost.com/local/new-report-finds-that-untreated-the-effects-of-child-abuse-and-neglect-can-last-a-lifetime/2013/09/12/1edc0bdc-1bc7-11e3-82ef-a059e54c49d0_story.html.

32. *Domestic Violence and Child Abuse*, CHILD. HOSP. OF PHILA. RES. INST., https://violence.chop.edu/domestic-violence-and-child-abuse (last visited Oct. 23, 2021).

33. Sherry Hamby et. al., *Children's Exposure to Intimate Partner Violence and Other Family Violence*, U.S. DEP'T OF JUSTICE, OFF. OF JUST. PROGRAMS1, 3 (Oct. 2011), https://www.ojp.gov/pdffiles1/ojjdp/232272.pdf (noting that the number of affected children grows when accounting for inter-sibling violence or violence between other parties close to the children).

34. *Domestic Violence and Child Abuse*, *supra* note 32.

35. Trepiccione, *supra* note 24, at 1500 (citing Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 L. & PSYCH. REV. 137, 145 (1994)).

forms: children may experience physical abuse, such as beatings and physical violence; sexual abuse; or neglect, including malnutrition and exposure to toxins or alcohol.[36]

Exposure to violence in the household may affect a child's developmental growth, causing them to feel socially isolated, and may result in the loss of the child's ability to empathize with others.[37] In addition to emotional consequences that a child will suffer, Adverse Childhood Event Studies have found a strong association between child abuse and neglect and the leading causes of adult death (stroke, cancer, and heart disease).[38] All experiences with and around abuse are traumatic to a person in development and may result in post-traumatic stress disorder (PTSD).[39]

PTSD can manifest in many ways: recurrent, involuntary, and intrusive distressing memories of the traumatic event; recurrent, distressing dreams in which the content and/or effect of the dream are related to the traumatic event; dissociative reactions; intense or prolonged psychological distress, which can result from either internal or external cues that symbolize or are associated with the trauma experienced; and marked physiological reactions to said cues.[40] While PTSD can be overcome through treatment, it can be a debilitating condition for a child. Undoubtedly, a child has a right to be free from abuse, neglect, and the psychological trauma that stems from these situations. Acknowledging the real and drastic effects of abuse, and the right of children to be free of abuse, led states to establish protections for vulnerable children.

2. The Evolution of Negligence Statutes Designed to Mitigate Harm to Children

Negligence statutes were designed to protect children by identifying harmful situations and creating opportunities for the state to intervene on a child's behalf. Child abuse and neglect law began in the 1960s, although there were mechanisms to protect children prior.[41] Child protection laws generally follow the form of punishing direct actions taken against children (such as physical or sexual abuse), but a second type of neglect law encompasses failure to protect laws—acts of omission that endanger children.[42] States have generally defined a neglected child as one of less than 18 years "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."[43] Negligence statutes include acts of omission in physical

36. John Stirling & Lisa Amaya Jackson, *Understanding the Behavioral and Emotional Consequences of Child Abuse*, 122 PEDIATRICS 667, 668 (2008).

37. IMPACT ON CHILDREN AND YOUTH, *supra* note 30.

38. Stirling & Jackson, *supra* note 36, at 667.

39. *See generally Domestic Violence and Child Abuse*, *supra* note 32.

40. CTR. FOR SUBSTANCE ABUSE TREATMENT, DEP'T OF HEALTH & HUM. SERVS., A TRAUMA-INFORMED CARE IN BEHAVIORAL HEALTH SERVICES 8 (2014).

41. Mahoney, *supra* note 28, at 432.

42. Trepiccione, *supra* note 24, at 1490 (citing Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 HASTINGS WOMEN'S L.J. 67, 67 n.1 (1995)).

neglect (resulting in homelessness, unhygienic living conditions, or malnutrition), educational neglect, emotional neglect, or medical neglect.[44] Negligence statutes establish a minimum standard of care that a parent or guardian must meet in order to avoid being charged.

Negligence as a standard has itself evolved over time and geography. For example, previously in New Mexico (which currently has an active failure to protect statute), a parent was held strictly liable for simple negligence of their duty to protect.[45] Later, New Mexico re-interpreted N.M. Stat. Ann. § 30-6-1(c) as requiring a heightened level of negligence for strict liability—criminal (not civil) negligence, lowering the level of minimum care to be proved.[46] Despite the heightened standard of negligence, New Mexico courts have found many mothers to have met the threshold of strict liability for endangerment, without any regard for the steps taken by the mother to protect her children or that the mother was a victim of abuse as well.

At first, failure to protect laws only dealt with direct acts of violence to the child that a parent was present to prevent.[47] However, starting in the late 1990s, prosecutors began charging survivors of abuse with failure to protect under state neglect laws for situations where a child witnessed violence, even where the child was not a victim of the violence.[48] *In re Lonell* was one of the first cases to establish "strict liability" for a "battered mother's" inability to prevent her abuser from subjecting her to abuse.[49] The underlying principle espoused that exposing children to violence was an act of child neglect or abuse, and that a woman's battering was only evidence of her knowledge and complicity in the situation.[50] A woman's parental rights could then be terminated for maintaining an ongoing relationship with the abuser. According to one article written around the time, "we, as society, are holding mothers accountable for conduct they did not engage in, conduct that, until recently, was socially permissible and conduct that authorities are still loath to stop."[51]

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43. *See, e.g.*, Nicholson v. Scoppetta, 3 N.Y.3d 357, 368 (N.Y. 2004).

44. *Child Neglect*, FINDLAW, https://criminal.findlaw.com/criminal-charges/child-neglect.html (last updated Jan. 24, 2019).

45. *See* State v. Lucero, 647 P.2d 406 (N.M. 1982); *see also* Michelle Jacobs, *Requiring Battered Women to Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 634 (1998).

46. Santillanes v. State, 849 P.2d 358 (N.M. 1993).

47. *See, e.g.*, *In re* Bryan L., 565 N.Y.S.2d 969, 971–73 (N.Y. Fam. Ct. 1991) (declining to evaluate physical acts done by the father to the mother, in the presence of their children, as grounds for neglect).

48. Trepiccione, *supra* note 24, at 1493.

49. *Id.* at 1494. The term "battered woman" comes from the caselaw and the language used at the time *In re Lonell* was decided. This paper does not condone the use of the phrase "battered woman" and refers to individuals as survivors of abuse or intimate partner violence.

50. *See In re Bryan L.*, 565 N.Y.S.2d at 971–73; *see also* Trepiccione, *supra* note 24, at 1490.

51. Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1090 (1995).

3. A Shift in Failure to Protect Laws: An In-Depth Look at *Nicholson v. Scoppetta*

Nicholson v. Scoppetta pushed against the strict liability model from *In re Lonnell* and represents a shift in thinking about culpability in failure to protect cases, establishing a means by which to address the mother's experience with trauma as well as the child's. After Sharwline Nicholson ended her relationship with her boyfriend, he beat her for the first time, in view of her children.[52] To protect her family and herself, Sharwline called 911—a decision that put her at risk of losing her children.[53] While in the hospital, New York's Administration for Children's Services (ACS) informed Sharwline that the state was holding her children, as "she was not able to protect them given that her boyfriend had beaten her."[54] The state argued that the children's exposure to Sharwline's abuse was enough trauma to warrant state separation and removal. Sharwline contested that ACS's policy violated her due process by removing her children from a loving relationship because of a situation that was unlikely to occur again. Sharwline was leaving the abusive partner. Along with Sharlene Tillett and Ekaete Udoh, mothers whose children were removed under similar circumstances, Sharwline challenged the validity of the law.

Nicholson began in the District Court for the Eastern District of New York as a class action lawsuit.[55] Petitioners argued that the city's policy of removing children solely on the ground that mothers failed to prevent their children from witnessing violence was a violation of the non-abusive parent's substantive due process.[56] The District Court granted a preliminary injunction on the grounds that the City "may not penalize a mother, not otherwise unfit, who is battered by her partner."[57] The District Court also found, in response to constitutional questions, that "[ACS's] practice was to separate mother and child when less harmful alternatives were available."[58] As alternatives to removal existed, the process was not narrowly tailored and therefore not constitutional. The case was appealed to the Second Circuit, which affirmed the injunction to retain custody with the parents. The Court of Appeals for the Second Circuit remanded the case to the District Court for review of three questions of statutory interpretation.[59] The three questions concerned: 1) the definition of neglect and whether it encompassed situations where the children were only exposed to violence, 2) if there was any possible injury, under the current definition, that could befall a child exposed to

52. Mahoney, *supra* note 28, at 450.
53. *Id.*
54. *Id.*
55. Kathleen A. Copps, *The Good, the Bad, and the Future of* Nicholson v. Scoppetta*: An Analysis of the Effects and Suggestions for Further Improvements*, 72 ALB. L. REV. 497, 506 (2009).
56. Nicholson v. Scoppetta, 3 N.Y.3d 357, 365 (N.Y. 2004).
57. *Id.* at 366.
58. *Id.*
59. Copps, *supra* note 55, at 506.

domestic violence, and 3) if the exposure alone demonstrated that removal is necessary.[60]

Notably, the final *Nicholson* decision did not address the constitutional questions that the lower court had originally considered.[61] The New York Court of Appeals judges addressed only the statutory interpretation questions.[62] Importantly, the court held that, in determining if a domestic violence victim has exercised a "minimum degree of care," the judge must specifically consider: 1) the risks attendant to leaving, 2) the risks attendant to staying, 3) the risks attendant to seeking assistance through government channels, 4) the risks attendant to criminal prosecution of the batterer, 5) the risks attendant to relocating, 6) the severity and frequency of the violence, and 7) the resources available to the woman.[63] The court also determined that there should be no blanket presumption of removal.[64] It ordered that lower courts, in addressing failure to protect cases, balance the imminent risk to the child (which it had defined as an immediate, not merely possible, risk)[65] and the harm that removal might cause.[66] Finally, the judges found that expert testimony would be admissible, but not necessary.[67]

As described in Kathleen Copps' review of *Nicholson*, the court attempted to preserve the idea that maintaining a relationship between the child and non-abusive parent, and removing the batterer instead, is the ideal course of action.[68] It was a landmark decision and a product of its time. The case benefited from the beliefs of Chief Judge Kaye, who was known for her dedication to improving society through her judicial decisions.[69] Simultaneously, experts and child advocates challenged the belief that survivors of abuse had "safe, viable options to leave."[70] They also challenged the assumption that leaving was *always* in the best

60. *Nicholson*, 3 N.Y.3d at 367, 372, 382.

