# Unfettered Discretion: Criminal Orders of Protection and Their Impact on Parent Defendants

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*The last two decades have witnessed an astonishing increase in the use of the criminal justice system to police neglectful parents. Recasting traditional allegations of neglect as criminal charges of endangering the welfare of a child, prosecutors and the police have involved criminal courts in the regulation of aspects of the parent-child relationship that were once the sole province of family courts. This Article explores the legal implications of vesting judges in these cases with the unfettered discretion to issue protective orders that criminalize contact between a parent and her child. I argue that procedures for issuing protective orders that were once justified by the challenges of fighting domestic violence cannot constitutionally be applied to parents charged with criminal neglect. Instead, criminal courts and legislatures should look to family court, the forum traditionally empowered to police neglectful parents, for guidance on how to properly intervene on behalf of neglected children.*

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## INTRODUCTION

Nobody suggested that a model parent would pass out drunk in a taxi at 2:00 a.m. with her two young children awake beside her.[1] What was surprising was the two New York City police officers' response to the situation. They could have taken custody of the children and notified the Administration for Children's Services (ACS) to institute temporary removal proceedings to protect the children from "imminent danger."[2] Had they done so, the mother would have been afforded an array of constitutional protections to ensure that the state, in its effort to protect the children, did not needlessly interfere with her constitutional right to the "companionship, care, custody, and management"[3] of her children.

Instead, the police officers chose to arrest the mother and charge her with a crime. As a result, she spent the night in a precinct lockup before being transported to criminal court to be arraigned on a misdemeanor charge of "endangering the welfare of a child."[4] At the arraignment, the judge, at the behest of the prosecutor, issued a full

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1. Criminal procedure and the idiosyncrasies of criminal practice vary widely from jurisdiction to jurisdiction. The constitutional issues surrounding parent defendants are common across states and localities, but they may manifest themselves in decidedly different ways. Not only does each state have its own criminal procedure, but individual jurisdictions (and individual judges) have their own practices. While I have attempted to provide examples across jurisdictions, I have chosen to focus on New York City to provide context and examples in this article. I do not mean to suggest, however, that New York is the only state that has failed to adequately incorporate due process protection for parents in its criminal procedure. On the contrary, the failure to protect parents when orders of protection are issued appears to be a widespread phenomenon. *See* Christopher R. Frank, Comment, *Criminal Protection Orders in Domestic Violence Cases: Getting Rid of Rats with Snakes*, 50 U. MIAMI L. REV. 919, 936 (1996) (noting that criminal courts in many states disregard hearing requirements when they issue orders of protection).

The story of the mother in the taxi is a real one. Before entering academia, the author represented a mother of two young children in just such a case. The mother was arraigned in early 2006 in Bronx Criminal Court, and it took over nine months to resolve her case. Consistent with the racial pattern associated with the criminal prosecution of neglectful parents, *see infra* Part II, the defendant mother was poor, single, and black.

2. *See* N.Y. FAM. CT. ACT § 1024 (McKinney 2010).

3. Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." (citation omitted) (internal quotation marks omitted)).

4. A person is guilty of endangering the welfare of a child when:

> 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health; or
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> 2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten, three and seven of the family court act.

temporary order of protection[5] barring the mother from any contact with her children. The prosecutor's request was subject to no burden of proof; the judge's decision required no findings of fact. The mother was offered no opportunity to call or examine a witness or to testify as to her own actions. Indeed, the issuance of the order reflected the standard practice in criminal court of requiring defendants to stay away from the alleged victims of their crimes. Despite the glaring absence of any procedural protections and no adjudication of guilt whatsoever, the mother's right to associate with her child was abrogated for the life of the criminal case.[6]

The last two decades have witnessed an astonishing increase in the use of the criminal justice system to police neglectful parents.[7] Recasting traditional allegations of neglect as criminal charges of endangering the welfare of a child,[8] prosecutors and the police have introduced a new kind of defendant into the criminal system bearing a new set of constitutionally protected liberty interests. The right of a parent to the company and custody of her child is "perhaps the oldest of the fundamental liberty interests recognized by [the Supreme] Court."[9] Civil courts have long held that state officials cannot separate children from their families, even temporarily, without providing due process of law.[10] Yet, while family courts[11] recognize the constraints of

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N.Y. PENAL LAW § 260.10 (McKinney 2008).

Because the crime of Endangering the Welfare of a Child incorporates by reference the definition of "neglect" from the New York Family Court Act, acts sufficient to establish a civil neglect case are also sufficient to establish a crime under New York Penal Law § 260.10. *See* N.Y. FAM. CT. ACT § 1012 (McKinney 2009); N.Y. PENAL LAW § 260.10 (McKinney 2008); People v. Carroll, 715 N.E.2d 500, 502 (N.Y. 1999); Alison B. Vreeland, Note, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 FORDHAM URB. L.J. 1053, 1068 (2000).

5. "The name given to these types of orders varies among jurisdictions. They are also known as restraining orders, stay-away orders, no-contact orders, . . . and protective orders." Emily J. Sack*, Domestic Violence Across State Lines: The Full Faith and Credit Clause, Congressional Power, and Interstate Enforcement of Protection Orders*, 98 NW. U. L. REV. 827, 833 n.16 (2004) (citing FREDRICA L. LEHRMAN, DOMESTIC VIOLENCE PRACTICE AND PROCEDURE § 4:1 (1996)).

6. Criminal court judges often include a provision in the order of protection that allows a family court judge to modify the order if parallel charges are brought by ACS in family court. This occurred in the actual case upon which this fact pattern is modeled, and the family court ultimately allowed the mother to have contact with her children. The modification of the order of protection, however, took several weeks. *See infra* Part I(E).

7. This Article addresses the arrest and criminal prosecution of parents only for acts that constitute neglect as opposed to physical abuse or other cognizable criminal charges. Typical neglect allegations include leaving a young child unattended, maintaining unsanitary home conditions, or failing to assure that a child attends school. Vreeland, *supra* note 4, at 1061.

8. *See* sources cited *supra* note 4.

9. Troxel v. Granville, 530 U.S. 57, 65 (2000).

10. *See* Gomes v. Wood, 451 F.3d 1122, 1127 (10th Cir. 2006) ("[S]tate officials may not remove children from the home, through either temporary seizures or the permanent termination of parental rights, without providing due process of law."); Southerland v. Giuliani, 4 F. App'x 33, 36 (2d Cir. 2001) ("We have never required . . . that parental rights be completely or permanently terminated in order for constitutional protections to apply."); Wallis v. Spencer, 202 F.3d 1126, 1136 (9th Cir. 2000) (citing *Santosky v. Kramer*, 455 U.S. 745, 753, for the proposition that parents and children have a right to live together without governmental interference); Tenenbaum v. Williams, 193 F.3d 581, 594 (2d Cir. 1999); Hollingsworth v. Hill,

the Fourteenth Amendment,[12] criminal courts forcibly separate neglectful parents from their children as a matter of routine policy.[13]

The expansion of the criminal court's jurisdiction to police neglectful parents is consistent with the ever-expanding nature of the criminal law, which "tends to seek new frontiers of liability and to bring into its ambit areas of life previously not regulated by it."[14] Yet while the evolution of criminal law tends to push in the direction of broader liability,[15] it is also rigid in its adherence to established procedure and practice. Existing pretrial procedures that allow for the issuance of protective orders to separate assailants from their alleged victims were designed to accommodate the needs of domestic violence victims and were fashioned to overcome the criminal justice system's historic refusal to protect battered women.[16] Statutes authorizing protective

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110 F.3d 733, 738–39 (10th Cir. 1997); Nicholson v. Williams, 203 F. Supp. 2d 153, 237 (E.D.N.Y. 2002) ("[E]ven temporary removals by the state threaten the familial association interests of parents, and thus must satisfy requirements of procedural due process."); Strail *ex rel.* Strail v. Dep't of Children, Youth & Families of R.I., 62 F. Supp. 2d 519, 526 (D.R.I. 1999) ("[T]he Supreme Court has afforded protection against temporary deprivations in the parent-child relationship as part of the right to familial integrity.").

11. I use the term "family court" to connote those civil courts that traditionally have had jurisdiction to police child welfare. Such courts are also known as juvenile courts, domestic relations courts, dependency courts, and children's courts. *See* Jane M. Spinak, *Romancing the Court*, 46 FAM. CT. REV. 258, 271 n.1 (2008).

12. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring) ("If a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest, I should have little doubt that the State would have intruded impermissibly on 'the private realm of family life which the state cannot enter.'" (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944))).

13. To date, no court appears to have addressed the constitutionality of vesting criminal court judges with the discretion to issue orders of protection that abrogate a parent's right to care for her child. There have been cases in which defendants have challenged orders of protection on the grounds that such orders constitute de facto evictions which deprive defendants of a property interest without due process of law. *Compare, e.g.*, People v. Forman, 546 N.Y.S.2d 755 (N.Y. Crim. Ct. 1989) (finding that defendants have a right to a hearing to challenge orders of protection), *with* People v. Koertge, 701 N.Y.S.2d 588 (Nassau County Dist. Ct. 1998) (refusing to find any right to a hearing challenging a protective order). However, in addition to ignoring the more substantive right to care for one's child, those "property cases" focused only on the defendant's right to a hearing. The evidentiary standard for issuing the order was not addressed. *See, e.g.*, *Forman*, 546 N.Y.S.2d at 759 n.1 (declining to identify the evidentiary standard required under the Fourteenth Amendment to support defendant's continued exclusion from his home).

14. JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 9 (2009).

15. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) ("Since all change in criminal law seems to push in the same direction—toward more liability—this state of affairs is growing worse: legislatures regularly add to criminal codes, but rarely subtract from them.").

16. *See infra* Part I.B; *see also* Deborah Epstein, *Procedural Justice: Tempering the State's Response to Domestic Violence*, 43 WM. & MARY L. REV. 1843, 1873 (2002) (describing the history of domestic violence reforms in the criminal and civil justice system and the "accompanying reduction in procedural protections for perpetrators").

orders were designed without procedural protections for defendants in a conscious effort to encourage reluctant judges to intervene and protect battered women.[17] As the practice of issuing protective orders evolved to include new crimes, this lack of procedural protections has had an unforeseen impact on defendant parents charged with neglect. Moreover, the demographics of arrest for endangering the welfare of a child reflect the discriminatory patterns of the child welfare system as a whole: defendants tend to be disproportionately poor, female, and black.[18] It is a bitter irony that a tool designed to liberate women from abusive circumstances is routinely used to deny women of color the "intrinsic human rights"[19] that the Fourteenth Amendment was designed to secure.

This Article argues that the procedures for issuing orders of protections that were once justified by the challenges of fighting domestic violence cannot constitutionally be applied to parents charged with criminal neglect. Instead, criminal courts and legislatures should look to family court, the forum traditionally empowered to police neglectful parents, for guidance on how to properly intervene on behalf of neglected children.

Using New York City as a primary example, Part I of this article describes how domestic violence concerns influenced the development of the order of protection as it evolved from a narrowly tailored family court remedy for spousal abuse to a ubiquitous criminal court decree used to separate a wide variety of defendants from the alleged victims of their crimes**.** Part II describes the rising incidence of state actors using the criminal justice system to police child neglect and its disproportionate impact on poor women of color. Part III examines the constitutionality of procedures that vest absolute discretion in judges to bar parents from seeing their children. Finally, Part IV suggests that criminal courts should look to family court to develop standards that allow courts to intervene responsibly to protect children without violating the right of parents to care for their children.

