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CRIMINALIZING BATTERED MOTHERS

Courtney Cross*

Abstract

How a domestic violence survivor responds to the abuse she is experiencing depends on many factors. Some critical considerations include her access to resources, desire to stay in her relationship, and assessment of her own safety. Criminal and civil court systems place enormous pressure on survivors to separate from their abusive partners. Not only are survivors with children pressured to leave, they are punished when they stay. That punishment can come in any combination of diminished custody rights, limited parental rights, and incarceration. Yet a survivor who flees with her children is not immune to these same consequences: if she leaves in a manner that is not state sanctioned, she may be punished criminally or civilly for kidnapping her children, regardless of the violence she was experiencing at home.

Criminal parental kidnapping charges can cost a survivor her liberty, safety, and relationship with her children. While some state statutes attempt to address the potential for flight from domestic violence, many do not acknowledge the intersection between parental kidnapping and domestic violence at all and none provide sufficient safeguards for battered parents. Survivors are caught in a double bind in which the state can both pressure them to leave abusive relationships and also punish them for the manner in which they do so. A survivor who does not incur criminal parental kidnapping charges may still be negatively impacted by her decision to leave in both the child welfare system and domestic relations court.

Large scale systemic change is necessary to truly enhance survivors' independence. In addition to amending parental kidnapping laws to adequately anticipate and respond to safety seeking defendants, individual attorneys and the larger domestic violence movement must become more willing and better prepared to advocate for all survivors across and outside of the legal system.

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I. INTRODUCTION

Criminal laws punishing parents for kidnapping their own children are largely conceived as existing to prevent a disgruntled parent from acting out of spite to punish the children's other parent.¹ Frequent news stories and AMBER Alerts often describe parents on the run, refusing to obey custody orders issued against them.² But parental kidnapping laws, also known as custodial interference statutes, cast a wider net than these stories might imply. It is not just vindictive, scheming parents who risk arrest and conviction when they deny access to their children. Survivors of domestic violence can also find themselves enmeshed in criminal proceedings for fleeing with their children. Although parental kidnapping laws vary greatly among the fifty states and Washington, D.C.,³ none of them adequately anticipate domestic violence or provide the protections needed when survivors of domestic violence escape with their children.

It is not surprising that parental kidnapping occurs in the context of abusive relationships: it is important to note, however, that departures with the children by *either* the abusive parent or the survivor may be considered parental kidnapping.⁴

¹ See, e.g., *People v. Olsewski*, 630 N.E.2d 131, 136 (Ill. App. 1994) (“The statute was primarily intended to prevent disgruntled parents who were unsuccessful in their attempts to obtain custody through legal channels from seeking self-help by spiriting the children away to another jurisdiction in violation of a custody order.”).

² See, e.g., Dallas Franklin, *Authorities Locate Oklahoma Mother Who Allegedly Abducted 2 Boys*, NBC KFOR.COM (Aug. 9, 2016, 9:22 AM), <http://kfor.com/2016/08/09/authorities-searching-for-oklahoma-boys-who-were-allegedly-abducted-by-non-custodial-parent/> [<https://perma.cc/WU3V-ESJM>] (detailing the safe return of two children abducted by their noncustodial mother); *Mother Who Allegedly Abducted Her 6-Week-Old Baby Extradited to Virginia Jail*, ABC WJLA (Aug. 2, 2016), <http://wjla.com/news/crime/mother-who-abducted-her-6-week-old-baby-extradited-to-virginia-jail> [<https://perma.cc/B2C4-76AK>] (noting that Child and Family Services had an order to remove the child from her mother's care when the child was discovered missing); Jesse Paul, *Fort Collins Police Say Parental Kidnapping Prompted Amber Alert for 5-Year-Old Girl*, THE DENVER POST (Aug. 12, 2016, 5:21 AM), <http://www.denverpost.com/2016/08/12/amber-alert-five-year-old-girl-fort-collins/> [<https://perma.cc/NBL6-NYXA>] (describing a mother evading a court order to relinquish custody); Nicole Perez, *3-Year-Old Girl Found Safe After Amber Alert*, ALBUQUERQUE JOURNAL (Aug. 2, 2016, 8:48 AM), <https://www.abqjournal.com/819018/3-year-old-abducted-from-santa-rosa.html> [<https://perma.cc/7SBG-9TBA>] (reporting on the safe return of a child after being kidnapped by her mother in violation of a custody order). It is interesting to note the prevalence of news stories regarding children abducted by their mother.

³ NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, *THE IMPACT OF PARENTAL KIDNAPPING LAWS AND PRACTICE ON DOMESTIC VIOLENCE SURVIVORS* 11–13 (2005) [hereinafter NATIONAL CLEARINGHOUSE].

⁴ *Id.* at 1.

The difference in motivation between a survivor seeking safety with her children⁵ and an abusive partner asserting control and dominance is of critical importance, especially given that research has demonstrated a strong relationship between domestic violence and parental kidnapping.⁶ Yet in an extensive report on parental kidnapping, the National Clearinghouse for the Defense of Battered Women (“NCDBW”) posited that “[d]espite the dramatic difference between these two acts—one vindictive and the other protective—the criminal justice system rarely considers the contexts of abductions.”⁷

There is also a gendered component to parental kidnapping prosecutions. Although most children abducted by a relative are abducted by their biological

⁵ This Article intentionally presumes that the survivors being discussed herein are both women and mothers, though it does not also presume that the abusive partners are men. While men can be abused in relationships by both women and men, this Article is specifically exploring the intersection between motherhood and survivorship in the context of defending against parental kidnapping charges in criminal court. Moreover, women are more likely to be on the receiving end of the kind of extensive intimate terrorism, coercive control, and battering that might prompt the need to suddenly and secretly break off all ties with an abusive partner. *See, e.g.*, LISA A. GOODMAN & DEBORAH EPSTEIN, LISTENING TO BATTERED WOMEN: A SURVIVOR-CENTERED APPROACH TO ADVOCACY, MENTAL HEALTH, AND JUSTICE 8–12 (Am. Psychol. Ass’n 2008) (discussing domestic violence typologies and the increased likelihood of women to be the victims of intimate terrorism as opposed to the more equally distributed situational couple violence); LEIGH GOODMARK, A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM 38–40 (N.Y.U. Press 2012).

⁶ *See, e.g.*, JANET CHIANCONE ET AL., A.B.A. CTR. ON CHILDREN AND THE LAW, ISSUES IN RESOLVING CASES OF INTERNATIONAL CHILD ABDUCTION BY PARENTS 15 (1998) (finding that 60% of abducting parents had previously threatened the life of the nonabducting parent in the past); GEOFFREY L. GREIF & REBECCA L. HEGAR, WHEN PARENTS KIDNAP: THE FAMILIES BEHIND THE HEADLINES 36 (1993) (finding that domestic violence “was present in 54% of the couples in [the] sample, with the abductor reportedly the only violent partner 90% of the time”); JANET R. JOHNSTON ET AL., EARLY IDENTIFICATION OF RISK FACTORS FOR PARENTAL ABDUCTION, JUVENILE JUSTICE BULLETIN 5 (2001) (reporting “high incident rates of domestic violence” in families that experienced parental kidnapping); Janet R. Johnston & Samantha K. Hamilton, *Parental Abduction*, in ENCYCLOPEDIA OF DOMESTIC VIOLENCE 523, 524 (Nicky Ali Jackson ed., 2007) (describing how “[d]omestic violence and substance abuse—more often perpetrated by the male partner—are alleged to have occurred in two-thirds to three-quarters of families where children are subsequently abducted by a parent. In the majority of these cases there is some evidence to back up these claims”); Monique C. Boudreaux et al., *Child Abduction: An Overview of Current and Historical Perspectives*, 5 CHILD MALTREATMENT 63, 66 (Feb. 2000) (noting the correlation between domestic violence and parental kidnapping); Leslie Ellen Shear & Julia C. Shear Kushner, *Taking and Keeping the Children: Family Abduction Risk and Remedies in U.S. Family Courts*, 10 J. CHILD CUSTODY 252, 272 (2013) (noting that “many families that experience abduction have experienced domestic violence”).

⁷ NATIONAL CLEARINGHOUSE, *supra* note 3, at 1.

father,⁸ mothers are more likely to be convicted and incarcerated for parental kidnapping than fathers.⁹ This is true even though multiple researchers have found that mothers abducting their children were likely seeking safety from abuse while fathers were committing the abduction as part of a larger pattern of exerting power and control over the mother.¹⁰

The harm that stems from the failure to distinguish between abusers and safety seekers is exacerbated by the ways in which the state—through both civil and legal systems—pressures survivors in abusive relationships into separating from their partners.¹¹ Not only do many judges insist that it is the survivor’s responsibility to leave a violent relationship,¹² they also assume she is prepared to make and maintain that choice, and that doing so is in her and her children’s best interest.¹³ In fact, many survivors make decisions to stay or leave specifically in light of how each decision might impact their children’s safety.¹⁴ If, however, a survivor rationally decides not to leave her abusive partner in order to protect her children, she risks being punished for this decision by incarceration, termination of parental rights, or loss of custody. On the other hand, if she chooses to separate on her own accord or bows to systemic pressure to do so, her departure with the children—if it meets the statutory

⁸ HEATHER HAMMER ET AL., CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATES AND CHARACTERISTICS, NAT’L INCIDENCE STUD. OF MISSING, ABDUCTED, RUNAWAY, AND THROWN AWAY CHILDREN 4 (2002) (stating that 53% of family abductions are committed by biological fathers and 25% by biological mothers).

⁹ JOHNSTON ET AL., *supra* note 6, at 8.

¹⁰ Johnston & Hamilton, *supra* note 6, at 524 (noting that it is usually fathers who kidnap children as part of a campaign of domestic violence whereas it is usually mothers who flee to protect their children); see also Janet R. Johnston & Linda K. Girdner, *Early Identification of Parents at Risk for Custody Violations and Prevention of Child Abductions*, 36 FAM. & CONCILIATION CTS. REV. 392, 404 (1998) (describing the fathers’ acts of kidnapping as a tactic of domestic violence against the other parent).

¹¹ Rona Kaufman Kitchen, *Constrained Choice: Mothers, the State, and Domestic Violence*, 24 TEMP. POL. & CIV. RTS. L. REV. 375, 383–84 (2015) (“[S]tates have passed laws that punish women if they fail to leave an abusive relationship through state-sanctioned routes.”).

¹² Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 19–20 (1991) (discussing how legal actors assume it is the survivor’s responsibility to leave abusive relationships regardless of emotional attachments).

¹³ Mahoney, *supra* note 12, at 61 (describing “several assumptions about separation: that the right solution is separation, that it is the woman’s responsibility to achieve separation, and that she could have separated”); see also Rana Fuller, *How to Effectively Advocate for Battered Women When Systems Fail*, 33 WM. MITCHELL L. REV. 939, 940 (2007) (confirming that society tells survivors that leaving is always the right choice and often a mandatory choice).

¹⁴ Simon Lapierre, *More Responsibilities, Less Control: Understanding the Challenges and Difficulties Involved in Mothering in the Context of Domestic Violence*, 40 BRIT. J. SOC. WORK 1434, 1442 (2010).

definitions of parental kidnapping—may also risk exposing her to incarceration, termination of parental rights, or loss of custody.

Parental kidnapping charges are not solely triggered when a parent takes her children out of state or out of the country.¹⁵ Even a parent who remains in the same city or jurisdiction as the other parent is not immune from a parental kidnapping claim. For survivors considering leaving unsafe relationships, their decision about where to relocate will often be grounded in considerations of safety and stability rather than jurisdictional concerns.¹⁶ For some survivors, the threat of separation violence may mandate that they leave their current home and, in so doing, leave very little trace of where they have gone for fear of being followed, stalked, or attacked.¹⁷ Other survivors may need to stay in their communities to avoid disrupting employment, childcare, schooling, family relationships, or benefits. Research has demonstrated that domestic violence survivors are capable of understanding and predicting the unique risks they face in both staying in and leaving their relationships.¹⁸ Yet in punishing survivors for making decisions that are not sanctioned by the state, their experiences and insights are being devalued.¹⁹ Moreover, little government or private funding is available to help domestic violence survivors access resources that would help them develop a state sanctioned plan for separation.²⁰

Survivors in violent relationships have to navigate a multisystem legal labyrinth: stay and risk state intrusion or leave and risk even more.²¹ This Article

¹⁵ Catherine F. Klein et al., *Border Crossings: Understanding the Civil, Criminal, and Immigration Implications for Battered Women Fleeing Across State Lines with Their Children*, 39 FAM. L.Q. 109, 119 (2005).

¹⁶ See NATIONAL CLEARINGHOUSE, *supra* note 3, at 2 (“[A] parent who is a domestic violence survivor may need to relocate for safety”); Klein et al., *supra* note 15, at 110 (“The decision to flee the state may mean an opportunity to live with extended family members who will offer a survivor and her children a safe, caring, supportive, and familiar environment.”).

¹⁷ Klein et al., *supra* note 15, at 110.

¹⁸ See, e.g., Margaret E. Johnson, *Balancing Liberty, Dignity, and Safety: The Impact of Domestic Violence Lethality Screening*, 32 CARDOZO L. REV. 519, 531 (2010) (synthesizing the findings of research on these women’s ability to predict their own risk).

¹⁹ Kitchen, *supra* note 11, at 376 (articulating the tension between survivors acting in accordance with the state versus taking action into their own hands).

²⁰ Deborah M. Weissman, *Law, Social Movements, and the Political Economy of Domestic Violence*, 20 DUKE J. GENDER L. & POL’Y 221, 222 (2013) (discussing funding priorities in the 2013 reauthorization of the Violence Against Women Act); see also Kitchen, *supra* note 11, at 376–77 (describing the constrained choices survivors have when pressured to leave without being provided with resources to support separation).

²¹ Kitchen, *supra* note 11, at 385 (discussing the “inhospitable legal labyrinth” that survivors encounter when they do try to seek safety through separation). See also LORRAINE RADFORD & MARIANNE HESTER, *MOTHERING THROUGH DOMESTIC VIOLENCE* 142 (2006) (describing the “three planets” battered mothers must navigate: the domestic violence system, the domestic relations system, and the child welfare system).

analyzes how the state constrains battered mothers' choices and criminalizes many of their options, focusing on those survivors who flee with their children.²² Part II begins by exploring the myriad ways both civil and criminal court systems pressure survivors to leave violent relationships despite the very real danger of separation violence. Part III analyzes state parental kidnapping laws and related federal laws, discusses how battered mothers may fall within their scope, and emphasizes the extreme variations in states' application of parental kidnapping laws on survivors of violence. Part IV examines the risks mothers face after making the choice to separate while recognizing that this choice may be state imposed. Part V concludes by providing recommendations for lawyers working with separating survivors, suggestions for amending state parental kidnapping statutes' language, and proposals for expanding the domestic violence movement's activism to include a more intersectional framework that would benefit survivors, their families, and their communities.

II. STATE PRESSURE TO LEAVE

There are several ways in which civil and criminal legal systems pressure domestic violence survivors into leaving their abusive partners: they must leave their abusive partners if they want to either invoke state assistance²³ or avoid unwanted state intervention.²⁴ This pressure to separate permeates many practices now considered routine, including law enforcement officers executing mandatory arrest and no drop prosecution policies;²⁵ prosecutors including stay away orders in both

²² This Article's scope is limited to survivors who flee within the United States, as this phenomenon has received less scholarly attention and may be more feasible for many survivors. This is meant not to diminish the experiences of survivors who flee outside of the United States. For comprehensive discussions of survivors escaping from domestic violence with their children by fleeing internationally, see Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49 (2008); Susan Kreston, *Prosecuting International Parental Kidnapping*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 533 (2001); Brian Quillen, *The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction*, 49 TEX. INT'L L. J. 621 (2014); Merle H. Weiner, *International Child Abduction and the Escape from Domestic Violence*, 69 FORDHAM L. REV. 593 (2000).

²³ GOODMAN & EPSTEIN, *supra* note 5, at 19; ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 77 (2000); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1018 (2000).

²⁴ Kitchen, *supra* note 11, at 385–86.

²⁵ G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 245–46, 265 (2005).

pre and posttrial conditions of release;²⁶ judges denying survivors' requests to vacate civil protection orders;²⁷ abusive partners being granted custody of the children in family court;²⁸ and survivors being charged with failing to protect their children.²⁹

Despite being pressured to separate and punished for staying, there are many reasons why survivors may not leave their abusive partners, including love, logistics, economic dependence, social and psychological isolation, pressure from family or friends, or fear of separation violence.³⁰ Yet most legal systems ignore survivors' agency and insight and instead focus on separation-based remedies.³¹

A. Mandatory Arrest and No Drop Prosecution Policies

In the last thirty years, nearly all states and the District of Columbia adopted mandatory arrest policies in response to local law enforcement's consistent failure to arrest batterers.³² These policies make it mandatory for officers to arrest if there is probable cause to believe that domestic violence has occurred.³³ While many saw this as a step toward taking domestic violence seriously,³⁴ there is doubt about these policies' effectiveness³⁵ and debate over their fairness.³⁶ Much has been written

²⁶ Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 56–60 (2006). Suk notes that “state-imposed de facto divorce is so class-contingent that it could be called poor man’s divorce.” *Id.* at 59.

²⁷ Johnson, *supra* note 18, at 562–63.

²⁸ Kitchen, *supra* note 11, at 397.

²⁹ See, e.g., Leigh Goodmark, *Law Is the Answer? Do We Know that for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 223 ST. LOUIS U. PUB. L. REV. 7, 21–22 (2004).

³⁰ See, e.g., SCHNEIDER, *supra* note 23, at 77; Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 201–02 (2008); Tamara L. Kuennen, *Love Matters*, 56 ARIZ. L. REV. 977, 990 (2014); Jody Raphael, *Battering Through the Lens of Class*, 11 AM. U. J. GENDER, SOC. POL’Y, & L. 367, 371–73 (2002).

³¹ GOODMARK, *supra* note 5, at 9–10; Johnson, *supra* note 18, at 526; Kitchen, *supra* note 11, at 386 n.75.

³² Miccio, *supra* note 25, at 240 n.2; Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 757–58 (2007).

