

PARENTAL RIGHTS AND THE BEST INTERESTS OF THE CHILD: IMPLICATIONS OF THE ADOPTION AND SAFE FAMILIES ACT OF 1997 ON DOMESTIC VIOLENCE VICTIMS' RIGHTS

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I. INTRODUCTION

The Adoption and Safe Families Act of 1997¹ ("ASFA" or the "Act") purports to change the current law affecting children in our country's abuse and neglect systems by focusing on the "safety and

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1. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) [hereinafter "ASFA" or "the Act"].

health of the child”² rather than on the rights of biological parents, and by keeping children from “lingering in foster care for years.”³ The Act employs several tactics to accomplish these goals. First, the Act shortens the permanency planning timeline that states must follow with regard to children in the foster care system.⁴ Second, the Act encourages adoption by removing the “geographic barriers”⁵ associated with adoption.⁶ Finally, the Act provides financial incentives for states that increase their rates of adoption.⁷

2. 143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee); see ASFA § 101 (asserting that “the child’s health and safety shall be the paramount concern”).

3. 143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee).

4. See ASFA § 103(a) (mandating that a state join or initiate termination of parental rights proceedings for all children who have been in foster care for “15 of the most recent 22 months”); see also 143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee) (“States will be required to make a permanent plan for these children after a year, and if a child has been in foster care for more than 15 months . . . the State will be required to take the first steps toward terminating parental rights and finding an adoptive home.”).

5. 143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee).

6. See ASFA § 202, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) (addressing the issue of adoption across state and county jurisdictions). Section 202(a) mandates that “the State shall develop plans for the effective use of cross-jurisdictional resources to facilitate timely adoptive or permanent placements for waiting children.” *Id.* § 202(a). Section 202(b) provides:

[A] State shall not be eligible for any payment under this section if the Secretary finds that, after the date of the enactment of this subsection, the State has . . . denied or delayed the placement of a child for adoption when an approved family is available outside of the jurisdiction with responsibility for handling the case of the child; or . . . failed to grant an opportunity for a fair hearing . . . to an individual whose allegation of a violation of paragraph (1) of this subsection is denied by the State or not acted upon by the State with reasonable promptness.

Id. § 202(b).

7. See ASFA § 201 (discussing financial benefits for states to increase adoption rates). Section 201 provides:

[T]he Secretary shall make a grant to each State that is an incentive-eligible State for a fiscal year in an amount equal to the adoption incentive payment payable to the State under this section for the fiscal year, which shall be payable in the immediately succeeding fiscal year A State is an incentive-eligible State for a fiscal year if . . . the State has a plan approved under this part for the fiscal year . . . the number of foster child adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year [T]he adoption incentive payment payable to a State for a fiscal year under this section shall be equal to the sum of . . . \$4000, multiplied by the amount (if any) by which the number of foster children adoptions in the State during the fiscal year exceeds the base number of foster child adoptions for the State for the fiscal year; and . . . \$2000, multiplied by the amount (if any) by which the number of special needs adoptions in the State during the fiscal year exceeds the base number of special needs adoptions for the State for the fiscal year.

Id.; see also 143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee) (“There is money here for States that increase the rate of adoption in their States.”).

The Act's drafters considered timely termination of parental rights essential to increase adoption rates and to prevent children from languishing in the foster care system.⁸ To accomplish these goals, ASFA mandates that a state begin termination of parental rights ("TPR") proceedings for children who have been in foster care for at least fifteen of the most recent twenty-two months.⁹ Also, ASFA enumerates situations in which, absent a compelling reason, a state *must* join or initiate immediate TPR proceedings for children entering foster care.¹⁰ These situations include those where a parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent.¹¹

The drafters intended these criteria to expedite a child's move from foster care to permanent placement if his biological parents have proved to be unfit, either through lack of improvement for fifteen months or through behavior that poses an inherent and irreparable threat to the child's safety.¹²

Upon initial inspection, these guidelines for mandatory initiation of TPR proceedings seem reasonable and in the best interests of the child.¹³ For example, the guidelines complement the presumption

8. See H.R. REP. NO. 105-77, at 7 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2739 (explaining that ASFA intends to allow states to "move expeditiously to terminate parental rights and make a child available for adoption"); 143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee) ("Terminating parental rights is the critical first step in moving children into permanent placements . . ."); see also 143 CONG. REC. H2012-06, H2016 (daily ed. Apr. 30, 1997) (statement of Rep. Shaw) (stating that, in some circumstances, states can forego reunification attempts with biological parents and begin immediate termination of parental rights in order to speed adoption).

9. ASFA § 103(a), Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

10. *Id.*

11. *Id.*

12. During debate, Rep. Shaw asserted that:

If families will not or cannot change within a reasonable period of time, we must, in the interest of the children, be willing to terminate parental rights and move expeditiously toward adoption . . . In the case of parents who have murdered another child or lost custody of other children, States are required to dispense with the services for the family and to move quickly to terminate parental rights and get the child adopted.

143 CONG. REC. H2012-06, H2015-16 (daily ed. Apr. 30, 1997) (statement of Rep. Shaw).

13. See 143 CONG. REC. H2012-06, H2023 (daily ed. Apr. 30, 1997) (statement of Rep. Packard) (asserting that it is simply wrong for states to return children to biological parents who have abandoned them or badly abused them); 143 CONG. REC. H2012-06, H2018 (daily ed. Apr. 30, 1997) (statement of Rep. Roemer) (reporting that previous child welfare laws have often

that people generally advocate removing a child from a natural parent who threatens the child's safety.¹⁴ However, when viewed more closely, the criteria of ASFA section 103 do not necessarily serve the best interests of the child, the family, or society at large.¹⁵

This Comment focuses on one way that ASFA section 103 may fall short of working toward the best interests of the child and the child's family—specifically, the statute's failure to address situations where domestic violence exists in a family unit.¹⁶ The statutory language mandates that a state terminate a woman's parental rights for aiding or abetting the murder or voluntary manslaughter of a child, or for committing a felony assault against a child.¹⁷ Guided by ASFA, a state could terminate an abused mother's parental rights because she did not intervene when her batterer killed or abused her child. A battered woman may not have intervened because she feared angering her abuser and causing the child more harm, or because she was physically restrained from taking action.¹⁸ Thus, the statutory

resulted in children being returned to abusive parents only to be badly harmed or killed soon thereafter).

14. See Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 894 (1984) (stating that all jurisdictions will terminate parental rights if the parent is proven unfit or has abandoned the child).

15. See *infra* notes 47-55 and accompanying text (discussing criticism of ASFA).

16. See ASFA § 103, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) (listing parental behaviors that determine that a state must initiate TPR proceedings). Section 103(a)(3)(ii) allows a state to forego TPR proceedings if "a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child." *Id.* ASFA does not define "compelling reason" or suggest factors, such as domestic violence, that may provide a compelling reason to forego immediate TPR. *Id.*

17. See ASFA § 103 (listing aiding and abetting murder or voluntary manslaughter and committing a felony assault as reasons to initiate immediate TPR proceedings).

18. See V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 242-49 (1996) [hereinafter Enos, *Prosecuting Battered Mothers*] (describing incidents of such situations). Enos recounts situations where women were physically unable to intervene or were afraid of doing so. *Id.* at 240-60. One woman testified that she believed if she tried to escape or stop her abuser from raping her daughter, he would follow through with his threat to kill both her and her daughter. *Id.* at 242. The abuser had previously followed through with threats to harm them. *Id.* Another woman did not call the police while her husband killed her son because he had threatened to kill her as well. *Id.* at 255. A pregnant woman did not intervene while her husband fatally beat her daughter because he had beaten her in the past and threatened to beat her while she was pregnant. *Id.* at 249. See also Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 747-55 (1998) (explaining that a mother did not interfere when her husband beat her daughter because "she knew, from repeated past experience with this cycle of violence, that her intervention would further enrage her husband, and thus place her daughters and herself at greater risk of physical injury." Another woman failed to seek immediate medical attention for her daughter after her abuser repeatedly burned the child with a hot spatula and cigarettes because he bolted the door and held a knife to the woman's throat.); Cf. V. Pualani Enos, *Counter-Response to Kathryn L. Quaintance*, 21 HARV. WOMEN'S L.J. 315 (1998) (maintaining her position regarding her critical

language not only encourages states to assign legal liability to a battered woman for failure to protect her child, but it also allows states to terminate her parental rights on these grounds.¹⁹

ASFA does not create the problem of blaming and punishing women for their abusers' actions. Rather, case law and prior statutes create a preexisting framework that controls when applying ASFA.²⁰ Still, as ASFA attempts to reform the abuse and neglect system, parts of the Act, specifically section 103, may actually exacerbate existing problems in the abuse and neglect system by requiring that domestic relations law be separated from abuse and neglect law.²¹ This

analysis of Quaintance's prosecution of a battered woman for failure to protect her child); *But see* Kathryn L. Quaintance, *Response to V. Pualani Enos' "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children," Published in Volume 19 of the Harvard Women's Law Journal*, 21 HARV. WOMEN'S L.J. 309 (1998) (defending her actions as prosecutor in *Minnesota v. Loch* (unreported 1992 decision), which Enos analyzed).

19. Jane C. Murphy defines the "failure to protect" doctrine in the context of child abuse:

Under . . . "failure-to-protect" laws, the caretaking parent's failure to perform the legal duty of protecting a child against abuse or neglect takes the place of the criminal act. Some failure-to-protect statutes require either knowledge of danger to the child or intent to endanger the child. Most statutes, however, impose "strict liability" by imposing criminal liability on caretakers who "permit" or "create" a substantial risk of injury or neglect without requiring an affirmative act that violates the duty of care or an intent to harm.

Murphy, *supra* note 18, at 719-20.