## I. THE EVOLUTION OF ORDERS OF PROTECTION

Criminal courts did not always have the statutory authority to issue orders of protection. In fact, while orders of protection have existed in one form or another for centuries, the modern-day statutes authorizing judges to issue protective orders were initially developed for civil courts to protect married women from abusive husbands.[20]

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17. See *infra* Part I.C; *see also* Epstein, *supra* note 16, at 1851 ("Given the long legacy of state protection of and deference to those who abuse their intimate partners, it is hardly surprising that promoting procedural fairness for batterers was of little interest to activists, academics, and policymakers. Instead, these groups focused on improving and expanding the justice system's responsiveness to victims in need of protection. Although there was no conscious strategic decision to target and reduce batterers' sense of fair and respectful treatment by authorities, many of the movement's most successful reforms, both individually and taken as a whole, have had precisely that impact.").

18. *See infra* Part II.

19. Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 845 (1977) (citing Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977)).

20. Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1844–45 (2006) ("Legislatures first began to provide legal recourse to married

Today, protective orders have become a procedural default in criminal court, largely divorced from the liberating principles that initially catalyzed their growth. However, judicial attitudes about orders of protection, as well as the procedures that govern their issuance, have been profoundly influenced by the modern protective order's roots in the fight against domestic abuse.

### *A. Orders of Protection as a Weapon Against Domestic Violence*

Orders of protection were not always associated with the fight against domestic abuse. Courts have used protective injunctions for centuries to regulate citizens' behavior.[21] Blackstone traced the use of "peace bonds," an early form of protective injunction, back to Alfred the Great, the Anglo-Saxon King of Wessex, who, "to prevent rapine and disorders," required families to act as sureties for one another as a means of "preventative justice."[22] In the late seventeenth and early eighteenth centuries, several American colonies, particularly the Quaker government in Pennsylvania, made extensive use of "peace bonds" to regulate the behavior of their citizens.[23] Such bonds were issued to ensure the good behavior of feuding neighbors,[24] alleged thieves,[25] and even a witch accused of casting spells on cattle.[26]

This is not to suggest that protective injunctions were never used to police domestic violence. In seventeenth- and eighteenth-century England, victims of domestic abuse could seek "articles of peace" from the local magistrate.[27] If the magistrate accepted the wife's account of abuse, her husband could be ordered to enter a "recognizance"[28] obliging him to refrain from further abuse or risk losing a significant amount of money

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women who were victims of domestic violence in the 1970s and 1980s through the development of warrantless arrest statutes, the availability of civil protection orders, and the funding of battered women's shelters.").

21. *See* R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY 220 (1979).

22. 1 WILLIAM BLACKSTONE, COMMENTARIES *114; 4 WILLIAM BLACKSTONE, COMMENTARIES *251.

23. Paul Lermack, *Peace Bonds and Criminal Justice in Colonial Philadelphia*, 100 PA. MAG. HIST. & BIOGRAPHY 173, 174 (1976); *see also* David H. Flaherty, *Crime and Social Control in Provincial Massachusetts*, 24 HIST. J. 339, 351 (1981) (discussing imposition of "bonds for good behaviour" in colonial Massachusetts, including upon acquitted persons); Kathryn Preyer, *Penal Measures in the American Colonies: An Overview*, 26 AM. J. LEGAL HIST. 326, 336–37 (1982) (discussing the use of peace bonds in several colonies including Pennsylvania, Massachusetts, and New Haven).

24. Lermack, *supra* note 23, at 176.

25. *Id.* at 187.

26. *Id.* at 177.

27. ELIZABETH FOYSTER, MARITAL VIOLENCE: AN ENGLISH FAMILY HISTORY, 1660–1857, at 22 (2005); *see also* Jennine Hurl-Eamon, *Domestic Violence Prosecuted: Women Binding over Their Husbands for Assault at Westminster Quarter Sessions, 1685–1720*, 26 J. FAM. HIST. 435, 436 (2001).

28. According to Blackstone, "A recognizance is an obligation of record, which a man enters into before some court of record or magistrate duly authorized, with condition to do some particular act; as to appear at the assizes, to keep the peace, to pay a debt, or the like." ABRIDGMENT OF BLACKSTONE'S COMMENTARIES 217 (William C. Sprague ed., 1893).

or even jail time (if he had insufficient funds).[29] However, while injunctions to keep the peace were successfully utilized in some circumstances to protect wives from further abuse, such injunctions were, at best, a shield against particularly violent behavior, not a means to politically empower women.[30]

As the domestic violence movement coalesced in the 1970s, advocates focused on legal reforms aimed to "assert battered women's right to be free from violence."[31] It was at this time that advocates identified the potential for injunctive relief to radically alter the balance of power between abusers and their victims.[32] Legislation authorizing the issuance of orders of protection on behalf of battered women was championed as a key aspect of larger efforts to expand women's autonomy and independence.[33] While orders of protection had existed in various forms for centuries, the roots of the modern protective order lie in the statutes passed in the 1970s that focused exclusively on issues related to domestic violence. Moreover, the advocates and legislators who drafted those statutes were keenly aware of the difficulties battered women faced when they sought help from the criminal justice system. These concerns played an important role in limiting the procedural protections the courts ultimately afforded defendants.

### *B. The Criminal Justice System's Historic Failure to Protect Battered Women*

In the 1970s, the criminal justice system's refusal to intervene to protect battered women was pervasive.[34] Police routinely declined to arrest abusers; prosecutors balked at pursuing criminal charges; and judges refused to intervene in private "family matter[s]," instead directing the parties to work things out for themselves.[35] A judge's suggestions to a victim and her batterer that the two should "kiss and make up and get

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29. FOYSTER, *supra* note 27, at 22–23; *see also* Hurl-Eamon, *supra* note 27, at 436.

30. *See* Hurl-Eamon, *supra* note 27, at 436, 450 (noting that the legal protections against male spousal violence served to further, not to challenge, the legitimacy of patriarchal power).

31. ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 44 (2000); *see also* Patricia E. Erwin, *Exporting U.S. Domestic Violence Reforms: An Analysis of Human Rights Frameworks and U.S. "Best Practices,"* 1 FEMINIST CRIMINOLOGY 188, 191–92 (2006).

32. Barbara J. Hart, *Civil Protection Orders*, JUV. & FAM. CT. J., Nov. 1992, at 5, 23.

33. *Id.* ("A new remedy was needed. One that would enjoin the perpetrator from future abuse. One that would not displace the abused woman from her home but could compel relocation of the abuser. . . . One that would advance the autonomy and independence of the battered woman from the abuser. Civil protection orders were this new remedy.").

34. G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 278 (2005) ("Police and prosecutorial failure to adequately enforce laws was contextualized within a cultural and systemic failure to protect battered women's rights and lives.").

35. Sally F. Goldfarb, *Reconceiving Civil Protection Orders for Domestic Violence: Can Law Help End the Abuse Without Ending the Relationship?*, 29 CARDOZO L. REV. 1487, 1494 (2008); *see also* Deborah Epstein, *Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System*, 2 YALE J.L. & FEMINISM 3, 4 (1999) ("It has long been common practice for police to refuse to arrest, for prosecutors to decline to press charges, and for judges to be reluctant to issue civil protection orders or impose meaningful sentences on batterers. Overall, the system's response to domestic violence has been unresponsive and oriented toward non-enforcement.").

out of my court"[36] underscored the barriers that battered women faced when they sought help from the criminal courts. Domestic violence advocates recognized that the introduction of legal tools like protective orders would ultimately prove ineffective if they failed to challenge the criminal justice system's failure to recognize and respond to domestic violence.[37]

Advocates sought to confront the criminal system's failure to protect women with a combined strategy of public education, litigation, and legislative reform.[38] In a series of class action law suits, advocates sued police departments that had demonstrated a pattern of refusing to arrest batterers.[39] Mandatory arrest laws were championed that required the police to arrest batterers if there was probable cause to believe that a crime between intimates existed.[40] Activists also promoted laws authorizing police officers to make warrantless arrests in cases involving domestic violence, eliminating a protection for defendants that had posed a significant obstacle to women seeking police assistance.[41] Additionally, advocates pushed District Attorney offices to adopt "no-drop policies," which limited prosecutorial discretion by preventing prosecutors from dropping cases based on claims that the complaining witness was reluctant to cooperate.[42]

The mandatory arrest laws and no-drop policies were not without their critics. Some advocates questioned whether these developments would deter women from seeking assistance, while others suggested that such policies revictimized and disempowered

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36. Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy,* 61 OHIO ST. L.J. 1, 47 (2000) (citing to congressional testimony by the National Organization of Women Legal Defense and Education Fund in support of the Violence Against Women Act, *Women and Violence: Hearing Before the Senate Judiciary Comm.*, 101st Cong., pt. 1, 64–67 (1990)).

37. *See* SCHNEIDER, *supra* note 31, at 44 ("One of the first and most important legal issues that came to the fore was the failure of police to protect battered women from assault."); Epstein, *supra* note 35, at 13 ("Since the early 1970s, battered women's advocates have called upon police and prosecutors to treat domestic violence 'like any other crime.' This plea was voiced in response to a long-standing failure by these officials to recognize a criminal dimension to family abuse."); David Jaros, *The Lessons of* People v. Moscat*: Confronting Judicial Bias in Domestic Violence Cases Interpreting* Crawford v. Washington, 42 AM. CRIM. L. REV. 995, 1000 (2005).

38. SCHNEIDER, *supra* note 31, at 44.

39. *Id. See, e.g.*, Bruno v. Codd, 393 N.E.2d 976 (N.Y. 1979) (describing an action for "declaratory and injunctive relief against officials and employees of New York City Police Department, Department of Probation and Family Court alleging a pattern and practice of discrimination and misconduct against [battered wives] by reason of defendants' failure to enforce and comply with controlling statutes and regulations with reference to complaints by battered wives"); Complaint, Scott v. Hart, No. C-76-2395 (N.D. Cal. Oct. 28, 1976) (complaint initiating class action suit challenging the procedures of the Oakland Police Department and seeking effective police protection of domestic violence victims).

40. Miccio, *supra* note 34, at 265 (describing the battered women's movement's development of mandatory arrest strategies); *see also* SCHNEIDER, *supra* note 31, at 184.

41. Epstein, *supra* note 16, at 1853. Prior to the reforms, many states did not allow police officers to arrest defendants accused of committing misdemeanor crimes if the misdemeanor was not committed in the officer's presence. *Id.* As most domestic violence crimes were misdemeanors, this policy was a significant obstacle to arresting alleged batterers. *Id.*

42. SCHNEIDER, *supra* note 31, at 184–85 (describing the promotion of no-drop policies by victim advocates).

women by depriving them of autonomy and subjecting them to state coercion.[43] Ultimately, the majority of advocates agreed that the policies, while perhaps flawed, were "essential to correct the systemic abandonment of women survivors of male intimate violence."[44]

### *C. The Omission of Procedural Protections for Accused Batterers Facing Protective Orders: The New York Experience*

Many of the domestic violence reforms promoted by activists and policymakers significantly reduced procedural protections for alleged batterers.[45] For example, statutes authorizing the police to make warrantless arrests in domestic violence cases eliminated a procedural protection for defendants that was widely regarded as an impediment to successful state intervention in domestic violence cases.[46]

Similarly, awareness of the courts' historic refusal to intervene on behalf of battered women led to the conscious elimination or avoidance of procedural protections that could provide reluctant judges with an excuse not to issue protective orders. A close examination of the evolution of New York's order of protection law reveals a conscious effort to avoid procedural protections that might be used to justify a judge's refusal to issue a protective order.

In 1962, the New York state legislature passed the unified Family Court Act (FCA).[47] The FCA created a single tribunal "capable of adjudicating every justiciable family related dispute."[48] The state legislature afforded the newly established family court "a wide range of powers for dealing with the complexities of family life so that its action [might] fit the particular needs of those before it."[49] Among those powers was the ability to issue orders of protection wholly apart from other judicial orders of support or custody.[50]

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43. *Id.* at 186.