61. *Id*. at 367.

62. *Id*.

63. Copps, *supra* note 55, at 507.

64. *Nicholson*, 3 N.Y.3d at 378; Copps, *supra* note 55, at 507.

65. *Nicholson*, 3 N.Y.3d at 369 ("[I]mminent danger, however, must be near or impending, not merely possible.").

66. Copps, *supra* note 55, at 508.

67. *Id*. at 509.

68. *See generally id*.

69. Hon. Victoria Graffeo, *Chief Judge Judith S. Kaye: She is Forever in Our Hearts*, LEAVEWORTHY (2016), https://archive.nysba.org/leaveworthyspring16/.

70. Adriana Kohler, *The Battered Mother's Struggle in New York: The Laws and Policies that Led to the Removal of Children from Their Abused Mothers Based on the Child's Exposure to Domestic Violence*, 13 U. PA. J.L. & SOC. CHANGE 243, 258–60 (2010).

interest of the mother and child—new data revealed that the substantial risks existed for women who left abusive relationships.[71]

In the state of New York, the change in policy was effective—fewer children are removed and fewer survivors of domestic violence are charged for failure to protect solely on exposure.[72] The lower courts have embraced the ideal that *Nicholson* set: the goal of preserving a family. This was particularly helpful in maintaining familial ties in a case where the mother had actively taken her children to safety and only returned home in order to facilitate visitation in compliance with a court order, rather than defaulting to parental termination.[73] Further, batterers are receiving failure to protect sentences for exposing the children to domestic violence and trauma—rather than the survivors receiving the charge.[74]

The factors outlined in *Nicholson* are critical for identifying survivors of abuse and preserving the family unit where possible.[75] However, the application of these factors in practice is still inefficient, even in New York.[76] Decisions in failure to protect cases fail to consider evidence that would explain the victim's mindset when making decisions. Courts apply an inapplicable "reasonable person" analysis, even though the standard should be tailored to intimate partner violence (IPV).[77] In one case, the court sentenced the mother on failure to protect grounds and openly ignored evidence that the mother was in therapy to recover from the trauma of her abuse—it further overlooked evidence that the abusive partner would be prevented from continuing his assaults under a protective order.[78]

Failure to protect laws vary from state to state, but the underlying notions of parental duty, especially motherly instinct, are consistent throughout. It is important to underscore that *Nicholson* has a continued influence on how the laws are prosecuted. *Nicholson* does not prevent the abuse of the mother from being introduced at trial, but prevents the prosecution from finding neglect because a child witnessed their parent being abused.[79] Further, courts were instructed to consider the reasons *why* a mother would not leave an abusive situation, and to consider

71. *Id*. at 260 (noting that risks to survivors who looked to leave an abusive relationship included stalking, harassment, abuse, murder, and homelessness).

72. Copps, *supra* note 55, at 510 ("One of the most obvious, but also most important, benefits [of the *Nicholson* opinion] has been that ACS has been removing fewer children and charging fewer victims of domestic violence with neglect solely because of the exposure of their children to domestic violence.").

73. *Id*.

74. *See id*. at 511.

75. *See id*. at 507 ("[1)] the risks attendant to leaving, [2)] the risks attendant to staying, [3)] the risks attendant to seeking assistance through government channels, [4)] the risks attendant to criminal prosecution of the batterer, [5)] the risks attendant to relocating, [6)] the severity and frequency of the violence, and [7)] the resources available to the woman").

76. *See id*. at 512.

77. *Id*. at 513.

78. Xavier J. v. Francesca J., 849 N.Y.S.2d 648, 648–50 (N.Y. App. Div. 2008).

79. Copps, *supra* note 55, at 507.

the harmful effects of separation from a loving mother on the child.[80] That aside, the experiences and effects of abuse on the non-abusive partner are still not fully considered as a possible explanation for the failure to protect in all courts.

B. THE CURRENT LANDSCAPE OF FAILURE TO PROTECT LAWS

Failure to protect laws vary from state to state. Currently, twenty-nine states directly criminalize some variation of "permitting of child abuse" and allow for the non-abusive parent to be presented with the same charges as the abuser.[81] In some states, acts of omission are felonies[82] while in others they are misdemeanors (varying based on the frequency or caliber of the violence committed by the abusive parent or partner).[83] States that do not have specific failure to protect statutes have carved out similar failure to protect provisions as part of their child neglect statutes.[84] Other statutes can carry out failure to protect cases through their neglect statues, which fall into general categories of: neglect of a dependent,[85] cruelty to children or cruelty to juveniles,[86] and endangerment,[87] with sentencing guidelines that differ from that of the abusive partner. All of these laws fault non-

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80. Nicholson v. Scoppetta *Sets Precedent Protecting Children of Battered Women From Being Taken away from Their Mothers*, PARENT ADVOCATES, http://www.parentadvocates.org/nicecontent/dsp_printable.cfm?articleID=6839 (last visited Oct. 23, 2021).

81. ALASKA STAT. § 11.51.100 (2013); ARIZ. REV. STAT. ANN. § 13-3623 (2018); ARK. CODE ANN. § 5-27-221 (2003); CAL. PENAL CODE § 273(a) (West 2016); DEL. CODE ANN. tit. 11, § 1102 (2017); FLA. STAT. § 827.03 (2017); HAW. REV. STAT. § 709-903.5 (2011); IDAHO CODE § 18-1501 (2005); 720 ILL. COMP. STAT. ANN. 150/5.1 (LexisNexis 2016); 720 ILL. COMP. STAT. ANN. 5/12C-5 (LexisNexis 2016); IOWA CODE ANN. § 726.6 (West 2021); KY. REV. STAT. ANN. § 508.100 (West 1982); ME. REV. STAT. ANN. tit. 17, § 554 (2019); MASS. GEN. LAWS ANN. ch. 265, § 13J (West 1993); MINN. STAT. ANN. § 609.378 (West 2005); MISS. CODE ANN. § 97-5-39 (West 2013); NEV. REV. STAT. ANN. § 200.508 (West 2015); N.M. STAT. ANN. § 30-6-1 (West 2009); N.C. GEN. STAT. ANN. § 14-318.4 (West 2013); N.D. CENT. CODE ANN. § 14-09-22 (West 2019); OHIO REV. CODE ANN. § 2903.15 (West 1999); OKLA. STAT. ANN. tit. 21, § 843.5 (West 2021); OKLA. STAT. ANN. tit. 21, § 701.7 (West 2012); OKLA. STAT. ANN. tit. 21, § 852.1 (West 2021); S.C. CODE ANN. § 16-3-85 (2000); S.C. CODE ANN. § 16-3-95 (2000); S.C. CODE ANN. § 63-5-70 (2000); S.D. CODIFIED LAWS § 26-10-30 (2006); TENN. CODE ANN. § 39-15-401 (2019); TENN. CODE ANN. § 39-13-102 (2019); TENN. CODE ANN. § 39-15-402 (2019); TEX. PENAL CODE ANN. § 22.04 (West 2021); UTAH CODE ANN. § 76-5-109 (West 2017); VA. CODE ANN. § 18.2-371.1 (West 2016); W. VA. CODE ANN. § 61-8D-1 (West 2014); W. VA. CODE ANN. § 61-8D-4 (West 2014); WIS. STAT. ANN. § 948.03 (West 2016).

82. *See* ALASKA STAT. § 11.51.100 (2013); ARK. CODE ANN. § 5-27-221 (2003); FLA. STAT. § 827.03 (2017).

83. *See* DEL. CODE ANN. tit. 11, § 1102 (2017); 720 ILL. COMP. STAT. ANN. 150/5.1 (LexisNexis 2016); 720 ILL. COMP. STAT. ANN. 5/12C-5 (LexisNexis 2016) (failure to protect a child is a misdemeanor, unless the abuse is a proximate cause of the death of the child, in which case it is a felony); *see also* TENN. CODE ANN. § 39-15-401 (2019); TENN. CODE ANN. § 39-13-102 (2019); TENN. CODE ANN. § 39-15-402 (2019) (raising the felony from a Class B to a Class A felony if the child is under eight years old).

84. COLO. REV. STAT. § 18-6-401 (2019); IND. CODE § 35-46-1-4 (2019); MD. CODE ANN., CRIM. LAW § 3-602.1 (West 2015).

85. IND. CODE § 35-46-1-4 (2019); MD. CODE ANN., CRIM. LAW § 3-602.1 (West 2015).

86. D.C. CODE § 22-1101 (2013); GA. CODE ANN. § 16-5-70 (2004); LA. STAT. ANN. § 14:93 (2018); 11 R.I. GEN. LAWS ANN. § 11-9-5 (West 2004); VT. STAT. ANN. tit.13, § 1304 (2015).