20. *See* Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 229 ("Although the 'failure to protect' doctrine is a valuable tool for the effective protection of children, the overly broad application of the doctrine by the courts results in grave inequities for battered mothers and substantial harm for their children."). Michelle S. Jacobs explores the development of the failure to protect doctrine in abuse and neglect law in *Requiring Battered Women to Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579 (1998). Jacobs asserts that a parent's duty to protect his child is "one of the earliest consistently recognized special relationships." *Id.* at 625. Legislators' focus on reducing child abuse in the early 1970's, and their decision to prosecute parents for unintentionally injuring a child, prompted states to begin using the failure to protect doctrine to prosecute parents. *Id.* at 609. *State v. Williquette*, 370 N.W.2d 282 (Wis. Ct. App. 1985), established criminal liability for non-abusing parents on failure to protect grounds. In that case, the trial court dismissed the state's prosecution of a mother for failure to protect her children from their father's abuse. *Id.* at 282. The appeals court reversed, finding that if the mother knew that her husband abused the children and did not interfere, the state could prosecute her for aiding and abetting the abuse under the failure to protect doctrine. *Id.* at 285. Following this case, Wisconsin codified the failure to protect doctrine within its child protective statute. Jacobs, *supra*, at 618. Other states followed, and now most jurisdictions include failure to protect within their child protective statutes. Jacobs, *supra*, at 612.

21. *See* ASFA § 103 (requiring States to file a petition to terminate parental rights if the parent has committed felony assault upon one of her children). ASFA § 103 mandates that

[I]n the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined the child to be an abandoned infant . . . or has made a determination that the parent has committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents . . . and,

separation discourages states from examining the effect of domestic violence on a battered woman's behavior regarding her abused child.²² By failing to address child abuse within the context of family violence, ASFA section 103 may prevent states from working toward the best interests of the child.²³

This Comment addresses the potential problems of ASFA section 103's mandatory termination of parental rights in view of the existing systemic separation of domestic violence from abuse and neglect law. Part II provides a brief historical background of ASFA, including why legislators felt a need to reform abuse and neglect law and how they have attempted to accomplish these goals through ASFA. Part III explains that many jurisdictions currently separate domestic violence and abuse and neglect cases into different court systems, despite research and statistics that reveal an overwhelming connection between the two issues. Part IV discusses why courts should consider domestic violence during termination of parental rights proceedings. Furthermore, Part IV suggests that domestic violence affects a woman's actions and apparent inactions, and when courts fail to consider this fact, they may erroneously terminate a battered mother's parental rights. Part V analyzes how ASFA not only fails to consider domestic violence, but encourages jurisdictions not to consider domestic violence. ASFA accomplishes this through the language of section 103 and by shifting onto the state the burden to present a compelling reason not to terminate parental rights of a victim of domestic violence. Finally, Part VI proposes solutions to the problem, such as modifying the statutory language to create

concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless (i) at the option of the State, the child is being cared for by a relative; (ii) a State agency has documented in the case plan . . . a compelling reason for determining that filing such a petition would not be in the best interests of the child; or (iii) the State has not provided to the family of the child, consistent with the time period in the State case plan, such services as the State deems necessary for the safe return of the child to the child's home, if reasonable efforts of the type described in section 471(a)(15)(B)(ii) are required to be made with respect to the child.

Id.

22. See Jacobs, *supra* note 20, at 611 ("[A] woman involved in a battering relationship cannot always exercise choices we assume would be 'normal' and rational.").

23. See Catherine J. Ross, *The Failure of Fragmentation: The Promise of a System of Unified Family Courts*, 32 FAM. L.Q. 3, 7 (1998) ("[A] court that treats a range of family problems 'as a series of single separate controversies may often not do justice to the whole or to the several parts. The several parts are likely to be distorted in considering them apart from the whole.'") (quoting Roscoe Pound, *The Place of the Family Court in the Judicial System*, 5 NAT'L PROBATION & PAROLE ASS'N J. 161, 164 (1959)); Barbara A. Babb, *Where We Stand: An Analysis of America's Family Law Adjudicatory Systems and the Mandate to Establish Unified Family Courts*, 32 FAM. L.Q. 31, 32 (1998) (noting that, because of courts' failures to meet families' needs, the American Bar Association has recommended that all states create unified family courts to address all issues relating to the family).

awareness of domestic violence and child abuse in the context of family violence.

II. THE HISTORY OF ASFA

ASFA grew out of federal legislators' belief that, under the Adoption Assistance and Child Welfare Act of 1980,²⁴ states focused too much on parental rights and not enough on the best interests of the child.²⁵ The Adoption Assistance and Child Welfare Act mandated that when a child entered the foster care system, the state should make reuniting the child with his biological parents its primary objective.²⁶ The drafters presumed that a child would be best

24. Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

25. See H.R. REP. NO. 105-77, at 8 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739, 2740 (asserting that sometimes courts protect the rights of the parents to the detriment of the child); 143 CONG. REC. H2012-06, H2018 (daily ed. Apr. 30, 1997) (statement of Rep. Burton) ("In the last decade child welfare has grown into an enormous bureaucratic system that is biased toward preserving the family at any cost."). *But see* Kathleen A. Bailie, *The Other "Neglected" Parties in Child Protective Proceedings: Parents in Poverty and the Role of the Lawyers Who Represent Them*, 66 *FORDHAM L. REV.* 2285, 2288 (1998) (asserting that ASFA resulted from societal outrage over news reports on extreme acts of child abuse by biological parents whose children are in the abuse and neglect system); Barbara Peterson, *New Adoption Law Means "Fundamental Shift" in Rights*, *ST. BAR NEWS*, Mar./Apr. 1998, at 14 (stating that ASFA resulted from highly publicized cases where foster children were returned to their abusive natural parents and were seriously harmed or killed soon thereafter). The legislative history of ASFA supports Bailie's and Peterson's assertions. During debate, several Representatives and Senators included in their statements anecdotes of extreme child abuse and appealed to their colleagues' sensibility, rather than their sense, in asking them to pass ASFA. For example, Rep. Hoyer encouraged his fellow members of Congress to support ASFA by painting the following portrait:

You may remember a child named Dooney Waters. The *Washington Post* ran a series of stories on him in 1989. Dooney was raised in a crack house Dooney spent days at a time hiding behind his bed Dooney was burned by boiling water and his hand was singed by a can used to heat crack cocaine The bill requires expedited terminat[ion] of parental rights in chronic cases of abuse and neglect, such as Dooney's.

143 CONG. REC. H2012-06, H2021 (daily ed. Apr. 30, 1997) (statement of Rep. Hoyer).

In the Senate, Sen. Chafee used a similar tactic to inspire support of ASFA:

The tragic story of young Sabrina Green's short life is harrowing, and it is all too reminiscent of the cases we read and hear about, unfortunately, every single day. Each time I read about a case like Sabrina Green's, I feel outrage and frustration Now, Mr. President, we cannot bring Sabrina Green back to life . . . but we can take action to prevent such deaths in the future, and that is what we're doing today.

143 CONG. REC. S12526-02, S12526 (daily ed. Nov. 13, 1997) (statement of Sen. Chafee). See also 143 CONG. REC. H2012-06, H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly) ("Every one of us in this body can turn to and refer to headlines in their papers, the terrible, heartbreaking case with little Emily in Michigan, other cases across these United States, headlines telling us the very worst can happen."); 143 CONG. REC. H2012-06, H2018-19 (daily ed. Apr. 30, 1997) (statement of Rep. Roemer) (citing *Chicago Tribune* articles documenting children reunited with their biological parents who were then badly abused or killed soon thereafter); 143 CONG. REC. H2012-06, H2028 (daily ed. Apr. 30, 1997) (statement of Rep. Tiahrt) ("I am reminded of a young girl named Halie, who was 2 years old, who refused to eat her dinner and her parents tied her to an electric heater; and once she got caught into that system . . . she did not get out of foster care until she was 18 years old . . .").

26. See 143 CONG. REC. H2012-06, H2020 (daily ed. Apr. 30, 1997) (statement of Rep.

served by reuniting her with her natural parents if at all possible, rather than seeking adoption.²⁷ Still, they realized that in some situations, a child's best interests diverged from the goal of keeping the family intact.²⁸ For this reason, the drafters did not mandate that a state indefinitely attempt to reunite a parent and child, but that it make "reasonable efforts" to reunite a child with her natural parents.²⁹ Under the Adoption Assistance and Child Welfare Act, agencies such as Child Protective Services ("CPS") and Children and Youth Services ("CYS") attempted to protect abused and neglected children while remaining sensitive to parents' fundamental rights.³⁰

According to ASFA's drafters, agencies' and states' misinterpretation of the "reasonable efforts" requirement contributed to the rising number of children in foster care and the increased amount of time children spent in foster care.³¹ During floor debate on ASFA, Representative Harman stated that, "in the absence of clear laws or regulations defining reasonable efforts, there has been considerable confusion about when to bypass or discontinue such efforts [T]he reasonable efforts provision has sometimes served to keep kids in foster homes, instead of in permanent adoptive homes, longer than necessary."³² Some analysts asserted that CPS and similar agencies allowed children to languish

Pomeroy) ("The 1980 Child Welfare Act clearly made the priority reunification of families.").

27. See Bailie, *supra* note 25, at 2289 (asserting that the philosophy behind the Adoption Assistance and Child Welfare Act assumes that keeping or reuniting a child with her biological parents is preferable to foster placement or adoption).

28. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 123 (1995) (expressing that the legislators of the Adoption Assistance and Child Welfare Act hoped that states would terminate parental rights after the eighteenth month of foster care, if the biological parent was still not a suitable caretaker).

29. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101(5), 94 Stat. 500.

30. See Bailie, *supra* note 25, at 2290 (explaining that the Adoption Assistance and Child Welfare Act mandated that a state remove a child from her parents' home if her home environment is unsafe, and make efforts to reunify the family following removal); The Honorable Patrick R. Tamilia, *A Response to Elimination of the Reasonable Efforts Required Prior to Termination of Parental Rights Status*, 54 U. PITT. L. REV. 211, 212 (1992) (outlining the history of the nation's abuse and neglect system). See generally *Santosky v. Kramer*, 455 U.S. 745 (1982) (establishing clear and convincing as the evidentiary standard in termination of parental rights proceedings).