44. Miccio, *supra* note 34, at 245.

45. Epstein, *supra* note 16, at 1845 (noting that domestic violence reforms have "reduced the level of procedural justice accorded to batterers").

46. *Id.* at 1853.

47. Family Court Act, ch. 686, 1962 N.Y. Laws 3043 (codified as amended at N.Y. FAM. CT. ACT §§ 111–1019 (McKinney 2008, 2009, & 2010)). The FCA, and the specific orders of protection it authorized, did not represent a concerted effort to liberate women from destructive relationships. To the contrary, the Act was explicitly intended to provide "practical help" so that families could remain intact. As part of that effort, the FCA effectively decriminalized domestic violence by stripping the New York criminal courts of jurisdiction over acts, which would constitute either assault or disorderly conduct between spouses under the rationale that domestic violence was a private matter ill-suited for the criminal courts. *See* Judith A. Smith, *Battered Non-Wives and Unequal Protection-Order Coverage: A Call for Reform*, 23 YALE L. & POL'Y REV. 93, 127 (2005) (describing the New York legislature's intention to decriminalize domestic violence and to put related issues in a court that was supposedly well-suited and uniquely qualified to solve what was then considered a private family matter).

48. Merril Sobie, The Family Court: A Short History, (Mar. 2003), http://www.courts.state.ny.us/history/family_ct/History_Fam_Ct.htm.

49. N.Y. FAM. CT. ACT § 141.

50. Family Court Act, ch. 686, §§ 841–42, 1962 N.Y. Laws (codified as amended at N.Y. FAM. CT. ACT §§ 841–42 (McKinney 2010)).

Under the original version of the FCA, orders of protection could be obtained only if the allegations of assault or disorderly conduct in the family offense petition were first proven by a preponderance of the evidence in an "adjudicatory hearing."[51] In 1964, two years after its passage, the FCA was amended so that a family court judge could, "for good cause shown," issue a preliminary order of protection prior to the adjudicatory hearing.[52] While the amendment empowered family court judges to dispense with the full evidentiary hearing, fundamental procedural safeguards for alleged batterers remained in place, as the provisions authorizing temporary protective orders were interpreted to require a "full judicial inquiry" before a finding of good cause could be made.[53]

From 1962 to 1977, a battered spouse in New York was unable to press charges in criminal court for misdemeanor crimes associated with domestic abuse.[54] In response to increasingly vocal criticism from women's groups regarding the State's failure to combat domestic violence,[55] the New York legislature gave the criminal court concurrent jurisdiction over family offenses, thereby enabling women to choose a forum in which criminal penalties would be available to the court.[56] Concerned that women would be forced to choose between pressing charges in criminal court and obtaining an order of protection in family court, the New York legislature, for the first time, gave criminal courts the statutory power to issue orders of protection. The criminal courts' authority, however, was limited to issuing protective orders only in cases alleging a narrow set of "family offense" crimes between household members.[57]

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51. Family Court Act, ch. 686, § 821(a), § 832 1962 N.Y. Laws 3043, 3124, 3126 (requiring the petition to include allegations of assault or disorderly conduct).

52. Act to Amend the Family Court Act, ch. 156, § 7 1964 N.Y. Laws 770, 771 (codified as amended at N.Y. FAM. CT. ACT § 828 (McKinney 2010)).

53. Ahmed v. Ahmed, 689 N.Y.S.2d 357, 360 (Nassau County Sup. Ct. 1999) (citing Douglas J. Besharov, *Practice Commentaries*, N.Y. FAM. CT. ACT § 828 (McKinney 1964)); *see also* Owre v. Owre, 400 N.Y.S.2d 131, 132 (N.Y. App. Div. 1977); People v. Koertge, 701 N.Y.S.2d 588, 594 (Nassau County Dist. Ct. 1998).

54. By 1969, family court had exclusive jurisdiction over disorderly conduct, harassment, menacing, reckless endangerment, assault, or attempted assault between spouses or between parent and child or between members of the same family or household. *See* Act of May 22, 1969, ch. 736, § 2, 1969 N.Y. Laws, 1942, 1942 (codified as amended at N.Y. FAM. CT. ACT § 812 (McKinney 2010)).

55. Evidence of the important role that feminist advocacy groups played in securing the passage of the 1977 amendments can be seen in the bill jacket attached to the 1977 legislation, in which the report from the State Division of the Budget explicitly acknowledges that the bill was "supported by most women's groups" including the New York City and Albany Chapters of the National Organization for Women. The report further states that "[t]here is a consensus among women's groups that Family Court remedies are not working and that there is a genuine need to at least temporarily incarcerate some husbands." NEW YORK STATE DIVISION OF THE BUDGET, BUDGET REPORT ON GENERAL ASSEMBLY BILL A.8842 3 (1977).

56. Act of July 19, 1977, ch. 449, § 1, 1977 N.Y. Sess. Laws 1, 1 (codified as amended at N.Y. FAM. CT. ACT § 812(1) (McKinney 2010)). *See* Koertge, 701 N.Y.S.2d at 591 ("The temporary order of protection was necessary in all three courts so that the abused victim would not have to forego the protection by choice of forum.").

57. Specifically, the criminal court was authorized to issue protective orders only when the defendant faced one or more of the following charges: disorderly conduct, harassment,

The decision to authorize criminal courts to issue orders of protection did not receive universal support. In its comments on the proposed legislation, the New York Division of Criminal Justice Services (CJS) opposed the legislature's decision "to engraft upon the criminal courts a process peculiar to Family Court procedures."[58] Arguing that many judges "lack the necessary legal training and sociological insights" to administer the provisions appropriately, CJS asserted that orders of protection "present a potential for great difficulties."[59]

Yet even the law's critics failed to identify a crucial difference between § 828 of the Family Court Act and the language in Criminal Procedure Law (CPL) § 530.11, the newly enacted section of the criminal procedure law authorizing criminal courts to issue protective orders. Wholly unacknowledged in the legislative materials attached to the bill was the fact that the legislature had not "engrafted" the exact language of § 828 into the CPL. The legislature had, in fact, omitted the language "for good cause shown" in the CPL, thereby eliminating the requirement that criminal courts make a "full judicial inquiry" before issuing orders capable of depriving defendants of access to their home or their children.[60]

The decision to eliminate the good cause requirement is best explained by legislators' fear that judges would, if given the opportunity, refrain from issuing orders of protection in domestic violence cases. Legislators were very much aware of the criminal justice system's reluctance to intervene on behalf of battered women. The Division of the Budget noted in its recommendation in favor of the bill that "[i]t could be argued that there is no current evidence to suggest that criminal courts [will] use the full extent of their powers to punish these offenses . . . ."[61]

Moreover, the decision to drop the good cause language clearly was deliberate. Four years after granting criminal courts the power to issue orders of protection in cases involving family offenses, the legislature authorized criminal courts to issue protective orders on behalf of any victim in any criminal case. Surprisingly, the legislature did not simply expand § 530.11 to include a broader array of crimes and victims. Instead, a separate provision, CPL § 530.13, which authorized the issuance of protective orders for nonfamily members, was introduced.[62] This new provision, unlike the one authorizing protective orders for family members, *included* the original language from the Family Court Act requiring that judges make a finding that there is good cause to issue the order.[63] As a result of the discrepancy between the two statutes,

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menacing, reckless endangerment, assault, attempted assault, or attempted murder. § 11977 N.Y. Sess. Laws at 1. Thus, if a husband burglarized his estranged wife's house, killed her pet, or damaged her property, the criminal court would not be authorized to issue a protective order.

58. Memorandum from Robert Schlanger, General Counsel, New York State Division of Criminal Justice Services, to Judah Gribetz, Counsel, Governor Hugh L. Carey (July 6, 1977).

59. *Id.*

60. Act of July 19, 1977, ch. 449, § 11, 1977 N.Y. Laws 1, 3 (recodified as amended at N.Y. CRIM. PROC. LAW § 530.12 (McKinney Supp. 2010)) (conferring to criminal courts concurrent jurisdiction over family offenses, authorizing criminal courts to issue protective orders to victims of family offenses, and authorizing criminal courts to issue orders of protection).

61. NEW YORK STATE DIVISION OF THE BUDGET, BUDGET REPORT ON GENERAL ASSEMBLY BILL A.8842 4 (1977).

62. Act of July 15, 1981, ch. 575, § 1, 1981 N.Y. Laws 1849–50 (codified as amended at N.Y. CRIM. PROC. LAW § 530.13 (McKinney Supp. 2010)).

63. *See id. Compare* N.Y. CRIM. PROC. LAW § 530.12(1) (McKinney Supp. 2010) ("When a

criminal courts in New York are afforded greater discretion to issue orders of protection that interfere with the ostensibly protected relationship between parent and child than they are between complete strangers.

Any questions concerning the legislature's intentions regarding procedural protections for alleged batterers were laid to rest when the statute was amended in 1988 as part of a legislative effort to encourage criminal court judges to issue more protective orders. As originally drafted, § 530.12 stated that a criminal court could add additional provisions to a protective order to preclude the defendant from frequenting places where the named family member might be found (such as the complainant's home or place of employment).[64] In the years following the statute's enactment, domestic violence advocacy groups and some members of the state legislature grew frustrated with the continued reluctance of judges to issue orders that barred defendants from the homes they shared with the complainants. The 1988 amendment was a deliberate effort to "encourage the use of orders of exclusion"[65] by requiring judges to issue written decisions explaining why they had either issued or refused to issue an order that included a ban on visiting the complainant's home or place of employment.[66]

In fact, the amendment was drafted terribly, and a plain reading of the language, despite its universally agreed upon purpose,[67] suggests that judges need to issue a written decision *only* in cases in which the order includes a prohibition on visiting the complainant's home or place of employment.[68] The poorly drafted amendment did

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criminal action is pending involving a complaint charging any crime or violation between spouses, former spouses, [or] parent and child, . . . the court, in addition to any other powers conferred upon it by this chapter *may* issue a temporary order of protection . . . ." (emphasis added)), *with* N.Y. CRIM. PROC. LAW § 530.13(1) (McKinney Supp. 2010) ("When any criminal action is pending, and the court has not issued a temporary order of protection pursuant to section 530.12 of this article, the court, in addition to the other powers conferred upon it by this chapter, *may for good cause shown* issue a temporary order of protection . . . ." (emphasis added)).

64. N.Y. CRIM. PROC. LAW § 530.12(a) (McKinney Supp. 2010).

65. People v. Forman, 546 N.Y.S.2d 755, 767 n.3 (N.Y. Crim. Ct. 1989) ("[T]he purpose of the amendment was to encourage the use of orders of exclusion, but the language of the section 'lends itself to an interpretation that is just the opposite of the one intended.'" (citing Peter Preiser, Supplemental Commentaries, N.Y. CRIM. PROC. LAW § 530.12 (McKinney 1984 & Supp. 1989))).

66. In her comments on the floor of the New York Assembly on August 24, 1988, Representative Helene Weinstein repeatedly stressed that the purpose of the amendment was to encourage the issuance of protective orders that include provisions banning defendants from the complaining witness' home and place of work. Representative Weinstein's comments were included in the legislative materials attached to the bill when it was forwarded to Governor Mario Cuomo to sign. When Governor Cuomo signed the bill, he issued a Memorandum of Approval explaining that the factors listed in the statute were to be considered "illustrative" and "not intended to limit the circumstances in which a court may order an individual to stay away from the home." Governor Mario M. Cuomo, Memorandum of Approval, Act of Sept. 2, 1988, ch. 702, § 530.12, 1988 N.Y. Laws 3172–73.