³³ Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1859–60 (1996); Miccio, *supra* note 25, at 265.

³⁴ Miccio, *supra* note 25, at 265.

³⁵ See, e.g., Donna Coker, *Crime Control and Feminist Law Reform in Domestic Violence Law: A Critical Review*, 4 BUFF. CRIM. L. REV. 801, 824–25 (2001); Sue Osthoff, *But, Gertrude, I Beg to Differ, a Hit Is Not a Hit Is Not a Hit: When Battered Women Are Arrested for Assaulting Their Partners*, 8 VIOLENCE AGAINST WOMEN 1521, 1451 n.11 (2002).

³⁶ Holly Maguigan, *Wading into Professor Schneider’s “Murky Middle Ground” Between Acceptance and Rejection of Criminal Justice Responses to Domestic Violence*, 11 J. GENDER SOC. POL’Y & L. 427, 431 (2003) (observing that “[t]he negative impacts on

about their negative impact on marginalized survivors, from increasing the likelihood of arrest³⁷ to undermining autonomy.³⁸

Regardless of these consequences, however, mandatory arrest policies were designed to ensure that batterers were swiftly removed from the situation and held accountable for their actions.³⁹ They reflect the belief that neither police nor survivors should have discretion when it comes to deciding how to respond to domestic violence.⁴⁰ Even if a survivor did not call the police and even if she does not wish to see her partner arrested, she has no say in whether he is arrested: she and her partner will be separated in the interest of keeping her safe. While many survivors reasonably believe that arresting their partners will expose them to more violence at the hands of their partners and law enforcement,⁴¹ this concern is overridden by the state's desire to separate the parties to immediately remove the threat.⁴²

Both before and after the adoption of mandatory arrest policies, very few domestic violence cases were prosecuted.⁴³ The influx of arrests due to mandatory arrest policies did not result in a significantly increased number of prosecutions because prosecutors were under resourced and unmotivated to pursue a case if a victim expressed ambivalence or doubt about moving forward with the case.⁴⁴

communities of color, of all classes, and on poor people, of all ethnicities, were entirely predictable many years ago. Racial disparities were already well established throughout the criminal justice system at the time battered women's advocates started working for more reliance on the system. They are starker now.”)

³⁷ Ellen L. Pence & Melanie F. Shepard, *An Introduction: Developing a Coordinated Community Response*, in COORDINATING COMMUNITY RESPONSES TO DOMESTIC VIOLENCE: LESSONS FROM DULUTH AND BEYOND 3, 7 (Melanie F. Shepard & Ellen L. Pence, eds., 1999); Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1043 (2000); Gruber, *supra* note 32, at 813; Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking a Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers*, 17 J. GENDER RACE & JUST. 105, 110–11 (2014); Andrea J. Richie, *Law Enforcement Violence Against Women of Color*, in THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY 138, 140 (INCITE! Women of Color Against Violence ed. 2016).

³⁸ Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 4 (2009); Tamara L. Kuennen, *Analyzing the Impact of Coercion on Domestic Violence Victims: How Much Is Too Much?*, 22 BERKELEY J. GENDER L. & JUST. 2, 6 (2013); Miccio, *supra* note 25, at 293–94.

³⁹ See Laurie S. Kohn, *The Justice System and Domestic Violence: Engaging the Case but Divorcing the Victim*, 32 N.Y.U. REV. L. & SOC. CHANGE 191, 215 (2008).

⁴⁰ Goodmark, *supra* note 38, at 3–4.

⁴¹ Coker, *supra* note 37, at 1042.

⁴² See Johnson, *supra* note 18, at 551.

⁴³ EPSTEIN & GOODMAN, *supra* note 5, at 73.

⁴⁴ Kohn, *supra* note 39, at 222–23.

Activists in the movement saw this as a reflection of the state's lack of interest in holding batterers accountable.⁴⁵ To combat this apathy, they advocated for the adoption of various no drop prosecution policies, including hard no drop policies which require prosecutors to prosecute cases regardless of the complaining witness' wishes or concerns; and soft no drop policies, which encourage prosecutors to stay the course and provide some resources to keep victims involved.⁴⁶ These policies became the domestic violence movement's method of both ensuring that batterers were not just arrested but brought to justice and sending a message to the public that domestic violence was condemned by the state.⁴⁷

No drop prosecution policies reflect the mainstream beliefs that the legal system is the most effective way to address domestic violence and that the best way for the legal system to combat domestic violence is through keeping the parties apart.⁴⁸ This commitment to legal intervention overlooks the reality that arrest and criminal prosecution may actually expose survivors to potential anger, violence, and isolation from the defendant.⁴⁹ When survivors resist this one size fits all model, however, they are seen as either helpless and unable to think for themselves⁵⁰ or lying schemers with questionable agendas.⁵¹ Survivors thus do not have a choice about whether to separate from or stay with their abusive partners once law enforcement gets involved: the decision to separate has been made for them by the criminal system.

B. Criminal Stay Away Orders

Once a defendant has been arraigned on criminal domestic violence charges, it is common for prosecutors to request conditions of release if the defendant is not going to be detained pending trial.⁵² In domestic violence cases, it is especially routine for prosecutors to request that the defendant stay away from and have no contact with the complaining witness.⁵³ This means that the defendant could be arrested and charged with a new crime—that of violating the conditions of his release—if he is found to have texted, visited, or returned to living with his partner.⁵⁴ Law professor Jeannie Suk refers to this practice as “state-imposed de facto divorce” and has opined on how criminal law is increasingly devoted to intervening in and restructuring family life for justice-involved individuals and their partners.⁵⁵

⁴⁵ EPSTEIN & GOODMAN, *supra* note 5, at 37; *See also* Goodmark, *supra* note 38, at 12.

⁴⁶ Goodmark, *supra* note 38, at 12–13; Miccio, *supra* note 25, at 266–67.

⁴⁷ Miccio, *supra* note 25, at 265–67.

⁴⁸ Goodmark, *supra* note 29, at 8.

⁴⁹ EPSTEIN & GOODMAN, *supra* note 5, at 76.

⁵⁰ Goodmark, *supra* note 29, at 20; Miccio, *supra* note 25, at 241.

⁵¹ Kohn, *supra* note 39, at 202.

⁵² Suk, *supra* note 26, at 16.

⁵³ *Id.* at 8.

⁵⁴ *Id.* at 21.

⁵⁵ *Id.* at 8.

For a survivor who did not want law enforcement involvement to disrupt or determine the fate of her relationship, finding out that her partner is legally prohibited from interacting with her can have far reaching emotional⁵⁶ and economic consequences.⁵⁷ The most immediate consequences of involving the criminal justice system in the lives of a survivor are her inability to share a home with, communicate with, or even see her partner. In addition, for defendants who blame their partners for the arrest or prosecution, involvement in the criminal justice system may also cause them to stop providing economic or emotional support—a choice they may not have made but for intervention by the criminal legal system.

A survivor cannot just opt out of participating in the criminal process, however. Prosecutors typically subpoena survivors to testify at trial: if a subpoenaed survivor does not come to the court date, prosecutors can and do request bench warrants against her and move to hold her in contempt of court, which can result in incarceration.⁵⁸

C. Civil Protection Orders

Survivors who do not want to engage with the criminal legal system and manage to evade its reach may nonetheless choose to obtain a civil protection order. While not a criminal proceeding per se,⁵⁹ these civil injunctions can place onerous restrictions on the opposing party, including eviction from a shared home, requirements not to contact or come near the survivor, and mandatory counseling or treatment—often at the opposing party’s expense.⁶⁰ While survivors petitioning for a protection order often select which conditions they wish to have imposed, it is not unheard of for judges to include unrequested requirements in the final order. A violation of any of the provisions included in a civil protection order can result in a

⁵⁶ For an example of a complaining witness struggling with a stay away order, see Aya Gruber, *supra* note 32, at 743 (describing an interaction with a complaining witness: “Britney tells me that she only called the police ‘cause I was mad and wanted him out of the house.’ She does not want to pursue charges against Jamal and adamantly refuses to comply with any no-contact order. Then, in a more hushed tone, she asks, ‘What if I just leave now and don’t show up later—will they drop the case?’”).

⁵⁷ Suk, *supra* note 26, at 57.

⁵⁸ Jane K. Stoever, *Parental Abduction and the State Intervention Paradox*, 92 WASH. L. REV. 861, 870–71 (2017). See also Alex Barber, *Prosecutor Orders Arrest of Woman as Material Witness to Testify Against Her Alleged Abuser*, BANGOR DAILY NEWS (Sept. 20, 2013, 9:03 PM), <http://bangordailynews.com/2013/09/20/news/state/prosecutor-orders-arrest-of-woman-as-material-witness-to-testify-against-her-alleged-abuser/> [<https://perma.cc/5FTU-ES8P>]; Jodie Fleischer, *Innocent Victim Speaks Out About Being Jailed for 17 Days*, WSB-TV 2 ATLANTA (May 1, 2012, 8:50 PM), <http://www.wsbtv.com/news/innocent-victim-speaks-out-about-being-jailed-17-d/242355608> [<https://perma.cc/A4U9-S2QG>].

⁵⁹ Many scholars have noted the “quasi-criminal” nature of the civil protection order. See, e.g., Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1142–50 (2009).

⁶⁰ *Id.* at 1111.

criminal prosecution, similar to the violation of a criminal stay away order.⁶¹ These remedies can benefit a survivor who is able to conceive of how she wants to limit her relationship with her partner for a year—or, in many jurisdictions, indefinitely.⁶²

Some survivors who obtain a civil protection order may find that, for various reasons, it is not helping them achieve their goals—for example, providing childcare to children, benefiting from a joint income, or reconciling with their partner. Protection order beneficiaries who seek to vacate their order are not always able to do so.⁶³ Unlike other civil contexts where plaintiffs are able to dismiss no longer desired court orders, survivors are often forced to convince judges to permit them to modify or vacate their orders.⁶⁴ It is not uncommon for judges to push back on survivors' requests, or even deny them entirely, refusing to vacate the protection order.⁶⁵ Rather than listen to a litigant's own expression of agency and desire, judges may substitute their values and beliefs about what a survivor needs or how she should live her life.⁶⁶ As a result, when a motion to vacate is denied, a survivor and her partner must either comply with the court imposed separation or risk the criminal consequences of being in violation of the order.⁶⁷

D. Custody Determinations

Given the frequency with which abusive parents request and are granted custody in family court cases,⁶⁸ survivors may choose to stay in abusive relationships to maintain access to their children.⁶⁹ Yet this decision may prove detrimental if either parent decides to seek custody of the children either independently or as part of a larger dissolution of marriage case. A survivor who claims domestic violence or child abuse in a family court setting but did not leave the relationship may be seen

⁶¹ KATHLEEN J. FERRARO, *NEITHER ANGELS NOR DEMONS: WOMEN, CRIME, AND VICTIMIZATION* 97 (2006).

⁶² For information on the length of a protection order in any state, consult the appendix included in Jane K. Stoever, *Enjoining Abuse: The Case for Indefinite Domestic Violence Protection Orders*, 67 *VAND. L. REV.* 1015, 1093 (2014).

⁶³ See Johnson, *supra* note 59, at 1149; Kohn, *supra* note 39, at 233–34.

⁶⁴ See Johnson, *supra* note 59, at 1149; Kohn, *supra* note 39, at 233–34.

⁶⁵ See Johnson, *supra* note 59, at 1149; Kohn, *supra* note 39, at 233–34.

⁶⁶ GOODMAN & GOODMAN, *supra* note 5, at 81.

⁶⁷ While it is typically the respondent who faces criminal charges for violating a protection order, some judges have threatened to hold victims in contempt as well. Kohn, *supra* note 39, at 230.

⁶⁸ Stoever, *supra* note 58, at 906; Joan S. Meier, *Rates at Which Accused and Adjudicated Batterers Receive Sole or Joint Custody*, DVLEAP.ORG (2013), <https://drive.google.com/file/d/1hZvruA9pzaH1IEgX0JqRmEdW50ucwALQ/view> [<https://perma.cc/BA96-P7XG>] (citing multiple studies that find abusive fathers contest custody twice as often as nonabusive fathers and receive custody in more than half of custody cases where abuse is alleged).

⁶⁹ Kitchen, *supra* note 11, at 396.

as fabricating the abuse in order to gain an advantage in the custody proceedings,⁷⁰ which strongly undermines the survivor's credibility and perceived motives in the eyes of a judge untrained or uninterested in the dynamics of domestic violence.⁷¹ Survivors requesting that the other parent receive limited or no access to the children may also be viewed as uncooperative,⁷² which can be seen as a fatal flaw in states that have adopted "friendly parenting" statutes that emphasize the importance of supportive coparenting.⁷³ A survivor who does not take the steps the family court judge deems necessary for collaborative coparenting may be seen as not acting in the child's best interest—even if those choices have been mandated by other court systems.⁷⁴ Survivors who stay in abusive relationships may struggle to be seen by the court as good mothers or credible witnesses: these impressions will undermine their testimony and their attempts to obtain substantial parenting time and significant decisionmaking abilities.

E. Failure-to-Protect Charges

Survivors who remain in unsafe relationships risk being charged with failing to protect their children by exposing their children to domestic violence or child abuse: these charges may occur through criminal prosecution, through the child welfare system, or both.⁷⁵ Either proceeding can have devastating effects on survivors, ranging from loss of liberty to loss of parental rights.

⁷⁰ Raeder, *supra* note 37, at 120 (observing that courts may see survivors' claims of child abuse in the custody setting as merely "a litigation tactic").

⁷¹ *Id.* at 119 (noting that "commentators consider that judges tend to disbelieve women who are victims of domestic violence, whether from stereotypical gender biased views or because they believe these women make bad choices that disregard the best interests of their children."); see also Deborah M. Goelman, *Shelter from the Storm: Using Jurisdictional Statutes to Protect Victims of Domestic Violence After the Violence Against Women Act of 2000*, 13 COLUM. J. GENDER & L. 101, 167 (2004) (citing "misconceptions about domestic violence" and a tendency to believe that women "lie about abuse" as an explanation of why survivors struggle to obtain custody of their children).

⁷² Kitchen, *supra* note 11, at 397.

⁷³ Kitchen, *supra* note 11, at 397.

⁷⁴ Margo Lindauer, *Damned If You Do, Damned If You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL'Y & L. 797, 799 (2012) (discussing how even women who fully comply with orders and expectations placed on them by other involved courts may be negatively judged by family court judges who value coparenting over separation); Klein et al., *supra* note 15, at 132–33 (discussing how "friendly parenting" provisions and philosophies in custody cases can harm survivors who prioritize safety over coparenting); Goodmark, *supra* note 29, at 27–28 (also arguing that friendly parenting policies unfairly impact survivors who are custody litigants).

⁷⁵ See, e.g., Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 567 (2004); Raeder, *supra* note 37, at 110–11.

Even if the child or children are not being abused themselves, the survivor may nonetheless be criminally charged with failure to protect the children because she allowed them to be exposed to her own abuse.⁷⁶ These charges presuppose both that the harm to children directly or indirectly witnessing domestic violence is severe and also that this harm is the result of the survivor's inability to protect the children, thus rendering her a bad mother.⁷⁷ These charges fall under the often overlapping categories of child endangerment or neglect,⁷⁸ which, in some states, includes impacting the child's welfare rather than just the child's physical safety.⁷⁹

⁷⁶ See, e.g., Lindauer, *supra* note 74, at 798; Kitchen, *supra* note 11, at 383–85. Some scholars have suggested that more exposure to domestic violence charges have been filed criminally since the *Nicholson* case in New York curtailed the use of exposure to domestic violence as a rationale for removing children from their homes through the child welfare system. *Nicholson v. Williams*, No. 00 CV 2229 JBW, 2004 WL 4780498 (E.D.N.Y. Apr. 5, 2004); see, e.g., David Michael Jaros, *Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants*, 85 IND. L.J. 1445, 1460 (2010).

⁷⁷ See Dorothy Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 97–98, 116–18 (1993).

⁷⁸ See Raeder, *supra* note 37, at 383 n.66.

⁷⁹ Many states have statutes written broadly enough to include impact on the child's mental or emotional welfare. See, e.g., ARK. CODE ANN. § 5-27-206(a)(1) (2006) (defining endangering the welfare of a minor in the second degree); ARK. CODE ANN. § 5-27-207(a)(1) (2006) (defining endangering the welfare of a minor in the third degree); CAL. PENAL CODE § 273a (1997) (prohibiting willful harm or injury to child, including endangering person or health); COLO. REV. STAT. § 18-6-401 (2014) (prohibiting child abuse); CONN. GEN. STAT. § 53-21 (2015) (prohibiting injury or risk of injury to, or impairing morals of, children); DEL. CODE ANN. tit. 11, §§ 1102, 1102(a)(1)(a) (2017) (prohibiting endangering the welfare of a child); IDAHO CODE § 18-1501 (2005) (prohibiting injury to children); 720 ILL. COMP. STAT. 5/12C-5 (2013) (prohibiting endangering the life or health of a child); IND. CODE § 35-46-1-4 (2017) (prohibiting neglect of a dependent); IOWA CODE § 726.6(1)(e) (2017) (recognizing domestic violence as an affirmative defense if the defendant had a reasonable fear of serious bodily harm); KAN. STAT. ANN. § 21-5601 (2011) (prohibiting endangering a child); MD. CODE ANN., CRIM. LAW § 3-602.1 (2011) (prohibiting neglect of a minor); MINN. STAT. § 609.378 (2005) (prohibiting neglect or endangerment of a child); MO. REV. STAT. § 568.045 (2017) (prohibiting first degree child endangerment); MO. REV. STAT. § 68.050 (2017) (prohibiting second degree child endangerment); MONT. CODE ANN. § 45-5-622 (2007) (prohibiting endangering the welfare of children); NEB. REV. STAT. § 28-707(1)(a) (2015) (prohibiting child abuse); NEV. REV. STAT. § 200.508 (2015) (prohibiting neglect or endangerment of a child); N.H. REV. STAT. ANN. § 639:3(I) (2016) (prohibiting endangering the welfare of a child); N.J. STAT. ANN. § 9:6-1(b) (1987) (prohibiting abuse, abandonment, cruelty, and neglect of a child); N.M. STAT. ANN. § 30-6-1(D)(1) (2009) (prohibiting the abandonment or abuse of a child); N.Y. PENAL LAW § 260.10(1) (2010) (prohibiting endangering the welfare of a child); N.D. CENT. CODE § 14-09-22(1) (1957) (prohibiting child abuse); OHIO REV. CODE ANN. § 2919.22 (2011) (prohibiting endangering children); OKLA. STAT. tit. 21, § 843.5 (2014) (prohibiting child abuse); S.C. CODE ANN. § 63-5-70 (2008) (prohibiting unlawful conduct toward a child); TEX. PENAL CODE ANN. § 22.04(a)(2) (2017) (prohibiting injury to a child and recognizing a very specific domestic violence

Survivors are especially in danger of being criminally charged with failing to protect their children if their children also experience abuse. Many states define child endangerment to include allowing or enabling abuse of the children.⁸⁰ These charges

defense); VT. STAT. ANN. tit. 13, § 1304 (1971) (prohibiting cruelty to a child and recognizing a domestic violence affirmative defense); VA. CODE ANN. § 18.2-371.1 (2016) (prohibiting abuse and neglect of children); WYO. STAT. ANN. § 6-4-403 (1977) (prohibiting abandoning or endangering children). Note that the breadth of these statutes indicates the possibility of these charges being brought for exposing a child to domestic violence even if these states have not pursued this option.