31. See H.R. REP. NO. 105-77, at 8 (1997), reprinted in 1997 U.S.C.A.N. 2739, 2740 ("One barrier [to adoption] is the 'reasonable efforts' criterion in the Federal statute Federal statutes, the social work profession, and the courts sometimes err on the side of protecting the rights of parents."); Barbara Kessler, *Congress, Texas Lawmakers Work to Expedite Adoptions*, DALLAS MORNING NEWS, Feb. 22, 1998, at 32A (asserting that adoptions have been delayed because "courts and caseworkers labored fruitlessly to rehabilitate a drug-addicted parent or dysfunctional couple").

32. 143 CONG. REC. H2012-06, H2022 (daily ed. Apr. 30, 1997) (statement of Rep. Harman).

in the foster care system while the agencies gave parents years to correct inappropriate and unsafe behavior, even when the parents made little effort to improve themselves.³³ As this continued, the number of children in foster care increased, but adoptions did not increase at the same rate, in part because some parental rights were not terminated in a timely fashion.³⁴

By the mid 1990s, the nation's foster care system had grown so large that legislators felt it must be reformed to lessen the caseload.³⁵ ASFA's drafters wanted to reduce the number of children in foster care by increasing the rate of adoptions.³⁶ They also wanted to accelerate the adoption process to ensure that children did not spend years in foster care.³⁷

To accomplish these goals, ASFA mandates that states focus on the best interests of the child rather than parental rights.³⁸ For example, section 101 addresses when a state should make "reasonable efforts"³⁹

33. See Tamilia, *supra* note 30, at 223 (noting the failure of social and legal services to negotiate effectively the reasonable efforts requirement); 143 CONG. REC. H2012-06, H2023 (daily ed. Apr. 30, 1997) (statement of Rep. Packard) (outlining the failures of the current abuse and neglect system, including "returning children to the natural parents, despite circumstances such as abandonment and chronic physical or sexual abuse . . ."); see also 143 CONG. REC. H2012-06, H2020 (daily ed. Apr. 30, 1997) (statement of Rep. Pomeroy) (criticizing efforts to aid parents "who just have not been able to grow up and deal responsibly with their parental responsibilities").

34. See 143 CONG. REC. H2012-06, H2023 (daily ed. Apr. 30, 1997) (statement of Rep. Packard) (noting that less than 10% of children in foster care are adopted each year and blaming "Washington bureaucracy").

35. See H.R. REP. NO. 105-77, at 8 (1997) (noting that the nation's foster care system houses about 500,000 children and has grown tremendously since the mid 1980s); 143 CONG. REC. H2012-06, H2016 (daily ed. Apr. 30, 1997) (statement of Rep. Camp) ("[S]ince 1982 the number of children in foster care has increased by 89%."); see also Cristina Chi-Young Chou, *Renewing the Good Intentions of Foster Care: Enforcement of the Adoption Assistance and Child Welfare Act of 1980 and the Substantive Due Process Right to Safety*, 46 VAND. L. REV. 683, 684 (1993) (blaming weakening family structure, alcoholism, homelessness, and worsening social conditions as reasons for the increase of children in foster care).

36. See Peterson, *supra* note 25, at 14 (stating that ASFA "aims to move children from foster care into permanent homes by speeding up the adoption process"). See generally 143 CONG. REC. H2012-06, H2028 (daily ed. Apr. 30, 1997) (statement of Rep. Burton) (explaining why long-term foster care is detrimental to children). According to the American Civil Liberties Union, of the 15,000 foster care children who reach the age of majority in a given year, "40% become dependent on [Aid to Families with Dependent Children], 46% [drop] out of school, 51% were unemployed, and 60% of the women had out-of-wedlock births within 2 years from graduating from foster care" and the Bureau of Justice reports that "former foster children are nearly 30 times more likely to be incarcerated" than those who never entered the foster care system." *Id.*

37. See Peterson, *supra* note 25, at 14 (discussing the motivation behind ASFA); see also 143 CONG. REC. H2012-06, H2014 (daily ed. Apr. 30, 1997) (statement of Rep. Hall) (stating that ASFA aims to hasten adoption of children in foster care).

38. See Peterson, *supra* note 25, at 14 (explaining that ASFA represents a shift in focus).

39. ASFA § 101(B) explains that a state should make "reasonable efforts . . . to preserve and reunify families . . . prior to the placement of a child in foster care, to prevent or eliminate the need for removing the child from the child's home" and "to make it possible for a child to

to keep a child with his natural parents, stressing that "the child's health and safety shall be the paramount concern."⁴⁰ Section 103 enumerates situations in which a state must initiate or join immediate TPR proceedings because the natural parent presents a threat to the child's safety and, presumably, no chance of improvement exists.⁴¹ Section 103 also mandates that a state work simultaneously to determine whether there is a compelling reason to reunify a child with her parents and to find an adoptive home for her.⁴² This dual approach aims to decrease the amount of time a child stays in foster care.⁴³ Finally, section 106 requires criminal record checks for prospective adoptive parents.⁴⁴ ASFA thus represents a "fundamental

safely return to the child's home." ASFA, Pub. L. No. 105-89, § 101(B), 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.). ASFA does not specifically define "reasonable efforts," but section 103(a) refers to reasonable efforts as "such services as the State deems necessary for the safe return of the child to the child's home." ASFA § 103(a)(iii). This language gives states wide discretion in deciding what constitutes reasonable efforts. *Id.*

40. ASFA, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

41. ASFA, Pub. L. No. 105-89, § 103(a)(3)(E), 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.). This section provides:

in the case of a child who has been in foster care under the responsibility of the State for 15 of the most recent 22 months, or, if a court of competent jurisdiction has determined a child to be an abandoned infant (as defined under State law) or has made a determination that the parent has committed murder of another child of the parent, committed voluntary manslaughter of another child of the parent, aided or abetted, attempted, conspired, or solicited to commit such a murder or such a voluntary manslaughter, or committed a felony assault that has resulted in serious bodily injury to the child or to another child of the parent, the State shall file a petition to terminate the parental rights of the child's parents (or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and, concurrently, to identify, recruit, process, and approve a qualified family for adoption

Id. See also Gail Vida Hamburg, *An Act of Compassion May Require Some Decisive Actions to Make it Work*, CHI. TRIB., Jan. 4, 1998, at 1 (observing that psychologists assert that severe child abuse irreparably breaks the parent-child bond, and the child in this situation is best served by the State's terminating his abusive parent's parental rights).

42. ASFA, Pub. L. No. 105-89, § 103, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

43. See Roya R. Hough, *Juvenile Law: A Year in Review*, 63 MO. L. REV. 459, 468 (1998) (explaining that concurrent planning should lessen the amount of time a child spends in foster care because the alternative plan often takes a significant amount of time to litigate, which could leave a child in temporary foster care for an unnecessarily long time if begun after reuniting with parents fails).

44. ASFA § 106 mandates:

[U]nless an election provided for in subparagraph (B) is made with respect to the State, provides procedures for criminal records checks for any prospective foster or adoptive parent before the foster or adoptive parent may be finally approved for placement of a child on whose behalf foster care maintenance payments or adoption assistance payments are to be made under the State plan under this part, including procedures that . . . in any case in which a record check reveals a felony conviction for child abuse or neglect, for spousal abuse, for a crime against children (including child pornography), or for a crime involving violence, including rape, sexual assault, or homicide, but not including other physical assault or battery, if a State finds that a

shift"⁴⁵ in states' weighing of rights, from parent-focused to child-focused.⁴⁶

Nevertheless, it remains to be seen whether the legislation will truly work in the best interests of the child. ASFA has already received criticism from professionals in the abuse and neglect system who assert that the legislation could break up families unjustly.⁴⁷ A professor at New York University School of Law criticized the mandatory initiation of TPR proceedings for children in the system for fifteen of the most recent twenty-two months, saying, "[w]e banish children from their relatives and we pretend to make efforts to reunify the family and then we pounce on these families and say 'its too late.'"⁴⁸ Another child advocate attacked ASFA section 103's intensive pursuit of termination of parental rights, noting that "only one-half of one percent of child abuse [cases] are the crimes you read about, yet our entire system is designed to avoid the one-half of one percent, and everybody responds as if all these parents are going to kill their children."⁴⁹ During House debate, Representative Patsy Mink criticized ASFA as well, stating that section 103, which requires states to initiate or join immediate TPR proceedings, restricted states too severely.⁵⁰ She went on to assert,

[it] is easy enough to state that adoption will be in the best interests of the child, who will have a better home to live in and a higher quality material environment than the one from which they came.

court of competent jurisdiction has determined that the felony was committed at any time, such final approval shall not be granted; and . . . in any case in which a record check reveals a felony conviction for physical assault, battery, or a drug-related offense, if a State finds that a court of competent jurisdiction has determined that the felony was committed within the past 5 years, such final approval shall not be granted

ASFA, Pub. L. No. 105-89, § 106, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

45. Peterson, *supra* note 25, at 14.

46. Critics assert that ASFA shifts states' focus from family-focused to child-focused. *See* Bailie, *supra* note 25, at 2291-92 (asserting that ASFA diminishes the concept of family preservation and may place unjust demands on parents who desire reunification with their children).

47. *See* Peterson, *supra* note 25, at 14 (noting that people have attacked ASFA as "anti-family"); Bailie, *supra* note 25, at 2292-93 (stating that ASFA represents a backlash against family preservation and suggesting that, because ASFA focuses on cases of extreme abuse, the more common cases of neglect due to poverty will be mishandled under the new legislation. This could result in "poor families who are in the child welfare system because of suspected neglect [being] ignored.").

48. Peterson, *supra* note 25, at 14.

49. Hamburg, *supra* note 41, at 1.

50. *See* 143 CONG. REC. H2012-35, H2023 (daily ed. Apr. 30, 1997) (statement of Rep. Mink) ("A Congress that has repeatedly argued States rights should not abandon that principle and enact legislation whose title in section 3 provides: States required to initiate or join proceedings to terminate parental rights for certain children in foster care").