87. ALA. CODE § 13A-13-6 (1975); KAN. STAT. ANN. § 21-5601 (2011); MONT. CODE ANN. § 45-5-622 (2007).

abusive parents for the crimes committed against them and against their children by their partner.

Oklahoma, Missouri, Nebraska, Nevada, South Carolina, and West Virginia have life sentences as punishments for their failure to protect laws.[88] When classified as felonies, sentences can range from "up to two years"[89] to "up to 60 years"[90] (or life in the six states listed above). The factors that contribute to sentencing include the number of offenses the parent already has against them, the type and duration of the abuse, and the age of the child. Generally, sexual abuse crimes receive harsher penalties. If a parent was aware (or "should have known") that their partner was sexually abusing their children, they are liable for a greater sentence—such as in the case of Nevada where life (with parole following a minimum of 10 years incarcerated) becomes applicable when a child suffered sexual, but not physical, abuse (which carries a felony sentence of 20 years).[91] When the child is younger, the sentence tends to be longer as well: in Tennessee the sentence shifts from a Class B to a Class A felony if the child is younger than eight years old.[92]

In addition to incarceration, courts can also terminate parental rights.[93] While in *Nicholson* the children were returned to their mother, had she been deemed unfit, termination of her parental rights would have been admissible as punishment, providing the court found it to be in the "best interests" of her children.[94] Failure to protect statutes prioritize removal at the risk of destroying the connection between a child and their loving parent—ultimately causing more damage, and destroying the mother's ability to parent due to the system's failure to help her escape.[95]

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88. Tim Talley, *Group Takes Aim at Oklahoma's Failure-to-Protect Law*, ASSOCIATED PRESS (Sept. 29, 2018), https://apnews.com/article/45a6f24af72c4750ac141f3fe10b3bc9.

89. S.D. CODIFIED LAWS § 26-10-30 (2006) (defining the crime as a class six felony, which in South Dakota can receive a prison sentence of two years); Mark Theoharis, *South Dakota Felony Crimes by Class and Sentence*, CRIMINAL DEFENSE LAWYERS, (last visited Oct. 4, 2021), https://www.criminaldefenselawyer.com/resources/criminal-defense/state-felony-laws/south-dakota-felony-class.htm.

90. TENN. CODE ANN. § 39-15-402 (2019) (ruling the failure to act a Class A Felony). Class A felonies have a maximum sentence of sixty years in Tennessee. Ave Mince-Didier, *Tennessee Felony Crimes by Class and Sentences*, CRIMINALDEFENSELAWYERS, (last visited Oct. 4, 2021), https://www.criminaldefenselawyer.com/resources/criminal-defense/state-felony-laws/tennessee-felony-class.htm.

91. NEV. REV. STAT. § 200.508 (2015).

92. TENN. CODE ANN. § 39-15-402 (2019).

93. Child removal is a severe legal punishment for the parent and life-altering for the child. Life sentences and other stringent prison sentences have similar negative effects on the relationship between child and parent. For the purposes of this paper, life-term sentences are akin to removal when considering the interference of the state on the parent's liberty interest.

94. *See generally* CHILD.'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1–2 (2017), https://www.childwelfare.gov/pubpdfs/groundtermin.pdf.

95. *Id.*

C. THE APPLICATION OF CURRENT FAILURE TO PROTECT STATUTES AGAINST MOTHERS

Most failure to protect laws contain a narrow scope of analysis which presumes a preference for custodial removal by ignoring a non-abusive parent's full narrative. Generally, statutes ask simply whether the parent stopped the abuse or whether the abuse continued. There is no gradience or context as to *why* a parent would not have reported the abuse right away.[96] In fact, any evidence of the parent's own abuse at the hand of the batterer is typically not introduced as an affirmative defense, but rather as evidence of their lack of action.[97] There is not a consistent method by which courts have tried to account for a mother's defense of her own abuse.[98] Courts have viewed mothers who are survivors of domestic violence in particular as "unreasonable," finding anything short of calling the police to be inaction.[99] There are, however, three categories of "inaction" that are wrongly assumed to be equal in this process.[100] First, the mother who "did nothing" because she was not present during the abuse and had no prior knowledge of it.[101] Second, the mother who "did nothing" because she knew of the abuse but, for reasons unknown, did not report.[102] Third, and most common in failure to protect cases, are mothers who did take action to protect their children (such as by saving funds to leave or seeking help), but fell short of actually removing their child from the abusive parent's reach by the time CPS intervened.[103] This

96. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3623 (2009); ARK. CODE ANN. § 5-27-221 (2003); N.D. CENT. CODE § 14-09-22 (2017); *see also* Mahoney, *supra* note 28, at 437–38.

97. *See* Mahoney, *supra* note 28, at 444 (citing Jacqueline Mabatah, *Blaming the Victim? The Intersections of Race, Domestic Violence, and Child Neglect Laws*, 8 GEO. J.L. & MOD. CRITICAL RACE PERSP. 355, 357 (2016)); *see also* Fugate, *supra* note 22, at 292; Jacobs, *supra* note 45, at 585 ("The courts reason that since she is aware of the violence that occurs in the home, she should do more to ensure that her children are shielded from that violence.").

98. While both men and women are tried under the failure to protect statutes, women (and mothers specifically) are disproportionately targeted by these laws. This paper focuses primarily on the cases against non-abusive mothers in abuse situations.

99. Jacobs, *supra* note 45, at 651. There are many reasons for someone to not call the police. For survivors of intimate partner violence in particular, past negative experiences with police can influence whether or not they are willing to phone for help. *See* Ruth E. Fleury et. al., *Why Don't They Just Call the Cops?: Reasons for Differential Police Contact Among Women with Abusive Partners*, 13 VIOLENCE & VICTIMS 333 (1998). Certain communities are more likely to distrust police as well—acts of police brutality, over-enforcement of small infractions, and the high numbers of unsolved shootings have eroded trust and encouraged self-help rather than turning to the police force, which they believe will escalate a situation. *See* Abené Clayton, *Distrust of Police is Major Driver of US Gun Violence, Report Warns,* GUARDIAN (Jan. 21, 2020), https://www.theguardian.com/us-news/2020/jan/21/police-gun-violence-trust-report. Black Americans have significantly less trust in police, with nearly half reporting that they have little to no confidence that police officers in their community will treat them fairly. *See* Laura Santhanam, *Two-Thirds of Black Americans Don't Trust the Police to Treat Them Equally. Most White Americans Do*, PBS NEWSHOUR (June 5, 2020), https://www.pbs.org/newshour/politics/two-thirds-of-black-americans-dont-trust-the-police-to-treat-them-equally-most-white-americans-do. A history of negative interactions with police would discourage Black mothers in particular from calling police to intervene in a crisis.

100. Jacobs, *supra* note 45, at 651.

101. *Id.*

102. *Id.*

103. *Id.*

involves mothers, such as Tondalao Hall,[104] who were saving up money to leave and were actively coordinating other housing.[105] In failing to differentiate these three scenarios, the courts also fail to review any testimony that would be offered regarding effects of trauma on the non-abusive parent.

Courts, in this presumption for removal, do not regularly take into account testimony to understand the actions of an abused parent.[106] The cultural, economic, and societal factors which may have restricted a mother's opportunities to remedy her situation are ignored.[107] Courts have assumed that threats the abuser makes to the mother would encourage her to leave, when this in fact has the opposite effect.[108] However, as *Nicholson* demonstrated, leaving an abusive husband is not a foregone conclusion, as financial consequences, or threats of further abuse, may stop a woman from leaving.[109] *Nicholson* cabined that expert testimony *may* be heard, but cannot be required.[110] Evidence of the non-abusive parent's trauma as a means of explaining the decision-making process can be critical for a court to deliver a just result. However, the trauma is often manipulated or outright ignored in failure to protect cases against the non-abusive parent, as highlighted in the case studies below.

II. HOW A SYSTEM INTENDED TO PROTECT MOTHERS IS USED AGAINST THEM

A. REPRODUCTIVE JUSTICE FRAMEWORK

Despite the original purpose of failure to protect statues (to encourage mothers to report or leave dangerous situations),[111] when applied, these statutes discount evidence relevant to the mother's reasoning and operate contrary to their stated aim. The statutes use evidence of a failing system against mothers in their fight to claim their right to parent. In failure to protect cases, women are subject to greater scrutiny because of societal norms around motherhood.[112] However, the courts ignore this gendered oppression, the extreme standards set for women but not for men, and fail to account for the reasons why a mother may choose to keep her children with her, or why she might not immediately call the police. A reproductive justice framework would allow the courts to review all the ways a mother

104. *See* Alfonsi, *supra* note 13.

105. Mahoney, *supra* note 28, at 445–46.

106. *Id*. at 457 (calling for the introduction of expert testimony to explain the non-abusive parent's experiences to the court).

107. *See* Crystal M. Hayes et al., *Reproductive Justice Disrupted: Mass Incarceration as a Driver of Reproductive Oppression*, 110 AM. J. PUB. HEALTH S21 (2020) ("Reproductive justice recognizes that control over one's fertility is complex and cannot be fully understood outside the social conditions that affect it—including the racialized phenomenon of mass incarceration and its historical relationship to slavery and Jim Crow."). While this source specifically addresses women's fertility, the right to raise children in a healthy, sustainable environment is equally affected by the multitude of factors listed here.