67. Cuomo, *supra* note 66; *Forman*, 546 N.Y.S.2d at 767 n.3.

68. *See Forman*, 546 N.Y.S.2d at 767 n.3 ("[T]he purpose of the amendment was to encourage the use of orders of exclusion, but the language of the section lends itself to an interpretation that is just the opposite of the one intended." (internal quotation marks omitted) (citing Peter Preiser, Supplemental Commentaries, N.Y. CRIM. PROC. Law § 530.12 (McKinney 1984 & Supp. 1989))).

make clear, however, that the legislature had no intention of establishing procedural protections for defendant family members. Appended to the language requiring judges to examine the need for the order was additional language explicitly explaining that an order of protection was valid even if the judge had not considered whether such an order was appropriate.[69]

By 1988, orders of protection had become a ubiquitous feature of the criminal justice system in New York. Issued in cases involving all types of crimes and all kinds of defendants, protective orders were no longer limited to domestic violence or tied to the concern of balancing "power differentials between men and women."[70] In cases involving family members, however, procedural protections for defendants had been substantially diminished in an effort to overcome the system's resistance to intervening in domestic violence cases. As policing strategies focused increasingly on relationships between other family members, namely parents and children, orders of protection began to be used against the very women they were originally designed to liberate, empower, and protect.

### *D. The Order of Protection in Criminal Neglect Cases*

A parent arrested in New York City on a charge of endangering the welfare of a child[71] can expect to spend approximately twenty-four hours in jail before she sees a lawyer and is arraigned by a judge.[72] At the arraignment, the parent is given notice of the charge against her and the judge must decide whether to set bail or release her on her own recognizance.[73] It is at the arraignment that the judge makes the initial decision whether or not to issue the order of protection, which can require, among other things, that the defendant parent stay away from her child.

There is a strong likelihood that prosecutors will request orders of protection in cases alleging endangering the welfare of the child, even when the factual allegations suggest no immediate risk of subsequent harm to the child. New York county prosecutors are instructed to follow a "mandatory domestic violence protocol" in every case involving a "'crime or violation committed by a defendant against . . . a member of his or her same family or household . . . ."[74] This protocol includes, among other

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69. N.Y. CRIM. PROC. LAW §530.12(a) (McKinney Supp. 2010).

70. Sally Engle Merry, *Rights, Religion, and Community: Approaches to Violence Against Women in the Context of Globalization*, 35 LAW & SOC'Y REV. 39, 49 (2001).

71. *See* N.Y. PENAL LAW § 260.10 (McKinney 2008); Vreeland, *supra* note 4, at 1053.

72. *See* UDI OFER, YANILDA GONZALEZ & ROBERT PERRY, JUSTICE DELAYED, JUSTICE DENIED: A STUDY OF ARREST-TO-ARRAIGNMENT TIMES IN NEW YORK CITY 3 (2006); *see also* People *ex rel.* Maxian v. Brown, 570 N.E.2d 223, 225 (N.Y. 1991) (describing New York City arraignment process).

73. N.Y. CRIM. PROC. LAW §§ 510.20, 510.30 (McKinney 2009); *Forman*, 546 N.Y.S.2d at 762.

74. Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2, 42–43 (2006) (quoting 2004 CRIMINAL COURT CRIMES MANUAL 18 (2004)) (first alteration in original). Because policies and norms vary from one prosecutor's office to another, one must be cautious in drawing broad conclusions about institutional practices from the policies of a specific office. However, at least one study found an "amazing consistency that prevails in prosecutorial decision making systems throughout the United States." A. Didrick Castberg, *Prosecutorial Independence in Japan*, 16 UCLA PAC. BASIN L.J. 38, 44 n.35 (1997) (quoting JOAN E. JACOBY ET. AL., U.S. DEP'T OF

things, instructions that the prosecutor request the court to issue an order of protection at arraignment barring the defendant from all contact with the complaining witness.[75] Because of the protocol's expansive definition of "domestic violence," the District Attorney's policy for requesting orders of protection applies to neglectful parents accused of endangering the welfare of a child as well as violent abusers.[76]

There are significant pressures on judges to accede to prosecutors' requests for protective orders.[77] Judges cannot be too careful when it comes to restraining alleged criminals.[78] As one criminal court judge explained, "'Like they tell you in judge school, no one ever wound up on the front page of The New York Post for setting high bail.'"[79] Judges who fail to restrain criminal defendants, by refusing either to set high bail or to issue orders of protection, risk being attacked by the media (and the prosecution) should the defendant subsequently harm the alleged victim.[80] As one scholar (and former Manhattan District Attorney) explained:

> Judges in New York City issue [Temporary Orders of Protection] in virtually (almost without exception) every case in which the Prosecutor requests one. Right or wrong, that's the way it is. Not issuing an Order of Protection is perceived as an extremely dangerous thing to do. The New York Post would have a field day if

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JUSTICE, PROSECUTORIAL DECISION MAKING: A NATIONAL STUDY 27 (1982)). Moreover, while many District Attorney's offices may not have adopted explicit policies requiring line prosecutors to request orders of protection, many of the same political concerns that prompt judges to issue protective orders, see *infra* text accompanying notes 78–83, also induce prosecutors to request them.

75. Suk, *supra* note 74, at 48 (citing 2004 CRIMINAL COURT CRIMES MANUAL 18).

76. *See supra* note 4.

77. David H. Taylor, Maria V. Stoilkov & Daniel J. Greco, *Ex Parte Domestic Violence Orders of Protection: How Easing Access to Judicial Process Has Eased the Possibility for Abuse of the Process*, 18 KAN. J.L. & PUB. POL'Y 83, 92 (2008) ("No judge wants to deny an order of protection to a person who is later injured or killed by the person against whom they unsuccessfully sought relief.").

78. Judy Harris Kluger, *Independence Under Siege: Unbridled Criticism of Judges and Prosecutors*, 5 J.L. & POL'Y 535, 536–37 (1997) ("If a defendant commits a new crime while released on bail, the judge who set the original bail is often criticized, and the critics ignore any discussion of New York State law which prohibits preventative detention.").

79. David Feige, *Bumble in the Bronx*, LEGAL AFF., July/Aug. 2002, http://www.legalaffairs.org/issues/July-August-2002/feature_feige_julaug2002.msp.

80. The story of former Brooklyn Judge Lorin Duckman is a striking example of the costs a judge can face by failing to sufficiently restrain a defendant. Judge Duckman released a defendant on bail over the prosecution's objections, noting that the defendant had already been incarcerated for the full term of the maximum sentence he would serve if convicted. Tragically, three weeks after his release, the defendant killed his live-in girlfriend. The murder triggered a media frenzy in New York that culminated in an ultimatum from then-Governor George Pataki to the New York Commission on Judicial Conduct, demanding that the Commission remove Judge Duckman from office. The commission capitulated and removed the judge from the bench. Duckman's removal was later upheld by the New York Court of Appeals despite a particularly vigorous dissent. Abraham Abramovsky & Jonathan I. Edelstein, *Prosecuting Judges for Ethical Violations: Are Criminal Sanctions Constitutional and Prudent, or Do They Constitute a Threat to Judicial Independence?*, 33 FORDHAM URB. L.J. 727, 763–64 (2006); *In re* Duckman, 699 N.E.2d 872, 881 (N.Y. 1998).

> something happened in a case in which a judge refused to issue a requested [Temporary Order of Protection].[81]

While there are certainly thoughtful judges who will refrain from issuing unjustified orders of protection that separate parents from their children, the risk of failing to issue such an order is undeniable.

Moreover, the decision to issue an order of protection is initially made in the context of the judge's decision whether or not to release the defendant on her own recognizance.[82] Given the political risks of releasing defendants, judges may view orders of protection as a costless way to insulate themselves against the seemingly lenient decision to release defendants from custody. As a result, judges may view releasing a parent with an order of protection barring her from contact with her child as the lesser of two possible state intrusions on the defendant's liberties.

### *E. Criminal Court Orders Subject to Family Court Modification*

Many New York Criminal Court judges issue orders of protection barring parents from seeing their children but make the order "subject to family court" order of modification.[83] In essence, the criminal court temporarily abrogates a parent's right to associate with her child, but allows another court to alter the order if it sees fit. At first blush, this practice suggests some procedural protection for parents inasmuch as it creates an alternative avenue to regain custody of their children. Closer examination, however, suggests that this option works to parents' detriment.

First, such provisions likely increase the probability that criminal court judges will issue the orders in the first place. While judges might once have closely weighed the impact of their decisions on the parent-child relationship, judges can avoid taking responsibility for separating a child from its parent by passing the buck to the family courts for resolution. Second, by issuing a protective order and making it subject to modification, criminal courts effectively flip the burden of proof. Had the case started in family court, the government would have been required to prove by a preponderance of the evidence that removal of the child was warranted to avoid imminent risk to the child's life or health.[84] By passing through criminal court first, the burden shifts to the parent to persuade a family court judge to take the political risk of affirmatively altering the criminal court's separation order.[85] Finally, there is no guarantee that the

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81. *See* Suk, *supra* note 74, at 49 n.202 (quoting Shalley & Murray, New York Domestic Violence Cases, http://www.queensdefense.com/domestic_violence_cases.htm).

82. "Release on recognizance" means setting bail at zero.

83. Vreeland, *supra* note 4, at 1083.

84. N.Y. FAM. CT. ACT §§ 1027, 1046(b) (McKinney 2010); Nassau County Dep't of Soc. Servs. *ex rel.* Miranda H. v. Laquetta H., 595 N.Y.S.2d 97, 98 (N.Y. App. Div. 1993).

85. As discussed above, judges put their own careers in political jeopardy when they choose to allow children to return to their parents. *See* Jane M. Spinak, *Adding Value to Families: The Potential of Model Family Courts*, 2002 WIS. L. REV. 331, 348–49 (2002) ("'[T]he specter of a headline announcing that a child has suffered injury or death as a result of being returned to its parents looms more realistically for most judges and may cause some to [separate children from their parents].'" (quoting Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 152 (1995))). For

protective order will ever come before a family court judge to be modified.[86] Judges include the modification language in orders of protection because it is not unusual for social services to start a parallel proceeding in family court shortly after the criminal case commences.[87] There are times, however, when ACS will, upon further investigation, determine that there is no need for intervention, and the agency will refrain from filing a parallel case in family court. As a result, those cases least likely to justify separating a parent from her child are also least likely ever to be reviewed (and then modified) by a family court judge. Ultimately, provisions allowing for family court modification of criminal court orders of protection likely exacerbate, rather than ameliorate, the criminal courts' failure to consider parents' rights.

Nor do provisions allowing for subsequent family court modification erase the constitutional defects inherent in the practice of issuing orders of protection that separate parents from their children.[88] In *Stanley v. Illinois*, the Court flatly rejected the suggestion that procedures that might subsequently restore custody could remedy the failure of a court to provide adequate process at the initial separation; as Justice White explained, "This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone."[89] *Stanley* further recognized the cognizable harm that results from the "delay between the doing and the undoing" of orders stripping parents of custody.[90] Provisions allowing for family court modifications merely reduce the likelihood that judges will carefully consider the consequences of separation orders. They do little to ameliorate the constitutional flaws in the process.

## II. THE INCREASING CRIMINALIZATION OF NEGLECT AND ITS DISPROPORTIONATE IMPACT ON POOR MINORITY WOMEN

The last two decades have seen a dramatic increase in the criminal prosecution of parents for factual allegations that would once have prompted neglect proceedings in family court.[91] There are a number of explanations for the growing criminalization of

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a discussion of how cognitive biases might further discourage judges from returning children to their parents, see Davis & Barua, *supra*, at 149 (describing how "[t]he responsibility hypothesis suggests that if the child has experienced a pre-trial removal, the judge is likely to shun responsibility for the risk associated with the action of returning the child").