⁸⁰ See, e.g., ALASKA STAT. § 11.51.100(a)(3) (2013) (prohibiting leaving a child with another person when the defendant knows the person has previously mistreated the child); ARIZ. REV. STAT. ANN. § 13-3623(A)(1) (2009) (prohibiting intentional or knowing child abuse); ARK. CODE ANN. § 5-27-221(a) (2003) (prohibiting the reckless permission of abuse of a minor and recognizing an affirmative defense for taking remedial measures to end the abuse); CAL. PENAL CODE § 273a (1997) (prohibiting willful harm or injury to child); COLO. REV. STAT. § 18-6-401 (2014) (prohibiting permitting a child to be placed in an abusive situation); DEL. CODE ANN. tit. 11, §§ 1102, 1102(a)(1)(b) (2017) (prohibiting endangering the welfare of a child); FLA. STAT. § 827.03(1)(b)(3) (2017) (prohibiting “active encouragement” of child abuse); HAW. REV. STAT. § 709-903.5(1)(a) (2008) (prohibiting intentionally or knowingly allowing another person to abuse a child); HAW. REV. STAT. § 709-904(1)(a) (2008) (prohibiting recklessly allowing another person to abuse a child and recognizing a domestic violence affirmative defense); IDAHO CODE § 18-1501 (2005) (prohibiting permitting a child to suffer); 720 ILL. COMP. STAT. 5/12C-5(a) (2013) (prohibiting permitting the endangerment of a child); IOWA CODE § 726.6(e) (2017) (prohibiting permitting the abuse of a child and recognizing a domestic violence affirmative defense); KAN. STAT. ANN. § 21-5601 (2011) (prohibiting causing or permitting the endangerment of a child); KY. REV. STAT. ANN. §§ 508.100, 508.110, 508.120 (1982) (prohibiting permitting abuse when the defendant has actual custody of the child); ME. STAT. tit. 17-A, § 554(B-2) (2015) (prohibiting recklessly failing to protect child from harm); MASS. GEN. LAWS ch. 265 § 13J (2010) (prohibiting conduct that creates a substantial risk of injury or sexual abuse to a child); MICH. COMP. LAWS § 750.136b(3)–(7) (2017) (prohibiting failure to act causing harm to a child and recognizing a domestic violence affirmative defense); MINN. STAT. § 609.378(b)(1) (2005) (prohibiting permitting a child to be placed in a situation likely to substantially harm that child and recognizing a domestic violence affirmative defense); MISS. CODE ANN. § 97-5-40(1) (1992) (prohibiting knowingly condoning felonious abuse—must be more than not reporting); MONT. CODE ANN. § 45-5-628(1)(b) (2013) (prohibiting placing a child in the physical custody of someone who the defendant knows has previously injured the child); NEB. REV. STAT. § 28-707(1) (2015) (prohibiting permitting child abuse); NEV. REV. STAT. § 200.508(2) (2015) (prohibiting permitting child to suffer); N.H. REV. STAT. ANN. § 639:3(I) (2016) (prohibiting violating a duty to protect); N.J. STAT. ANN. § 9:6-1(d) (1987) (prohibiting willful omission causing unnecessary pain or suffering); N.M. STAT. ANN. § 30-6-1(D) (2009) (prohibiting permitting abuse of child); N.C. GEN. STAT. § 14-318.2(a) (2009) (prohibiting allowing injury to be inflicted on child); N.D. CENT. CODE § 14-09-22(1) (2015) (prohibiting allowing abuse of child); OHIO REV. CODE ANN. § 2903.15(B) (2009) (recognizing an affirmative defense for when defendant could not prevent the harm and took steps to get help); OKLA. STAT. tit. 21, § 852.1(A)(1) (2011) (prohibiting knowingly permitting physical or sexual abuse); OKLA.

also presume that it is the survivor's responsibility to prevent abuse: while the abusive parent may also be charged with child abuse, the brunt of criminal charges related to children often falls on mothers, who are typically seen as responsible for protecting their children at any cost.⁸¹ Even when the survivor herself has been abused by the child's abuser, she may still receive a substantial sentence for not intervening.⁸²

STAT. tit. 21, § 843.5(B) (2014) (prohibiting enabling child abuse); 18 PA. CONS. STAT. § 4304(a)(1) (2017) (prohibiting violating a duty of protection); S.C. CODE ANN. § 16-3-95 I(B) (2000) (prohibiting inflicting or allowing infliction of great bodily injury against a child); S.C. CODE ANN. § 63-5-70(A)(2) (2008) (prohibiting causing any bodily harm to be done to the child that does or is likely to endanger the child); S.C. CODE ANN. § 63-5-80 (2008) (prohibiting causing unnecessary pain or suffering to be done against a child); S.D. CODIFIED LAWS § 26-10-30 (2006) (prohibiting permitting physical or sexual abuse of a child and recognizing a domestic violence affirmative defense); S.D. CODIFIED LAWS § 26-9-1 (1993) (prohibiting contributing to abuse of child); TENN. CODE ANN. § 39-15-401(c)(1) (2017) (prohibiting knowingly exposing or failing to protect child from abuse); TENN. CODE ANN. § 39-13-102(b) (2015) (prohibiting reckless conduct that results in harm to another); TENN. CODE ANN. § 39-15-402(a) (2016) (prohibiting aggravated child abuse, neglect, and endangerment); TEX. PENAL CODE ANN. § 22.04(a) (2017) (prohibiting causing injury to a child through omission when the defendant has a duty of care to the child and recognizing a very specific domestic violence affirmative defense); TEX. PENAL CODE ANN. § 22.041 (2007) (prohibiting endangering or abandoning child by act or omission); UTAH CODE ANN. § 76-5-109(2) (2017) (prohibiting permitting child abuse); VT. STAT. ANN. tit. 13, § 1304(a) (2017) (prohibiting exposing child to cruelty); VA. CODE ANN. § 18.2-371 (2015) (prohibiting causing or encouraging acts rendering a child delinquent or abused); VA. CODE ANN. § 18.2-371.1 (2016) (prohibiting abuse of child by act or omission); WIS. STAT. § 948.03(4) (2015) (prohibiting failing to act to prevent bodily harm to child); WYO. STAT. ANN. § 6-4-403(a)(ii) (2012) (prohibiting permitting child endangerment).

⁸¹ Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare Reform, Family, and Criminal Law*, 83 CORNELL L. REV. 688, 718 (1998); Evan Stark, *A Failure to Protect: Unravelling "The Battered Mother's Dilemma,"* 27 W. ST. U. L. REV. 29, 38 (2000) (noting that "a state's broad responsibility to protect women from assault conflicts with the presumptive duty of parents under common law, as well as most states' statutory laws, to provide for their children's general welfare. In the minds of judges and juries, it is unclear when, if ever, women's rights to safety and autonomy supercede their responsibilities as mothers."); Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 166, 170-74, (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (describing the bad mother trope in popular culture and literature as an introduction to a discussion of mothers committing child abuse).

⁸² Between 2014 and 2015, BuzzFeed News reporter Alex Campbell wrote a series of articles exploring how failure to protect laws operate against survivors whose children have also been abused. In one article, he chronicles the cases of over 75 survivors who were criminally charged with failing to protect their children and received a sentence of at least 10 years. Alex Campbell, *These Mothers Were Sentenced to at Least 10 Years for Failing to Protect Their Children from a Violent Partner*, BUZZFEED NEWS (Oct. 2, 2014, 8:51 PM), <https://www.buzzfeed.com/alexcampbell/these-mothers-were-sentenced-to-at-least-10->

In these cases, the factfinder rarely inquires into whether the survivor was aware of the abuse or was taking steps to either mitigate the abuse or devise a plan to leave the relationship.⁸³ While this Article is not suggesting that battered parents should never be held criminally accountable for choices they make regarding their children, it is critical to recognize that survivors' choices receive an immense amount of scrutiny compared to those of the abusive coparent.⁸⁴

Civil failure-to-protect charges may also be brought against a survivor who stays in a violent relationship regardless of whether criminal charges are pursued.⁸⁵ Often these cases are brought when a survivor is advised by a child welfare social worker to either get a protection order or quickly leave the relationship and she fails

years-for-failin?utm_term=.otqWZ1MZg#.civ4nlxnG [https://perma.cc/74ZR-XQBZ]; see also Alex Campbell, *Battered, Bereaved, and Behind Bars*, BUZZFEED NEWS (Oct. 2 2014, 8:00 PM), https://www.buzzfeed.com/alexcampbell/how-the-law-turns-battered-women-into-criminals?utm_term=.pkPA0zq0g#.tq55gVbg8 [https://perma.cc/A4U9-S2QG] (describing Arlena Lindley's history of abuse and her 45 year sentence after her boyfriend murdered her child); Alex Campbell, *Woman Sent to Prison for Failing to Protect Toddler Is Up for Parole*, BUZZFEED NEWS (Dec. 30 2015, 4:48 PM), https://www.buzzfeed.com/alexcampbell/woman-sent-to-prison-for-failing-to-protect-toddler-is-up-fo?utm_term=.suP097e9z#.kkkyoOPo8 [https://perma.cc/Y6LF-R5YD] (continuing the previous story's discussion of Arlena Lindley in light of her parole hearing); Alex Campbell, *How "Failure to Protect" Laws Cost a 12-Year-Old Rape Victim His Mother*, BUZZFEED NEWS (Oct. 7, 2014, 5:26 PM), https://www.buzzfeed.com/alexcampbell/mothers-imprisonment-leads-rape-victim-to-wish-he-had-never?utm_term=.nnLaE4XEeq#.pxJMnqVnj [https://perma.cc/QTQ5-EAKN] (analyzing how a victim's mother received more prison time than did his sexually abusive stepfather); Alex Campbell, *This Battered Woman Wants to Get Out of Prison*, BUZZFEED NEWS (Nov. 11, 2014, 1:48 PM), https://www.buzzfeed.com/alexcampbell/this-battered-woman-wants-to-get-out-of-prison?utm_term=.wvPYAZIAD#.snLJx7Nx1 [https://perma.cc/2J2D-MBCP] (again providing details into a case where a mother received more prison time than her abusive boyfriend); Alex Campbell, *Vermont Kills Failure-to-Protect Law*, BUZZFEED NEWS (May 18, 2015, 12:25 PM), https://www.buzzfeed.com/alexcampbell/vermont-kills-failure-to-protect-law?utm_term=.ui54rQErX#.ohLwzPpzX [https://perma.cc/FBU4-CKWX] (reporting on Vermont's House of Representatives removed a failure to protect provision from a child abuse prevention bill and instead added a domestic violence affirmative defense to its child endangerment law). Unsurprisingly, mothers who are not being abused are also being prosecuted for their children's deaths, even when they do not participate in the violence directly. For a recent example, see Jordan Owen, *Mother of Murdered Toddler Gets 7 Years for Child Endangerment*, CHI. SUN TIMES (May 9, 2016, 3:26 PM), <https://chicago.suntimes.com/news/mother-of-murdered-toddler-gets-7-years-for-child-endangerment/> [https://perma.cc/MX4M-JB7B] (mother who ignored injuries inflicted by her boyfriend while she was at work pled to two counts of felony child endangerment after the child was murdered).

⁸³ See Murphy, *supra* note 81, at 743–61; FERRARO, *supra* note 61, at 231–35.

⁸⁴ See Roberts, *supra* note 77, at 110–11.

⁸⁵ See Kitchen, *supra* note 11, at 388–89.

to do so.⁸⁶ While cases in the child welfare system cannot result in incarceration unless a court order is violated, they nonetheless can have even more long term and devastating consequences for a parent: the limiting or outright loss of parental rights.⁸⁷ Similar to criminal charges, failure-to-protect allegations can be made against a parent for exposing their child to either domestic violence or child abuse.⁸⁸

Although supporters of the child welfare system advocate for state intervention as a way to ensure support for unstable families,⁸⁹ critics have long demonstrated the vast disparity in resources going toward removal rather than rehabilitation.⁹⁰ More sobering still are statistics showing the unlikelihood of family reunification once a child has been removed as well as the risk of harm children in the foster care system face.⁹¹ For survivors, removing a child from an unsafe home neither guarantees safety for the child nor provides the resources she needs to achieve the stability necessary to get her child back. Moreover, a growing body of research demonstrates that providing assistance and support to survivors is the most effective way to keep children safe.⁹²

Once survivors find themselves involved in the legal system—be it the civil system, the criminal system, or both—they may find the terms of their relationships dictated not by their own desires, realities, or calculations but by system actors including police officers, prosecutors, and judges. Because the pervading philosophy within the legal system is that domestic violence is best remedied by separation,⁹³ survivors may struggle to maintain their preferred lifestyle, relationship, and control over their safety once separated.⁹⁴ A court ordered restriction to contact or come near a partner may logistically result in either or both parties needing to reassess their

⁸⁶ Lindauer, *supra* note 74, at 798.

⁸⁷ Raeder, *supra* note 37, at 108–09.

⁸⁸ Lindauer, *supra* note 74, at 804–05; Dunlap, *supra* note 75, at 566–67. While the publicity of the *Nicholson* case has been somewhat persuasive in other jurisdictions regarding not making exposure to domestic violence the sole reason for child removal, this still remains a possibility in some states. Raeder, *supra* note 37, at 117–18 (noting both the influence of *Nicholson* and its limitations, namely loss of custody even as parental rights are maintained).

⁸⁹ LINDA SPEARS, BUILDING BRIDGES BETWEEN DOMESTIC VIOLENCE ORGANIZATIONS AND CHILD PROTECTIVE SERVICES 3–5 (2000).

⁹⁰ Raeder, *supra* note 37, at 121 (discussing the extreme disparity in federal funding of child welfare systems, with most going to out of home placement as opposed to preventative services).

⁹¹ Murphy, *supra* note 81, at 712; *see also* Lindauer, *supra* note 74, at 811–12 (discussing both the challenges to reunification and the dangers children are exposed to once removed).

⁹² *See, e.g.*, ANN ROSEWATER & KATHY MOORE, ADDRESSING DOMESTIC VIOLENCE, CHILD SAFETY AND WELL-BEING: COLLABORATIVE STRATEGIES FOR CALIFORNIA FAMILIES: RECOMMENDATIONS FROM THE CALIFORNIA LEADERSHIP GROUP ON DOMESTIC VIOLENCE AND CHILD WELL-BEING 6 (2010).

⁹³ Kohn, *supra* note 39, at 200.

⁹⁴ *See* Kitchen, *supra* note 11, at 388–89.

relationship and their living situation. For battered mothers with children, however, needing to leave a formerly shared household may not be as simple as moving out (which for reasons including finances, family, and the housing market, is not simple at all). Survivors are told by the state that they cannot remain with their partners in any meaningful way, yet they are not also being provided with either resources or reasonable guidelines to facilitate and maintain this state imposed separation. Survivors who choose not to leave are punished for not doing so: they may face incarceration, suspension or termination of parental rights, or loss of custody. These punitive responses to survivors staying in abusive relationships place further pressure on survivors to leave the relationship lest they incur these consequences. Leaving the relationship, however, by no means guarantees stability, safety, or liberty, as survivors who do leave may nonetheless find themselves in violation of parental kidnapping laws.

III. PARENTAL KIDNAPPING LAWS

It is now fairly common knowledge that it takes many survivors multiple attempts to be able to successfully extricate themselves from the lives of their abusive partners.⁹⁵ Despite this increasingly widespread recognition, it remains critical not to lose sight of the realities underlying these statistics. For survivors of domestic violence, both deciding to leave and actually separating from an abusive partner can be extremely difficult.⁹⁶ There are many factors that survivors must consider and there are myriad reasons why a survivor might rationally decide that

⁹⁵ This fact is found in numerous, easily accessible, introductory discussions and explanations of domestic violence. *See, e.g., 50 Obstacles to Leaving*, NATIONAL DOMESTIC VIOLENCE HOTLINE (June 10, 2013) <http://www.thehotline.org/2013/06/10/50-obstacles-to-leaving-1-10/> [<https://perma.cc/K868-KJDW>]; Sarah LeTrent, *When A Friend Won't Walk Away from Abuse*, CNN (Jan. 10, 2013, 1:53 PM), <http://www.cnn.com/2013/01/10/living/friend-domestic-abuse/index.html> [<https://perma.cc/W4VX-VNY8>]; *Domestic Violence*, BUILDING FUTURES (2017), http://www.bfvc.org/domestic_violence.php [<https://perma.cc/GJK9-X9B5>]. This concept gained even more traction after NFL star Ray Rice was filmed knocking his soon-to-be wife Janay Palmer out in an elevator in 2014; *see, e.g., Sarah Kaplan, #WhyIStayed: She Saw Herself in Ray Rice's Wife, Janay, and Tweeted About It. So Did Thousands of Others*, WASH. POST (Sept. 9, 2014), https://www.washingtonpost.com/news/morning-mix/wp/2014/09/09/whyistayed-she-saw-herself-in-ray-rices-wife-janay-and-tweeted-about-it-so-did-thousands-of-others/?utm_term=.b94c21428b42 [<https://perma.cc/GWP7-AWPU>]; Nina Bahadur, *#WhyIStayed Stories Reveal Why Domestic Violence Survivors Can't 'Just Leave,'* HUFFINGTON POST (Sept. 9, 2014, 12:24 PM), https://www.huffingtonpost.com/2014/09/09/whyistayed-twitter-domestic-violence_n_5790320.html [<https://perma.cc/U9HJ-CUGD>]; Kathy A. Bolten, *Leaving for Good Often Takes 7 to 9 Tries*, DES MOINES REGISTER (Sept. 14, 2014, 1:25 AM), <http://www.desmoinesregister.com/story/news/2014/09/14/domestic-abuse-leaving-good/15621169/> [<https://perma.cc/K7GW-N6YH>].