108. Fugate, *supra* note 22, at 290 n.78; *see also* Kohler, *supra* note 70, at 260.

109. Kohler, *supra* note 70, at 260.

110. Copps, *supra* note 55, at 509.

111. Mahoney, *supra* note 28, at 431.

112. Jacobs, *supra* note 45, at 587.

faces oppression in a failure to protect case, from her initial interaction with the abusive partner to her final court date.[113]

Reproductive justice has three primary pillars: 1) the right not to have a child, 2) the right to have a child, and 3) the right to parent children in safe and healthy environments.[114] Whether these rights have been properly secured and defended, especially the right to raise a child in a healthy and safe environment (at issue in failure to protect cases), requires an understanding of the social context in which the cases occur.[115] The key is understanding the relationship between health, health care, financial resources, and individual experiences to clearly grasp why a mother may not have removed herself and her children from a dangerous situation.[116] Race and class are critical components to understanding the choices a parent makes in raising their children, yet often only one "version" of motherhood is accepted by courts.[117] Women in failure to protect cases are punished for not adhering to the judge's view of motherhood, regardless of whether or not that path was an option. Reproductive justice ideologies, and this paper, urge courts to consider the entire system that the mother operates in before terminating parental rights. Without full consideration of the reproductive oppression the mother is already subject to, the court will inevitably fail to apply a strict scrutiny analysis and deny the non-abusive parent her fundamental right to parent.

B. CASE STUDIES

The cases below highlight the assumptions courts make to determine termination of parental rights. The record shows that how a mother may have found herself in a domestic abuse situation is not considered. Judges do not ask for evidence of trauma that the mother may have experienced, nor do they consider how few options the mother may have had to leave her abusive situation. The cases below also highlight that, over decades, courts have often failed to account

113. Reproductive justice has been led by SisterSong Women of Color Reproductive Justice Collective, who coined the term in recognition that the women's movement did not reflect the needs of women of color, marginalized women, and trans people. *See also* ROSS & SOLINGER, *supra* note 23, at 14, 54–57, 60 (discussing how the reproductive justice movement was, in part, a reaction to the reproductive abuses women of color, and other marginalized women, had experienced at the hands of the government and society across the decades). Understanding that reproductive justice is in response to the full spectrum of reproductive oppression and abuse that marginalized communities have endured is critical to accounting for the way laws are carried out today.

114. ROSS & SOLINGER, *supra* note 23, at 9.

115. *Id*. at 12.

116. *See id*.; *see also id*. at 69 ("Reproductive justice argues that social institutions, the environment, economics and culture affect each woman's reproductive life."); *see also* ASIAN COMMUNITIES FOR REPRODUCTIVE JUSTICE, A NEW VISION (2005) ("Women's ability to exercise self-determination—including in their reproductive lives—is impacted by power inequities inherent in our society's institutions, environment, economics, and culture."); Reproductive Justice, SISTERSONG, https://www.sistersong.net/reproductive-justice (last visited Jan. 5, 2022).

117. ROSS & SOLINGER, *supra* note 23, at 15–16 (regarding laws that separate children from their mothers: "[t]hese have given the state both the power to decide what constitutes a good mother and the capacity to act against the motherhood of women defined as falling short of the standard, even when that standard might embed and depend on racial and class biases.").

for the full range of evidence of a mother's desire to raise her child in a healthy and sustainable environment.[118] *In re C.W.* highlights that the assumptions the court (and state) may make in determining parental termination ignore the difficulties the mother may be facing. *Johnson v. State* exemplifies that a court may be blatantly ignorant of the effects of trauma on a mother. While these two cases span across decades of time, they show that the incorrect presumptions around a mother's ability to protect her children are timeless.

1. *In re C.W.* (2015)

In *In re C.W.*, the court terminated parental rights for a non-abusive mother based on the fact that she did not leave the father during the proceedings, but the court failed to ask why the mother did not leave the father. The mother, H.W., was living with the father, D.W., of their three children, and two children from his previous marriage.[119] D.W. faced charges for sexually and physically abusing his children.[120] Although there was another suspected sexual abuser,[121] the court held the father responsible and required H.W. to leave the father in order to maintain parental rights.[122] Despite her statements that she would leave the father if required,[123] the court never engaged with the mother as to why she would not want to leave. The therapist who established that the father was the abuser did not once speak to the mother about the father's abuse or provide his evidence that the father was the abuser.[124] H.W. honestly believed that the father had not abused the children and "wanted her whole family together."[125] However, the court viewed her disbelief about the abuse as evidence of her inability to parent—even though the court acknowledged that the abuser may have been a third party.[126] The state testified in the underlying proceeding that "the mere fact that she chooses to remain with [the father] . . . prohibits her from being an option. I find that unfortunate. But that's her choice to make."[127] Yet again, no one delved into why

118. While failure to protect cases have been litigated and challenged since 2015, as exemplified in the cases of Tondalao Hall and Marion Phillips, *see supra* Introduction, not all modern cases contain sufficient information on the assumptions of the judge to have been useful for the case studies here. The 2015 and 1987 cases were chosen because the opinions shed light on aspects of the hearing and the judge's perspective that reflect the assumptions used in these cases.

119. *In re* C.W., No. 113,547, 2015 WL 5311260, at *1 (Kan. Ct. App. Sept. 4, 2015).

120. *Id.*

121. *Id.* at *5.

122. *Id.*

123. *Id.* (noting that both the mother and father reported signs of sexual abuse and believed it to have been from a perpetrator named Josh or his ex-wife's boyfriends with whom the children stayed sometimes. The court found that even if another person committed some abuse, the therapist testimony stating that D.W. was an abuser meant the father could not be in the children's lives).

124. *Id.* at *4.

125. *Id.* at *5.

126. *Id.* at *11–13. While the court noted that it was possible for someone to have carried out the abuse on the children, evidence presented in the appeal—as the children were older—indicated that the father was sexually abusive. It was also clear, however, that the mother had no knowledge of this abuse.

127. *Id.* at *5.

the mother remained with the father, instead presuming that she made the conscious decision to choose the abusive father over her children. The mother hoped to have a relationship with the father and with her children, which her attorney explained by stating that the mother should not have to choose between her children and their father.[128] To the mother, keeping the family together was in everyone's best interest.

The facts of the case raise questions that the court failed to address and did not consider in its analysis. The facts detail that the mother could not get to work on her own, and that on occasion she would have to leave the eldest child to watch the younger siblings so the father could drive her to work.[129] This suggests a financial dependency on the father which would make leaving him difficult. The effects of trauma, as described in Part I and Part III.C.2.a, also complicate a mother's choice to leave a partner. The court fails the mother in *C.W.* by not investigating any of these issues, and instead enforcing a presumption of unfitness because of the family's history with child services and because of the mother's history with the father.[130] This incomplete analysis is not fit for deciding whether or not the children should have a relationship with their mother for the rest of their lives.

2. *Johnson v. State* (1987)

In *Johnson v. State*, Brenda Johnson had witnessed her abusive boyfriend, Eric Rolle, murder her daughter. Her attorney presented evidence that the mother herself was abused by the partner and suffered trauma from Eric Rolle's hand.[131] A neighbor's testimony further proved the mother had a loving relationship with her daughter.[132] The state did not indicate that the appellant ever inflicted any injury on the child.[133] Despite the evidence of Brenda's abuse, the judge found fault that during the trial she answered some questions with "I do not recall" and "I don't remember."[134] Trouble recalling memories and false memories are common symptoms of PTSD.[135] Thus, Brenda's answers likely could have been the

128. *Id.* at *11.

129. *Id.* at *2.

130. *Id.* at *6. Note that the child's stay in the foster care system, which was about a year, was used as evidence of the mother's unfitness, although the child's tenure in the system was largely determined by the length of the legal proceedings.

131. Johnson v. State, 508 So. 2d 443, 444 (Fla. Dist. Ct. App. 1987) (Zehmer, J., dissenting).

132. *Id.*

133. *Id.*

134. *Id.* at 446 (citing the sentencing judge's observation during trial).

135. *See generally* Slawomira Diener et. al., *Learning and Consolidation of Verbal Declaration Memory in Patients with Posttraumatic Stress Disorder,* 218 ZEITSCHRIFT FÜR PSYCHOLOGIE 135, (2010) (confirming previous reports of declarative verbal memory deficits in PTSD. The report also found that arousal symptoms, such as startled responses in stressful situations or jumpiness, would interfere with memory formation in PTSD patients); *see also* Jill Waite, Memory in Adult Female Victims of Intimate Partner Violence 74 (August 2018) (Ph.D dissertation, Walden University) (ScholarWorks, Walden University) (finding that female victims of IPV have their ability to learn affected by the trauma "which can help explain why many women report that they do not know why

aftereffects of her abuse. However, without expert testimony to illustrate the effects of PTSD or even raise PTSD as an explanation, Brenda's narrative was discredited. The state's recommendation for sentencing was to follow the guidelines of three to seven years and the state recommended "that the low end of [the] guidelines" be followed, rather than the departure the court took in sentencing the maximum of fifteen.[136] This case resulted in a mother's worst fear, the death of her daughter. However, Brenda's main crime, in the eyes of the court, was living with a cruel man.[137] *Johnson* showcases deficiencies in failure to protect statutes: they do not account for a loving parent's relationship with their child and they criminalize parents for living with an abusive partner.