86. Vreeland, *supra* note 4, at 1083–84 (stating that often, judges in criminal court will issue orders of protection with "a clause that makes them 'subject to family court,' which relies on the family court judge to ameliorate the situation. Here, the concern is not that the arrest initiates a family court case, but rather that, without a concurrent family court case, a full protection order remains in place, barring the parent from seeing the child. [One criminal court judge] found this concern to be so compelling that, as a result, he often issues limited, rather than full, orders.").

87. In such cases, the criminal court case often tracks the family court case; the disposition of the criminal charges is largely an afterthought of the family court case. (Some practitioners complain that each court wants to wait for the other to resolve its case, and, as a result, both cases tend to progress at a snail's pace.)

88. *See infra* Part III.

89. 405 U.S. 645, 647 (1972).

90. *Id.*

91. *See* People v. Smith, 678 N.Y.S.2d 872, 875 (N.Y. Crim. Ct. 1998) (noting that "there are an increasing number of these so called 'home alone cases'[] appearing in Criminal Court which are charged under section one of P.L. § 260.10"); Shannon DeRouselle, *Welfare Reform*

neglect. Some have suggested that the increased prosecution of parents was a natural expansion of the "mandatory arrest policy" used in cases of domestic violence.[92] Scholars have noted how the domestic violence movement successfully recast the home as a place where the criminal law appropriately intervenes and coercively reorders private relationships.[93] This recasting of the home as a public space likely has contributed to the increased willingness of state actors to involve themselves in policing parents as well as husbands and wives.[94] The extension of criminal liability to include neglect likewise is consistent with criminal law's general propensity to expand into new substantive areas of law.[95] Scholars have described how the politics of getting "tough on crime" combine with institutional forces favoring increased discretion for law enforcement to lead to ever-increasing criminal liability.[96]

The application over the last two decades of the "broken windows" approach to crime prevention likely has contributed to the use of the criminal justice system to police neglect. The "broken windows" theory presumes that the intensive policing of minor infractions can help deter more serious crimes.[97] In the late nineties, New York City, for example, "extended the broken windows philosophy to its child protection policy, implementing a campaign of arresting [parents] for misdemeanor child endangerment on the theory that it [would] deter more serious child abuse."[98]

Finally, several highly publicized failures of the civil child welfare system have likely contributed to the rising use of the criminal justice system to police neglectful

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*and the Administration for Children's Services: Subjecting Children and Families to Poverty and Then Punishing Them for It*, 25 N.Y.U. REV. L. & SOC. CHANGE 403, 421 (1999) (pointing out that "New York City's use of its police force to handle minor neglect as well as more serious cases of abuse ha[d] contributed to a 60% increase in misdemeanor arrests for endangering children" over a two-year period); Meghan Scahill, *Prosecuting Attorneys in Dependency Proceedings in Juvenile Court: Defining and Assessing a Critical Role in Child Abuse and Neglect Cases*, 1 J. CENTER FOR CHILD. & CTS. 73, 78 (1999) (noting that "the criminalization of child abuse and neglect has increased significantly"); Vreeland, *supra* note 4, at 1061 (examining the increasing numbers of parents prosecuted in criminal court for acts of child neglect that were traditionally handled through child protective services and the family court); Eric C. Shedlosky, Comment, *Protecting Children from the Harmful Behavior of Adults*, 98 J. CRIM. L. & CRIMINOLOGY 299, 312–13 (2007) (noting how policy changes have resulted in an increase in the number of parents who have been arrested and criminally prosecuted for acts that previously would have been addressed by the civil child welfare system).

92. Vreeland, *supra* note 4, at 1053.

93. SUK, *supra* note 14, at 16–17; *see* Linda C. McClain, *The Domain of Civic Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 FORDHAM L. REV. 1617, 1649 (2001) ("[G]overnment properly prohibits family violence and, in public awareness campaigns about domestic violence, sends a message that contradicts any assumption that such violence is a 'private' matter or that family life affords a space immune from protection against violence.").

94. SUK, *supra* note 14, at 16–17.

95. *See Id.* at 11; Stuntz, *supra* note 15, at 507; Suk, *supra* note 74, at 5; Paul Rosenzweig, *The Over-Criminalization of Social and Economic Conduct*, CHAMPION, Aug. 2003, at 28, 35 ("This wide span of American law is the product of institutional pressures that draw legislators to laws with broader liability rules and harsher sentences.").

96. *See* Stuntz, *supra* note 15, at 509–10.

97. *See generally* James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982, at 29.

98. Dorothy E. Roberts, *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 833–34 (1999).

parents. The 1995 grisly murder of Elisa Izquierdo by her mother highlighted numerous problems with New York's child welfare system.[99] The media frenzy which followed led to a number of social service reforms including an effort by the then-newly appointed Administration for Children's Services Commissioner to incorporate criminal prosecutions into the city's strategy for fighting child abuse.[100] Two years later, New York Police Commissioner Howard Safir directed all New York City police officers to "take action . . . when [they] see children in dangerous situations."[101]

Ultimately, the causes of increased criminalization of child welfare are less important than its effect. As the state's strategy for protecting children increasingly relies on the use of the criminal justice system, it becomes progressively more important that criminal courts protect parents' fundamental liberty interest in maintaining a relationship with their children.

Moreover, the criminalization of neglect and the courts' attendant failure to adequately protect defendant parents' rights have a disproportionate impact on discrete segments of society, namely poor women of color.[102] Low-income women of color are far more likely to be prosecuted for neglectful acts than any other group.[103] "[W]omen are almost six times more likely than men to be custodial parents."[104] As a result, there are simply many more opportunities for women to neglect their children than for men.[105] Additionally, because of societal expectations that women are better suited

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99. *See* Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1725 n.41, 1725–26 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999)) (describing how the number of child welfare cases in New York City soared in the aftermath of the Izquierdo case).

100. Martin G. Karopkin, *Child Abuse and Neglect: New Role for Criminal Court*, N.Y. L.J., Feb. 28, 1996, at 1, 4 ("The highly publicized death of Elisa Izquierdo has led to more fundamental changes in the way child abuse cases are handled by both police and prosecutors. These changes have brought a steady stream of criminal cases where the injuries are less severe or where there is no injury and the charges involve allegations of neglect."); Kim Nauer, *Zero Tolerance*, CITY LIMITS MAGAZINE, Aug./Sept. 1997.

101. DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 78 (2002) (quoting Joanne Wasserman, *More Kids Left Alone, State Says*, N.Y. DAILY NEWS, July 27, 1997, at 4) (alteration in original).

102. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577, 578 (1997) ("Nationwide, juvenile courts and child protection agencies target hundreds of thousands of mothers who are disproportionately poor and of color, even though child abuse and neglect is not confined to any social class or race.").

103. *See* ROBERTS, *supra* note 101 (identifying the extreme racial and class disparity that marks the child welfare system); Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817, 818 (2000) (describing the criminalization of neglect and its disproportionate impact on women); Donna Coker, *Foreword: Addressing the Real World of Racial Injustice in the Criminal Justice System*, 93 J. CRIM. L. & CRIMINOLOGY 827, 829 (2003) (describing the "overwhelming empirical evidence demonstrating unjust and unequal treatment in the criminal justice system of African Americans and . . . Latinos").

104. Cahn, *supra* note 103, at 819.

105. Jennifer M. Collins, *Crime and Parenthood: The Uneasy Case for Prosecuting Negligent Parents*, 100 NW. U. L. REV. 807, 817 (2006) (explaining that mothers are most likely

than men to care for children, they often are treated more harshly when they are accused of failing to provide adequate care for their children.[106] Furthermore, women, and particularly women of color, are more likely than men to be poor.[107] Not surprisingly, there is a high correlation between poverty and neglect.[108] Indeed, the symptoms of indigence—poor nutrition and housekeeping, inadequate medical care, leaving children unattended, and substandard housing—are often the bases for neglect charges despite being rooted in poverty rather than parental unfitness.[109] Additionally, because poor people generally are under greater government supervision by virtue of their need to interact with institutions like public hospitals, welfare agencies, public housing offices, and probation officers, neglectful acts of the poor are less likely to escape the notice of the authorities than those of the wealthy.[110]

Finally, the role of race cannot be ignored. Both the child welfare system and the criminal courts have long been marked by racial disparities.[111] Families of color are grossly overrepresented in the child welfare system,[112] and blacks and Latinos

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to be the perpetrators of neglect due to the "'disproportionate numbers of children in the custody of their mothers rather than their fathers'" (quoting CHERYL L. MEYER & MICHELLE OBERMAN, MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE "PROM MOM" 97–98 (2001))).

106. *See* Appell, *supra* note 102, at 584–85 ("When fathers are involved in the proceedings, they are usually subject to lower expectations and are significantly less likely to be criminally charged with neglect or passive abuse of their children."); Cahn, *supra* note 103, at 818 ("Because women are so closely identified with their children, they are treated particularly harshly for alleged crimes against their children.").

107. Women were about 40% more likely to be poor than men in 2006; the poverty rate was 12.4% for women and 8.8% for men. LEGAL MOMENTUM, READING BETWEEN THE LINES: WOMEN'S POVERTY IN THE UNITED STATES, 2006 1 (Sept. 2007), https://secure2.convio.net/legalm/site/DocServer/lm_povertyreport2006.pdf?docID=721; Aric K. Short, *Slaves for Rent: Sexual Harassment in Housing as Involuntary Servitude*, 86 NEB. L. REV. 838, 855 n.100 (2008) ("[W]omen are 39% more likely to be poor than men.").

108. ROBERTS, *supra* note 101, at 29 (citing a U.S. Department of Health and Human Services report that instances of child abuse and neglect were twenty-six times higher in low-income families).

109. *See* Smith v Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 834 (1977) (noting studies that indicate that social workers' attitudes reflect "a bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child"); ROBERTS, *supra* note 101, at 27 ("Poverty is confused with neglect . . . because 'it often comes packaged with depression and anger, poor nutrition and housekeeping, lack of education and medical care, leaving children alone, exposing children to improper influences.'" (quoting LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION 309 (1999))).

110. ROBERTS, *supra* note 101, at 29 ("Government authorities are more likely to detect child maltreatment in poor families, who are more closely supervised by social and law enforcement agencies."); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1432 (1991).

111. ROBERTS, *supra* note 101; Coker, *supra* note 103, at 829 (describing the "overwhelming empirical evidence demonstrating unjust and unequal treatment in the criminal justice system of African Americans and . . . Latinos"); Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 15–19 (1998).

112. ROBERTS, *supra* note 101; Sheri Bonstelle & Christine Schessler, *Adjourning Justice: New York State's Failure to Support Assigned Counsel Violates the Rights of Families in Child Abuse and Neglect Proceedings*, 28 FORDHAM URB. L.J. 1151, 1207 (2001) ("Current child

disproportionately populate the criminal justice system.[113] The criminalization of neglect thus combines two administrative systems that are notorious for their disparate treatment of people of color.

Given the escalation in parental prosecutions and its disproportionate impact on poor women of color, it is incumbent upon criminal courts to examine the constitutionality of the procedures they follow when they seek to separate a parent from her child.[114]

## III. THE CONSTITUTIONAL RIGHT OF A PARENT TO CARE FOR HER CHILD[115]

The Supreme Court has consistently used sweeping language to describe the fundamental right of parents to make decisions concerning the care of their children.[116]

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welfare policy undeniably affects significantly more black and Hispanic families than white ones. Black parents are far more likely than white parents to be reported for abuse and neglect, even when their children exhibit similar symptoms, and authorities are twice as likely to remove a black child from home than a white child after a confirmed report of abuse or neglect." (citation omitted)).