⁹⁶ SCHNEIDER, *supra* note 23, at 77; GOODMAN, *supra* note 5, at 80.

staying in the relationship is the most strategic choice.⁹⁷ When survivors do leave, these same considerations may make it challenging—if not impossible—to remain separated. Survivors who share children with their abusive partners, this calculus can be even more complicated logistically, financially, and emotionally.⁹⁸

Nonetheless, survivors with children who do choose to separate from and leave—whether on their own volition or because of pressure exerted by either the domestic violence legal response or by other state systems—must navigate their children’s survival as well as their own against the backdrop of both separation violence that undermines their safety and state parental kidnapping laws that threaten their liberty.

Separation violence has long been recognized as a phenomenon that occurs when an abusive partner forcefully reasserts control over a survivor who has attempted to leave.⁹⁹ Separation violence is common at the end of abusive relationships and provides insight into why some survivors decide it is most strategic to return to or stay in the relationship.¹⁰⁰ For survivors who anticipate or have already experienced separation violence, it may also underscore the need for ensuring a clean break or putting distance between themselves and their partners.¹⁰¹

Analyzing the impact of state parental kidnapping laws on battered mothers is especially critical given its interplay with state pressure to leave and separation violence. The term “kidnapping” typically connotes images of children or adults being forcefully removed from their homes and held in seclusion against their will,

⁹⁷ As discussed *supra* note 95, the #WhyIStayed hashtag has given readers who may be less familiar with domestic violence scholarship tremendous insight into the realities of battered women’s lives and decisions about separating. Other mainstream articles exploring this topic and hashtag include: Val Willingham, *Why I Stayed: Tangles of Domestic Abuse*, CNN (Sept. 16, 2014, 8:43 AM), <http://www.cnn.com/2014/09/09/health/domestic-abuse-willingham/index.html> [<https://perma.cc/L7N3-5PNV>]; Michele Hunt, *Out of the Closet on Domestic Abuse: Why I Stayed, Why I Left and Why I Choose Now to Tell My Story*, HUFFINGTONPOST (Sept. 12, 2014, 9:39 AM), https://www.huffingtonpost.com/michele-hunt/domestic-abuse-why-i-stayed_b_5809290.html [<https://perma.cc/9VWW-YYQ5>]; Franchesca Ramsey, *14 Tweets Answer ‘Why I Stayed.’ 11 Broke My Heart, But the Last 3 Gave Me Hope*, UPWORTHY (Sept. 9, 2014), <http://www.upworthy.com/14-tweets-answer-why-i-stayed-11-broke-my-heart-but-the-last-3-gave-me-hope> [<https://perma.cc/F46C-LZAS>]; Julie Lee, *#WhyIStayed: Powerful Stories of Domestic Violence*, USA TODAY (Sept. 10, 2014, 1:44 PM), <https://www.usatoday.com/story/news/nation-now/2014/09/10/why-i-stayed-hashtag-twitter-ray-rice/15385027/> [<https://perma.cc/JP95-9BJ3>]; see also SCHNEIDER, *supra* note 23, at 77; Coker, *supra* note 37, at 1017–18; Kuennen, *supra* note 38, at 4–5.

⁹⁸ Miccio, *supra* note 25, at 263; Mahoney, *supra* note 12, at 23; Coker, *supra* note 35, at 832; Dunlap, *supra* note 75, at 580.

⁹⁹ See Mahoney, *supra* note 12, at 5. See also Martha R. Mahoney, *Victimization or Oppression? Women’s Lives, Violence, and Agency*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 59, 79 (Martha Albertson Fineman & Roxanne Mayktiuk eds., 1994).

¹⁰⁰ See generally Mahoney, *supra* note 12, at 5.

¹⁰¹ See Klein et al., *supra* note 15, at 110.

often for the kidnapper's monetary or sexual gain.¹⁰² Parental kidnapping, on the other hand, conjures up images of bitter custody battles and vindictive parents absconding with their children out of state or out of the country.¹⁰³ In reality, parental kidnapping laws are triggered by a much broader range of circumstances. It is not just a disgruntled, disappointed litigant whose flagrant contempt of a court order triggers a parental kidnapping statute. Rather, states proscribe different behaviors by different subsets of people with different states of mind and subject them to different punishments.¹⁰⁴ Furthermore, some states directly address the possibility of fleeing domestic violence by including specific exemptions to prosecution and affirmative defenses in their statutes while others do not. Depending on where they live, survivors with children may be caught in a serious bind in which they may be criminally punished for both staying and leaving an abusive relationship. There is very real potential for unfair and arbitrary outcomes based on geography, which underscores the need for these laws to be written and implemented in ways that do not harm parents or children fleeing from unsafe homes.

A. Required Relationships

Because states' definitions of parental kidnapping vary greatly, the first step in determining the applicability of a parental kidnapping law is to analyze what legal relationships the state is requiring between the fleeing parent, the abusive parent, and the child.¹⁰⁵ Not all states share the same conception of parental custody. That is, in some states, parents automatically have joint custody over a child until a court says otherwise¹⁰⁶ while other states' de facto position is to deny any custody to fathers who are unmarried.¹⁰⁷ Biological mothers will typically have a right to custody unless a custody or child welfare court orders otherwise. That a mother has this right does not necessarily mean that she will fall within the scope of every parental kidnapping law.

As scholars and advocates Catherine Klein, Leslye Orloff, and Hema Sarangapani noted over a decade ago, parental kidnapping statutes typically fall into three categories of applicability: statutes that only apply when a custody or visitation

¹⁰² In fact, 33 of the top 34 images that come up when searching "kidnap" on a Google image search show people restrained by rope, duct tape, or hands and three include weapons (on file with author). The one image that differs only depicts the bust of a man.

¹⁰³ Many of the top Google images for "parental kidnapping" show custody related images or images of children torn between two parents (on file with author).

¹⁰⁴ See Klein et al., *supra* note 15, at 117 (observing that "the statutory provisions concerning definitions of lawful custodian, the availability of statutory exceptions or defenses, and the severity of the criminal penalty for conviction vary greatly between states").

¹⁰⁵ *Id.*

¹⁰⁶ See, e.g., NEV. REV. STAT. § 125C.0015 (2015).

¹⁰⁷ See, e.g., S.C. CODE ANN. § 63-17-20(B) (2008); TENN. CODE ANN. § 36-2-303 (1997).

proceeding has already been initiated; statutes that apply regardless of the existence of a family court case; and statutes with ambiguous applicability.¹⁰⁸ For a survivor living in states where parental kidnapping requires at least the initiation of a family court case,¹⁰⁹ a lack thereof would render her immune from parental kidnapping charges, though the act of leaving may still be used against her in civil actions.¹¹⁰ It is important to recognize the very real possibility that a survivor has already sought help from the court system before she decides to flee. Whether through a divorce, custody, or protection order hearing, a survivor or her abusive partner may have sought temporary or permanent care and control over their children. Despite the existence of such a case, a survivor who is still being battered—or feels like she or the children are still in danger—may choose to leave rather than wait for her partner to comply with a court order.¹¹¹

In states where parental kidnapping charges can be brought regardless of the existence of a family court case, survivors are at risk of prosecution even when they are not in violation of a court order. In several states, only a person with “no legal right” to custody can be charged with parental kidnapping.¹¹² This language and similar variations create ambiguity over whether a mother can have “no legal rights” to custody of her biological children without a family or child welfare order denying her custody or terminating her parental rights. Moreover, in a few states, only a person who removes a child from a legal custodian and/or deprives a legal custodian of a right to custody has committed parental kidnapping.¹¹³

¹⁰⁸ See Klein et al., *supra* note 15, at 118–19.

¹⁰⁹ These states include: Arkansas, ARK. CODE ANN. § 5-26-502(a)(1) (2017); Colorado, COLO. REV. STAT. ANN. § 18-3-304(1) (2017); Louisiana, LA. STAT. ANN. 14:45.1(A) (2017); Michigan, MICH. COMP. LAWS § 750.350a(1) (2017); Mississippi, MISS. CODE ANN. § 97-3-51(1) (2017); North Carolina, N.C. GEN. STAT. § 14-320.1 (2017); North Dakota, N.D. CENT. CODE § 14-09-24 (2017); Rhode Island, 1956 R.I. GEN. LAWS § 11-26-1.2(a) (2017); South Carolina, S.C. CODE ANN. § 16-17-495(a)(1) (2017); South Dakota, S.D. CODIFIED LAWS § 22-19-9 (2017); Utah, UTAH CODE ANN. § 76-5-303(b),(c) (2017); Virginia, VA CODE ANN. § 18.2-49.1(A),(B) (2017); and West Virginia, W. VA. CODE § 61-2-14d(a) (2017).

¹¹⁰ *Id.*; see also Part III, *infra*.

¹¹¹ Klein et al., *supra* note 15, at 110. (noting that even survivors with protection orders may still experience abuse, prompting their departure).

¹¹² These states include: Alaska, ALASKA STAT. § 11.41.320(a) (2017); Arizona, ARIZ. REV. STAT. ANN. § 13-1302(A) (2017); Connecticut, CONN. GEN. STAT. § 53a-98(a) (2017); Delaware, DEL. CODE ANN. tit. 11 § 785(1) (2017); Georgia, GA. CODE ANN., § 16-5-45(b)(1) (2017); Idaho, IDAHO CODE § 18-4506(1) (2017); Kentucky, KY. REV. STAT. ANN. § 509.070(1) (2017); Nebraska, NEB. REV. ST. § 28-316(1); New York, N.Y. PENAL LAW § 135.45(1) (2017); Ohio, OHIO REV. CODE ANN. § 2919.23(A) (2017); Vermont, VT. STAT. ANN. tit. 13, § 2451(a) (2017); and Wyoming, WYO. STAT. ANN. § 6-2-204(a) (2017).

¹¹³ These states include: Alabama, ALA. CODE § 13A-6-45(a) (2017); Kansas, KAN. STAT. ANN. § 21-5409(b) (2017); Maryland, MD. CODE ANN. CRIM. LAW § 3-503(a) (2017); New Hampshire, N.H. REV. STAT. § 633:4(I) (2017); and Oklahoma, OKLA. STAT. ANN. tit. 21, § 891 (2017).

These distinctions seriously affect survivors with children. In those states requiring court involvement, survivors who have not engaged with the family court system would be better able to determine their relocation without risking prosecution. Similarly, in states like Tennessee where mothers of children born out of wedlock are assumed to have sole custody,¹¹⁴ battered mothers will have more leeway in determining how best to respond to the violence at home. In many states, however, battered mothers' decisionmaking may result in action prohibited by their state's parental kidnapping laws.

B. Prohibited Acts and Enhanced Punishments

Every state proscribes variations of a parent abducting, concealing a child, or interfering with court ordered custody. In addition, many states provide enhanced punishments for doing so outside the state. For survivors fleeing violence, however, staying within states lines is not likely to outweigh the benefits of leaving if other states offer greater access to support networks, safety, or employment opportunities.¹¹⁵

Many states specifically prohibit removing a child from that state¹¹⁶ or include enhanced punishments for doing so.¹¹⁷ In addition to actions amounting to parental

¹¹⁴ See, e.g., TENN. CODE ANN. § 36-6-205 (determining that “[a]bsent an order of custody to the contrary, custody of a child born out of wedlock is with the mother”).

¹¹⁵ See Klein et al., *supra* note 15, at 110.

¹¹⁶ ALASKA STAT. § 11.41.320 (2017); GA. CODE ANN. § 16-5-45(b)(1)(c)-(2) (2017); HAW. REV. STAT. § 707-726(1)(a)(ii)&(1)(c) (2017); 720 ILL. COMP. STAT. 5/10-5(b)(5) (2017); IND. CODE § 35-42-3-4(a)(1)&(a)(2) (2017); IOWA CODE § 710.6 (2017); KAN. STAT. ANN. § 21-5409(b)(2)(C)-(E) (2017); LA. STAT. ANN. § 14:45(A)(4) (2017); ME. STAT. tit. 17-a, § 303(1)(B)-(C) (2017); MD CODE ANN., FAM. LAW §§ 9-304, 9-305 (2009); MISS. CODE ANN. § 97-3-51 (2017); MONT. CODE ANN. § 45-5-632 (2017); NEV. REV. STAT. § 200.359 (2017) (removing the child from the jurisdiction of the court, not the state specifically); N.H. REV. STAT. ANN. § 633:4(1) (2017); N.Y. PENAL LAW § 135.50 (McKinney 2017); N.C. GEN. STAT. § 14-320.1 (2017); N.D. CENT. CODE § 12.1-18-05 (2017); OKLA. STAT. tit. 21, § 891 (2017); OR. REV. STAT. § 163.257 (2017); 1956 R.I. GEN. LAWS 11-26-1.1 (2017); S.D. CODIFIED LAWS § 22-19-10 (2017); TENN. CODE ANN. § 39-13-306 (2017); TEX. PENAL CODE § 25.03 (2017) (taking the child out of the judicial district or county); VA. CODE ANN. § 18.2-49.1 (2017); VA. CODE ANN. § 18.2-47(D) (2017); WASH. REV. CODE § 9A.40.060(1)(c)-(d) (2017).

¹¹⁷ ARK. CODE ANN. § 5-26-502(b)(1) (2017); ARIZ. REV. STAT. ANN. §§ 13-1302(E) and 13-1305(B) (2017); GA. CODE ANN. § 16-5-45(b)(1)(c)-(2) (2017); HAW. REV. STAT. § 707-726(1)(a)(ii)&(1)(c) (2017); 720 ILL. COMP. STAT. 5/10-5(b)(5) (2017) (prohibiting refusal to return child to Illinois after out of state visitation); IND. CODE 35-42-3-4(a)(1)-(2) (2017); IDAHO CODE § 18-4506(2) (2017); IOWA CODE § 710.6 (2017); KAN. STAT. ANN. § 21-5409(b)(2)(C)-(E) (2017); LA. STAT. ANN. § 14:45(A)(4) (2017); ME. STAT. tit. 17-A, § 303(1)(B)-(C) (2017); MASS. GEN. LAWS. ch. 265, § 26A (2017); MISS. CODE ANN. § 97-3-51 (2017); MO. REV. STAT. §§ 565.150 and 565.153 (2017); MONT. CODE ANN. § 45-5-

kidnapping being punishable by the survivor's state of origin, some states also criminalize bringing and retaining an abducted child into that new state from a different state.¹¹⁸ Fleeing from one state into another may thus result in a survivor being charged in two states for parental kidnapping.

For survivors fleeing violent relationships, considerations about where to go are determined far more by safety, resources, and support networks than by state boundaries. Yet in many states, they risk far greater punishment if they seek sanctuary outside of that state. Survivors who conceal their children from the other parent can only hope that their state provides alternate mechanisms to avoid either arrest or conviction for intra or interstate parental kidnapping.

C. Exemptions and Defenses

Many states provide exemptions from prosecution or affirmative defenses against conviction to defendants who quickly return their children to the other parent. Encouraging actions that rectify the kidnaping makes sound policy sense in situations outside of the domestic violence context. But for families experiencing domestic abuse, these options are not useful to survivors who commit to their separation for more than just a few days.¹¹⁹

632 (2017); OHIO REV. CODE ANN. § 2919.23 (2017); UTAH CODE ANN. § 76-5-303 (2017); W. VA. CODE § 61-2-14d(b) (2017).

¹¹⁸ See, e.g., MO. REV. STAT. § 565.156(1)(4) (2017); 720 ILL. COMP. STAT. 5/10-5(b)(9) (2017); MINN. STAT. § 609.26 (2017); MASS. GEN. LAWS ch. 265, § 26A(1)(5) (2017). Missouri and Illinois have identical affirmative defenses for when the defendant is fleeing domestic violence (including child abuse), whereas Minnesota only has an affirmative defense for protecting the child.