The above case law illustrates the typical process for prosecuting failure to protect cases. Trauma alone does not explain every decision a mother makes or the full scope of the violence. Brenda Johnson, and mothers in similar situations, should not have her abuse used against her, since she is a loving parent who, separate from her abuser, would provide for her child.

C. ANALYSIS OF GENDER OPPRESSION IN THE COURTS

While men and women abuse and fail to protect children in equal measure,[138] mothers face greater scrutiny of their parenting efforts and are indicted for failure to protect laws more frequently—in Oklahoma ninety-three percent of failure to protect cases convict women.[139] Gendered expectations for mothers skew the way juries decide the allocation of guilt, sentencing, and even what evidence can be considered for evaluation.[140] Historically, health care professionals believed that women who were abused or permitted abuse were "sick" women.[141] Women also face disproportionate abuse when they have less education, are poor, or are part of minority communities.[142] The pressures of being a good partner and

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they see their abuser again."); Florence Durand et al., *Emotional Memory in Post-traumatic Stress Disorder: A Systematic PRISMA Review of Controlled Studies*, FRONTIERS PSYCH. (2019) https://www.frontiersin.org/articles/10.3389/fpsyg.2019.00303/full ("Indeed, PTSD patients tend to complain about cognitive functions, notably memory difficulties, which impact their daily functioning.").

136. *Johnson,* 508 So. 2d at 445 (Zehmer, J., dissenting).

137. *Id*. at 444.

138. Corinne May-Chahal, *Gender and Maltreatment: The Evidence Base*, 4 SOC. WORK & SOC'Y INT'L ONLINE J. 53, 53–54 (2006) (noting findings that women physically assault their children in equal numbers to men—although the goal of her piece was to note the ways in which abuse by men and women differs in type and degree, it does show that for failure to protect purposes, men and women could be prosecuted in more even measure).

139. Darla Slipke, *Mother Imprisoned Under Failure to Protect Laws Reflects on First Months of Freedom*, OKLAHOMAN (Feb. 3, 2020, 5:00 AM), https://www.oklahoman.com/article/5653956/mother-imprisoned-under-failure-to-protect-laws-reflects-on-first-months-of-freedom; *see also* Fugate, *supra* note 22, at 285.

140. Mahoney, *supra* note 28, at 443.

141. Jacobs, *supra* note 45, at 593 (citing Suzanne P. Starling et al., *Abusive Head Trauma: The Relationship of Perpetrators to their Victims*, 95 PEDIATRICS 259, 259–60 (1995)).

142. CTRS. FOR DISEASE CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010–2012 STATE REPORT 198 (2017).

mother clash in abusive relationships and society fails to acknowledge the toll this takes on women.

Because of gendered assumptions, the standard of "minimal care" women must meet to avoid neglect under failure to protect laws is higher than that of men. It is also generally assumed that a woman knows what is best for her children whereas men are not expected to have the same knowledge. In addition, The court also imposes its own opinion onto the situation.[143] Often, the court will refuse to accept any action other than immediate removal—a mother choosing to keep her children with her is not a decision the court sees as furthering the child's interest.[144] However, in the long-term, a sustained relationship with a caring mother benefits the child's well-being, and can negate the trauma of loss and separation a child may otherwise suffer.[145] A "mother's intuition" creates a bar too high for mothers, especially those who are survivors of abuse, to meet when it comes to preventing harm to their children from their live-in partners. Mothers are expected to suppress their own needs to protect their children.[146] In most cases, the mothers are attempting to do both: save themselves and their family.[147]

Mothers are presumed to intuitively know about abuse against their children, even if they never witness the abuse.[148] This was true in Tondalao Hall's case, where the prosecutor argued: "She's their mother. She's responsible for them. She is the one person in this world who should be standing up for them and taking up [sic] of them and making sure that they are loved and that they are cared for, and she did not do that."[149] The father was not similarly accused.[150]

Failure to protect charges are rarely brought against male partners.[151] It should be noted that men are also victims of the system created by failure to protect

143. Such as in the cases of *C.W.* and *Johnson*. *See supra* Part II.B.

144. *Testimony of Ms. Hall, supra* note 15, at 42 ("So rather than worrying about the health of your kids, you worried about them being taken away from you?"). The prosecution's question assumes that the two are not in line with the interests of the child; however, in a case like Tondalao Hall's, where she was working to remove the children from the abusive partner to a safer home, her hesitancy to go to the hospital was in the children's long-term interest of maintaining a relationship with their mother.

145. Nicholson v. Scoppetta, 344 F.3d 154, 163 (2d Cir. 2003) (discussing the harms of removing a child from their non-abusive parent for a length of time).

146. Jacobs, *supra* note 45, at 587.

147. *See* Campbell v. State, 999 P.2d 654, 660, 664 (Wyo. 2000) (holding a mother accountable for her partner's actions, despite her stated intent to protect her children); Fugate, *supra* note 22, at 273 (referencing *Campbell*: "While Campbell did the best she could for her daughter, it was not enough to satisfy the court; Boyer, the actual abuser, was convicted of only a misdemeanor while Campbell was convicted of a felony."); *see also In re* C.W., No. 113,547, 2015 WL 5311260, at *5 (Kan. Ct. App. Sept. 4, 2015) (noting that the mother was hoping to keep her family together, believing it in everyone's best interests).

148. Fugate, *supra* note 22, at 296 (citing People v. Peters, 586 N.E.2d 469 (Ill. App. Ct. 1991)).

149. *See* Transcript of Formal Sentencing After Previous Plea of Guilty 7–8, Oklahoma v. Hall, No. 2007-6403 (Dist. Ct. Okla. 2007) [hereinafter *Formal Sentencing of Ms. Hall*].

150. *Id.*

151. Leet v. State, 595 So. 2d 959, 962–63 (Fla. Dist. Ct. App. 1991) (finding a boyfriend had a duty to protect his girlfriend's children from her abuse when they were in his care, living in his home, and he had several instances to question if their injuries were related to abuse).

laws, evidence of their own abuse is often neglected. Society still rarely recognizes abuse of men by women.[152] Further complicating matters, gender expectations influence the kind of charges that are brought in a case of domestic abuse, as exemplified by David Schwartz. David witnessed Jessica Schwartz, his son's stepmother, abuse his son, A.J.[153] A.J. eventually passed away from the assaults.[154] While the stepmother was charged with murder, just like the fathers in the case of *Johnson*, A.J.'s father did not face charges. No failure to protect laws were brought against Schwarz and there was no public outcry.[155] Failure to protect laws continuously punish women more harshly than men by having higher expectations for women's decision-making ability in a crisis.[156]

There are so few cases of failure to protect brought against men that some argue there is no "typical" failure to protect process for the male non-abusive partner.[157] The gender difference comes into starker contrast when the court refuses to consider if the male partner has fostered a relationship with the child. Male partners, who may be parenting but not biologically related to the child, do not have evidence introduced related to their relationship with the child; for men, *in loco parentis* relationship factors are excluded when determining whether there is a nonparental duty owed to an abused child.[158] Case law suggests that a jury may conclude that, for the purposes of establishing negligence, the male partner had established a temporary familial relationship to amount to *in loco parentis*, but the court itself will not consider these factors when considering the standard of "knowledge" that the partner should have had about the abuse.[159]

Overall, women are expected to intuit children's needs regardless of if the children are their own. Without the parental duty, men are not held to the same standard as women.[160] Men receive the benefit of the doubt regarding their ability to protect children from abuse they are themselves suffering from, a benefit that should extend to all non-abusive partners.

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152. Rob Whitley, *Domestic Violence Against Men: No Laughing Matter*, PSYCH. TODAY (Nov. 19, 2019), https://www.psychologytoday.com/us/blog/talking-about-men/201911/domestic-violence-against-men-no-laughing-matter (writing on the assumed societal narrative that men conduct domestic violence and women are always the victims).

153. Jacobs, *supra* note 45, at 583–84.

154. *Id.* at 584.

155. *Id.*

156. *See, e.g.*, Fugate, *supra* note 22, at 273 (noting that in *Campbell*, though she "did the best she could for her daughter, it was not enough to satisfy the court; Boyer, the actual abuser, was convicted of only a misdemeanor while Campbell was convicted of a felony.").

157. *Id.* at 281.

158. *Id.* at 283; Leet v. State, 595 So. 2d 959, 962 (Fla. Dist. Ct. App. 1991).

159. *Leet*, 595 So. 2d at 962–63.

160. *See* Fugate, *supra* note 22, at 282–83.

III. THE ARGUMENT FOR APPLYING STRICT SCRUTINY REVIEW WHERE REMOVAL OR TERMINATION OF PARENTAL RIGHTS IS AT RISK

A. STRICT SCRUTINY AND THE FOURTEENTH AMENDMENT

This paper argues that failure to protect laws violate a non-abusive parent's substantive due process by undermining their interest to parent under the Fourteenth Amendment. Statutes that implicate a fundamental right must pass muster under a higher standard than a "rational basis" to determine constitutionality. Failure to protect statutes must be reviewed under a two-prong analysis. The first prong assesses whether the state has a compelling interest to overcome the individual's rights. The second prong assesses whether the government has used narrowly tailored means to achieve its goal. This paper argues that while the state has a compelling interest to ensure the safety of children, removal is not a narrowly tailored means of achieving its goal—the removal presumption blinds the court to the evidence of a non-abusive mother's relationship with her child and ignores alternate solutions.[161] Removal, in light of all the interests and evidence, is *not* a narrowly tailored means to protect the child and discourages parents from reporting abuse. First, this paper will establish that parenting is a fundamental right deserving of strict scrutiny under the Fourteenth Amendment; second, the paper will review failure to protect laws under the strict scrutiny framework.