113. MICHAEL TONRY, MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA (1995) (describing black overrepresentation in all aspects of the criminal justice system); Davis, *supra* note 111, at 16 n.10; Michael Tonry & Matthew Melewski, *The Malign Effects of Drug and Crime Control Policies on Black Americans*, 37 CRIME & JUST. 1, 1–2 (2008).

114. The Supreme Court has suggested that courts should be particularly concerned with potential constitutional violations that affect "discrete and insular minorities" who may not be adequately protected by the political process. *See* United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73–104 (1980) (arguing that judicial review should be used in cases where the democratic process has failed and focusing on the situations in n.4 of *Carolene Products* as prime examples).

115. This paper focuses largely on the impact of criminal orders of protections on *parental* rights. This is not to suggest, however, that children do not also have a constitutional interest at stake in the issuance of orders of protection. Children have been found to have a separate but related interest in preserving their family integrity. *E.g.*, Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977) ("This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest of the parent in the companionship, care, custody, and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent." (citations omitted) (internal quotation marks omitted)). For a more detailed discussion of the effect that the criminalization of neglect has had upon children, see Vreeland, *supra* note 4.

116. Stanley v. Illinois, 405 U.S. 645, 651 (1972) ("It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children 'come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements.'") (internal citation omitted); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925))).

The Court has described the interest of a parent in the companionship, care, custody, and management of his or her children as "[f]ar more precious . . . than property rights" and "more significant and priceless than 'liberties which derive merely from shifting economic arrangements.'"[117] While a permanent termination of parental rights is "'a unique kind of deprivation'" [118] because it can cut off forever a parent's right to care for her child, temporary child custody decisions still "infringe that fundamental liberty interest."[119] Because a parent's interest in caring for her child is "deeply rooted in this Nation's history and tradition,"[120] it is protected by both the substantive and procedural components of the Fourteenth Amendment's Due Process Clause.[121] As a result, it is necessary to evaluate the criminal courts' practice of issuing orders of protection that separate parents from their children according to both tracks of analysis.[122]

### *A. Unfettered Discretion and Substantive Due Process*

Substantive due process "forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest."[123] Because the Court has found that the state has a compelling interest in protecting children from harm,[124] substantive due process is not an absolute bar to governmental interference with custody. Instead, state actions that infringe on parents' ability to care for their children, such as the issuance of protective orders, are subject to strict scrutiny to ensure that they restrict parental rights no more than is necessary to promote the child's welfare.[125]

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117. Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 38 (1981) (internal citations omitted).

118. Santosky v. Kramer, 455 U.S. 745, 759 (1982) (quoting *Lassiter*, 452 U.S. at 27).

119. *Id.*; *see supra* note 10.

120. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977).

121. *E.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the rights . . . to direct the education and upbringing of one's children . . . ." (citations omitted)); Kia P. v. McIntyre, 2 F. Supp. 2d 281, 290 (E.D.N.Y. 1998) ("The liberty interests of parent and child in continued care and companionship has both procedural as well as substantive elements.").

122. Nicholson v. Williams, 203 F. Supp. 2d 153, 236–46 (E.D.N.Y. 2002) (utilizing both procedural and substantive due process analysis to evaluate New York City's practice of removing children of battered women from their mother's custody).

123. Reno v. Flores, 507 U.S. 292, 302 (1993) (emphasis in original).

124. *See* Parham v. J.R., 442 U.S. 584, 602–03 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. . . . Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized."); Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944) ("[T]he family itself is not beyond regulation in the public interest . . . [a]nd neither rights of religion nor rights of parenthood are beyond limitation. Acting to guard the general interest in youth's well being, the state as *parens patriae* may restrict the parent's control . . . [T]he state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare.").

125. Seal v. Morgan, 229 F.3d 567, 574 (6th Cir. 2000) ("Government actions that burden the exercise of those fundamental rights or liberty interests are subject to strict scrutiny, and will

Laws that vest judges with unfettered discretion to issue orders of protection that separate parents from their children cannot survive the strict scrutiny associated with substantive due process analysis. The Supreme Court has explained that there is "little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[126]

While the state's interest in protecting children from harm is compelling, order of protection statutes that grant judges limitless discretion to separate parents from their children are simply too broad to withstand strict scrutiny.[127] Legislatures may justly be concerned that judges will fail to issue protective orders when they are warranted. There is little evidence, however, that requiring judges to evaluate the danger to the child will result in the erroneous denial of a significant number of protective orders. Indeed, given the emotional and physical risks associated with forcibly removing a child from his home, the state's interest in protecting children actually may be furthered by restricting judges' discretion to separate parents from their children.[128] Accordingly, statutes that authorize orders of protection without providing any limitations on judicial discretion violate the substantive due process component of the Fourteenth Amendment.

### *B. Unfettered Discretion and Procedural Due Process*

Procedural due process requires the government to implement procedures that deprive a person of life, liberty, or property in a fair manner.[129] In *Lassiter v.*

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be upheld only when they are narrowly tailored to a compelling governmental interest."); *Nicholson*, 203 F. Supp. 2d at 245 (E.D.N.Y. 2002) ("Thus, where the fundamental right of a parent against state interference is pitted against society's equally fundamental obligation to protect the innocent and vulnerable from harm, some flexibility is required to prevent deadlock. But there are degrees of parental rights and degrees of state interest. If the centrality of the mother-child relationship—custody—is being challenged, then the state's interest must be subject to strict justification. The state must demonstrate that its policy of separation really is needed to protect the child.").

126. Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (quoting in part Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring) (internal quotation marks omitted)).

127. *See Nicholson*, 203 F. Supp. 2d at 245 ("If the centrality of the mother-child relationship—custody—is being challenged, then the state's interest must be subject to strict justification. The state must demonstrate that its policy of separation really is needed to protect the child.").

128. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 836 n.40 (1977) (noting that "the very fact of removal from even an inadequate natural family is often traumatic for the child"); Theo Liebmann, *What's Missing From Foster Care Reform? The Need for Comprehensive, Realistic, and Compassionate Removal Standards*, 28 HAMLINE J. PUB. L. & POL'Y 141, 148 (2006) (describing the need to account for the harm caused to children by being removed from their home); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 644–45 (1976).

129. United States v. Salerno, 481 U.S. 739, 746 (1987).

*Department of Social Services* and subsequently in *Santosky v. Kramer*, the Supreme Court evaluated the fundamental fairness of state procedures affecting parental rights by employing the traditional three-factor test established in the seminal procedural due process case, *Mathews v. Eldridge*.[130] Under *Mathews v. Eldridge,* courts must balance (1) the private interests affected by the proceeding against (2) the risk of error created by the state's chosen procedure, and (3) the countervailing governmental interest that supports the use of the challenged procedure.[131] Even a cursory review of the process by which criminal courts issue orders of protection suggests that vesting criminal court judges with complete discretion to separate parents from their children violates procedural due process.

The Supreme Court has held that the private interest at issue—the right of parents to care for their children—"'undeniably warrants deference and, absent a powerful countervailing interest, protection.'"[132] Moreover, children have an interest in avoiding unnecessary interference with their right to remain with their parents.[133] As the Court explained in *Santosky*, until the state proves parental unfitness, the child and his parents "share a vital interest" in maintaining their relationship.[134]

While the government does have a *parens patriae* interest in protecting children alleged to have experienced some form of neglect, the government's interest in a completely discretionary process is limited to its interest in avoiding the *erroneous* denial of protective orders that might result from more stringent standards (as well as any administrative costs associated with additional procedural protections). This interest in a discretionary statutory scheme must be counterbalanced by the state's interest in avoiding the issuance of unnecessary protective orders that may not be in the best interests of the child.[135]

The government, arguably, has an additional prosecutorial interest in preventing witness tampering by defendant parents when the child serves as the state's primary witness. However, not only is a witness-tampering concern speculative, there is a

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130. Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* Santosky v. Kramer, 455 U.S. 745, 758–68 (1982) (employing *Mathews v. Eldridge* analysis to evaluate proper evidentiary standard for parental rights termination proceedings); Lassiter v. Dep't of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 31–32 (1981) (employing *Mathews v. Eldridge* analysis to determine whether due process required that states provide free counsel when they sought to terminate the custodial rights of indigent parents).

131. *Mathews*, 424 U.S. at 335.

132. *Lassiter*, 452 U.S. at 27 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).

133. *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977).

134. *Santosky*, 455 U.S. at 760 ("At the factfinding, the State cannot presume that a child and his parents are adversaries. . . . [U]ntil the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship."); *see also* Franz v. Lytle, 997 F.2d 784, 792–93 (10th Cir. 1993) ("However, we must be sensitive to the fact that society's interest in the protection of children is, indeed, multifaceted, composed not only with concerns about the safety and welfare of children from the community's point of view, but also with the child's psychological well-being, autonomy, and relationship to the family or caretaker setting.").

135. *Lassiter*, 452 U.S. at 27 ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision.").

strong likelihood that the child's testimony will not ultimately be needed as over 90% of all criminal cases are resolved by a plea bargain prior to trial.[136]

The risk of error associated with the state's chosen procedure of granting criminal court judges total discretion to decide whether a parent can have contact with her child is severe. As discussed above, there are powerful political pressures on judges to issue orders of protection. By failing to require judges even to consider the need for a protective order, current criminal procedures create a significant likelihood that judges will issue protective orders that are not necessary to safeguard the welfare of many child victims. Furthermore, there is little evidence of a correspondingly significant risk that more substantial proof requirements will lead to the erroneous denial of protective orders. First, the significant political pressure to issue the orders mitigates against erroneous denials. More importantly, for decades, civil family courts have been required to make findings of fact by a preponderance of the evidence[137] before temporarily separating parents from their children. While a number of commentators have argued compellingly that the procedural protections afforded to parents in the civil context are insufficient,[138] few have alleged that these proof requirements have prevented the state from successfully intervening when a child was in danger.

Procedural due process demands that "the litigants and the factfinder must know at the outset of a given proceeding how the risk of error will be allocated, [and thus] the standard of proof necessarily must be calibrated in advance."[139] The government's significant interest in ensuring that children in need of protective orders receive them must be balanced against parents' and children's interest in avoiding an unnecessary forced separation. Given the risk that the state's chosen procedure of issuing protective orders will lead to a substantial number of children being unnecessarily separated from their parents, procedural due process requires that courts make some finding of danger based on a specified standard of proof before a parent can be barred from seeing her child.

Yet if the current procedures vesting judges with unfettered discretion to issue protective orders violate parents' constitutional rights, how can criminal courts responsibly intervene to protect those children who may be in danger? For too long the criminal justice system has conflated child neglect with domestic abuse.[140] As a result,

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136. *See* George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 1012–13 (2000) (noting that in modern American courtrooms, "guilty-plea rates above ninety or even ninety-five percent are common"). It is likely, given the state's limited punitive interest in prosecuting neglectful parents, that criminal neglect cases are even less likely to proceed to trial than other misdemeanor criminal cases.

137. *See, e.g.*, N.Y. FAM. CT. ACT §§ 1027, 1048(b) (McKinney 2010). The Family Court Act was first enacted in 1962. Family Court Act, 1962 N.Y. Sess. Law Serv., ch. 686 (McKinney) (codified as amended at N.Y. FAM. CT. ACT (McKinney 2008, 2009, & 2010)); *see also* Nassau County Dep't of Soc. Servs. *ex rel.* Miranda H. v. Laquetta H., 595 N.Y.S.2d 97 (N.Y. Ct. App. 1993) (affirming the family court's finding by a preponderance of the evidence that the child was appropriately removed pursuant to § 1027).