¹¹⁹ In Tennessee, it is an affirmative defense to custodial interference if the defendant voluntarily returns the child prior to the issuance of an arrest warrant. TENN. CODE ANN. § 39-13-306(c)(2) (2017). Michigan's child taking statute states that an adoptive or biological parent "shall not take that child, or retain that child for more than 24 hours, with the intent to detain or conceal the child from any other parent or legal guardian of the child who has custody or parenting time rights under a lawful court order at the time of the taking or retention." MICH. COMP. LAWS § 750.350a(1) (2017). In New Jersey, if the child is detained, concealed, taken, or enticed for longer than 24 hours or outside of the United States, the act is chargeable as a crime of the second degree as opposed to a crime of the third degree. N.J. STAT. ANN. § 2C:13-4 (2017). In Arizona, charges of custodial interference may be dropped from a class three felony to a class one misdemeanor if the child is voluntarily and safely returned within 48 hours. ARIZ. REV. STAT. ANN. § 13-1302(E) (2017). Idaho provides an affirmative defense for a defendant who returns the child within 24 hours "after expiration of an authorized visitation privilege." IDAHO CODE § 18-4506(2) (2017). In Minnesota, a deprivation of parental or custodial rights case must be dismissed if the child is voluntarily returned within 48 hours or the defendant both stays in Minnesota and, within seven days of taking the child, either the defendant or the complainant files a motion in family court. MINN. STAT. § 609.26(5) (2017). Indiana's interference with custody statute provides that, if a defendant returns the child within 7 days after the violation of a court order, the judge may

In contrast, survivors will find far greater protection in a state that provides specific mechanisms for considering domestic violence or child abuse when investigating or deciding parental kidnapping charges. Seventeen states specifically include an exemption or affirmative defense for fleeing domestic violence or child abuse in at least one of their parental kidnapping statutes,¹²⁰ while fourteen only

consider this return a mitigating circumstance. IND. CODE § 35-42-3-4(c) (2017). In Texas, it is an affirmative defense if the child is returned to the district or country where the child was removed within three days of the offense. TEX. PENAL CODE § 25.03(c) (2017). In Wisconsin, this time limit to return a child to another legal custodian after court ordered parenting time or visitation is only 12 hours. WIS. STAT. § 948.31(1)(b) (2017). Maryland's and Washington, D.C.'s parental kidnapping laws both include provisions prohibiting a parent who initially had lawful possession of the child to detain the child for more than 48 hours after that lawful possession ended and the lawful custodian requested the child's return. MD. CODE ANN., FAM. LAW §§ 9-304(2), 9-305(2) (2017); D.C. CODE § 16-1022(b)(3) (2017). Montana's parenting interference statute specifically states that, for an individual's first offense, that individual does not commit the crime if he or she does not leave the state and returns the child before arraignment or, alternatively, does leave the state but returns the child before arrest. MONT. CODE ANN. § 45-5-634(3) (2017). Pennsylvania's interference with custody of children statute also reduces that crime from a third degree felony if the act consisting of interference was done in good cause and for less than 24 hours, if the defendant has been given some amount of custody or visitation through a valid Pennsylvania court order, and the defendant both lives in Pennsylvania and did not remove the child from the state: 18 PA. CONS. STAT. § 2904(c)(2) (2017). *See also* NATIONAL CLEARINGHOUSE, *supra* note 3, at 20 (noting that this practice is "unlikely to provide any legal protection" to survivors.).

¹²⁰ 13 states provide statutory affirmative defenses to all of their parental kidnapping related laws for parents fleeing from either harm to the child or harm to themselves. 17 states have at least one parental kidnapping statute with an exemption or affirmative defense for defendants whose actions were based in either protecting themselves or protecting their children. ARIZ. REV. STAT. ANN. § 13-1302 (2017), but no defense for ARIZ. REV. STAT. ANN. § 13-1305 (2017); CAL. PENAL CODE § 278.5 (2017), but no defense for CAL. PENAL CODE § 278 (2017); D.C. CODE § 16-1023 (2017); IDAHO CODE § 18-4506 (2017); IND. CODE § 35-42-3-4 (2017); MINN. STAT. § 609.26(2) (2017); MO. REV. STAT. §§ 565.153, 565.156 (2017), but no defense for MO. REV. STAT. § 565.150 (2017); N.J. STAT. ANN. § 2C:13-4 (2017); NEV. REV. STAT. § 200.359 (2017); 1956 R.I. GEN. LAWS §§ 11-26-1.2, 11-26-1.1 (2017), separate defense for 1956 R.I. GEN. LAWS § 11-26-1.4 (2017), which involves kidnapping a minor against his will; TEX. PENAL CODE § 25.03 (2017), but no defense for TEX. PENAL CODE § 25.04 (2017); UTAH CODE ANN. § 76-5-303 (2017); WASH. REV. CODE §§ 9A.40.060, 9A.40.070 (2017); WIS. STAT. § 948.31 (2017). Florida, Illinois, and Pennsylvania each have at least one statute with an affirmative defense for domestic violence and child abuse and at least one statute with only an affirmative defense for child abuse. FLA. STAT. § 787.03 (2017) covers both but FLA. STAT. § 787.04 (2017) only covers child abuse; 720 ILL. COMP. STAT. 5/10-5 (2017) covers both but 720 ILL. COMP. STAT. 5/10-5.5 (2017) only covers child abuse; 18 PA. CONS. STAT. § 2909 (2017) covers both but 18 PA. CONS. STAT. § 2904 (2017) only covers child abuse.

consider flight to protect the child.¹²¹ Nineteen include no specific consideration for either domestic violence or child abuse.¹²² Finally, Montana's interference and aggravated interference with parent child contact statutes provide an exemption from violating those laws when a defendant acts with "reasonable cause," which may allow for considerations of domestic violence or child abuse but does not specifically require that they be taken into account.¹²³

1. Protecting the Child

The states that recognize the relevance of protecting children from child abuse in parental kidnaping cases do so in very different ways, albeit all in the form of affirmative defenses. The largest distinctions between the affirmative defenses involve the kind of harm to the child that satisfies the defense; the immediacy of the

¹²¹ 14 states' statutes provide affirmative defenses for protecting only the child but not the fleeing parent. ARK. CODE ANN. § 5-26-501 (2017) (interference with visitation—but not interference with custody or interference with court ordered custody); COLO. REV. STAT. § 18-3-304 (2017); HAW. REV. STAT. § 707-726 (2017) (custodial interference in the first degree—but not second degree); LA. STAT. ANN. § 14:45.1 (2017) (interference with the custody of a child—but none for simple kidnapping, which explicitly applies to parents); MD. CODE ANN., FAM. LAW §§ 9-304, 9-305 (2017), but none for MD. CODE ANN., CRIM. LAW § 3-503 (2017); MICH. COMP. LAWS § 750.350a (2017); N.H. REV. STAT. ANN. § 633:4 (2017); N.Y. PENAL LAW § 135.50 (2017) (custodial interference in the first degree—but not second degree); OHIO REV. CODE ANN. § 2919.23 (2017) (interference with custody); OKLA. STAT. tit. 21, § 567A(B) (2017) but none for OKLA. STAT. tit. 21, § 891 (2017); 18 PA. CONS. STAT. §§ 2904, 2909 (2017); TENN. CODE ANN. § 39-13-306 (2017); VT. STAT. ANN. tit. 13, § 2451 (2017); W. VA. CODE § 61-2-14d (2017); WYO. STAT. ANN. § 6-2-204 (2017). As noted above, Illinois has one statute carving out a defense for protecting only a child, 720 ILL. COMP. STAT. 5/10-5.5 (2017), and one statute with a defense for fleeing domestic violence generally, 720 ILL. COMP. STAT. 5/10-5 (2017), which could also include a child. Finally, Florida's statute provides a defense for protecting a child or a parent but limits this defense to protecting the child only if the child is taken out of state. FLA. STAT. § 787.03 (2017) (interference with custody—protecting both child and parent); FLA. STAT. § 787.04 (2017) (removing minors from state or concealing minors contrary to state agency order or court order—protecting child).

¹²² AL, CT, DE, GA, IA, KS, KY, ME, MD, MA, MS, NE, NM, NC, ND, OR, SC, SD, VA. Note that several of these states may have statutes with defenses for nonabuse related factors like obtaining consent, returning the children, or the other parent failure to assert his custody rights in a set amount of time.

¹²³ MONT. CODE ANN. § 45-5-633(1) (2017). While this exemption applies to interference with parent child contact and aggravated interference with parent child contact charges, it does not apply to parenting interference or custodial interference violations. These statutes provide only an exemption for first time offenses when the child is quickly and voluntarily returned. MONT. CODE ANN. §§ 45-5-304(3), 45-5-634(3) (2017). A variation thereof is also available as a defense under the interference with parent child contact laws. MONT. CODE ANN. § 45-5-633(2) (2017).

harm; and whether any steps must be taken by the survivor either before or after her departure.

Some states' affirmative defenses provide that the harm to the child that a parent is fleeing from must be physical injury.¹²⁴ Other states offer a broader definition of harm, essentially allowing a parent to flee to protect a child's safety or welfare.¹²⁵ In these states, a survivor would be able to provide a broader range of evidence that her child was endangered, even if that danger was not in the form of physical injury.¹²⁶

In addition to defining the harm required to invoke an affirmative defense, some states also require that the imposition of that harm must be immediate.¹²⁷ An imminence requirement undermines a survivor's ability to plan a strategic and uneventful departure; rather, she must wait until the child is in actual danger before departing.

¹²⁴ See, e.g., ARK. CODE ANN. § 5-26-501(c)(1) (2017), which states that it is an affirmative defense in an interference with visitation prosecution that the defendant committed the acts in question to "protect the minor from imminent physical harm" so long as the defendant was reasonable in her belief that physical harm was imminent and her withholding of visitation rights was a reasonable response to the perceived harm. This same defense is not available for defendants being prosecuted for interference with custody.

¹²⁵ See, e.g., COLO. REV. STAT. § 18-3-304(3) (2017) (stating that the defendant need only prove that she "reasonably believed that [her] conduct was necessary to preserve the child from danger to his welfare"); see also LA. STAT. ANN. § 14:45.1(A) (2017) (stating that it is a defense to Louisiana's interference with the custody of a child statute "that the offender reasonably believed his actions were necessary to protect the welfare of the child"); N.Y. PENAL LAW § 135.50(2) (2017) ("It shall be an affirmative defense to a prosecution . . . that the taking was necessary in an emergency to protect the victim because he has been subjected to or threatened with mistreatment or abuse."); OHIO REV. CODE ANN. § 2919.23(c) (2017) ("It is an affirmative defense to a charge of enticing or taking under division (A)(1) of this section, that the actor reasonably believed that the actor's conduct was necessary to preserve the child's health or safety."); MICH. COMP. LAWS § 750.350a(7) (2017) (the defendant must prove that "her actions were taken for the purpose of protecting the child from an immediate and actual threat of physical or mental harm, abuse, or neglect").

¹²⁶ That is, rather than being restricted to only putting on evidence that the child was in actual physical danger, the defendant would be able to provide more holistic evidence and testimony about the general safety and welfare of the child being compromised, thereby presenting a more detailed picture of the circumstances that led the parent to flee.

¹²⁷ See, e.g., ARK. CODE ANN. § 5-26-501(c)(1) (2017) (stating that it is an affirmative defense in an interference with visitation prosecution that the defendant committed the acts in question to "protect the minor from imminent physical harm"); N.H. REV. STAT. ANN. § 633:4(III) (2017) (stating that the defendant must have been "acting in good faith to protect the child from real and imminent danger"); TENN. CODE ANN. § 39-13-306(C)(1) (2017) (providing an affirmative defense when "the person who removed the child or incompetent person reasonably believed that, at the time the child or incompetent was removed, the failure to remove the child or incompetent person would have resulted in a clear and present danger to the health, safety, or welfare of the child or incompetent person").

Many states also require that the defendant take certain steps to alert law enforcement or family court judges to the child's location.¹²⁸ Some of these requirements are extremely onerous in terms of both timing¹²⁹ and what actions must be taken.¹³⁰ In these states, the defendant must not only attempt to resettle herself and her children in a new place, search for work, enroll her children in school, and determine childcare arrangements,¹³¹ all while looking for signs that her abusive partner has found her—she must also consult with a lawyer in order to be made aware of these requirements and time limits. She must further hope that, at trial, the judge will agree with her assessment of the dangers her children faced prior to her move.

Although these fourteen states do provide an avenue for survivors to avoid parental kidnapping convictions when their actions have been borne out of actual or threatened child abuse, a narrow interpretation of these defenses by the court can

¹²⁸ See, e.g., OKLA. STAT. tit. 21, § 567A(B) (2017) (“The offender shall have an affirmative defense if the offender reasonably believes that the act was necessary to preserve the child from physical, mental, or emotional danger to the child’s welfare and the offender notifies the local law enforcement agency nearest to the location where the custodian of the child resides.”); WYO. STAT. ANN. § 6-2-204(c)(1) (2017) (providing an affirmative defense when the defendant’s action “was necessary to preserve the child from an immediate danger to his welfare”).

¹²⁹ See, e.g., MD CODE ANN., FAM. LAW § 9-306 (2017) (requiring a detailed petition to be filed within 96 hours of the flight); N.H. REV. STAT. ANN. § 633:4(III) (2017) (requiring that the defendant demonstrate that she was “acting in good faith to protect the child from real and imminent physical danger,” and noting that evidence of good faith may include “the filing of a nonfrivolous petition documenting such danger and seeking to modify the custody decree in a court of competent jurisdiction within this state. Such petition must be filed within 72 hours of termination of visitation rights.” While this is an example of the kind of proof the court is looking for, both its specificity and its very short timeline indicate the challenges of being able to access this defense during a time of transition.); N.H. REV. STAT. ANN. § 633:4(IV) (2017) (stating explicitly the defense is not available to any defendant who took the child out of state); VT. STAT. ANN. § 2451(c) (2017) (providing a substantively identical affirmative defense to New Hampshire law).

¹³⁰ See, e.g., HAW. REV. STAT. § 707-726(2) (2017) (requiring that a survivor invoking the defense must have “filed a report with the clerk of the family court detailing the whereabouts of the minor, the person who took, enticed, detained, concealed, or removed the minor or child, and the circumstances of the event as soon as the filing of the report was practicable; and provided further that the person asserting the affirmative defense also filed a request for a custody order as soon as the filing of the request was practicable.” Given that “practicable” is not defined in statute or case law, this affirmative defense requires the defendant to have taken a series of steps that could jeopardize her safety and still not be deemed by the court to have been undertaken quickly enough).

¹³¹ Coker, *supra* note 35, at 836 (“Women who separate need money for new housing—first and last month rent plus deposit, new childcare arrangements, new school enrollment, and a new job. Many women must make these arrangements while using inadequate and unreliable public transportation.”).

result in their protection being denied to survivors.¹³² And, despite the long established link between abusing partners and child abuse,¹³³ survivors whose children have not been abused or who are unaware of their children's abuse would not be able to benefit from these affirmative defenses at all.¹³⁴

2. *Protecting the Child or the Fleeing Parent*

Survivors have better chances of achieving lasting safety and independence in states that explicitly consider the role their abuse played in their decisions and actions. Better yet, rather than relying only on affirmative defenses at trial, several states provide exemptions for survivors of domestic violence: rather than providing an affirmative defense at trial, some statutes include measures that are meant to prevent certain survivors from being arrested or prosecuted.¹³⁵ For example, the District of Columbia provides an exemption and an affirmative defense within its parental kidnapping statute.¹³⁶ Florida, however, is the only state to provide both an exemption¹³⁷ and an affirmative defense¹³⁸ for defendants charged with interference

¹³² NATIONAL CLEARINGHOUSE, *supra* note 3, at 17.

¹³³ See Peter G. Jaffe, *Children of Domestic Violence: Special Challenges in Custody and Visitation Dispute Resolution*, in DOMESTIC VIOLENCE AND CHILDREN: RESOLVING CUSTODY AND VISITATION DISPUTES, A NATIONAL JUDICIAL CURRICULUM 19–31 (Janet Carter et al., eds., 1995) (estimating that approximately 30% of abusive partners also abuse their children).

¹³⁴ NATIONAL CLEARINGHOUSE, *supra* note 3, at 22–23.

¹³⁵ *Id.*

¹³⁶ See D.C. CODE § 16-1023(a)(1)–(2) (2017) (stating that the parental kidnapping statute does not apply to a defendant whose action “[i]s taken to protect the child from imminent physical harm . . . [or] [i]s taken by a parent fleeing from imminent physical harm to the parent . . .”). D.C. CODE § 16-1023(b)-(c) (2017) (providing that if the survivor can convince a police officer or a prosecutor of the existence of imminent physical danger to either herself or her child, she should be able to avoid prosecution all together. If a survivor does violate the parental kidnapping statute, the statute provides that she can file a petition with the court stating that a lack of action would have resulted in “clear and present danger to the health, safety, or welfare of the child” and also attempt to obtain or modify a custody order—if she does this within five days of the action constituting parental kidnapping and the court finds that the child was in fact in clear and present danger, she will have a complete defense to parental kidnapping charges. In D.C., a survivor is entitled to avoid prosecution if she can demonstrate that she was fleeing from imminent physical harm but, if the harm was either not physical or not imminent, she loses this opportunity. While the statute provides a back end fix for defendants taking their children away from child abuse, this same defense does not exist for survivors of domestic violence). See also 18 PA. CONS. STAT. § 2909(a) (2017) (providing an exemption in the child concealment statute based on domestic violence or child abuse). *But see* 18 PA. CONS. STAT. § 2904(b)(1) (2017) (providing only an affirmative defense in its separate interference with custody statute if the action was taken to protect the child).

¹³⁷ FLA. STAT. § 787.03(6)(b)(1)–(3) (2017).

¹³⁸ FLA. STAT. § 787.03(4)(a)–(b) (2017).

with custody. This statute provides both front and back end fixes for parents fleeing from either child abuse or domestic violence. Interestingly, if the child is taken out of Florida against a court order, the defendant can only avail an affirmative defense regarding fleeing child abuse.¹³⁹ If the survivor is choosing to both defy a court order and leave the state, only the child's safety is explicitly recognized as relevant.¹⁴⁰ California,¹⁴¹ Rhode Island,¹⁴² Illinois,¹⁴³ and Texas¹⁴⁴ each also provide exemptions to prosecution based on violence to the child or the mother.

According to practitioners surveyed by the NCDBW, these exemptions are promising because "when the system works as intended, a victim is not charged . . . This allows survivors to remain in refuge states with their children, pending the results of civil custody cases."¹⁴⁵ On the other hand, practitioners have also reported that only some survivors have benefited from the exemptions due to

¹³⁹ FLA. STAT. § 787.04(5) (2017).

¹⁴⁰ This is a prime example of mothers' identities and safety being prioritized below both that of their children and the integrity of a court.

¹⁴¹ CAL. PENAL CODE § 278.7 (2017) (providing an exemption based on child abuse or domestic violence for deprivation of custody assuming that, in either case, leaving the child with the abusive parent would result in "immediate bodily injury or emotional harm."); *see generally* CAL. PENAL CODE § 278 (2017) (providing an exemption for the child's suffering, not the mother's, even if the mother is experiencing abuse. In addition to this inquiry, the survivor must take several steps to avail herself of this exemption: within 10 days, she must make a report to the original jurisdiction's district attorney regarding her explanation for her actions as well as her and her children's contact info, within 30 days, she must begin a PKPA compliant custody case, and she must continue to update the original district attorney with changes in contact info. There are no similar exemptions or affirmative defenses for a parent with no legal right to custody who is accused of parental kidnapping.).