This however ignores that basic undifferentiated family value of the love of a parent.⁵¹

Representative Mink's statement reveals an essential flaw of ASFA: in its attempts to focus on the child, it could fail to work toward the best interests of the family.⁵² ASFA, particularly section 103, encourages states to focus on the child, rather than viewing family problems concurrently.⁵³ The question arises as to whether we truly serve the best interests of the child when we view his situation, which is part of a deeper family dynamic, as separate from the conditions from which it grows.⁵⁴ ASFA's intense child-focus and inflexible standard for mandatory termination of parental rights could result in inadequate responses to a family's needs when a child enters foster care.⁵⁵

This potential failure of ASFA could prove especially problematic for domestic violence victims.⁵⁶ The often unjust termination of these victims' parental rights has been well-documented.⁵⁷ Rather than working to rectify this, ASFA could exacerbate the problem and

51. *Id.*

52. See Peterson, *supra* note 25, at 14 (noting that some people within the abuse and neglect system criticized ASFA as "anti-family").

53. See *supra* notes 37-45, and accompanying text (enumerating how ASFA shifts the focus of those who work in the abuse and neglect system).

54. See Bailie, *supra* note 25, at 2287 ("Children . . . are not independent or isolated individuals but, rather, are members of families. Therefore, any attempt to help children must attempt to help and heal the entire family.").

55. See Bailie, *supra* note 25, at 2293 (proposing that ASFA focuses on the most extreme cases of abuse and neglect, and may result in the unjust separation of poor families because poverty often cannot be rectified within 15 months). In an interview by Jean Hellwege, Marian Wright Edelman, founder of the Children's Defense Fund, asserted that:

[I]t is imperative that services that expedite decisions about reunification or permanent placement be provided to children and their parents from the first day the children enter the foster care system [U]nless there are additional resources at all levels to families who suffer from problems related to mental health diseases or disorders, domestic violence, and substance abuse, children will likely continue to bounce in and out of foster care and be denied permanent placement.

Interview by Jean Hellwege with Marian Wright Edelman, founder of the Children's Defense Fund, TRIAL (Aug. 1998), at 20, 24.

56. See *infra* Part V (discussing how ASFA's mandate that TPR proceedings begin immediately for aiding and abetting, or the mother's failure to protect the child could result in the unjust termination of the battered women's parental rights).

57. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 260 ("Too often . . . instead of protecting the mother from her abuser, the courts will terminate the mother's parental rights."); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 290 (1995) (explaining that many states will file TPR proceedings against both an abusive and non-abusive parent, even though this "makes little sense" for an abused woman, because she will very likely become a safe and effective parent when protected from her abuser).

sacrifice the best interests of the family through statutory insensitivity to domestic violence victims.⁵⁸

III. MANY JURISDICTIONS CURRENTLY SEPARATE DOMESTIC VIOLENCE AND ABUSE AND NEGLECT PROCEEDINGS, DESPITE A STRONG STATISTICAL LINK BETWEEN THE TWO.

Many jurisdictions separate issues of abuse and neglect from those of domestic violence.⁵⁹ In fact, only eleven jurisdictions address all family law matters⁶⁰ within one family court, division, or department.⁶¹

58. See *infra* Part V (addressing ASFA's statutory mandate that states terminate parental rights in cases of aiding and abetting murder or voluntary manslaughter or failure to protect from severe abuse).

59. In her analysis of family law in the United States, Barbara A. Babb enumerates how all fifty states address family law matters. See Babb, *supra* note 23, at 38-39 (enumerating the different methods used by all fifty states and the District of Columbia). To assess the responsiveness of each state's approach, she focuses on the structure of the court system, the subject matter jurisdiction states afford their family courts, the methods of case assignment, and the length of judges' terms. *Id.* Regarding structure of the court system, Babb found that Delaware, New York, Rhode Island, South Carolina, and Vermont have separate family courts. *Id.* The District of Columbia, Florida, Hawaii, New Jersey, and Washington address family law matters in their own division of trial courts. *Id.* Massachusetts addresses family law cases in a separate department of its trial court. *Id.* at 39. Alabama, Colorado, Kansas, Louisiana, Mississippi, Missouri, Nevada, New Mexico, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, and Wisconsin have separate family courts in some areas of those states. *Id.* at 40. California, Georgia, Illinois, Kentucky, Maine, Maryland, Michigan, New Hampshire, and Virginia have or plan to implement "pilot family court projects." *Id.* Alaska, Arizona, Arkansas, Connecticut, Idaho, Indiana, Iowa, Minnesota, Montana, Nebraska, North Carolina, North Dakota, South Dakota, Tennessee, Utah, West Virginia, and Wyoming adjudicate family law cases within their general civil trial dockets. *Id.* However, states' determinations of what constitutes family law varies, and the subject-matter jurisdiction that states afford their family courts or divisions reflects this. *Id.* at 42. Thus, even in the few jurisdictions that have separate family courts, issues of domestic violence might not be addressed because "family law" is determined by the subject matter jurisdiction the states afford the court. *Id.* States' methods of assigning cases vary widely, even in the jurisdictions that have separate family courts. *Id.* at 43. Some assign cases on a "daily, weekly, monthly, or regularly scheduled basis." *Id.* at 44. Others assign cases to judges for the duration of the case. *Id.* at 45. Still others assign one judge to one family. *Id.* However, these jurisdictions do not always afford broad subject matter jurisdiction to their family court or division, so the same judge will not necessarily hear both domestic violence and child abuse issues. *Id.* at 38-46. The lengths of judges' terms vary as well, from several months to life. *Id.* at 43-46.

60. Babb defines family law as:

a comprehensive approach to family law subject-matter jurisdiction, including jurisdiction over cases involving divorce, annulment, and property distribution; child custody and visitation; alimony and child support; paternity, adoption, and termination of parental rights; juvenile causes (juvenile delinquency, child abuse, and child neglect); domestic violence; criminal nonsupport; name change; guardianship of minors or disabled persons; and withholding or withdrawal of life-sustaining medical procedures, involuntary admissions, and emergency evaluations.

Babb, *supra* note 23, at 31 n.1.

61. See Babb, *supra* note 23, at 38-42 (listing Delaware, D.C., Florida, Hawaii, Massachusetts, New Jersey, New York, Rhode Island, South Carolina, Vermont and Washington as these

Of these, only one state assigns one judge per family for any family law issue that brings them before the court.⁶² In many jurisdictions, communication between the various courts and social agencies dealing with a particular family is poor or non-existent.⁶³ This causes "unnecessary delay, duplication and contradictory rulings and recommendations"⁶⁴ which "wastes money and does not serve children well."⁶⁵ All of the issues adjudicated result from the same family dynamic, yet different cases and different courts address them.

Because courts view issues of domestic violence and child abuse separately, a judge will not consider domestic violence during TPR proceedings.⁶⁶ This becomes problematic considering the strong statistical link between domestic violence and child abuse; in homes

jurisdictions). Babb explains that states afford varying degrees of subject matter jurisdiction to their family courts. *Id.* at 42. For example, New York's family court adjudicates child neglect, including TPR proceedings, but does not address domestic violence. *Id.* The District of Columbia's family court has comprehensive jurisdiction over all matters that fall within the rubric of family law, including abuse and neglect and domestic violence. *Id.* However, judges preside over the various dockets in D.C. Family Court for ninety days to nine months, so the chance of a family coming before the same judge to address different family law issues is less likely than if the judge presided over a particular docket for a longer period of time. *Id.* at 42-n.68.

62. See Babb, *supra* note 23, at 44 (noting that only Delaware assigns one judge to one family). This structure may provide the best way to adjudicate family law cases. Because Delaware adjudicates family law matters separately from its general civil docket, affords comprehensive jurisdiction to the family courts, and assigns one judge to one family, the state increases the possibility that a judge will gain a comprehensive understanding of the family dynamic and controlling forces within the family such as domestic violence. See *id.* (noting that only Delaware assigns one judge per family so that each time a family member appears in court, they appear before the same judge).

63. See Babb, *supra* note 23, at 47 (citing ABA PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION 54 (1993)) [hereinafter ABA PRESIDENTIAL WORKING GROUP] ("In virtually all cases, in virtually all communities, the myriad courts and social service agencies do not communicate adequately with each other."); see also Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 2 (1995) ("In Cook County [in Illinois], two courts—domestic violence and juvenile—are little more than a mile apart, yet they inhabit different planets.").

64. Babb, *supra* note 23, at 47 (quoting ABA PRESIDENTIAL WORKING GROUP).

65. Babb, *supra* note 23, at 47 (quoting ABA PRESIDENTIAL WORKING GROUP).

66. Bernadine Dohrn explains that:

Where child neglect or abuse is adjudicated, for example, domestic violence against the mother may not be apparent. At the same time, feminists argue that the adjudication of child neglect or abuse takes place in a troubling vacuum which rejects consideration of context: a mother's need to survive and to protect her children, their economic dependency, or their fear of physical violence.

Dohrn, *supra* note 63, at 1-2. See also Murphy, *supra* note 18, at 744 ("A battered mother whose partner has abused her child may be a defendant in a criminal prosecution for 'failure to protect.' That same mother may also be a complaining witness herself in a criminal case against her abuser or a petitioner seeking a civil protection order."); Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 244 (explaining that a battered woman may be held criminally liable for parental kidnapping if she tries to escape her home with her children, but risks being held criminally liable for failure to protect if she stays).

where domestic violence exists, children are overwhelmingly more likely to be abused than children who do not live with domestic violence in their families.⁶⁷ A father who abuses his wife is three times more likely to abuse his children than a father who does not.⁶⁸ Both parents are more likely to abuse their children if the father abuses the mother.⁶⁹ The correlation between child abuse and domestic abuse suggests that judges should examine potential domestic violence while adjudicating child abuse cases, including TPR proceedings, in order to establish a full understanding of the family dynamic, the parents' behaviors, and the effects on the child.⁷⁰ Still, even if a woman is permitted to present evidence of domestic violence, the judge has wide discretion in weighing the evidence.⁷¹

Despite statistics showing the two are inextricably linked, the separation of domestic violence from abuse and neglect law persists, and, as a result, courts terminate mothers' parental rights when termination may not be in the best interests of the child.⁷² This sometimes unjust termination often results from ignorance about domestic violence, which pervades every aspect of the abuse and neglect system.⁷³ The police who initially investigate abuse and

67. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 268 n.27 (estimating that children who grow up in families where domestic violence is present have a 1500% higher rate of physical, emotional, or sexual abuse than average); see also Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 372 n.8 (1995) (noting a National Crime Survey revealing that 91% percent of spousal violence incidents were committed by men against women); Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 234-35 ("Abusers may injure the children of their female victims purposely in order to hurt and control the abused women or may hurt children because they try to defend their mothers."); Murphy, *supra* note 18, at 741 (noting a significant statistical link between domestic abuse and child abuse).