138. *See, e.g.*, J. Bohl, *"Those Privileges Long Recognized": Termination of Parental Rights Law, the Family Right to Integrity and the Private Culture of the Family*, 1 CARDOZO WOMEN'S L.J. 323, 368 (1994); Paul Chill, *Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM. CT. REV. 457, 465 (2003).

139. *Santosky*, 455 U.S. at 757.

140. *Cf.* Suk, *supra* note 74, at 43–44 (describing the Manhattan District Attorney's

criminal courts and prosecutors have adopted procedures developed for domestic violence victims that fail to take into account the unique constitutional interests of defendant parents. By looking to family court, the institution that has traditionally policed child neglect, the criminal justice system can develop procedures that properly balance the constitutional interests of parents with the state's legitimate need to protect neglected children.

## IV. APPLYING THE LESSONS OF FAMILY COURT TO CRIMINAL ORDERS OF PROTECTION

Family courts have long been criticized for failing to provide the procedural protections afforded to defendants in criminal court.[141] It is not surprising, therefore, that criminal courts have not naturally looked to family courts for guidance on how to safeguard defendants' due process rights. Unlike criminal courts, however, family courts have wrestled for decades with the difficulties of balancing parents' constitutional rights with the need to safeguard children. By carefully adapting the lessons of family court to the criminal arraignment process, criminal courts can better develop procedures for issuing orders that protect children while respecting defendants' constitutional rights.

The challenge of importing procedural safeguards from family court to the criminal context is no easy task. First, the procedures for temporarily separating parents from their children vary significantly from state to state. Second, the procedures themselves tend to be complex, often creating two burdens for the state—one to establish the family court's jurisdiction over the child and another to control the subsequent decision of whether the child will be separated from his or her parent. Finally, while any process likely is better than the unfettered discretion afforded criminal court judges to separate parents from their children, existing procedures in family court have, themselves, been criticized as insufficient to adequately guard against the erroneous removal of children from their parents.[142]

One option available to states is to adopt measures in criminal courts that mirror the particular procedural questions and burdens that a state's family courts use when they consider temporarily removing a child from her parent. A more ambitious proposal would be to take into account the frequent criticisms leveled at existing family court regimes and establish a more stringent burden for the state in criminal court. By looking to the standards originally proposed in 1980 by the National Advisory Committee for Juvenile Justice and Delinquency Prevention ("NAC Standards"),[143]

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Manual's inclusion of criminal neglect in its domestic violence protocol).

141. *See, e.g.*, Martin Guggenheim & Randy Hertz, *Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials*, 33 WAKE FOREST L. REV. 553 (1998) (criticizing the refusal to grant juveniles in family court a trial by jury); Candra Bullock, Note, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1038–40 (2003) (condemning the Supreme Court's decision in *Lassiter v. Department of Social Services of Durham County, N.C.*, and the failure to provide indigent parents with free counsel).

142. *See, e.g.*, Bohl, *supra* note 138, at 367–68; Chill, *supra* note 138, at 464.

143. NAT'L ADVISORY COMMITTEE FOR JUVENILE JUSTICE AND DELINQUENCY PREVENTION, STANDARDS FOR THE ADMINISTRATION OF JUVENILE JUSTICE (1980) [hereinafter NAC STANDARDS].

criminal courts are in a position to adopt robust protections for parent defendants. This can be achieved with the knowledge that state welfare agencies would retain the ability to intervene via family court in cases in which criminal courts failed to act, and the agency deemed the child to be in danger.

### *A. Moderate Reform: Mirror the State-Specific Family Court Regime*

Criminal courts can, at very little administrative cost, import at least the minimal protections that are afforded to parents in family court when the state seeks to remove a child from the home. Before a criminal court judge issues an order of protection affecting a parent's right to have contact with her child, the judge should be required to consider the facts and make findings that mirror the determinations a family court judge from the same jurisdiction would have to make to temporarily separate a parent from her child.[144]

The adoption of family court procedures would require that criminal courts identify both the particular substantive questions that the jurisdictions' family court judges are obliged to resolve before temporarily removing a child from her home, as well as the standard of proof the family courts use. While "[e]ven a temporary separation . . . triggers constitutional protections,"[145] the Supreme Court has not prescribed a specific standard of proof for determinations involving *temporary* interference with parental rights.[146] As described below, several commentators have argued that, given the costs and benefits of removing a child from his home, the need for removal should be proven in family court by "clear and convincing" evidence.[147] While the clear and convincing standard may indeed strike the best balance between the need to protect parental rights and avoid unnecessary removals and the need to protect children who may be in danger, to date, the majority of states have not adopted such a stringent burden.[148]

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144. Many jurisdictions have different procedures for "emergency removal" and "temporary removal." *Compare* N.Y. FAM. CT. ACT § 1024 (McKinney 2010) (authorizing New York law enforcement and social service agencies to take a child into protective custody if there is imminent danger to the child and insufficient time to follow the procedure for obtaining a court order), *with* N.Y. FAM. CT. ACT § 1028 (McKinney 2010) (providing for a hearing within seventy-two hours of an emergency removal and obligating the state to prove by a preponderance of the evidence that there is an imminent risk to the child's life or health). Emergency removal procedures are intended to apply in the hopefully rare instance in which there is insufficient time to hold a hearing or go to court to obtain an order of removal. *See* Nicholson v. Williams, 203 F. Supp. 2d 153, 167 (E.D.N.Y. 2002). The decision to issue an order of protection more closely resembles the temporary removal process given that the safety of the child has been temporarily secured, the court has the time and opportunity to evaluate the need for continued separation, and the duration of the order can last for months at a time. It is the procedures for temporary removal that criminal courts should seek to emulate.

145. *Nicholson*, 203 F. Supp. 2d at 235.

146. *See, e.g.*, *In re* Juvenile Appeal (83-CD), 455 A.2d 1313, 1323–25 (Conn. 1983) (explaining that the proper standard of proof for temporary terminations of parental rights is a fair preponderance of the evidence while permanent terminations require the clear and convincing standard described in *Santosky*).

147. *E.g.*, Wald, *supra* note 128, at 654.

148. Two states presently use a clear and convincing evidence standard. IOWA CODE ANN. § 232.96 (West 2006); 42 PA. CONS. STAT. ANN. § 6335 (West 2000). Thirteen states and the

The substantive question that family courts must resolve to determine whether or not to remove a child from her home also can vary considerably from state to state. Some states allow the judge to remove a child from his home if the judge believes, based on a certain quantum of proof, that it is in the child's best interests to be removed.[149] Other states authorize judges to remove a child only upon a finding that remaining in the home would place the child in imminent danger of harm.[150] While judges retain considerable discretion over the decision to separate a parent from her child in jurisdictions applying the "best interests" standard, the adoption of either test by criminal courts would be a positive step toward recognizing that parent defendants have an important liberty interest in raising their children.

Importing the procedural protections that exist in family court into the criminal system likely would not require significant structural alterations to most states' criminal procedure. The arraignment is an ideal opportunity for criminal court judges to make an initial determination as to whether an order of protection is warranted. The defendant is already represented by legal counsel,[151] and, because courts generally make bail determinations at the arraignment, there exists an opportunity for both sides to argue the facts of the case and the strength of the evidence. To adequately protect parents' rights, criminal courts need only make explicit the substantive questions the judge must resolve and establish a clear standard of proof that puts the burden on the state to demonstrate that it is necessary to separate a parent from her child.

Some might question whether criminal court judges have the necessary experience and training to determine whether an order of protection is warranted. As discussed above, the New York Division of Criminal Justice Services resisted legislative efforts to empower criminal courts to issue protective orders, in part out of concern that judges lacked the training to determine when such orders would be appropriate.[152]

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District of Columbia currently have a preponderance of the evidence standard. CONN. GEN. STAT. ANN. § 46b-129 (West 2009); D.C. CODE § 16-2317 (Supp. 2009); HAW. REV. STAT. § 587-41(b) (2008); KY. REV. STAT. ANN. § 620.080(2) (LexisNexis 2008); ME. REV. STAT. ANN. tit. 22, § 4035(2) (Supp. 2009); MASS ANN. LAWS ch. 119, § 24 (LexisNexis 2009); NEB. REV. STAT. ANN. § 43-254 (LexisNexis 2005); N.H. REV. STAT. ANN. § 169-C:13 (2002); N.J. STAT. ANN. § 9:6-8.46 (West Supp. 2009); N.Y. FAM. CT. ACT §§ 1027, 1046(b) (McKinney 2010); UTAH CODE ANN. § 78A-6-306(9)(a) (2008); VT. STAT. ANN. tit. 33, § 5308 (Supp. 2009); VA. CODE ANN. § 16.1-252(G) (2003); WYO. STAT. ANN. § 14-3-405(c) (2009).

149. ARK. CODE ANN. § 9-27-328(b) (2009); COLO. REV. STAT. ANN. § 19-3-508(2) (West 2009); HAW. REV. STAT. § 587-53(c) (Supp. 2008); IDAHO CODE ANN. § 16-1615(5)(e) (2009); IND. CODE § 31-34-19-6 (LexisNexis 2007); MASS. ANN. LAWS ch. 119, § 29C (LexisNexis 2009); MISS. CODE ANN. § 43-21-301(4)(c) (West 2008); MONT. CODE ANN. § 41-3-432(5)(b) (2009); NEV. REV. STAT. § 432B.480(1)(b)(2) (LexisNexis Supp. 2007); N.Y. FAM. CT. ACT §1052(b)(i)(A) (MCKINNEY 2010); OR. REV. STAT. § 419B.185(d) (2009); WASH. REV. CODE ANN. § 13.34.130 (West Supp. 2010); WYO. STAT. ANN. § 14-3-426(c) (2009).

150. DEL. FAM. CT. C.P.R. 212(b); FLA. STAT. ANN. § 39.402(1) (West Supp. 2010); KAN. STAT. ANN. § 38-2243(f) (Supp. 2009); ME. REV. STAT. ANN. tit. 22 § 4034(2) (2004); OKLA. STAT. tit. 10A, § 1-4-203(A)(1) (2009); W. VA. CODE ANN. § 49-6-3(c) (LexisNexis 2009).

151. Brewer v. Williams, 430 U.S. 387, 398 (1977) ("Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (citations omitted) (internal quotation marks omitted)).

152. *See supra* note 58 and accompanying text.

Judges, however, *already* have the discretion to issue protective orders. The fact that criminal court judges may not be competent to determine whether a child is in danger does not necessarily support granting judges the unfettered discretion to issue those orders. Without any clear legal standard to follow, criminal court judges reflexively issue protective orders without any examination of the need for the order and without weighing that need against the parent's interest in continuing to care for her child. Moreover, given the emotional and physical risks associated with forcibly removing a child from his home, it is not at all clear that a rule eliminating all hurdles to issuing protective orders is even in the child's best interests.[153]

Nor should one assume that requiring judges to consider the appropriateness of issuing an order that separates parents from their children will necessarily result in a substantial decrease in the number of orders issued. As discussed above, in the domestic violence context, the New York legislature sought to require judges to issue opinions explaining their decision whether or not to issue an order of protection as a way to encourage the use of such orders.[154] Given the powerful political pressure on judges to issue orders of protection,[155] the relatively low evidentiary standards employed in family court should not unduly hamper the state's efforts to protect children who truly are in need of protection.

Finally, regardless of its ultimate impact on the number of protective orders issued, the state always can seek to use well-established family court procedures to remove a child whom authorities believe to be in danger. Importing a standard of proof and a fact-finding process into the criminal context simply prevents the state from bypassing those procedural protections that traditionally have been required in the civil context when the state seeks to protect a neglected child from his parents.