¹⁴² *See* R.I. GEN. LAWS § 11-26-1.2(b)(1)–(2) (2017) (protecting from prosecution actions "taken to protect the child from imminent physical harm; . . . [or] taken by a parent fleeing from imminent physical harm to himself or herself"); R.I. GEN. LAWS § 11-26-1.1 (2017) (providing an affirmative defense for fleeing family violence, which includes child abuse and domestic abuse).

¹⁴³ *See* 720 ILL. COMP. STAT. 5/10-5(b)(6) (2017) (providing a specific exemption for concealing a child his father, who is or was married to the survivor, on account of entering into a domestic violence program. This same statute also provides affirmative defenses for fleeing family violence, which includes both child abuse and domestic violence). *But see* 720 ILL. COMP. STAT. 5/10-5.5(g)(1) (2017) (providing an affirmative defense related to violence only when "a person or lawful custodian committed the act to protect the child from imminent physical harm, provided that the defendant's belief that there was physical harm imminent was reasonable and that the defendant's conduct in withholding visitation rights, parenting time, or custody time was a reasonable response to the harm believed imminent.").

¹⁴⁴ TEX. PENAL CODE § 25.03(c-2)(2) (2017) ("[F]leeing the commission or attempted commission of family violence, as defined by Section 71.004, Family Code, against the child or the person."); TEX. PENAL CODE § 25.04 (providing no related affirmative defenses and no exemptions or defenses).

¹⁴⁵ NATIONAL CLEARINGHOUSE, *supra* note 3, at 20.

the onerous steps many require of survivors to quickly undertake without any legal or financial assistance.¹⁴⁶

Arizona,¹⁴⁷ Idaho,¹⁴⁸ Indiana,¹⁴⁹ Minnesota,¹⁵⁰ Missouri,¹⁵¹ New Jersey,¹⁵² Utah,¹⁵³ Washington,¹⁵⁴ and Wisconsin¹⁵⁵ all provide an affirmative defense based on acts intended to protect either the mother or the child. As with statutes that only provide affirmative defenses for child abuse, these affirmative defenses also differ in terms of imminence, harm, and proactive steps required to invoke them.¹⁵⁶ Even with these provisions, proving imminence and harm in court may still be challenging

¹⁴⁶ NATIONAL CLEARINGHOUSE, *supra* note 3, at 20; *see also* JOHNSTON ET AL., *supra* note 6, at 5 (noting that “[d]espite California’s affirmative defense for parents who take their children to flee violence, not all cases involving domestic violence were identified and provided protection under this defense”).

¹⁴⁷ *See* ARIZ. REV. STAT. ANN. § 13-1302 (2017) (requiring the defendant to file for a protection order or custody claiming that the child is unsafe and has a good faith and reasonable belief that the child is in immediate danger with the other parent based on either child abuse or domestic violence); ARIZ. REV. STAT. ANN. § 13-1305 (2017) (providing no affirmative defenses).

¹⁴⁸ *See* IDAHO CODE § 18-4506(2)(a)–(b) (2017) (protecting either the child or the parent from imminent physical harm).

¹⁴⁹ *See* IND. CODE § 35-42-3-4(f) (2017) (applying when defendant was threatened or reasonably believes that the child was threatened).

¹⁵⁰ *See* MINN. STAT. § 609.26 subdiv. 2(1)–(2) (2017) (“[T]he person reasonably believed the action taken was necessary to protect the child from physical or sexual assault or substantial emotional harm . . . or the person reasonably believed the action taken was necessary to protect the person taking the action from physical or sexual assault.”).

¹⁵¹ *See* MO. REV. STAT. § 565.160 (2017) (“[F]leeing an incident or pattern of domestic violence,” which includes violence to the child or survivor); MO. REV. STAT. § 565.150 (2017) (providing no alternative defenses).

¹⁵² *See* N.J. STAT. ANN. § 2C:13-4(c) (2017) (stating that for reasonable belief of imminent danger to the child’s welfare, requires giving notice and contact info within 24 hours to the sheriff, prosecutor, or child welfare agency of the original jurisdiction; for reasonable belief of imminent danger toward the defendant, must quickly give notice as above or begin a custody case).

¹⁵³ *See* UTAH CODE ANN. § 76-5(6)(b) (2017) (stating that a reasonable belief that the action is necessary to protect the child from abuse). *But see* UTAH CODE ANN. § 76-5-305(a) (providing a more generally applicable defense when it is reasonably necessary to protect any other person from imminent bodily harm or death).

¹⁵⁴ *See* WASH. REV. CODE §§ 9A.40.080 (2017) (“The defendant’s purpose was to protect the child, incompetent person, or himself or herself from imminent physical harm, that the belief in the existence of the imminent physical harm was reasonable, and that the defendant sought the assistance of the police, sheriff’s office, protective agencies, or the court of any state before committing the acts giving rise to the charges or within a reasonable time thereafter . . .”).

¹⁵⁵ *See* WIS. STAT. § 948.31(4)(a)(1)–(2) (2017) (stating that one must reasonably believe in threat of physical harm or sexual assault to child or to defendant herself).

¹⁵⁶ NATIONAL CLEARINGHOUSE, *supra* note 3, at 22.

depending on the survivor's access to evidence. Even when a survivor may be able to successfully invoke an affirmative defense and avoid conviction, she cannot assert the defense until trial and must therefore experience arrest and possible pretrial detention and separation from her children even if she prevails at trial.¹⁵⁷

3. *Using the Common Law Necessity Defense*

A minority of states provide no affirmative defenses based on domestic or child abuse in any of their parental kidnapping statutes.¹⁵⁸ In many of the states with no specific defenses for fleeing child abuse or domestic violence, defendants could attempt to invoke the affirmative defense of necessity.¹⁵⁹ Without an explicit statutory defense, however, they may face an uphill battle in proving that the hypothetical harm of staying in the relationship was greater than the actual harm of depriving a parent of their right to see their child.¹⁶⁰ Moreover, case law regarding this defense frequently emphasizes that it may only be invoked when the defendant had no other means to address the harm and when her illegal action was the only “viable and reasonable” option.¹⁶¹ Courts may hold a defendant's failure to involve the police or the court system against her because of her failure to exhaust those options before fleeing.¹⁶² Practitioners have reported that many survivors have not been able prevail under necessity defenses.¹⁶³

The very fact that twenty states do not explicitly address child abuse or domestic violence demonstrates how the impact of domestic violence on survivors with children has not been comprehensively integrated into criminal law. The ways in which other states have attempted to address the interrelationship of domestic violence and parental kidnapping further highlight how this nexus remains largely unincorporated: protections are piecemeal and rarely recognize the intersecting demands on survivors fleeing violence. Although a total of thirty one states and Washington, D.C. provide some kind of protection for defendants fleeing to protect their children, they do so with vastly different elements, requirements, and burdens

¹⁵⁷ *Id.*

¹⁵⁸ Parental kidnapping statutes in Alabama, Connecticut, Delaware, Georgia, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Nebraska, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, South Dakota, and Virginia contain no explicit affirmative defense grounded in domestic or child abuse.

¹⁵⁹ *But see* ALASKA STAT. § 11.41.330(b) (2017) (providing that the affirmative defense of necessity in a second degree custodial interference prosecution is explicitly not applicable to a defendant who keeps a child for whichever is shorter: 24 hours or “the time necessary to report to a peace officer or social service agency that the child or incompetent person has been abused, neglected, or is in imminent physical danger.”).

¹⁶⁰ MODEL PENAL CODE § 3.02 (U.L.A. 2017).

¹⁶¹ NATIONAL CLEARINGHOUSE, *supra* note 3, at 18–19.

¹⁶² *Id.* at 18.

¹⁶³ *Id.*

of proof.¹⁶⁴ The seventeen states that also provide protection to a defendant who is in danger also run the gamut in terms of when the protection first applies, what must be proved, and what action is required from the defendant. Given these disparities and challenges in the ways that even protection for survivors are written, it is no surprise that their application has also been ineffective.¹⁶⁵ Survivors may not be able to effectively invoke those protections ostensibly intended for their benefit; law enforcement, prosecutors, judges, and juries may also be unfamiliar with both these mechanisms and dynamics of domestic violence more broadly.¹⁶⁶ Survivors may struggle to access and to prevail under legal tools created for them. Involvement with the criminal court system can create extensive and long lasting barriers for survivors who choose to separate from their abusive partners—and these consequences are even more severe for those survivors who are convicted of parental kidnapping. These barriers multiply for survivors whose decisions to leave implicate federal as well as state laws.

D. Intersection with Federal Laws

Survivors who choose to relocate out of state may experience the adverse consequences of additional state and federal custody laws. The two most prominent jurisdictional laws that are likely to be implicated in a survivor's flight to a different state are the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA")¹⁶⁷ and the Parental Kidnapping Prevention Act ("PKPA").¹⁶⁸ The UCCJEA itself is not a federal law: rather it is a model jurisdictional statute adopted by the National Conference of Commissioners on Uniform State Laws in 1997.¹⁶⁹ As of 2016, the District of Columbia and every state except Massachusetts have enacted state level versions of the UCCJEA.¹⁷⁰ Massachusetts continues to operate under the older Uniform Child Custody Jurisdiction Act ("UCCJA")¹⁷¹ which the

¹⁶⁴ See, e.g., N.J. STAT. ANN. § 2C:13-4(c)(1) (2017) (requiring the child protection affirmative defense be proved by clear and convincing evidence—the same is not explicitly required to invoke the self protection affirmative defense but may be presumed).

¹⁶⁵ NATIONAL CLEARINGHOUSE, *supra* note 3, at 24.

¹⁶⁶ *Id.*

¹⁶⁷ UNIF. CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT § 1, 9 pt. 1 U.L.A. pp. 257–94 (1999 Supp.).

¹⁶⁸ 28 U.S.C. § 1738A (2017).

¹⁶⁹ UNIFORM LAW COMMISSION, THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, LEGISLATIVE FACT SHEET—CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Child%20Custody%20Jurisdiction%20and%20Enforcement%20Act> [<https://perma.cc/E73K-X7VQ>] (last visited Aug. 28, 2017).

¹⁷⁰ *Id.*

¹⁷¹ MASS. GEN. LAWS ch. 209B (2017).

UCCJEA was created to amend.¹⁷² State level versions of the UCCJEA are jurisdictional statutes, which means that they do not address the merits of a custody case but rather provide a framework for state family courts to determine which state has jurisdiction to hear and decide a custody case.¹⁷³ This framework creates a jurisdictional analysis that is consistent across the states and district that have adopted it, and lays out three types of child custody jurisdiction: home state jurisdiction; more appropriate forum jurisdiction; and default jurisdiction.¹⁷⁴ The majority of cases fall under home state jurisdiction.

A state court has home state jurisdiction when the child and a parent have lived in that state for at least six months prior to an initial custody case being filed.¹⁷⁵ Home state jurisdiction takes priority over other forms of jurisdiction, but a critical aspect of the UCCJEA is its allowance for a non home state court to grant temporary emergency jurisdiction in situations when the child in question, her sibling, or her parent has been abused by the other parent.¹⁷⁶ This allows a fleeing survivor to file for custody or a modification of an existing custody order on a temporary basis without having to return to a court in her home state.¹⁷⁷

There is no guarantee, however, that a non home state court will grant temporary emergency jurisdiction or that a home state will decline jurisdiction. In either case, the survivor may be forced to return to the state she fled to litigate the custody case.¹⁷⁸ That means a survivor who has marshalled the physical and emotional resources to flee an abusive relationship could be required to return to the state she fled to litigate a custody case. Her presence back in the home state can disrupt her attempts to rebuild her and her children's lives and reexpose her to her abusive partner. Although the UCCJEA provides a mechanism for fleeing survivors to potentially receive temporary or even permanent custody orders from their new state, choosing to initiate this process requires taking a "calculated risk" considering the legal and nonlegal consequences that doing so may set into motion.¹⁷⁹

¹⁷² Joan Zorza, *The UCCJEA: What Is It and How Does It Affect Battered Women in Child-Custody Disputes*, 27 *FORDHAM URB. L.J.* 909, 909 (2000).

¹⁷³ Klein et al., *supra* note 15, at 113.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 113–14.

¹⁷⁷ For the new state's temporary emergency jurisdiction to control beyond temporary orders, a court in the original state must decline jurisdiction: the UCCJEA provides several rationales for denial of jurisdiction that take the survivor's domestic violence and safety into account. Klein et al., *supra* note 15, at 114. *See also* Zorza, *supra* note 172, at 917–18 (noting the distinctions in process for when a custody case has or has not already been filed in the state from which the survivor fled).

¹⁷⁸ *See* Leigh Goodmark, *Going Underground: The Ethics of Advising a Battered Woman Fleeing an Abusive Relationship*, 75 *UMKC L. REV.* 999, 1005 (2007) (noting the possibility that the survivor may be forced to reveal her location in the course of the custody litigation).

¹⁷⁹ *See* Zorza, *supra* note 172, at 920.

A survivor may also be subject to the PKPA.¹⁸⁰ The PKPA is a federal law that requires every state and tribal land grant full faith and credit to custody orders issued in other states and tribal lands so long as the order meets due process requirements and jurisdictional mandates laid out in the law.¹⁸¹ The PKPA was enacted “to discourage interstate conflicts over custody, deter interstate abductions, and promote cooperation between states about interstate custody matters.”¹⁸² As such, courts must defer to the PKPA when deciding whether to enforce a custody order from another court or tribe when considering exercising jurisdiction despite the existence of a pending custody matter in another state, or when determining whether to modify an existing order from another jurisdiction.¹⁸³

Although the PKPA is not a criminal statute, its relationship to the federal Fugitive Felon Act (“FFA”) may expose survivors to being detained on federal warrants and extradited back to their original jurisdiction.¹⁸⁴ In all of the many states where parental kidnapping out of state is a felony, out of state flight can trigger this law addressing interstate flight to avoid prosecution or testimony.¹⁸⁵ The FFA allows federal agents to issue warrants for individuals who have committed felonies and fled across state lines, and to extradite that individual back to the original state when located.¹⁸⁶ FBI agents have been known to track individuals to domestic violence shelters, resulting in their return to the state from which they fled.¹⁸⁷

Because there is no tool for screening victims of domestic violence out of this process, survivors who flee the state are at risk of detention, extradition, and further abuse—as are their children, who are often returned to the abusive parent.¹⁸⁸ In conjunction with the unpredictable and often harsh consequences of the state parental kidnapping laws themselves, federal laws implicated by fleeing survivors create additional challenges and potential for harm.

IV. RISKS OF LEAVING

Regardless of whether survivors are aware of the existence or the consequences of parental kidnapping laws, many choose to not just separate from their abusive partners but to take the children and flee, undermining the abusive parents’ relationships with their children. Whether survivors, for example, enter a shelter, move in with family or friends across town, or leave the state or country entirely, they are at risk of having their abusive coparent call the police to file charges against them. Even if survivors can get the charges dropped or succeed on an affirmative

¹⁸⁰ See Goodmark, *supra* note 178, at 1004; NATIONAL CLEARINGHOUSE, *supra* note 3, at 10; Klein et al., *supra* note 15, at 116.

¹⁸¹ See Zorza, *supra* note 172, at 912.

¹⁸² Klein et al., *supra* note 15, at 116.

¹⁸³ See Klein et al., *supra* note 15, at 116.

¹⁸⁴ See *id.*; Goodmark, *supra* note 178, at 1004.

¹⁸⁵ See 18 U.S.C. § 1073 (2012).

¹⁸⁶ NATIONAL CLEARINGHOUSE, *supra* note 3, at 9–10.

¹⁸⁷ *Id.* at 10 (citing the Clearinghouse’s own practitioner survey from 2003).

¹⁸⁸ *Id.* at 11.

defense, the act and fact of the arrest can have far reaching consequences. For survivors who are not able to meet the burden of proving an affirmative defense at trial—whether statutory or common law—conviction and incarceration, in addition to arrest, can wreak havoc on their lives moving forward.

A. *Criminal Exposure*

If the survivor's abusive coparent alerts the police of their absence and an arrest warrant is issued or if law enforcement encounters the fleeing family otherwise, the survivor may be arrested. The potential consequences of an arrest, even if there is ultimately no conviction, may include violence at the hands of law enforcement; the collateral consequences of an arrest record; and the children being taken into the child welfare system or, perhaps even more detrimental, being returned to the abusive parent.

1. *Arrest*

Violence and mistreatment by law enforcement against potential suspects and even nonsuspects has recently become a well known and well documented phenomenon.¹⁸⁹ Although far too many men—especially black men—are being killed by police, women—especially black women—are also being murdered and assaulted in indefensibly high numbers and are receiving far less media attention.¹⁹⁰

¹⁸⁹ For an incredibly detailed daily log documenting local incidents of police misconduct, see CATO INSTITUTE, NATIONAL POLICE MISCONDUCT REPORTING PROJECT (2017) <http://www.policemisconduct.net/> [<https://perma.cc/98T7-WXSB>].