68. See Murphy, *supra* note 18, at 741 (discussing the connections between domestic violence and child abuse).

69. See Julie Momjian, *Fighting the Domestic Violence Battle*, 28 PAC. L.J. 847, 860 n.3 (1997) (noting that roughly 70% of children who enter battered women's shelters are abused or neglected); Murphy, *supra* note 18, at 741 (noting the statistical correlation between domestic violence and child abuse).

70. See Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 89 (1993) ("[R]esearchers found that... children exposed to battering relationships showed more aggression, exhibited impaired cognitive and motor abilities, and were delayed in verbal development.").

71. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 244 ("Courts often 'note' or 'acknowledge' the fear of a battered woman but refuse to consider the reasonableness of these fears when determining the woman's culpability with regard to her duty to protect her children.").

72. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 231 (explaining that agencies revictimize abused children by separating them from their non-violent parent); Momjian, *supra* note 69, at 854 (noting that "whenever possible, an abused child needs to remain in the home with a non-offending parent to maintain the stability and well-being of the child.").

73. See Dohrn, *supra* note 63, at 8 ("Attorneys, judges, and caseworkers still frequently blame women for their victimization."); cf. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 14 (Oct. 1991) (observing that judges,

neglect cases may fail to recognize signs that a mother has been abused.⁷⁴ CPS might not correlate the mother's abuse to her alleged failure to parent appropriately,⁷⁵ and "some data suggests that there may be a bias among child protective services workers monitoring situations of [child] abuse to believe that the abuse is the mother's fault."⁷⁶ Lawyers in the system may treat the mother's abuse as a sign of her inability to parent.⁷⁷ Finally, courts are often unsympathetic to an abused mother; even when she provides evidence of domestic violence, courts may still declare her an unfit parent due to their fundamental misunderstanding of domestic violence's impact on a woman's behavior.⁷⁸ The separation of domestic violence from abuse

attorneys, social workers, and consulted psychologists have a one in four chance of being a victim or victimizer in domestic violence at some point in their lives. Because of this, "the atmosphere in the courtroom will not reflect mere ignorance Rather, the response to and evaluation of the case before them will also include the unseen and unspoken ties that bind these participants to the fabric of their own lives, their parents' lives, and their children's.")

74. See Murphy, *supra* note 18, at 752 (noting a case in which police arrested a mother for contributing to child abuse when she called them to her home after her boyfriend severely beat her daughter. A police officer noticed that the mother had bruises on her face, but made no inquiry into the matter.); see also Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 240 (analyzing several cases in which abused women were refused aid by the police department). But see Joan Zorza, *Mandatory Arrest for Domestic Violence: Why it May Prove the Best First Step in Curbing Repeat Abuse*, 10 CRIM. JUST. 2, 52 (1995) (discussing the implementation of mandatory arrest laws, which have increased the number of arrests in incidents of domestic violence).

75. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 250 (noting that CPS workers are generally not trained to work with battered women and discourage them from contacting their offices). But see Vivian Wakefield, *Helping not Hurting: Advocates for Battered Women, Children Working to Make the Home Safer*, FLA. TIMES-UNION, Aug. 18, 1997, at B1 (discussing a local project combining the expertise of CPS and battered women's advocates to serve abused women and children better).

76. Ashe & Cahn, *supra* note 70, at 87.

77. See Ashe & Cahn, *supra* note 70, at 99 ("[D]ecisions concerning prosecutions will tend to reflect race, class, and gender biases of prosecutors who have tended to be white, middle class, and male."); Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 248 (examining a child abuse case in which a prosecutor argued that a battered woman chose to return to her abuser, thereby exposing her child to danger, when the man physically forced himself into her home); see also Murphy, *supra* note 18, at 747-51 (chronicling a case in which a woman's daughters were removed from her home because she did not interfere when her abuser beat her daughter. The woman feared that interference would further enrage her abuser. As soon as the husband was gone, the woman took her children to her mother's house and then to the hospital. The Department of Social Services removed the girls from the woman soon thereafter. During the year-long adjudication of the case, neither the child protective services worker, the lawyers for the children and DSS, nor the judge asked whether the husband had abused the mother as well as the children.)

78. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 240-49 (discussing unjust termination of battered mother's parental rights, where no one involved inquired into potential domestic violence). Enos notes a case in which a court terminated a mother's parental rights:

[w]hile court reports describe the abuser kicking, punching, burning, and dragging the mother across a parking lot by her hair, the court failed to refer to these incidents when interpreting and rationalizing the behavior of the mother. The court . . . found that her inability to provide her child with a violence-free environment demonstrated a "willful failure" to meet the demands of her parental responsibilities.

Id. at 242. Another court recognized that a battered woman will sometimes not act due to her

and neglect law lies at the center of this problem.

IV. TO ACT IN THE BEST INTERESTS OF THE CHILD, COURTS SHOULD CONSIDER DOMESTIC VIOLENCE WHEN DETERMINING WHETHER OR NOT TO ENTER A CHILD INTO FOSTER CARE AND DURING TPR PROCEEDINGS

Viewed in a vacuum, a battered woman's behavior as a parent in an abuse and neglect case may seem irresponsible or even reprehensible enough to terminate her parental rights.⁷⁹ However, when an adjudicator considers the entire family dynamic, which is dictated by domestic violence, some women's behaviors begin to make more sense.⁸⁰

A woman may fail to protect her child because, based on past experience with her abuser, she fears her interference will further enrage him and ultimately cause more harm to the child.⁸¹ She may fail to protect her child because her abuser physically precludes her from doing so.⁸² She may fail to contact police out of a legitimate fear that doing so will lead CPS or a similar agency to remove the child from her custody.⁸³ She may reasonably fear that the system will

justified fear of her abuser, but still held the mother strictly liable for failure to protect her children. *See id.* at 248 (citing the ruling of a New York court in *In re Glenn G.*, 587 N.Y.S.2d 464, 470 (N.Y. Fam. Ct. 1992)). One court disregarded evidence of spousal abuse completely, holding that the woman had "freely, knowingly and intentionally [chosen] her situation." *Id.* at 249. Another court dismissed evidence of spousal abuse entirely as "unimportant." *Id. See also Ashe & Cahn, supra* note 70, at 99 ("Mothering is taken out of its context . . . and is judged by a judiciary that assumes middle-class, sexist, and racist norms."); Martha Minow, *Words and The Door to The Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1671 (1990) (noting that some in the legal field believe the court is an inappropriate forum to address issues of domestic violence).

79. *See In re J.E.B.*, 854 P.2d 1372, 1376 (Colo. Ct. App. 1993) (noting a "chaotic home life" and domestic violence as reasons to terminate a mother's parental rights); *In re L__E__E__*, v. H__E__, 839 S.W.2d 343, 354 (Mo. Ct. App. 1992) (affirming termination of mother's parental rights for boyfriend's abuse of her children); *see also State v. Williquette*, 370 N.W.2d 282, 285 (Wis. Ct. App. 1985) (holding that probable cause existed to convict mother of aiding and abetting for failing to protect her children from their father's abuse).

80. *See infra* notes 81-86 and accompanying text (explaining battered women's behavior in situations of child abuse).

81. *See Jane E. Brody, Battered Women Should Plan For Their Escape and Aftermath*, HOUS. CHRON., Mar. 22, 1998, at 3 (explaining that when batterers believe they are losing control of their family, they will frequently become more violent); Tracy Wilson & Lorenza Munoz, *Parents May Be Tried Separately in Girl's Death*, L.A. TIMES, May 13, 1997, at B1 (discussing the case of Gabriela Hernandez, who was charged with the beating death of her child. The mother asserted that when she interfered with her husband's child abuse, he would beat the child more, then beat her as well.).

82. *See Murphy, supra* note 18, at 755 (recounting a situation where a batterer bolted the door and held a knife to the mother's throat to keep her from seeking medical attention for her abused daughter. When the man finally left the apartment twenty-four hours later, the woman summoned help for her daughter. The police arrested her for child abuse as soon as they arrived.).

83. *See Davidson, supra* note 67, at 361 (contending that CPS tends to hold only mothers

assign legal liability to her for her husband's abuse of the child.⁸⁴ She may have attempted to seek help from the police or CPS in the past and have been turned away due to a systemic inability to effectively confront domestic violence.⁸⁵ Finally, a woman may do everything she can to actively protect her children, but ultimately fail because of her abuser's determination to harm her and the children if they attempt to leave him.⁸⁶

In these situations, the child's best interests would be better served by removing the abuser from the family than by removing the child from the home.⁸⁷ Witnessing one parent abuse another parent can severely damage a child emotionally and psychologically.⁸⁸ If the abusing parent acted violently toward the child as well, the child will

accountable for child abuse, and should shift their focus to family violence rather than child violence and mother-blaming); Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 251 ("The poor treatment of battered women, coupled with the risk of losing their children once they report incidents of domestic violence, deters women from reporting abuse and seeking protection for themselves and their children.").

84. See Murphy, *supra* note 18, at 745 (discussing the legal liability sometimes incurred for failure to protect).

85. Enos explains that:

CPS deters battered women from contacting its officers because it often offers no assistance. Moreover, even when agencies do respond, their solutions likely entail removing the children from both parents rather than protecting the child's nonabusive parent from the abuser . . . The police, another institution that battered women are expected to look to for assistance, also frequently deter women from reporting spousal and child abuse.

Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 250. See Jennifer Parker, *Consider Prevailing Circumstances in Chavez Case*, WIS. STATE J., Apr. 17, 1998, at 13A (asserting that women legitimately fear leaving their abuser because they are 75% more likely to be killed by their abuser if they leave him).

86. See Brody, *supra* note 81, at 3 (explaining that an abuser who is served with a protection order will often increase stalking, harassing, and violent behavior until he forces the woman to return to him); Davidson, *supra* note 67, at 363 (conveying that CPS caseworkers often adjudge a woman irresponsible for staying with her and the children's abuser, but fail to recognize that abusers often threaten to kill a woman or the children if they leave); see also Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 242-43 (analyzing a case in which an abused woman sought aid from CPS and the police, attempted to obtain a Civil Protection Order, and begged her abuser to stay away from her and her children. The abuser repeatedly entered her apartment by smashing her windows, and finally locked the woman and her daughter in a bedroom and raped her daughter. The woman was convicted of aiding and abetting the rape.).

87. See Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in The Child Protection System*, 48 S.C. L. REV. 577, 588 (1997) (noting that states use "laws passed to protect women and children from their abusers to separate nonabusive mothers from their children, rather than abusers from mothers and children."). But see Im Jung Kwuon, *Facing Down Abusers*, NEWSWEEK, Aug. 10, 1998, at 18 (discussing successful treatment for men who commit domestic violence).

88. See Ashe & Cahn, *supra* note 70, at 89 (discussing the negative repercussions of witnessing domestic violence); Momjian, *supra* note 69, at 854 (noting that domestic violence between parents can harm a child in three ways. First, abusers may also abuse their children. Second, abused parents may abuse their children. Finally, the children are victimized merely by witnessing the violence. Moreover, children raised in abusive homes stand a higher risk of becoming violent as adults.).

need emotional support and stability by the time CPS is alerted to the problem.⁸⁹ In this situation, it may not be in the child's best interest to remove him from the nonabusive parent.⁹⁰ While society judges women harshly based on paradigms of what it considers a "good mother," the child may not share this attitude.⁹¹ If the legal system removes the child from the custody of his nonabusive parent, the legal system becomes complicit with societal condemnation of the mother. The false assumption of the mother's parenting incompetency and a somewhat arbitrary value system sends the message to the child that her mother is "bad."⁹² Where the child previously had one parent who failed her, the legal system creates two. The child may want to be with her mother and feel emotionally and physically secure in her presence, but the legal system chooses to displace her from the limited stability in her life and situate her in foster care.⁹³ In addition to being separated from her mother, a child often is uprooted from her neighborhood, her school and the ethnic

89. See Claudio DeBellis, *Gregory K: Child Standing in Parental Termination Proceedings and the Implications of the Foster Parent-Foster Child Relationship on the Best Interests Standard*, 8 ST. JOHN'S J. LEGAL COMMENT. 501, 519 (1993) (asserting that children need stable homes, and the violence or neglect that bring CPS into a home destroys that stability).

90. See Ashe & Cahn, *supra* note 70, at 79 (asserting that removing a child from his parents causes emotional harm and should not be done as frequently as it is done today); D'Arcy Fallon & Todd Hartman, *Breaking Up Is Hard To Do/Social Workers Try To Keep Families Together*, COLO. SPRINGS GAZETTE TELEGRAPH, Feb. 9, 1997, at A1 (reporting that experts conclude that removing a child from his home and placing him in foster care stresses the child considerably and may not always be in the child's best interests).

91. See Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, KAN. J.L. & PUB. POL'Y, Fall 1995, 61, 61-66 (1995) (explaining that cultural and historical myths of proper behavior of women and mothers inform our legal judgment of women as mothers. Our culture demands that mothers be unequivocally self-sacrificing for their children. The woman who places any of her own needs or desires above her child is a "bad mother.").

92. See Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 15-16 (1995) ("We tend to see mothers as either saintly good mothers, like the Madonna, who have no interests apart from perfect service to their children, or as demonic bad mothers who at best are wholly indifferent to their children and at worst delight in hurting their children."); see also Neal, *supra* note 91, at 67. Neal explains:

In cases of terminating parental rights . . . the judges do not feel compelled to define the nexus between the behaviors or status of the mother and the harm to the child. Because they assume that their readers have internalized the same mythology, they often give information that appeals to the reader on a non-rational level: once you know this one piece of information about the mother . . . it is clear what the result of this case should be.

Id. at 67.

93. See Ashe & Cahn, *supra* note 70, at 79 (arguing that those within the abuse and neglect system often fail to see the "violence perpetrated by the legal process upon a child when he or she is abruptly and forcibly wrenched away from parents who, however inadequate, are nonetheless familiar."); Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 231 (asserting that agencies further traumatize children in abusive families by removing them from their non-abusive parent); Fallon & Hartman, *supra* note 90, at A1 (noting that one judge considers removing a child from her home to be a form of child abuse).

group with which she identifies.⁹⁴ When viewed in this context, keeping a child in her daily routine and united with her nonabusive parent (in cases where she will not be in immediate danger in her care) appears more desirable than separating her from these stabilizing forces.⁹⁵ The child has already been victimized by her father's abuse of both her and her mother.⁹⁶ The legal system does not have to re-victimize her by removing her from her non-abusive family and familiar environment.

This is not to imply that women who are victims of domestic violence are not responsible for their children's well-being and care. If a woman fails to leave her abuser after being offered help in doing so, a court may terminate her parental rights because her children are simply not safe in the family environment.⁹⁷ The legal system does not have to assign blame to her by saying she willfully exposed her children to abuse, or blithely turned her head as her partner abused her children, but the courts can still terminate parental rights if a woman cannot protect her children while in the presence of the abuser.⁹⁸

Nonetheless, before a judge decides to terminate parental rights, she must determine whether the result of that action creates the best possible future for the child.⁹⁹ To decide the best interests of the child, a judge must thoroughly understand the parents' behavior as

94. See Appell, *supra* note 87, at 599 (listing what a child leaves behind when entering foster care, such as his kinship network and local community); cf. Mary Beth Murphy, *Cleveland: A Pioneer in Neighborhood Foster Care—Experiences Offer Lessons for Officials Here*, MILWAUKEE J. SENTINEL, June 7, 1998, at 1 (discussing a recently implemented local program designed to keep children in a familiar locality when they enter foster care. Generally, Child Protective Services do not attempt to keep children in their neighborhood when they enter foster care. However, a new program recognizes that children are "already traumatized by being taken from their parents [and] fare much better in foster care if they can stay close to family, friends, classmates, and familiar surroundings.").

95. See Neal, *supra* note 91, at 67 (noting that analysts of child abuse and neglect maintain that children are "more often than not better off if they are able to retain familial ties with their parents").

96. See *supra* notes 65-70 and accompanying text (discussing how spousal and child abuse affect children).

97. See *State v. J.R.C.*, 455 N.W.2d 801, 807 (Neb. 1990) (terminating a mother's parental rights because "despite efforts by the court, the mother is unable to terminate the abusive relationship she has with her husband and is therefore unable to provide a healthy, loving, and safe environment for her child"); Douglas E. Cressler, *Requiring Proof Beyond a Reasonable Doubt in Parental Rights Termination Cases*, 32 U. LA. J. FAM. L. 785, 789 (1994) (enumerating situations in which courts may terminate parental rights, including when "extreme or repeated abuse has occurred . . . or when the conditions necessitating removal of the child have not been remedied and no reasonable likelihood exists that they will be").

98. See *J.R.C. & N.J.C.*, 455 N.W.2d at 807 (including a parent's inability to care for and protect a child as a reason to terminate parental rights).

99. See Neal, *supra* note 91, at 66-67 (explaining reasons why states terminate parental rights and discussing the procedural process of termination).

viewed in the context of how it affects the child.¹⁰⁰ By separating domestic violence issues from abuse and neglect law, most jurisdictions do not currently mandate that judges make such a determination.¹⁰¹ Acknowledging the presence of domestic violence in the home creates a context in which a judge can analyze parents' actions, or, in the case of many domestic violence victims, apparent inactions, and truly make decisions based on the best interests of the child.¹⁰²

V. ASFA'S FAILURE TO ADDRESS DOMESTIC VIOLENCE

A. Domestic Violence and "Aiding and Abetting" Under ASFA

ASFA section 103 requires a state to initiate or join termination of parental rights proceedings if a parent has "aided or abetted [in the] . . . murder or voluntary manslaughter"¹⁰³ of a previous child.¹⁰⁴ Generally, in determining whether a defendant has aided or abetted a crime, a court considers whether the defendant encouraged or helped another person "in planning or committing" the offense.¹⁰⁵ In situations where a parent is charged with aiding and abetting murder or manslaughter of her child, however, the state's approach is somewhat different. All fifty states assign parents a legal duty to protect their children.¹⁰⁶ This enables states to prosecute a parent for murder or manslaughter when the parent did not affirmatively

100. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1060 (1991) (asserting that courts should assess parents' behavior as it relates to their child); Roy T. Stuckey, *Guardians ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1799 (1996) ("The determination of the best interests of another person requires . . . a thorough understanding of the physical and psychological inter-relationship of the child and his parents . . .").

101. See Babb, *supra* note 23, at 46-49 (noting that the fragmentation of family courts results in holdings based on incomplete information that do not serve litigants well).

102. See Davidson, *supra* note 67, at 359-60 (remarking that states generally have different legal systems for addressing domestic abuse and child abuse, and combining the two in one legal system is essential); cf. Amy Haddix, Comment, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757, 799-800 (1996) (advocating termination of batterers' parental rights).