B. SUPREME COURT PRECEDENT ON PARENTAL RIGHTS

In order for the Court to invoke a strict scrutiny analysis, it must first establish that the right being violated is a fundamental right constituting a liberty interest under the Fourteenth Amendment.[162] The Supreme Court has not been forthright as to whether the right to parent should be a fundamental right deserving of strict scrutiny. The Court has called parenting a "fundamental right" but in the same breath applied a standard of review slightly less than that of strict scrutiny.[163] In other cases, the Court did not explicitly state parenting was a fundamental right, but it applied a high level of review.[164] This paper argues that Supreme Court precedent establishes grounds for using a strict scrutiny analysis for the termination of parental rights in failure to protect cases.

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161. Trepiccione, *supra* note 24, at 1514 ("[T]here is no exact test for infringement, and the totality of the circumstances is evaluated to determine whether substantial interference with a fundamental right has occurred.").

162. U.S. CONST. AMEND. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty or property, without the due process of law.").

163. *See generally* Troxel v. Granville, 530 U.S. 57 (2000).

164. Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (holding that while the state can intervene in the private realm of the family concerning an issue of great public interest, the court's standard of review was higher than that of a rational basis even though it never spoke of parenting or guardianship as fundamental rights).

1. *Meyer v. Nebraska* (1923)

Beginning with *Meyer v. Nebraska*, the Court interpreted the "liberty" provision in the Fourteenth Amendment as implicating personal rights.[165] *Meyer v. Nebraska* concerned whether a parent had a right to teach their children German when the state of Nebraska had forbidden the teaching of any foreign languages.[166] The Court found that the freedom guaranteed under the Fourteenth Amendment extends to "establish a home and bring up children."[167] The Court in *Meyer* applied a higher level of scrutiny than a rational basis test by analyzing the factual basis for the law, its purpose, and the resulting effects of the law on the individuals it affected.[168] The right to parent was therein recognized as something of greater importance than other rights, deserving a higher level of review to ensure that any infringement on the right was warranted by the government.

2. *Troxel v. Granville* (2000)

Troxel v. Granville, which addressed grandparents' right to visitation, found that a Washington statute allowing any person to petition for visitation at any time violated a mother's substantive due process to raise her children. The Court found that the Fourteenth Amendment protects the "fundamental right of parents" to have "care, custody, and control of their children."[169] *Troxel* attempted to establish a presumptive standard that the mother's relationship with her children is inherently beneficial to the child's wellbeing. However, despite the proclamation of the "fundamental" right, the Court did not apply a strict scrutiny standard of review.[170] This paper argues that the dicta in the Supreme Court cases,[171] which emphasizes the special nature of the relationship between a parent and child, recognizes that parenting is an inherent liberty interest—especially when at risk of removal.

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165. Meyer v. Nebraska, 262 U.S. 390, 390 (1923).

166. *Id.*

167. *Id.* at 399.

168. *See generally id.* at 399–400 (going above the needs of a rational basis test, although not quite applying a strict scrutiny analysis).

169. Troxel v. Granville, 530 U.S. 57, 66 (2000).

170. *See generally id.* at 65 (finding that the "liberty interest at issue in this case—the interest of the parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."). However, the Court did not go through the standard two prong analysis (for compelling interest and narrowly tailored means) that is required with liberty interests. *Id.* at 72–73. This inconsistent application of the strict scrutiny standard has caused some confusion within parental rights cases, although, this paper argues, the language used in cases like *Troxel* indicate a clear intention to treat the right to parent as any other liberty interest.

171. *Id.* at 65 ("[T]he liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interest recognized by this Court."); *Meyer*, 262 U.S. at 399 ("Liberty thus guaranteed . . . denotes not merely freedom from bodily restraint but also the right of the individual . . . to establish and bring up children."); *see also* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting) ("Accordingly, although the Constitution is verbally silent on the specific subject of families, freedom of personal choice in matters of family life long has been viewed as a fundamental liberty interest worthy of protection under the Fourteenth Amendment.").

While the Court has not directly reached a conclusion on the question of parental rights, this paper argues that failure to protect laws should be analyzed under a strict scrutiny standard due to the social emphasis placed on parenting and the Court's own acknowledgement of the centrality of parental rights in termination cases.[172] In the words of Justice Blackmun, dissenting in the case of *Lassiter v. Department of Social Services*:

> [T]he interest of a parent in the companionship, care, custody, and management of his or her children . . . [is an] interest [that] occupies a unique place in our legal culture, given the centrality of family life . . . far more precious . . . than property rights.[173]

3. *Santosky v. Kramer* (1982)

Santosky v. Kramer is a landmark Supreme Court case holding that the "preponderance of the evidence" standard does not apply to cases terminating parental rights.[174] *Santoksy* focused on a procedural due process question; however, it also had to decide whether revoking parental rights is an invasion of liberty, which is the "fundamental" requirement needed to trigger a strict scrutiny review under substantive due process.[175] *Santosky* began its analysis by proclaiming that parenting is a liberty interest, and listed in its holding that "the fundamental liberty interest of natural parents in the care, custody, and management of their child is protected by the Fourteenth Amendment."[176] The majority emphasizes that where the individual's interests are a liberty interest, defined as "particularly important" and "more substantial than mere loss of money," a clear and convincing evidentiary standard should be applied.[177] This interest was extended to include the loss of custodial rights. Similar to the issue central to *Santosky*, failure to protect laws concern a fundamental interest in need of review because they threaten

172. *Troxel*, 530 U.S. at 66; *see also* Wisconsin v. Yoder, 406 U.S. 205 (1972) (protecting parental rights in conjunction with religious freedom, creating a "hybrid" fundamental right due strict scrutiny analysis, but spending time on the discussion of the parent's right to parent in the total analysis of the government's intrusion); Care and Prot. of Charles, 504 N.E.2d 592, 598–99 (Mass. 1987) (acknowledging parents' "basic right [in] directing the education of their children" and reconciling it with the compelling interest of the state in educating its citizenry); *In re* Greene, 292 A.2d 387 (Pa. 1972) (refusing to overrule the right of a parent's care of their child, and their religious convictions, for a non-critical surgery—showcasing the heightened concerns about interfering into the sphere of the family).

173. *Lassiter*, 452 U.S. at 38 (Blackmun, J., dissenting) (internal citations omitted).

174. Robert A. Waigner, Santosky v. Kramer*: Clear and Convincing Evidence in Actions to Terminate Parental Rights*, 36 U. MIAMI L. REV. 369, 370 (1982).

175. The case dealt with the constitutional requirement that an individual must be given notice, the opportunity to be heard, and a decision by a neutral decision maker in a case. Santosky v. Kramer, 455 U.S. 745, 745 (1982).

176. *Id.*

177. *Id.* at 756.

the termination of parental rights. The Court's language in *Santosky* is deliberate and reflects the Court's previous indication that parenting is a fundamental right.

C. APPLYING STRICT SCRUTINY TO FAILURE TO PROTECT STATUTES

This paper argues the right to parent is fundamental and as such we must conduct an analysis under strict scrutiny review addressing a) whether the state's interest is compelling and b) whether that interest was advanced through narrowly tailored means. The state's interest in protecting a child from abuse and trauma meets the threshold of a compelling interest. However, as this paper argues, the statutes are not narrowly tailored because the presumption of removal is too invasive when considering the full breadth of evidence and when less severe alternatives can fulfill the same purpose. Further, in certain cases, the presumption of removal will hinder the state's interests in promoting the well-being of the child, who benefits from a long-term, stable relationship with a loving, non-abusive parent.

1. Establishing That a State Has a Compelling Interest to Secure the Safety of a Child

The first prong of strict scrutiny asks whether the state has a compelling interest in protecting children from abuse and trauma. The courts have proven their support of a compelling state interest standard by repeatedly ruling for state intervention where a child was at risk or their health was at stake.[178] The state is right to enforce these values. However, the duty of the parent has limits, to be respected by the state; for example, a parent is not required by the state to die for their child.[179] Similarly, the state cannot require mothers to put themselves in danger or risk abuse from their partners. Yet courts often persecute mothers for not leaving their partners, even if it means putting themselves in danger of abuse. While the interest is compelling, to properly advance a child's best interest, courts must consider the liberty interest of the mother and the full weight of the evidence available to support the child's interest.

178. *See* Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding that the state, as *parens patriae*, had a compelling interest in protecting the welfare of its children); *see also In re* Sampson, 317 N.Y. S.2d. 641 (N.Y. Fam. Ct. 1970) (finding that while the interests of the parents to raise children in their desired faith was strong, it did not foreclose the state's intervention to perform a surgery that was not necessary for the boy's survival—but was critical to his well-being—contrary to the parent's will).

179. Jacobs, *supra* note 45, at 623–24 (noting that the parental duty "neither could nor should punish all . . . omissions").