¹⁹⁰ See, e.g., Wesley Lowery, *Aren't More White People than Black People Killed by Police? Yes, But No*, WASH. POST (July 11, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/07/11/arent-more-white-people-than-black-people-killed-by-police-yes-but-no/?utm_term=.aedb7c01d3dd [<https://perma.cc/4YEN-56K8>] (both providing an analysis that the rates of black people shot by police is significantly higher than that of white people and also failing to include any discussion about specific female victims among the discussion of several male victims); Linda Sheryl Greene, *Before and After Michael Brown—Toward an End to Structural and Actual Violence*, 49 WASH. U. J.L. & POL'Y 1, 13–15 (2015) (discussing the racialized nature of law enforcement violence against individuals). See also Julia Craven, *Korryn Gaines, A 23-Year Old Mother, Latest Black Woman Killed by Police*, HUFFINGTON POST (Aug. 2, 2016, 3:13 PM), https://www.huffingtonpost.com/entry/korryn-gaines-shooting_us_57a0cfbfe4b08a8e8b5f9fd4 [<https://perma.cc/A8ZE-4SZV>] (describing the recent killing of Korryn Gaines and noting that 2016 is on pace to see more black women killed by police than 2016); Zoe Carpenter, *The Police Violence We Aren't Talking About*, THE NATION (Aug. 27, 2014), <https://www.thenation.com/article/police-violence-we-arent-talking-about/> [<https://perma.cc/2QTE-NJPB>]. See also Erick A. Paulino, *Deconstructing the Arrest of Sandra Bland*, THE FEMINIST WIRE (Aug. 4, 2015), <http://www.thefeministwire.com/2015/08/deconstructing-the-arrest-of-sandra-bland/> [<https://perma.cc/3T44-ZQ4U>] (arguing that “in challenging racial profiling and police brutality against people of color, #BlackLivesMatter activism must pay particular attention

Short of being murdered, women experience other forms of violence, mistreatment, and abuse of authority at the hands of police officers—especially women of color,¹⁹¹ women who transgress social and gender norms,¹⁹² and women who do not automatically and respectfully submit to police authority.¹⁹³ From the potential for physical¹⁹⁴ or sexual violence¹⁹⁵ to the discomfort and humiliation of the arrest itself,¹⁹⁶ this process can traumatize a survivor¹⁹⁷ and remind her all too clearly of the abuse she is attempting to leave behind. If the arrest takes place in front of the

to how police exercise force differently for men and women, as well as for LGBT+ people, especially transgender individuals and others whom are variously gender non-conforming.”); Chaedria Labouvier, *How Many Viral Videos Will It Take? Another Reminder of the Vulnerability of the Black Girl in America*, ELLE (Oct. 28, 2015), <http://www.elle.com/culture/career-politics/a31527/do-we-need-another-video-to-remind-us-that-black-girls-are-the-most-vulnerable/> [<https://perma.cc/4LQ4-M93E>] (asking “[d]o we need more videos of black girls dragged across school floors and front lawns to know that this is how black women are treated when they have the misfortune of encountering the police and the white male rage that so often seems part and parcel of the job?”). *But see* Homa Khaleeli, *#SayHerName: Why Kimberlé Crenshaw Is Fighting for Forgotten Women*, THE GUARDIAN (May 30, 2016, 10:02 AM), <https://www.theguardian.com/lifeandstyle/2016/may/30/sayher-name-why-kimberle-crenshaw-is-fighting-for-forgotten-women> [<https://perma.cc/NZK9-8XMB>] (describing law professor, scholar, and activist Kimberlé Crenshaw’s campaign to raise awareness about women killed by the police).

¹⁹¹ See generally ANANNYA BHATTACHARJEE, *WHOSE SAFETY? WOMEN OF COLOR AND THE VIOLENCE OF LAW ENFORCEMENT* (2001) (discussing and documenting violence against women of color by law enforcement in both the criminal and immigration contexts).

¹⁹² See Richie, *supra* note 37, at 143.

¹⁹³ See Osthoff, *supra* note 35, at 1533; SUSAN L. MILLER, *VICTIMS AS OFFENDERS: THE PARADOX OF WOMEN’S VIOLENCE IN RELATIONSHIPS* 27–28 (2005).

¹⁹⁴ See Richie, *supra* note 37, at 147; see generally ANDREA J. RICHIE, *INVISIBLE NO MORE: POLICE VIOLENCE AGAINST BLACK WOMEN AND WOMEN OF COLOR* (2017) (examining both historical trends of police brutality against women of color and recent examples of women of color murdered by police).

¹⁹⁵ See Richie, *supra* note 37, at 149; BHATTACHARJEE, *supra* note 191, at 33–36; Carpenter, *supra* note 190; Steven Yoder, *Officers Who Rape: The Police Brutality Chiefs Ignore*, AL JAZEERA AMERICA (Jan. 19, 2016, 5:03 AM), <http://america.aljazeera.com/articles/2016/1/19/sexual-violence-the-brutality-that-police-chiefs-ignore.html> [<https://perma.cc/V5KJ-L7YL>]; Kim Kelly, *When Police Officers Rape*, AL JAZEERA: OPINION (Oct. 31, 2017), <http://www.aljazeera.com/indepth/opinion/nypd-rape-cases-171030110833155.html> [<https://perma.cc/2HVP-GTQG>].

¹⁹⁶ See Simiao Li et al., *Women’s Perspectives on the Context of Violence and Role of Police in Their Intimate Partner Violence Arrest Experiences*, 30 J. INTERPERSONAL VIOLENCE 400, 412–13 (2015) (regarding survivors’ arrests in the domestic violence context, describing the negative consequences of an arrest, including humiliation, job loss, legal consequences, and loss of confidence in law enforcement).

¹⁹⁷ See BETH RICHIE, *COMPELLED TO CRIME: THE GENDERED ENTRAPMENT OF BATTERED, BLACK WOMEN* 6 (1996) (noting that the women she interviewed described being arrested as both interruptive and traumatic).

survivor's children, the children also run the risk of being not only traumatized themselves, but also taken into the custody of the child welfare system while their mother is detained.¹⁹⁸ Once in the child welfare system, the children will either be placed with a relative (including the abusive parent the family was fleeing) or into foster care.¹⁹⁹ If the nonabusive parent does have some form of custody of the children, it is probable that they will be returned to that parent.

Although not nearly as far reaching as those that follow a conviction, even an arrest may generate informal collateral consequences. For example, depending on how long someone is detained, she may miss a job interview and no longer be in consideration, miss work and be fired, or miss other critical appointments. Her mugshot may be publicly available on the internet and may show up on background checks done by potential or current employers.²⁰⁰ If she is on probation, parole, or supervised release, an arrest may cause her to miss a mandated meeting; moreover, a new arrest (even without a conviction) is enough to form the basis of a supervision revocation and send her back to jail or prison. If she is undocumented and her status is reported to Immigration and Customs Enforcement, her arrest may also trigger deportation proceedings if she has already been ordered to leave the United States. These ramifications intensify if the survivor is convicted of parental kidnapping or custodial interference.

2. Conviction and Incarceration

In addition to arrest, being detained pretrial or incarcerated postconviction—even briefly—can intensely impact survivors. Once incarcerated, a woman has little to no independence or freedom; she has no agency and has to rely on others' permission or generosity to meet even her most basic needs.²⁰¹ It is not unusual for female prisoners to feel isolated, alienated, and afraid.²⁰² Women's jails and prisons are also the site of a great deal of violence at the hands of corrections officers, fellow prisoners, and themselves.²⁰³ Although the Prison Rape Elimination Act of 2003²⁰⁴ was enacted to end sexual harassment and assault of prisoners, female prisoners are still assaulted and abused by prison staff. For survivors fleeing violence, being

¹⁹⁸ See CLARE M. NOLAN, CHILDREN OF ARRESTED PARENTS: STRATEGIES TO IMPROVE THEIR SAFETY AND WELL-BEING 8 (2003); Raeder, *supra* note 37, at 119.

¹⁹⁹ See BHATTACHARJEE, *supra* note 191, at 44.

²⁰⁰ See Michael Polatsek, *Extortion Through the Public Record: Has the Internet Made Florida's Sunshine Law Too Bright?*, 66 FLA. L. REV. 913, 949 (2014).

²⁰¹ See RICHIE, *supra* note 197, at 8.

²⁰² See *id.* at 7.

²⁰³ Julia Sudbury, *Gender Violence and the Prison Industrial Complex: Interpersonal and State Violence against Women of Color*, in DOMESTIC VIOLENCE AT THE MARGINS: READINGS ON RACE CLASS, GENDER, AND CULTURE 102, 108–09 (Natalie J. Sokoloff ed., 2005).

²⁰⁴ 42 U.S.C. § 15601 (2012).

incarcerated can aggravate past trauma and replicate survivors' past abuse.²⁰⁵ Unfortunately, most women's jails and prisons lack the trauma informed therapeutic programming that could help prisoners develop healthy coping mechanisms.²⁰⁶ Medical units are also underequipped and hard to access for treatment of preexisting or newly developed physical and mental health problems.²⁰⁷ Finally, most states have fewer women's jails and prisons, which means that, for many women, they will be incarcerated far from their homes.²⁰⁸ This distance can make it more challenging for female prisoners to keep in touch with their families or see their children.²⁰⁹

When a survivor finishes her sentence for parental kidnapping, which can range from a few days to several years, she may find that her conviction ushers in a host of collateral consequences. Collateral consequences are restrictions and limitations that flow from the existence of a person's criminal conviction.²¹⁰ Beginning in the 1980s, Congress and state legislatures passed measures limiting returning citizens' eligibility for welfare and food stamps, public housing, driver's licenses, employment licenses, and student loans.²¹¹ Limitations on employment, parenting, and voting rights were also enacted and expanded.²¹² Each restriction is detrimental in its own right but the consequences of their combination are devastating.²¹³ For a reentering survivor trying to reunite with her children, policies that limit access to cash benefits or subsidized housing will severely undermine her ability to achieve

²⁰⁵ See BHATTACHARJEE, *supra* note 191, at 37; see also Angela Davis, *The Color of Violence Against Women*, COLORLINES 4 (Oct. 10, 2000, 12:00 PM), <https://www.colorlines.com/articles/color-violence-against-women> [<https://perma.cc/N335-AR25>]; Stephanie S. Covington, *The Relational Theory of Women's Psychological Development: Implications for the Criminal Justice System*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 135, 148 (Ruth T. Zaplin ed., 2d ed. 2008).

²⁰⁶ See Beth E. Richie, *Challenges Incarcerated Women Face as They Return to Their Communities: Findings from Life History Interviews*, 47 CRIME & DELINQUENCY 368, 375 (2001). For a description of this phenomenon by a returning citizen, see WOMEN'S PRISON ASS'N, IMPROVING OUTCOMES FOR WOMEN IN REENTRY: A POLICY STATEMENT BY THE WOMEN'S ADVOCACY PROJECT 3 (2006).

²⁰⁷ Richie, *supra* note 206, at 373–74.

²⁰⁸ See Deseriee A. Kennedy, "The Good Mother": *Mothering, Feminism, and Incarceration*, 18 WM. & MARY J. WOMEN & L. 161, 178 (2012).

²⁰⁹ See *id.*; Ruth T. Zaplin & Joyce Dougherty, *Programs that Work: Mothers*, in FEMALE OFFENDERS: CRITICAL PERSPECTIVES AND EFFECTIVE INTERVENTIONS 463, 466 (Ruth T. Zaplin ed., 2d ed. 2008) (1998); Naomi R. Cahn, *Battered Women, Child Maltreatment, Prison, and Poverty: Issues for Theory and Practice*, 11 AM. U. J. GENDER SOC. POL'Y & L. 355, 359 (2002).

²¹⁰ See JEREMY TRAVIS, BUT THEY ALL COME BACK: FACING THE CHALLENGES OF PRISONER REENTRY 63–64 (2005).

²¹¹ See LEGAL ACTION CTR., AFTER PRISON: ROADBLOCKS TO REENTRY: A REPORT ON STATE LEGAL BARRIERS FACING PEOPLE WITH CRIMINAL RECORDS 8 (2004).

²¹² See *id.* at 8.

²¹³ See *id.* at 23.

her goals.²¹⁴ For survivors whose children were put into foster care upon her incarceration, federal laws focused on permanency and adoption may undermine or completely negate these efforts at family unification.²¹⁵ For reentering survivors and all returning citizens, collateral consequences make it extremely challenging to successfully reintegrate into society after incarceration.²¹⁶

Survivors coming home from jail or prison, especially those who are on some form of probation, parole, or supervised release, also face another gender specific challenge: a heightened vulnerability to domestic violence.²¹⁷ Because of the extensive obligations placed on them by the terms of their community supervision, combined with the restrictions of formal collateral consequences and the informal challenges inherent in reconnecting with family and friends, reentering survivors may find themselves relying heavily on their abusive partners to stay afloat.²¹⁸ This confluence of factors may render it extremely challenging to leave, should the abuse begin again, and nearly impossible to do so with children, especially if they are living with or in the custody of the abusive partner. As such, some abusive partners, aware of the even greater power differential, may take advantage of or trade on the control they have over their partners while the survivors find themselves even less able to seek help or gain independence.²¹⁹

B. Civil Consequences

Survivors with arrest records face immense scrutiny and disbelief from judges hearing their custody cases, even when they present evidence regarding domestic violence.²²⁰ Even if the survivor is not arrested or convicted of parental kidnapping, deciding to flee with children can have legal consequences outside of the criminal justice realm, most notably in the custody context. If the survivor flees in the absence of a preexisting custody order, her abusive partner may seek and obtain a custody

²¹⁴ See Raeder, *supra* note 37, at 107. For a discussion of the federal policies, see MAGGIE MCCARTY ET AL., CONGRESSIONAL RESEARCH SERVICE, DRUG TESTING AND CRIME-RELATED RESTRICTIONS IN TANF, SNAP, AND HOUSING ASSISTANCE (2016).

²¹⁵ See Cahn, *supra* note 209, at 364–65 (discussing the federal Adoption and Safe Families Act and its effects on incarcerated mothers).

²¹⁶ See LEGAL ACTION CTR., *supra* note 211, at 8–9; see also MARC MAUR & VIRGINIA MCCALMONT, THE SENTENCING PROJECT, A LIFETIME OF PUNISHMENT: THE IMPACT OF THE FELONY DRUG BAN ON WELFARE BENEFITS 7 (2013), <http://sentencingproject.org/wp-content/uploads/2015/12/A-Lifetime-of-Punishment.pdf> [<https://perma.cc/A29L-8JS8>] (observing that collateral consequences “would be difficult to manage under any circumstances . . . for people who are trying to reenter society after a period of incarceration, they are particularly damaging.”).

²¹⁷ See Courtney Cross, *Reentering Survivors: Invisible at the Intersection of the Criminal Legal System and the Domestic Violence Movement*, 31 BERKELEY J. GENDER L. & JUST. 60, 83–87 (2016).

²¹⁸ See *id.* at 82.

²¹⁹ See *id.* at 83–85, 99.

²²⁰ See Raeder, *supra* note 37, at 119–20.

order in her absence that grants the abusive partner both potentially extensive time with, or even custody of, the child, which itself often also requires contact with the survivor.²²¹ If the nonfleeing parent is the first to obtain a court order, a survivor who flees out of state is bound to encounter challenges to obtaining custody based on the UCCJEA, which provides state courts a framework for deciding when to accept or reject jurisdiction over a child custody case based on analysis of the child's home state.²²²

If the survivor flees with her child and a custody order is already in place, the survivor risks not only having the terms severely modified in her absence but also being held in contempt of court.²²³ Because family courts place such a high priority on coparenting and rarely deny one parent access to a child entirely, a survivor's decision to circumvent the legal process for determining custody will make her look like a recalcitrant and uncooperative parent.²²⁴ As such, in a custody or modification proceeding, she is less likely to fare well under a best interest analysis which considers a parent's willingness to coparent.²²⁵ Further, if a temporary or final order is in place, a survivor who flees with her children risks violating that order and being punished not just by unfavorable custody provisions but also by being held in contempt of court.²²⁶ Contempt of a court order can be punishable by both fines and incarceration. A survivor may face jail time for violating a court custody order especially—but not exclusively—if she has already been convicted of parental kidnapping by a criminal court.

Considering all the challenges that can spring from committing acts constituting parental kidnapping or custodial interference, a survivor may decide to flee without her children. In this case, however, a court may interpret this choice not as a compromise to protect herself without disrupting her children but as abandonment of the child or as an indicator that she is not willing or able to protect, provide, or care for her children.²²⁷ The survivor thus still risks being cut off from her children in the family court setting. Given the massive risks, challenges, and legal consequences of fleeing domestic violence with her children, a survivor may rationally decide that the most reasonable decision is to stay in the relationship.

²²¹ Lindauer, *supra* note 74, at 798–99 (discussing how most family courts emphasize joint contact with both parents and frown upon one parent attempting to prevent interactions between the child and the other parent).

²²² *See supra* Part II.4.

²²³ *See Klein et al., supra* note 15, at 131–35.

²²⁴ *See id.*

²²⁵ *See id.; see also DeCamp v. Hein*, 541 So.2d 708, 712 (Fla. Dist. Ct. App. 1989) (reversing and remanding a trial court's order that a survivor who fled Florida to New Jersey must return with her children but also ordering a hearing to determine the father's visitation rights); *Yelena R. v. George R.*, 326 P. 3d 989, 999–1000 (Alaska 2014) (affirming the trial court's decision to grant sole physical and legal custody to an allegedly abusive father after the mother and child left Alaska without the father's consent).

²²⁶ *See Klein et al., supra* note 15, at 135; *see also Goodmark, supra* note 178, at 1005 (noting the realities of facing contempt of court for survivors who not just flee their abusive partners but attempt to do so by going underground and hiding their identities completely).

²²⁷ *Klein et al., supra* note 15, at 133–34; *Goodmark, supra* note 178, at 1005.

V. RECOMMENDATIONS AND CONCLUSION

Examining the criminal, civil, and nonlegal consequences a battered mother may encounter while navigating an abusive relationship sheds light on both the role the state plays in pressuring survivors to separate and the power that courts have to punish survivors who do not respond to their abuse in a state sanctioned manner. Along with calling the police and initiating criminal actions and federal warrants, a survivor's abusive partner is also able to punish her for leaving through the civil legal system by triggering child welfare investigations and by filing for, or moving to modify, child custody orders based on her departure with the children. In addition to undermining survivors' agency, liberty, and safety, children are also at risk: whether children are returned to their abusive parent or placed in the foster care system, their physical, psychological, and emotional health and development may be endangered. In such circumstances, it is critical to weigh the potential benefits and harms of these placements against those inherent in remaining with the abused survivor.

To combat these undesirable and often dangerous outcomes, domestic violence activists and scholars should provide legal system actors with a more comprehensive understanding of the relationship between criminal and civil systems; advocate for state governments to reform laws and policies that negatively affect survivors of violence and their families; and encourage society to shift the scrutiny and blame currently reserved for survivors onto batterers instead. There are no doubt myriad ways to work toward these goals. This Article, however, focuses explicitly on a nonexhaustive set of recommendations to ameliorate the challenges faced by survivors fleeing violence with their children: namely, increased awareness of the impact of parental kidnapping statutes among lawyers working with survivors; thoughtful reform of parental kidnapping laws; and a broader recognition by the domestic violence movement of the cost of state involvement in survivors' lives.