103. ASFA § 103(a), Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

104. *Id.*

105. MODEL PENAL CODE § 2.06 (1997).

106. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 236 (relating that 37 states have "omission statutes," which are used to punish women for failing to protect their children). All 50 states designate to parents an affirmative duty to protect their children. *Id.*

participate in the killing in any way, but did not actively attempt to stop it.¹⁰⁷

Domestic violence victims have been held criminally liable for murder or manslaughter when their abusive partners killed their child.¹⁰⁸ *Labastida v. State*¹⁰⁹ illustrates the sometimes unjust results the aiding and abetting doctrine has on an abused parent's liability. In *Labastida*, a Nevada trial court convicted Kriseya Labastida of second-degree murder and child neglect when her boyfriend, Michael Strawser, killed the couple's seven-week-old son, Thunder.¹¹⁰ Labastida was twenty-four years old when Thunder, her first child, died.¹¹¹ Thunder's father abused the baby repeatedly during the child's brief life, but said he "concealed his actions from Labastida by abusing the baby behind closed doors or while she was asleep."¹¹² Labastida noticed the baby's injuries, but her boyfriend lied about their origins and convinced her not to seek medical attention, saying the baby's bruises were improving and that their prayers would heal him.¹¹³ Still, Labastida took the baby to a doctor twice because she noticed that Thunder cried incessantly.¹¹⁴ On the morning of Thunder's death, Labastida observed Thunder having difficulty breathing and wanted to take him to the hospital, but Strawser "persuaded her that the child was getting better."¹¹⁵ That afternoon,

107. See *Johnson v. State*, 501 S.E.2d 815, 817 (Ga. 1998) (finding a mother guilty for felony murder and cruelty to children, where the mother never abused her child but did not interfere with her boyfriend's abuse of the child); *People v. Staniel*, 606 N.E.2d 1201, 1204 (Ill. 1992) (discussing two cases where mothers were held responsible for their partners' killing of their children); *State v. Maupin*, 859 S.W.2d 313, 314 (Tenn. 1993) (reaching a guilty finding of first or second-degree murder for a mother who left her son in the care of her boyfriend, who then killed him); cf. *Jacobs*, *supra* note 20, at 637 (asserting that battered women often actively attempt to protect their children from abuse, but that courts view their behaviors as insufficient "non-action." Mothers' protective behaviors have included planning their child's daily routine to decrease the amount of time a child spends with the abusive parent, interfering verbally or physically, or leaving the home.).

108. See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 116 (1993) (discussing situations in which the law holds a mother legally responsible for her partner's actions toward their children).

109. 931 P.2d 1334 (Nev. 1996), *cert. dismissed*, 520 U.S. 1237 (1997).

110. *Id.*

111. *Id.*

112. *Id.* at 1336.

113. See *id.* (recounting that Strawser told Labastida the baby had fallen off the bed and off the washing machine).

114. See *Labastida v. State*, 931 P.2d 1334, 1336 (Nev. 1996), *cert. dismissed*, 520 U.S. 1237 (1997) (noting that Labastida took Thunder to a pediatrician when he was two days old, and to a breast-feeding specialist at two weeks old, thinking the child was crying because he had colic).

115. *Id.*

Thunder stopped breathing.¹¹⁶ Labastida called 911 and Thunder was rushed to the hospital, where he died.¹¹⁷

The lower court sentenced Labastida to life in prison for second degree murder and a consecutive twenty year term for child neglect.¹¹⁸ The appellate court affirmed Labastida's sentence.¹¹⁹ In a footnote, the appellate court discounted the possibility that Strawser abused and intimidated Labastida, reasoning that he would not have hidden his child abuse from Labastida if he abused her as well.¹²⁰ The dissent criticized the majority's holding, stating, "[t]his is a typical case in which a woman has been trapped by fear by an abusive and dominating male figure. Her failure or inability to remove herself and her baby from Strawser's household is indeed pitiable, but it is not murder."¹²¹

The *Labastida* court's holding is troubling for three reasons. First, as the concurrence and dissent asserted, no evidence existed showing that Labastida abused her child or condoned Strawser's abuse.¹²² Nevertheless, the court proceeded to convict Labastida of a crime that she did not physically commit.¹²³ Second, the majority casually dismissed the possibility that Strawser abused or intimidated Labastida.¹²⁴ The court did not engage in any legal analysis, cite any precedent, or refer to any authority to support its assertion that Strawser would not have hidden his abuse of the child from Labastida if he was abusing her as well.¹²⁵ Rather, the court conjectured that a

116. *Id.* at 1335.

117. *Id.* at 1336.

118. *Id.* at 1339.

119. *Labastida v. State*, 931 P.2d 1334, 1335 (Nev. 1996), *cert. dismissed*, 520 U.S. 1237 (1997).

120. *See id.* at 1335 n.1 (asserting that Labastida could not have remained unaware of the brutalization to which her child was subjected).

121. *Id.* at 1349 n.7 (Springer, J., dissenting).

122. *See id.* at 1342 (Shearing, J., concurring) ("There is not one iota of evidence that Labastida inflicted one injury on the child There is substantial evidence that Labastida was concerned about the welfare of her child and took measures to see to his welfare."); *id.* at 1343 (Springer, J., dissenting) (stating that Labastida did not abuse her child or endorse Strawser's abuse).

123. *See id.* at 1343 (Springer, J., dissenting) ("[I]t is clear from the record that she did not murder her son This is the most tragic miscarriage of justice that I have had the misfortune to witness in my close-to-sixteen years on this court.")

124. *Labastida v. State*, 931 P.2d 1334, 1335 n.1 (Nev. 1996), *cert. dismissed*, 520 U.S. 1237 (1997) (addressing why the court did not believe domestic violence was an issue in the case).

125. *Id.* The court relegated the issue of Labastida's possible abuse and intimidation to a brief footnote. *Labastida*, 931 P.2d at 1335 n.1. The court rejected the possibility that Strawser intimidated Labastida, asserting "it is difficult to believe" he would have hidden his abuse from her if she were intimidated by him. *Id.* The court based its conclusion on its own inability to conceive of a reason for Strawser's hiding the abuse and without citing any authority to confirm

batterer would not hide his child abuse from his partner, and assumed that no further explanation was needed for a reasonable jury to find Labastida guilty of aiding and abetting in the murder of her son.¹²⁶ Third, the decision is problematic in light of ASFA's possible repercussions for a woman in Labastida's position who has more than one child.¹²⁷

Under ASFA, a state would be compelled to initiate TPR proceedings against Labastida with respect to any other children she had who were in the abuse and neglect system.¹²⁸ The state would likely place her other children in the abuse and neglect system, because the death of one child can be the impetus for the state to restrict parental rights.¹²⁹ ASFA section 103 compels a state to join or initiate TPR proceedings *immediately* upon a child's entry into the foster care system.¹³⁰ This requirement allows no time for a state investigation of the abused parent's actual behavior in aiding and

its assumption of how an abuser behaves. *Id.* Because the court did not question why Strawser hid his abuse of the child from Labastida, the court concluded that Labastida willfully ignored the abuse of her child. *Id.* This explanation contradicts evidence the court mentioned throughout its opinion. Strawser admitted at one point that he hid his abuse from Labastida and lied to her about the baby's injuries. *Labastida v. State*, 931 P.2d 1334, 1336 (Nev. 1996), *cert. dismissed*, 520 U.S. 1237 (1997). On several occasions, including the day of Thunder's death, Strawser told Labastida not to seek medical assistance. *Id.* at 1336. On one occasion, Labastida's landlady attempted to convince the young mother to take Thunder to the hospital. *Id.* Labastida declined, but stared "intensely and very fiercely" at Strawser. *Id.* at 1338. Although this evidence does not conclusively prove that Strawser intimidated Labastida, it indicates that Labastida was acting *against* her will in not seeking medical attention, not that she purposefully failed to aid her child. *Id.* The evidence warrants further inquiry and discussion than the footnote the court dedicated to it.

126. See *Labastida*, 931 P.2d at 1335 n.1 (expressing that Strawser would not have hidden the child abuse from Labastida if he also abused her); see also Melanie Frager Griffith, *Battered Woman Syndrome: A Tool for Batterers?*, 64 FORDHAM L. REV. 141, 191 (1995) (explaining that batterers do not fit an easily definable personality type or generally behave in ways that overtly reveal them as abusive people); Neal, *supra* note 91, at 67 (explaining that judges sometimes use language and information in their rulings that appeal to readers on a "pre-rational" level, drawing on our assumptions of how individuals should or will behave). See generally Alene Kristal, *You've Come a Long Way, Baby: The Battered Women's Syndrome Revisited*, 9 N.Y.L. SCH. J. HUM. RTS. 111, 116 (1991) (examining the profile of a typical batterer); Minow, *supra* note 78, at 1665 (discussing how judges can use language to draw on our assumptions of what specific words imply to explain their rulings).

127. See *infra* notes 128-36 and accompanying text (discussing ASFA's potential repercussions on battered women).

128. See ASFA § 103 Pub. L. No. 105-89, 111 Stat. 2115 (1997) (requiring courts to immediately initiate TPR proceedings for children who enter the abuse and neglect system where a parent has been convicted of murdering one of her children).

129. See *In re William D.*, 198 A.D.2d 40, 40 (N.Y. App. Div. 1993) (explaining that a mother's children were removed from her home because she had "derivatively abused" them when she killed another one of her children); *People v. Ray*, 411 N.E.2d 88, 88 (Ill. App. Ct. 1980) (stating that after a mother was convicted of murdering one of her children, her parental rights regarding her other children were correctly terminated).

130. ASFA § 103.

abetting in the murder of her child.¹³¹ In a case such as Labastida's, this approach may not be in the best interests of the woman's other children because there was no evidence presented that Labastida knowingly hurt her child.¹³² Furthermore, the majority, concurrence, and dissent all note that Labastida's failure to seek medical attention for the baby was strongly influenced by Strawser,¹³³ both the majority and dissent address the potential existence of domestic violence.¹³⁴ The facts indicate that while a woman in Labastida's position may be an inappropriate parent when under the influence and control of her abusive partner, she is not necessarily an inherently dangerous individual who should not have custody of her child.¹³⁵ However, ASFA section 103 fails to consider this type of situation, and mandates that a state immediately begin TPR proceedings against a loving, well-intentioned woman whose insubordination under a dictatorial and violent male figure precludes her from taking action on behalf of her child.¹³⁶ Rather than requiring that states consider spousal violence when investigating child abuse, ASFA encourages states to follow the exact opposite course by mandating that states blame an abused woman for acts she did not commit, and work from a presumption of parental unfitness based on these acts.¹³⁷

B. *Domestic Violence and "Felony Assault" Under ASFA*

ASFA section 103(a) also requires a state to initiate or join immediate TPR proceedings if the parent has "committed a felony assault that has resulted in serious bodily injury to the child or to

131. See H.R. REP. NO. 105-77, at 7 (1997), reprinted in 1997 U.S.C.C.A.N. 2739, 2739 (stating that in some circumstances, a state will not make reasonable efforts to reunite the family).