2. Child Removal Is Not a Narrowly Tailored Means to Advance the State's Compelling Interest

While the state has a compelling interest in children's safety, it cannot impede the rights of the parent unless narrowly tailored.[180] Failure to protect laws falsely presume that removal is a narrowly tailored means to achieve the state's interest in protecting the child. However, removal does not consistently serve the state's interest. First, failure to protect laws do not acknowledge the interest in keeping the child with the non-abusive parent. Second, in view of the mother's full narrative, it often becomes clear that she is working to secure the child's interest in ways that are compatible with the state's interest.

a. A Complete Review of the Child's Interest to Be Secured by the State. In balancing the interests of the parent, child, and state during parental rights termination cases, the courts are called to review the child's interest in the litigation—however, the child's interest is often supplanted for the state's interest or not fully considered.[181] The evidence provided in favor of the state's interest in removal may also work against it. Separating a child from their family is generally an undesirable outcome for the child's development[182]—especially if one parent is still loving to the child and future abuse is unlikely once the parent separates from the abusive partner.[183] When CPS removes a child from their non-abusive parent's care, the disruption and trauma of new circumstances take a toll on the child's wellbeing.[184] Courts often assume that the termination of a parent's rights will benefit the child.[185] However, studies have found that a child's separation from a parent has adverse physiological and physical effects similar to those suffered by a child in the abusive situation itself.[186] It is in the child's interest to remain with their mother; however, this is often presented as in direct opposition to the state's interest.[187] Therefore, questions directed at Tondalao Hall focusing on why she chose her

180. *See* Wisconsin. v. Yoder, 406 U.S. 205, 226–27 (1972) (finding that while the state has a compelling interest in the education of its citizenry and the maturity of individuals, the specific law requiring two more years of school was not necessary to fulfilling that end and thus could not unnecessarily infringe upon the right of the parents to raise their children in the Amish community); State v. Walden, 293 S.E.2d 780, 786 (N.C. 1982) (finding that the state cannot require parents to place themselves in danger of death in carrying out their common law duty as a parent).

181. *See Yoder*, 406 U.S. at 241–42 (Douglas, J., dissenting) (calling for the Court to consider the interests and preferences of the children at issue and to ensure that the child's interest is a factor of the analysis).

182. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child's best interest.'") (internal citations omitted).

183. Stirling & Jackson, *supra* note 36, at 667; *see also* Nicholson v. Scoppetta, 344 F.3d 154, 164 (2d Cir. 2003) (discussing the harms of removing a child from their non-abusive parent for a length of time).

184. *Nicholson*, 344 F.3d at 164.

185. Santosky v. Kramer, 455 U.S. 745, 765 (1982).

186. Stirling & Jackson, *supra* note 36, at 667.

187. Trepiccione, *supra* note 24, at 1515.

custody rights over her children's health led the judiciary to incorrectly believe that the two are mutually exclusive.[188] When evaluating whether the statute ensures a "narrowly tailored means," it is necessary to consider if the rights of the mother and child are being pushed aside. The mother's experience may show that she is still a fit parent for the child and should not lose custody rights.

b. Review of the Non-Abusive Parent's Experience with Trauma and Ability to Provide for the Child. To properly review whether removal is a narrowly tailored means, the analysis must consider the totality of evidence representing the non-abusive parent's interest. The statutes must account for the full burden of the loss and ensure that removal is only pursued in the most crucial of circumstances. First, the evidence of a mother's own abuse at the hand of her partner must be considered in its entirety and in her favor. Second, this paper argues that courts must look to what actions the mother has taken to protect her children. These two considerations highlight the problems arising from statutes which presume mothers to be unfit—where in fact, a relationship with the mother is often the proper vehicle for advancing the child's interest.

i. Evidence of Abuse in Support of a Mother's Claim to Parent. First, courts should incorporate evidence of how the mother's abuse would affect her decision-making process into their review of removal procedures, instead of using the mother's abuse solely as evidence to demonstrate her knowledge of violence within the home.[189] This would utilize the trauma experienced by the mother to explain the decision-making process she employed in protecting her children and herself. It would also educate the court on abusive tactics to which the mother was likely subjected. Most notably in failure to protect cases, abusive partners use a multitude of manipulative techniques to coerce the non-abusive parent into staying. The American Medical Association Diagnostic and Treatment Guidelines on Domestic Violence identify coercive behaviors in violence and abuse cases, especially "isolation, deprivation and intimidation."[190] In fact, Tondalao Hall continued to receive threats from her abusive partner while in jail.[191] During her sentencing the judge even noted that Tondalao would look over to Braxton before answering, almost, one could argue, as if she was hoping to avoid angering him further.[192] Among female survivors of intimate partner violence, 51.8 percent experienced post-traumatic stress disorder (PTSD); among male survivors,

188. *See Formal Sentencing of Ms. Hall*, *supra* note 149 and accompanying text.

189. *See* Mahoney, *supra* note 28, at 444.

190. *American Med. Ass'n Diagnostic and Treatment Guidelines on Domestic Violence*, 1 ARCHIVES OF FAM. MED. 39, 40 (1992).

191. Alfonsi, *supra* note 13.

192. *Formal Sentencing of Ms. Hall*, *supra* note 149, at 12–13. ("There would be certain questions that would be asked of her where she would look over at the defendant and make direct eye contact with him prior to her taking a moment or two to respond . . . Was she scared of him? Probably.").

16.7 percent experienced PTSD.[193] Abusive partners perpetuated a fear so substantial as to skew their perception of reality. This fear pervaded every interaction Tondalao Hall had with Richard Braxton—and yet she had clearly acted to protect her children by actively seeking opportunities to leave. Fear impacts the non-abusive parent, but it does not instantly render them unable to parent; it merely provides a full narrative of the non-abusive parent's protection strategy. Tondalao Hall had actively set aside funds, protected her children when with them, and worked to provide for them, all while facing abuse at the hands of her partner—proving that mothers can parent even when facing extreme adversity. Courts would gain a fuller understanding of a non-abusive parent's circumstances if they analyzed a non-abusive parent's actions through the lens of trauma. This fuller understanding would ultimately benefit the interests of the state, child and non-abusive parent.

ii. Courts Should Acknowledge the Range of Reasonable Actions a Mother Can Take to Protect Her Children. Second, the statutes must recognize the difference between a mother acting to *protect* her children rather than acting to save them.[194] States that have failure to protect statutes do not account for this difference or the "reasonable actions" a survivor of abuse would take when her life or the security of her children is at stake.[195] This explains why Tondalao Hall would prioritize maintaining a relationship with her children, protecting them for the long term, rather than immediately removing them from Braxton's reach, at the cost of a separated family and additional loss to her children.

The courts do not at present consider the intent of the mother in protecting her children, only whether they are protected or not by the time CPS is made aware of the situation.[196] There are many complications delaying a woman who is attempting to leave an abusive partner. She may have nowhere else to go and need to plan accordingly to establish a secondary location safe from the abuser;[197] she may not be able to take advantage of available resources as it would require her to answer personal questions regarding her abuse (inciting fear of being discovered by CPS before she would pass qualifications to retain custody of her children);[198] she may have financial difficulties that need time and planning to overcome;[199] the abuser may have threatened future violence, to the mother or

193. CTRS. FOR DISEASE CONTROL, *supra* note 142, at 3.
194. Jacobs, *supra* note 45, at 644–45.
195. *Id.*
196. *See supra* Part I.C.
197. *See* Mahoney, *supra* note 28, at 445.
198. *See id.* at 445–46.
199. *See* LENORA E. A. WALKER, THE BATTERED WOMAN SYNDROME 82 (3rd ed. 2009) (Table 4.2 reviews the frequency with which women report not having checking accounts (36%), charge accounts (39%), or cash on hand (30%)—resulting in financial dependency on the abuser.). Financial abuse is a common component of Intimate Partner Violence cases. In fact, 99% of cases include economic abuse, defined as "controlling a woman's ability to acquire, use, and maintain economic resources." Adrienne

her children, if she were to report their situation.[200] The abuser may even threaten to report the mother to CPS, indicating that *she* will be the cause for CPS removing the children to foster care.[201] As noted under the reproductive justice framework, individual choice—here, the mother's ability to leave the abusive partner—is only "as capacious and empowering as the resources any woman can turn to in her community."[202] Lacking these support structures, many women cannot immediately remove themselves, or their children, from the danger. It is also important to consider how these pre-existing challenges may become heightened under state intervention. For example, in Marion Phillips' case, the $200 per month cost of traveling between counties and attending court dates was a steep sum for someone already experiencing financial duress.[203] The court then used her inability to pay court fees as evidence she was not a fit parent, however, barring state intervention, the $200 would have gone to providing care for her children. Marion's experience underscores *why* non-abusive parents often don't report—fear of retribution from the perpetrator or from the justice system.[204]

The COVID-19 pandemic made leaving a violent situation more difficult. First, studies show that family violence escalates during and after large-scale crises.[205] In response to lock-down provisions, countries across the globe have reported increases in their domestic violence hotline calls—and many survivors are unable to call because they are at home where their partner may overhear them.[206] Secondly, shelter-in-place orders have constrained opportunities to leave.[207] These considerations are not presented to the jury, and often the mother cannot articulate them well herself. The current use of expert testimony, and the possibility of expanding expert testimony at failure to protect proceedings, is a potential solution to this issue.

Expert testimony reinforces the mother's narrative and provides context for how the mother's actions may further the state's interest in securing the child's safety. This testimony can be used to explain how abuse affects the mind-frame and how this affects the decision-making process on a case-by-case basis. Further, expert testimony also speaks to the timeline of abuse. While a woman may understand, based on the abuser's past actions, that a threat exists to her children, it may not be clear when or if that threat will be realized.[208] Testimony

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E. Adams, *Measuring the Effects of Domestic Violence on Women's Financial Well-Being*, CTR. FOR FIN. SEC., UNIV. WISCONSIN-MADISON (2011) at 1.