A. Best Practices for Attorneys

Attorneys working with survivors of domestic violence are likely to encounter legal issues outside of the protection order sphere. Many domestic violence attorneys are also well versed in family law. It is important for these attorneys to have a breadth of family law knowledge beyond the custody and divorce statutes and practices in their jurisdiction.²²⁸ Knowledge of federal statutes, especially the UCCJEA, the older UCCJA, and the PKPA is critical.²²⁹ Law professor Catherine Klein and her colleagues advise that attorneys working with survivors contemplating leaving the state be familiar with a host of intersecting family, criminal, and immigration laws and policies in both the new state and the future state.²³⁰

²²⁸ See, e.g., NATIONAL CLEARINGHOUSE, *supra* note 3, at 25.

²²⁹ See Klein et al., *supra* note 15, at 121; Goodmark, *supra* note 178, at 1004–06.

²³⁰ See Klein et al., *supra* note 15, at 148–51.

While this advice has been explicitly given to attorneys whose clients are considering fleeing the state,²³¹ most of it also applies for attorneys of survivors who are separating from abusive partners without leaving the state. Any time an attorney is working with a survivor prior to or during a separation and children are involved, the attorney should consult her state's parental kidnapping statute to determine whether her client could be at risk and whether she should counsel her client around potential remedial measures that the client could take to strengthen her position, including filing for custody or alerting authorities to her and her children's current location.²³²

Criminal defense attorneys may also find themselves working with fleeing survivors if parental kidnapping charges are filed. While jurisdictional statutes may be less critical to the criminal case itself, survivor-defendants may be unaware of the options or restrictions that these statutes impose on them and would greatly benefit from comprehensive counseling that addresses all their goals, needs, and questions. Many survivors may not interact with an attorney until they are charged or even arraigned with parental kidnapping. As such, a broader understanding of the systems impacting fleeing survivors would be extremely valuable for clients.²³³ Given that public defenders typically carry very large caseloads that include a large variety of charges and may not include very many female clients, expertise in this specific area may well prove untenable. Developing a strong relationship with a civil legal services provider as both a resource and a source for narrowly tailored referrals would allow public defenders to serve their clients more holistically.

Although the interrelationship between criminal charges and immigration consequences has appropriately received much attention,²³⁴ it is similarly important to clients that defense attorneys be able to articulate how guilty pleas or convictions may impact a client's custody determination or parental rights.²³⁵ Although a guilty plea to a misdemeanor with a sentence of time served or probation may be appealing,

²³¹ For attorneys with clients contemplating leaving the country, familiarity with the Hague Convention on the Civil Aspects of International Child Abduction is also critical. Hague Convention on the Civil Aspects of International Child Abduction art. 3, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89; *see also* D. Brian Quillen, *The New Face of International Child Abduction: Domestic-Violence Victims and Their Treatment Under the Hague Convention on the Civil Aspects of International Child Abduction*, 49 TEX. INT'L L.J. 621, 630–31 (2014).

²³² As discussed in Part III, some states' statutes require that these actions be taken quickly for a defendant to pursue an affirmative defense. *See supra* Part III.

²³³ *See* NATIONAL CLEARINGHOUSE, *supra* note 3, at 31.

²³⁴ *See generally* Yolanda Vázquez, *Realizing Padilla's Promise: Ensuring Noncitizen Defendants Are Advised of the Immigration Consequences of a Criminal Conviction*, 39 FORDHAM URB. L.J. 169, 172–79 (2011) (closely examining the impact of *Padilla v. Kentucky*, 559 U.S. 356 (2010), on both defendants and defense counsel).

²³⁵ *See* Robin Steinberg, *Heeding Gideon's Call in the Twenty-First Century: Holistic Defense and the New Public Defense Paradigm*, 70 WASH. & LEE L. REV. 961, 963 (2013) ("Clients often cared more about the life outcomes and civil legal consequences of a criminal case than about the case itself. Liberty interests were not always paramount.").

especially to a mother who has been separated from her children, even a low level conviction for custodial interference can result in a denial of custody or a termination of parental rights.²³⁶

B. Amending State Laws and Policies

In addition to advocating for more effective client representation on an individual level, fleeing survivors would benefit greatly from thoughtful reform of parental kidnapping statutes. It is important to remember, however, that improvements to individual statutes are made against the backdrop of our flawed criminal justice system. As law professor Aya Gruber powerfully articulated in the related context of reforming mandatory domestic violence criminal policies,

I see problems with any kind of criminal enforcement in the absence of widespread social changes. Even “progressive” criminal reforms rest on the assumption that proper education of state actors will enable the criminal system to empower rather than subordinate minorities. I am skeptical of this possibility and hold the suspicious belief that, however well-intentioned, most criminal law reforms end up becoming yet another procedural vehicle for warehousing the worst off.²³⁷

It nonetheless does seem worthwhile to consider what kinds of short term changes might prevent survivors from falling too easily within the ambit of parental kidnapping laws. There are three reforms which could greatly improve outcomes for survivors, two of which are directly related to amending the statutes themselves; the third is a more broadly applicable systemic change.

First, domestic violence advocates and activists should support and lobby for the adoption of accessible exemptions to parental kidnapping statutes in every state.²³⁸ Every state’s statute should provide an exemption for survivors fleeing either child abuse or domestic violence so that survivors can avoid criminal charges. These exemptions should be straightforward and should not impose onerous requirements to invoke their protection. Such an exemption might read: “No one with a right to custody commits this offense if their actions were taken based on a good faith belief that a failure to act would endanger their or the child’s safety or welfare.”

Another benefit to adopting exemptions such as this would be that the burden of proof would fall on the prosecutor and not the defendant at trial. Rather than the defendant having to meet the burden of proving that she was fleeing from violence, the prosecutor would have to prove beyond a reasonable doubt that she was not, to make out all the elements of the crime.

²³⁶ See Klein et al., *supra* note 15, at 124–25; Raeder, *supra* note 37, at 122–23.

²³⁷ Gruber, *supra* note 32, at 822–23.

²³⁸ See, e.g., NATIONAL CLEARINGHOUSE, *supra* note 3, at 32 (recommending that it would be beneficial to enact both exemptions and defenses).

Second, state legislatures should amend their parental kidnapping statutes to require malicious intent to deprive the coparent of access to the child. Survivors fleeing from abuse would not typically meet this requirement. This amendment would benefit survivors without explicitly referencing domestic violence or appearing political. Both statutory changes would also benefit immigrant survivors in ways that adding an affirmative defense would not. If an immigrant survivor prevailed at trial by successfully invoking an affirmative defense, she might still be risking deportation if the prosecutor proved all the elements of the offense. These amendments would modify the elements of the offense itself, thus making it less likely that a survivor might be acquitted yet also placed into removal proceedings.

Finally, and more broadly, states should expand their use of alternatives to incarceration for survivors convicted of parental kidnapping.²³⁹ The argument for implementing viable alternatives to incarceration in the parental kidnapping context is compelling because it would reduce the state's infliction of trauma on survivors and children who have experienced violence directly, indirectly, or both. Some alternatives to incarceration that would keep nonabusive parents with their children include home confinement and electronic monitoring, community service, fines, and mandated mental health or drug treatment.²⁴⁰ While each of these options could pose serious challenges to homeless, low income, or working survivors, they should nonetheless be considered and employed when possible.

The use of alternatives to incarceration will benefit survivors whose incarceration may put them at risk of having their relationships with their children severed or their parental rights terminated.²⁴¹ It would also benefit their children by granting them the stability of remaining with their nonabusive parent instead of having to stay with any combination of the abusive parent, relatives, friends, or foster parents.²⁴² Scholars have also argued that children are more adversely affected when their mother is incarcerated than when their father is²⁴³ due in part to the loss of their primary caretaker.²⁴⁴ Moreover, the effects of parental incarceration are

²³⁹ See FAMILIES AGAINST MANDATORY MINIMUMS, ALTERNATIVES TO INCARCERATION IN A NUTSHELL, <http://famm.org/wp-content/uploads/2013/08/FS-Alternatives-in-a-Nutshell-7.8.pdf> [<https://perma.cc/NFD2-ZBK4>].

²⁴⁰ See *id.*

²⁴¹ See Charles J. Hynes, *Prosecutor Seeks Alternatives to Incarceration*, 16 CRIM. JUST. 48, 50 (2001); see also Kennedy, *supra* note 208, at 165–66.

²⁴² Kennedy, *supra* note 208, at 171 (discussing the “serious childcare gap” that is generated by the detention or incarceration of mothers, who are typically children’s primary caretakers); see also TRAVIS, *supra* note 210, at 132 (discussing the impact of mothers’ incarceration on children).

²⁴³ See Raeder, *supra* note 37, at 106; Kennedy, *supra* note 208, at 186 (noting that “[c]hildren of incarcerated mothers may be at greater risk of troubled behavior than the children of incarcerated fathers, putting these children at greater risk for engaging in criminal behavior and continuing a legacy of involvement with the criminal justice system.”).

²⁴⁴ See Julie Ajinkya, *Rethinking How to Address the Growing Female Prison Population*, CTR. AM. PROG. (Mar. 8, 2013, 9:00 AM), <https://www.americanprogress.org/>

extensive and can severely impact children's health, development, and behavior in both the short and long term.²⁴⁵ Imposing alternatives to incarceration can promote both individual and familial health and stability while also decreasing the costs of incarceration, foster care placement, and the collateral consequences of both on survivors, their children, and their communities.

C. Recommendations for the Domestic Violence Movement

Finally, domestic violence advocates, activists, and scholars should also push for the mainstream domestic violence movement²⁴⁶ to embrace an intersectional understanding of the role the state plays in the lives of survivors and their families—including their abusive partners' lives.²⁴⁷ First, the movement should encourage an

issues/women/news/2013/03/08/55787/rethinking-how-to-address-the-growing-female-prison-population/ [https://perma.cc/XF8X-UEHK].

²⁴⁵ TRAVIS, *supra* note 210, at 138–42; *see also* Chieko M. Clarke, *Maternal Justice Restored: Redressing the Ramifications of Mandatory Sentencing Minimums on Women and Their Children*, 50 HOWARD L.J. 263, 273 (2006).

²⁴⁶ It is challenging to define the domestic violence movement as it exists today. The movement grew out of survivors turned activists who provided services to other survivors; today, however, the movement is far less grassroots and can be thought of as including volunteers, advocates, activists, and scholars as well as policymakers, politicians, funding providers, and various offices and agencies within law enforcement. For more information on the transformation of the movement from a grassroots coalition to a professional industry, *see* Cross, *supra* note 217, at 87–102. Because the contemporary domestic violence movement is nebulous in terms of membership, leadership, and cohesive values, the author does not use the term to refer to an entity or explicit coalition but rather to collectively describe individuals engaged in domestic violence and sexual assault advocacy and reform.

²⁴⁷ The National Clearinghouse for the Defense of Battered Women and the Battered Women's Justice Project, two national technical assistance organizations, have long been promoting this broader lens. These organizations produce extensive trainings, webinars, and written resources that discuss various ways domestic violence and the state intersect. *See, e.g.,* Donna Coker & Ahjané D. Macquoid, *Why Opposing Hyper-Incarceration Should Be Central to the Work of the Anti-Domestic Violence Movement*, 5 UNIV. MIAMI RACE SOCIAL J. L. REV. 585, 617–18 (2015); Courtney Cross, *Victimized Again: How the Reentry Process Perpetuates Violence Against Survivors of Domestic Violence*, NAT. CLEARINGHOUSE DEF. BATTERED WOMEN, 13–21 (2013), http://docs.wixstatic.com/ugd/e520fb_2fd88a5991be4f3b8511915237d31585.pdf [https://perma.cc/N6JF-ZTB5]; Sarah Murphy, *Police Body Cameras in Domestic and Sexual Assault Investigations: Considerations and Unanswered Questions*, BATTERED WOMEN'S JUST. PROJECT 406 (2015), <http://www.bwjp.org/assets/documents/pdfs/police-body-cams-in-domestic-and-sexual-assault-inve.pdf> [https://perma.cc/ZCV9-MYNC]; Leigh Goodmark et al., *Police-Involved Domestic Violence*, BATTERED WOMEN'S JUST. PROJECT (2016), <http://www.bwjp.org/resource-center/resource-results/police-involved-dv.html> [https://perma.cc/PMF6-F6GX]; Sherry Hamby, *Best Practices and Help Seeking Obstacles: Advocacy and Law Enforcement* (2015), <http://www.bwjp.org/resource-center/resource-results/advocacy-and-law-enforcement.html> [https://perma.cc/K5FT-WQSA].

expansive view of the legal system over the current landscape of siloed specialization and narrow expertise. The movement should advocate for more and better trainings on how different aspects of the law interact, in addition to making these trainings available to a broad array of attorneys, judges, law enforcement, and nonlegal actors who may encounter survivors with potential or actual legal involvement.

The movement should also advocate for resources and services with the potential to prevent the precipitating events that lead survivors to flee. Because many survivors flee after a custody order is in place,²⁴⁸ the movement should also consider how to help survivors and their children obtain and abide by appropriate custody orders. Because court appointed guardians ad litem and family investigators play such a large role in providing information and making recommendations to the court, the movement should place a heavy emphasis on training these individuals—especially given widespread complaints regarding some third parties’ propensity to recommend unsafe forms of custody to abusive litigants.²⁴⁹ Another suggestion for the movement is to support free or low cost supervised visitation centers where parents could visit with their children yet could not abuse or kidnap them.²⁵⁰ The availability of these centers would help mitigate survivors’ real fears regarding treatment of themselves and their children, which could ameliorate some survivors’ desire to flee. This support is especially critical given recent trends that have seen many of these centers close or decrease hours and staff due to cuts in funding.²⁵¹

Additionally, the movement should adopt a larger framework of antioppression—opposing and subverting not only those systems that subordinate survivors of violence but also those that oppress marginalized individuals and communities more broadly.²⁵² Such a shift would require a reexamination of laws and policies that dictate how survivors respond to domestic violence as well as recognition that making financial resources and social services available to survivors

²⁴⁸ JOHNSTON ET AL., *supra* note 6, at 4.

²⁴⁹ See generally DOMESTIC VIOLENCE LEGAL EMPOWERMENT AND APPEALS PROJECT, THE PROBLEMATIC ROLE OF GUARDIANS AD LITEM IN CUSTODY AND ABUSE CASES 6–31 (2011) (providing anecdotal evidence of 28 incidents in which survivors felt guardians ad litem were complicit in their revictimization).

²⁵⁰ See generally CAMPBELL ET AL., FAMILY VIOLENCE PREVENTION FUND, BEYOND OBSERVATION: CONSIDERATIONS FOR ADVANCING DOMESTIC VIOLENCE PRACTICE IN SUPERVISED VISITATION 7–11 (2008) (providing an overview of the history, mission, and goals of utilizing supervised visitation centers in domestic violence contexts).

²⁵¹ See, e.g., Elizabeth Sias, *Local Host Site for Supervised Parental Visitation Closes*, ISANTI COUNTY NEWS (Oct. 19, 2011, 11:55 PM), <http://isanticountynews.com/2011/10/19/local-host-site-for-supervised-parental-visitation-closes/> [https://perma.cc/A4U9-S2QG] (discussing how, due to funding cuts, the nearest supervised visitation center was an over an hour away from the former site); *CFS Opens New Supervised Visitation Center in Upper Valley*, EAGLE TIMES A3 (Aug. 3, 2016), <https://www.eagletimes.com/pageview/viewer/2016-08-03#page=2> [https://perma.cc/L2PA-G87P] (noting void left by closure of a previous center).

²⁵² See, e.g., Gruber, *supra* note 32, at 830.

and their communities may prove more transformative than any legal intervention.²⁵³ For survivors with children in violent relationships, this shift in focus would translate into increased agency in deciding how to respond to the abuse, expanded preventative and remedial services with minimal risk of undesired state intervention, and the option of engaging with a legal system that is no longer premised on outdated stereotypes of good mothers and worthy victims. For survivors who choose not to leave their abusive partners, it may also consist of providing services and resources to both individuals in the relationship to promote stability and safety.²⁵⁴

VI. CONCLUSION

Parents experiencing domestic violence are caught in a double bind: civil and criminal court systems place immense pressure on survivors to leave abusive relationships, yet leaving in a manner that is not state sanctioned may jeopardize their safety, liberty, and relationships with their children. Survivors who do not comply with this pressure to separate may lose custody or even parental rights, potentially resulting in their children residing with the abusive parent or entering the foster care system. Choosing to leave the relationship, however, may usher in a host of logistical and legal challenges as well, which also include loss of custody or parental rights as well as incurring criminal charges.

Remedies for this catch 22 must include—but not be limited to—suggestions for statutory amendments. In addition to legislative action, change must be made more broadly. Civil and criminal attorneys representing survivors in related matters must be able to recognize the signs and impact of domestic violence and argue their relevance in court. Police, prosecutors, and judges must also develop a more nuanced understanding of domestic violence dynamics and how their own involvement and interventions may intersect and interact with the abuse. Finally, the domestic violence movement must not only remain committed to the trainings and consciousness raising necessary to impart this awareness to legal actors. It must also advocate for conditions that would prevent the need to flee with children, ranging from repealing policies that undermine survivors' agency to funding supportive services for both survivors and abusive partners. Such wide ranging advocacy would necessitate coalition building outside of the victims' rights movement and would illuminate often overlooked commonalities between the domestic violence movement and the criminal justice reform movement.

²⁵³ See FERRARO, *supra* note 61, at 12–13; Dorothy Roberts, *Feminism, Race, and Adoption Policy*, in *THE COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 42, 50 (INCITE! Women of Color Against Violence ed. 2016); Kathleen J. Ferraro, *The Dance of Dependency: A Genealogy of Domestic Violence Discourse*, 11 *HYPATIA* 77, 84 (1996).

²⁵⁴ When survivors believe their abuse is caused or exacerbated by their partners' struggles with employment, housing, physical or mental health, or substance abuse (to name only a few external factors), the movement should think of remedies beyond Batterers Intervention Programs when considering how to support survivors who are unable or unwilling to leave their relationship. See, e.g., Weissman, *supra* note 20, at 229 (discussing a lack of attention paid to how economic realities may be a catalyst for abuse).