Admittedly, current procedural safeguards in family court are far from perfect. Numerous commentators have argued that a variety of factors increase the likelihood that judges and other governmental actors (police, social workers, government attorneys, etc.) will unnecessarily separate children from their parents.[156] These factors include the tendency of such government actors to base removal determinations on the fear of job discipline, their own civil or criminal liability, or the fear of negative publicity resulting from the serious injury of a child left with or returned to his or her parents.[157] Similarly, parents' lack of sophistication with the legal process and the broad and ambiguous statutory definitions authorizing the temporary and permanent termination of parental rights contribute to an increased risk that children will be taken

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153. *See* Smith v. Org. of Foster Families for Equal. & Reform, 431 U.S. 816, 836–37 n.40 (1977) ("[T]he very fact of removal from even an inadequate natural family is often traumatic for the child."); Liebmann, *supra* note 128 (describing the need to account for the harm caused to children by their removal from their home); Wald, *supra* note 128, at 644–46.

154. *See supra* notes 66–68 and accompanying text.

155. *See supra* Part I.D.

156. *See supra* Part II.

157. Chill, *supra* note 138, at 460–61. A study conducted by the National Center on Child Abuse and Neglect found that investigators were more than twice as likely to incorrectly "substantiate" a false charge of child abuse or neglect than they were to erroneously find a legitimate charge to be "unfounded." MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 194 (2005) (citing NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, STUDY OF NATIONAL INCIDENCE AND PREVALENCE OF CHILD ABUSE AND NEGLECT 5–6 (1988)).

erroneously from their parents.[158] Finally, some critics argue that existing standards fail to adequately compensate for the tendency of judges and social workers to underestimate the harm associated with removing a child from her parent and placing her in foster care.[159]

Yet while current safeguards in family court may themselves be less than fully adequate, they are not without value. First, while some might argue that the burden of proof the government must satisfy to remove a child from her parents is too low, [160] even a minimal burden requires the judge to make findings that can then be reviewed by a higher court. More importantly, the value of holding a hearing focused directly on the issue of whether the state should interfere with a parent's relationship with her child should not be underestimated. While family courts may ignore the long-term implications of "temporary" custody decisions, those judges are at least forced to take responsibility for their decisions to remove children from their homes. In the criminal system, the abrogation of parental rights is currently a mere byproduct of a procedure focused on separating defendants from complaining witnesses. By failing to recognize the fundamental differences between typical defendants and parent defendants, criminal courts not only ignore the constitutional interests affected by orders of protection, they avoid squarely examining the ramifications of an order that bars a parent from seeing her child.

### *B. Ambitious Reform: Adopt the NAC Standards for Removal*

In 1974, Congress passed the Juvenile Justice and Delinquency Prevention Act. [161] As part of the Act's effort to reduce juvenile crime, the National Advisory Committee for Juvenile Justice and Delinquency Prevention was established to advise policy makers and to develop national standards for the administration of juvenile justice.[162] In 1980, the committee submitted its report to Congress proposing detailed standards and strategies for states to use when they intervene in children's lives.[163]

The standards proposed by the committee to govern the removal of children due to neglect or abuse represented a radical departure from existing state practices. While acknowledging the need to intervene to protect children from harm, the report explained that it was "clear that in too many instances, intervention has resulted in prolonged, often multiple out-of-home placements when less drastic alternatives could have provided as good or better protection."[164] In a conscious effort to limit judicial discretion, the committee proposed authorizing judges to separate children from their parents only if the court made three critical findings. First, the court had to find that the

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158. Wald, *supra* note 128, at 628–29; Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000–04 (1975).

159. *See supra* note 128.

160. *See, e.g.*, Chill, *supra* note 138, at 464.

161. Juvenile Justice and Delinquency Prevention Act of 1974, Pub. L. No. 93-415, 88 Stat. 1109 (1974) (codified as amended principally at 42 U.S.C. §§ 5601–72).

162. NAC STANDARDS, *supra* note 143.

163. *Id.*

164. *Id.* § 2.13 Commentary.

child had experienced one of nine specific harms.[165] Second, the court had to find that there was clear and convincing evidence that the child could not adequately be protected from further neglect and abuse unless the child were removed from the home.[166] Finally, the court was obliged to find that the alternative placement was less likely to be damaging to the child than remaining in the home.[167]

The NAC Standards envision a system radically different from the absolute discretion possessed by criminal court judges to issue protective orders. They are, in fact, far more restrictive than the procedures that exist in the majority of state family

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165. *Id.* § 3.113. The NAC standards identify nine distinct "harms" that justify family court jurisdiction over neglect and abuse cases. According to § 3.113, jurisdiction is appropriate in cases involving:

> a. Juveniles who are unable to provide for themselves and who have no parent, guardian, relative, or other adult with whom they have substantial ties willing and able to provide supervision and care;
> b. Juveniles who have suffered or are likely to suffer physical injury inflicted nonaccidentally by their parent, guardian, or primary caretaker, which causes or creates a substantial risk of death, disfigurement, impairment of bodily function, or bodily harm;
> c. Juveniles who have been sexually abused by their parents, guardian, primary caretaker, or a member of the household;
> d. Juveniles whose physical health is seriously impaired or is likely to be seriously impaired as a result of conditions created by their parents, guardian, or primary caretaker, or by the failure of such persons to provide adequate supervision and protection;
> e. Juveniles whose emotional health is seriously impaired and whose parents, guardian, or primary caretaker fail to provide or cooperate with treatment;
> f. Juveniles whose physical health is seriously impaired because of the failure of their parents, guardian, or primary caretaker to supply them with adequate food, clothing, shelter or health care, although financially able or offered the means to do so;
> g. Juveniles whose physical health has been seriously impaired or is likely to be seriously impaired or whose emotional health has been seriously impaired because their parents have placed them for care or adoption, in violation of the law, with an agency, an institution, a nonrelative, or a person with whom they have no substantial ties;
> h. Juveniles who are committing acts of delinquency as a result of pressure from or with the approval of their parents, guardian, or primary caretaker; and
> i. Juveniles whose parents, guardian, or primary caretaker prevent them from obtaining the education required by law.

*Id.*

166. *Id.* § 3.184.

167. *Id.* The NAC standards were very similar to standards proposed a few years earlier by the Institute of Judicial Administration and the American Bar Association ("IJA/ABA standards"). The chief difference between the two proposals was the inclusion of different standards of proof under the IJA/ABA standards based upon whether the case involved abuse or neglect. The National Advisory Committee determined that it was unnecessary to include a lower standard of evidence (preponderance) for abuse cases because both the danger and the inadequacy of alternative safeguards are easier to prove in such cases. *Id.* § 3.184 Commentary.

courts today. Nonetheless, there are compelling reasons for criminal courts to adopt the NAC Standards when they consider separating a parent from her child.

First, the NAC Standards provide substantially more protection for parents' liberty interest in having contact with their children than most existing family court regimes. While the Supreme Court has never determined the appropriate test for temporarily separating a parent from her child, it is clear that such a separation can be grievously traumatic. Most family court regimes have remained largely unchanged since the 1980s when the National Advisory Committee charged that then-existing family court procedures allowed for far too many instances of unnecessary separation when lesser interventions would have sufficed.[168] It therefore may be appropriate to heighten the standards for removal in order to adequately protect what has been recognized as a parent's fundamental right to have contact with her child.

Second, given the considerable political pressure on criminal court judges to separate parent defendants from their children,[169] the higher standard of proof and the clearly delineated substantive categories of harm proposed by the National Advisory Committee can provide cover for judges who may believe that the circumstances of a given case do not justify abrogating a parent's rights.

Third, by explicitly requiring courts to consider the potential harm caused by the alternative placement, criminal court judges are more likely to reflect on the full implications of their decision and take into account some of the costs of removal that are often ignored when judges consider issuing protective orders.

Finally, criminal courts can adopt the more stringent NAC Standards secure in the knowledge that the state can always pursue removal in family court. The diversion of cases to family court is likely to benefit both the child and the defendant as family courts, unlike criminal courts, have access to an array of social services intended to support the integrity of families. Indeed, the National Advisory Committee justified raising the standard of proof to "clear and convincing" in part on the basis that a higher standard would encourage the use of alternative support services that have the potential to protect children while keeping families whole.[170]

## CONCLUSION

Criminal court judges' unfettered discretion to separate parents from their children cannot be reconciled with the Supreme Court's recognition that a parent has a fundamental liberty interest in caring for her child.[171] The expansion of the criminal law into the home has been justly praised for helping to combat the scourge of domestic violence.[172] As criminal law extends its reach deeper into the private sphere,

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168. *Id.* § 2.13 Commentary; *see supra* text accompanying note 164.

169. *See supra* note 77 and accompanying text.

170. NAC STANDARDS, *supra* note 143, § 3.184 Commentary ("It is anticipated that the requirement for [the clear and convincing standard] will help to direct attention to the need for nonremoval alternatives.").

171. Troxel v. Granville, 530 U.S. 57, 65 (2000) ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

172. *See, e.g.*, Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 973–74 (1991) (praising the efforts of the battered women's movement for bringing domestic

however, criminal procedure must evolve to recognize the constitutional protections that safeguard those relationships the state seeks to regulate.

The criminal justice system's foray into policing neglect may well be ill advised. Criminal courts are designed to punish offenders for specific transgressions, not to rehabilitate families.[173] Unlike family courts, criminal courts lack the ability to provide the services and long term monitoring that family courts routinely utilize to protect children and preserve at-risk families.[174] The criminalization of neglect also may deter parents and neighbors from seeking state assistance when families are in crisis.[175]

The wisdom of using the criminal justice system to police neglect ultimately is a decision for policy makers. If, however, the system continues to criminally prosecute parents for neglect, it must do so in a way that comports with due process. The procedures for issuing orders of protections that were once justified by the challenges of fighting domestic violence cannot constitutionally be applied to parents charged with criminal neglect. Moreover, the disparate impact that this practice has upon poor women of color further undermines the authority of a judicial system already weakened by accusations of race and class bias.[176] By looking to the family court system, either by adopting existing procedural safeguards or using the proposals outlined by the National Advisory Committee, criminal courts can identify proper standards for determining when it is permissible to bar a parent from seeing her child. The adoption of such standards not only will vindicate important constitutional interests, it will ultimately promote the welfare of the children the system seeks to protect.

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violence into the public domain); Suk, *supra* note 74, at 5–6 ("During the period of over thirty years in which the criminalization of domestic violence has been in the making, feminists have sought to recast as 'public' matters previously considered 'private.' . . . This reform effort has met with remarkable and transformative success.").

173. Vreeland, *supra* note 4, at 1072 (citing N.Y. PENAL LAW § 1.05(5) (McKinney 1998)) (explaining that the purpose of the penal law is to provide "an appropriate public response to particular offenses").

174. *Id.* at 1068 ("The family court is a rehabilitative setting that aims to identify families in crisis, protect the parties in danger and provide services to the family.").

175. *Id.* at 1084 (citing Ilze Betins, *Child Welfare Doesn't Belong in Police Hands*, N.Y. TIMES, Oct. 30, 1997, at A30) (warning that the arrests of neglectful parents will discourage parents from reaching out for help when they need it).

176. *See, e.g.*, DAVID COLE, NO EQUAL JUSTICE: RACE AND CLASS IN THE AMERICAN CRIMINAL JUSTICE SYSTEM (1999) (arguing that race and class bias are endemic to the criminal justice system); CORAMAE RICHEY MANN, UNEQUAL JUSTICE: A QUESTION OF COLOR (1993) (detailing discrimination in the criminal justice system against African-Americans, Asian-Americans, Hispanic-Americans, and Native Americans); Davis, *supra* note 111, at 17 (identifying prosecutorial discretion as "a major cause of racial inequality in the criminal justice system").