200. Mahoney, *supra* note 28, at 446.

201. *See id*. at 445–46.

202. ROSS & SOLINGER, *supra* note 23, at 16.

203. Chen, *supra* note 1.

204. *Id.*

205. Caroline Bradbury-Jones & Louise Isham, *The Pandemic Paradox: The Consequences of COVID-19 on Domestic Violence*, 29 J. CLINICAL NURSING 2047, 2047 (2020).

206. Emma Graham-Harrison et al., *Lockdowns Around the World Bring Rise In Domestic Violence*, THE GUARDIAN (Mar. 28, 2020, 1:00 AM), https://www.theguardian.com/society/2020/mar/28/lockdowns-world-rise-domestic-violence?CMP=Share_iOSApp_Other.

207. Bradbury-Jones & Isham, *supra* note 205.

208. Jacobs, *supra* note 45, at 642.

would shed light onto what a reasonable person under the duress of abuse would do and how that compares to this woman's actions.[209] Experts would also indicate how the mother may or may not be able to recover and reestablish a loving relationship with her children.[210] While expert witnesses are cost-prohibitive, they add context to the mother's perspective and emphasize that the mother may still be fit to parent.

IV. WAYS TO ENSURE DUE PROCESS BEFORE REMOVAL OR TERMINATION OF PARENTAL RIGHTS

Alternatives to removal exist if society, and the courts, address the full system of gendered oppression the mother lives in. By providing greater community resources, financial aid, and support, other options become available to the mother to protect her children before a charge is brought. Instead of custodial removal, the state can enact less harsh sentences and educate its workforce to accommodate the needs of survivors of abuse.

A. SENTENCE REFORM

Courts should eradicate or lessen sentences based on issues this paper has highlighted because the law does not incentivize the participation of non-abusive parents in the child protective process,[211] and works contrary to the interest in keeping family together.[212] Some have argued that the threats of life sentences or parental termination are a violation of the Eighth Amendment.[213] The argument follows that the victim is punished for exhibiting symptoms of their own abuse, and that, instead, the statutory sentences should take the victim's experience into account.[214] Lesser sentences or changes in sentencing guidelines to automatically reduce the sentence (or remove termination from the charges) would protect survivors while ensuring that truly negligent parents are charged.

For Tondalao Hall, it was a commutation of her sentence that allowed her to reenter the lives of her children.[215] Now reunited with her children, she texts them every morning, telling them to "remember to smile" and reminding them that "prayer changes things."[216] The length of her sentence clearly did not reduce her love for her children, but it did affect the children's relationship with their mother by removing Tondalao from important life events and reducing communication and opportunities for bonding. Sentencing reform would allow for punishment without a near complete severance of a relationship.

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209. Mahoney, *supra* note 28, at 456.

210. *See generally* Kimberley Anderson & Elisa van Ee, *Mothers and Children Exposed to Intimate Partner Violence: A Review of Treatment Interventions*, 15 INT'L J. ENV'T RSCH. & PUB. HEALTH 1955 (2018).

211. Mahoney, *supra* note 28, at 446.

212. *See* Trepiccione, *supra* note 24, at 1515.

213. *See* Mahoney, *supra* note 28, at 449.

214. *Id.*

215. Ortiz, *supra* note 15.

216. Slipke, *supra* note 139.

B. REHABILITATION AND COUNSELING

In a response to the Tondalao Hall case, Joe Dorman, with the Oklahoma Institute for Child Advocacy, called for greater rehabilitation rather than just incarceration, stating: "[e]ven those who experienced the death of a child at the hands of a significant other deserve a chance to reintegrate with society following just sentencing and successful rehabilitation."[217] Mothers in rehabilitation would gain tools to address their children's trauma as well as their own trauma. Counseling in particular would be critical for mothers who struggle with the emotional byproducts of abuse—such as increased anxiety, depression, panic attacks and PTSD.[218] These issues require experienced counselors who have dealt with IPV survivors, and who can normalize the experience, provide community response and community based referrals, and offer concrete suggestions and overall promote a feeling of safety.[219] A study by Kimberly Anderson and Elisa van Ee found that, while PTSD and depression symptoms resulting from IPV can negatively impact a mother's ability to parent, there are several forms of interventions/rehabilitation programs that can help the survivor return to a state of better parenting.[220] The study reviewed separate interventions (psychosocial interventions that occur simultaneously for mothers and children but independently from one another); joint interventions (mother and child attend interventions together and do not receive any independent counseling); and combined interventions (where separate intervention programs are supplemented with joint sessions that mother and child attend together).[221] Separate interventions were found to lower parenting stress on mothers and improve parenting skills.[222] Joint interventions were found to improve family group sensitivity and positively impact the children's play skills in family settings.[223] In combined interventions, the mothers were found to have feelings of greater social support, reduced family conflict, and fewer symptoms of depression and increased self-efficacy.[224] In addition,

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217. Joe Dorman, *LETTERS: Stitt to Review 30-year 'Failure to Protect' Sentence*, STILLWATER NEWS PRESS (Oct. 17, 2019), https://www.stwnewspress.com/opinion/letters-stitt-to-review-30-year-failure-to-protect-sentence/article_c55f9b60-f085-11e9-b8b0-8f7549031d5b.html.

218. *Women's Experience of Domestic Violence and Abuse*, HEALTHTALK (Feb. 2020), https://healthtalk.org/womens-experiences-domestic-violence-and-abuse/getting-help-from-counselling-and-therapy-for-domestic-violence-and-abuse; Sarah Fader, *The Importance of Domestic Violence Counseling*, BETTERHELP (May 14, 2021), https://www.betterhelp.com/advice/domestic-violence/the-importance-of-domestic-violence-counseling/.

219. *See generally* Sonya V. Crabtree-Nelson, How Counseling Helps: An In-Depth Look at Domestic Violence Counseling (Aug. 2010) (Ph.D. dissertation, Loyola University Chicago) (ProQuest); *see also* Bethany Bray, *Addressing Intimate Partner Violence with Clients*, COUNSELING TODAY (June 24, 2019), https://ct.counseling.org/2019/06/addressing-intimate-partner-violence-with-clients/ (advising counselors on how to be the most effective resources for survivors of abuse throughout all stages of recovery).

220. Anderson & van Ee, *supra* note 210, at 1–3.

221. *Id*. at 5–7.

222. *Id*. at 16.

223. *Id*.

224. *Id*. at 16–17.

combined interventions were found to increase self-esteem, confidence in parenting skills, and improved symptoms of depression.[225] In short, rehabilitation would allow for a non-abusive parent to be seen as a mother again, not as a victim or as an accomplice to crime.

C. SAFE HARBOR PROVISIONS

Safe harbor provisions are legal protections within statutes that would shield an individual reporting under that provision from a legal liability or penalty.[226] In the context of failure to protect laws, a safe harbor provision for victims of abuse to come forward and report, without having to worry that this report would alone necessitate the removal of their children from their custody, would encourage reporting. The current status of failure to protect laws does not incentivize survivors of abuse to report for fear their child may be taken from them. For example, in the case of Tondalao Hall, she decided not to report her abusive partner for fear that she would have her children removed from her care.[227] Ultimately, safe harbor provisions would encourage safer environments for children by helping the parent out of the abusive situation before children are endangered.

Coupled with safe harbor provisions, criminal justice departments need to implement additional training of members to identify and aid survivors. If survivors of abuse are to come forward and report the danger to their children, members of law enforcement must understand the reasons for the survivor's lack of disclosure and recognize that the abuser is to answer for the crimes.[228] Allowing a way for survivors to come forward without fear of retribution by CPS (unless immediate danger is present) would advance the goals of failure to protect laws—protecting both the children's relationship with their non-abusive parent and their physical health. Such a provision would recognize the interconnected nature of the child's health and wellbeing while remaining with a loving, but traumatized, parent.

CONCLUSION

Today, Tondalao Hall is back with her family.[229] Governor Kevin Stitt commuted her sentence in November of 2018.[230] Tondalao Hall is a licensed cosmetologist providing for herself and her family—proof of her ability and strength to

225. *Id.*

226. *What is a Safe Harbor?*, WINSTON & STRAWN, LLP, https://www.winston.com/en/legal-glossary/safe-harbor.html.

227. *Formal Sentencing of Ms. Hall, supra* note 149, at 7.

228. CTRS. FOR DISEASE CONTROL, *supra* note 142, at 207.

229. Slipke, *supra* note 139.

230. Ortiz, *supra* note 15.

overcome trauma, which failure to protect laws ignored.[231] Meanwhile, Marion Phillips has started the arduous process of appealing the termination of her parental rights.[232] In light of COVID-19 stay-at-home orders and the increase in domestic violence cases, more women like Marion Phillips will likely fall victim to failure to protect laws.

Failure to protect laws consistently punish survivors of abuse, especially women, for the crimes of another without regard for the liberty interest of the parent to retain a relationship with their children. This paper argues that parenting is a liberty interest to be protected under the Fourteenth Amendment. As such, failure to protect statutes should consider alternatives to removal when judging each case of abuse, while acknowledging the full context of the parent's experience. Failure to protect laws' presumption of removal, as evidenced through the failure to consider the possibility of the non-abusive parent's ability to parent, is not a narrowly tailored means to achieving the ends of securing a child's safety and interests. However, a reproductive justice framework could prove a useful tool for revising failure to protect laws and ensuring the best, safest, and just outcome for both the child and the loving parent.

231. *Id.*
232. Chen, *supra* note 1.