132. See *Labastida v. State*, 931 P.2d 1334, 1343 (Nev. 1996), cert. dismissed, 520 U.S. 1237 (1997) (Shearing, J., concurring) (arguing that Labastida did not knowingly hurt her child because she trusted the father of her baby).

133. See *id.* at 1336 ("Strawser also advised Labastida against obtaining medical assistance . . ."); *id.* at 1342 (Shearing, J., concurring) ("[W]hen she wanted to seek medical assistance, Strawser discouraged her . . ."); *id.* at 1343 (Springer, J., dissenting) (asserting that Strawser lied to Labastida extensively regarding the baby's injuries).

134. See *id.* at 1335 n.1 (noting potential domestic violence and dismissing it); *Labastida v. State*, 931 P.2d 1334, 1349 n.7 (Nev. 1996), cert. dismissed, 520 U.S. 1237 (1997) (Springer, J., dissenting) (asserting that Labastida's behavior was affected by Strawser's abuse).

135. See Becker, *supra* note 92, at 32 ("[T]he mother's successful escape from an abusive relationship was the most effective way to lower levels of violence against the children.").

136. ASFA § 103, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.); see *supra* note 18 (discussing cases in which battered mothers did not intervene during their partner's abuse of their children, either because they were physically unable to do so or because they feared that doing so would endanger their own lives).

137. See Baillie, *supra* note 25, at 2294 (explaining that often times, child welfare agencies confuse poverty with neglect, charging parents with neglect when the true source of the family's problems is poverty).

another child of the parent.”¹³⁸ While the language of section 103(a) does not specifically include aiding and abetting,¹³⁹ courts have used the “failure to protect” doctrine to treat felonies against children similarly to aiding and abetting murder or manslaughter.¹⁴⁰

Using the “failure to protect” doctrine, states successfully prosecute abused mothers who do not stop their abuser’s felony assault of their child. For example, in *State v. Walden*,¹⁴¹ a North Carolina court convicted a woman of assault with a deadly weapon and sentenced her to five to ten years in prison for felony assault on her child.¹⁴² The appellate court upheld this sentence even though the woman never touched the child herself; the father alone beat the child with a belt.¹⁴³ The woman testified that she tried to stop the child’s father, but he struck her in the face.¹⁴⁴ The court reasoned that the mother failed to take affirmative steps to protect her child where common law assigned her this duty.¹⁴⁵ Nowhere in the opinion did the court consider the history of violence toward the mother in that situation.¹⁴⁶ Thus, the court convicted the mother of abusive acts that she did not commit and may not have been able to stop.¹⁴⁷ Under ASFA section 103, a court would initiate immediate TPR proceedings against this

138. ASFA § 103(a).

139. *See id.*

140. *See* Linda J. Palko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children From Their Male Partner’s Abuse*, 6 HASTINGS WOMEN’S L.J. 67, 78 (1995) (noting that some courts hold women criminally liable for child abuse where they did not interfere with their partner’s abuse even though they never affirmatively abused their children). *But see* *State v. Rundle*, 500 N.W.2d 916, 917-18 (Wis. 1993) (holding that a father could not be convicted of child abuse where he did not interfere with his wife’s abuse of the children, but did not actually abuse his children himself). *See generally* Nancy A. Tanck, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children From Abuse*, 1987 WIS. L. REV. 659 (1987) (discussing criminal liability for failure to protect).

141. 293 S.E.2d 780 (N.C. 1982).

142. *Id.* at 782.

143. *See id.* at 783 (holding that the woman was guilty as a principal to the offense when her child’s father beat her child, despite the fact that she tried to stop him and he struck her in the face, leaving her with visible injuries).

144. *Id.*

145. *See id.* at 780 (noting that a non-abusive mother may be convicted on an aiding and abetting theory solely on the basis that she was present and failed to take reasonable measures to prevent the assault).

146. *See State v. Walden*, 293 S.E.2d 780, 780-88 (N.C. 1982) (discussing the defendant’s liability where she committed no affirmative act).

147. Interestingly, the *Walden* court noted that the “failure to protect” doctrine has limits. The court explained that parents have no “legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children.” *Id.* at 786. Apparently, the court did not consider the domestic violence inflicted on the mother as sufficient bodily harm to warrant her failure to stop the child abuse. *Id.* The court’s conclusion seems to reflect a misunderstanding of—or lack of compassion for—domestic violence victims more than a careful weighing of the facts.

woman, punishing her for the acts of another whose physical threats and intimidation she could not stop.¹⁴⁸

As with situations where a mother does not stop her abuser from killing her child, ASFA's felony assault provision allows a court to terminate an abused mother's parental rights.¹⁴⁹ States apply ASFA's felony assault provision to situations such as the one in *Walden*, where an abused mother never assaulted her child, but could not effectively stop her abuser from doing so.¹⁵⁰ Following the enactment of ASFA, the nonabusive mother is not only criminally liable for her partner's abuse of her children, but also risks immediate termination of her parental rights.¹⁵¹

Prior to ASFA's enactment, courts terminated women's parental rights based on their partner's felony abuse of their children.¹⁵² In *In re B.R.*,¹⁵³ the court terminated a mother's parental rights because her husband abused one of their children.¹⁵⁴ The state filed a petition to terminate parental rights as to all three children based on the severe abuse of one child.¹⁵⁵ During the investigation into the parents' behavior, the wife revealed that her husband had abused her over the past two years.¹⁵⁶ In one instance, he punched her in the face twice and hit the baby she was holding.¹⁵⁷ The wife was seven months pregnant at the time.¹⁵⁸ On another occasion, he pushed her head into a window¹⁵⁹ and shoved her into a stove.¹⁶⁰ Although the court noted this evidence, it blamed the woman for not leaving her abuser

148. See ASFA § 103, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

149. See *State v. Walden*, 293 S.E.2d 780 (N.C. 1982) (providing an example of ASFA's application in this regard).

150. *Id.* See generally *supra* notes 142-49 (discussing the mother's role, or lack of a role, in the child abuse in *Walden*).

151. See ASFA § 103; see also Cressler, *supra* note 97, at 795 ("The loss of one's children through a termination proceeding has been called 'a sanction more severe than imprisonment.'").

152. See *In re Julie E.*, 451 N.W.2d 576, 578 (Mich. Ct. App. 1990) (terminating a mother's parental rights for "allowing" her husband to abuse the children and "not [standing] up" to him); *In re L. E. E., G. J. J.*, 839 S.W.2d 348, 353 (Mo. Ct. App. 1992) (terminating a woman's parental rights for her partner's child abuse).

153. 669 N.E.2d 347 (Ill. App. Ct. 1996).

154. *Id.* at 347-48.

155. *Id.* at 349.

156. *Id.* at 350.

157. *Id.*

158. *In re B.R.*, 669 N.E.2d 347, 350 (Ill. App. Ct. 1996).

159. *Id.*

160. *Id.*

and for exposing her children to “an environment injurious to their welfare,”¹⁶¹ and terminated her parental rights.¹⁶²

The court also cited the emotional problems the mother experienced after her children entered foster care as a reason to terminate her parental rights.¹⁶³ Considering the woman’s emotional instability, the court probably reached the correct conclusion in terminating the mother’s parental rights.¹⁶⁴ A psychological evaluation reported that her ability to manage her life was questionable and that she had poor judgment regarding her own well-being.¹⁶⁵ If this evaluation was accurate, the woman most likely could not care for her children effectively, and they would be safer in foster care or an adoptive home.¹⁶⁶

The court’s process in reaching this conclusion highlights a fundamental misunderstanding of domestic violence particularly in light of ASFA’s mandatory termination of parental rights requirement.¹⁶⁷ The court failed to credit the woman with leaving her abuser, which she did four months after her children entered foster care.¹⁶⁸ Instead, the court blamed her for staying with her abuser after she had warning that he had injured her children, and used this as a reason to terminate her parental rights.¹⁶⁹ Despite ample

161. *Id.* at 351.

162. *Id.*

163. *See In re B.R.*, 669 N.E.2d 347, 350-51 (Ill. App. Ct. 1996) (explaining that a psychological evaluation reported that the mother had had suicidal thoughts and displayed “poor judgment with regard to decisions affecting her own well-being.” The woman credited her depression to the possibility of losing her children.).

164. *See In re A.J.*, 646 N.E.2d 1239, 1240 (Ill. App. Ct. 1994) (basing TPR on the mother’s inability to manage her mental illness); *In re J.A.S.*, 627 N.E.2d 770, 772 (Ill. App. Ct. 1994) (terminating a woman’s parental rights when she was mentally unstable and could not fulfill her parental obligations effectively); *Schumm v. Schumm*, 510 N.W.2d 13, 14 (Minn. Ct. App. 1993) (terminating a mother’s parental rights because of unmanaged bipolar disorder).

165. *See In re B.R.*, 669 N.E.2d 347, 350-51 (Ill. App. Ct. 1996) (detailing a report that concludes the mother is not able to adequately provide for her well-being due to psychological deficiencies).

166. *See* Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1798-99 (discussing how to determine whether a child should be considered neglected if his parent is mentally ill and incapable of providing care).

167. ASFA § 103, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) (requiring states to either initiate or join proceedings to terminate parental rights when a court has determined that a child has either been abandoned or the parent has committed a specified felony).

168. *See In re B.R.*, 669 N.E.2d at 350-51 (reciting that the woman told a social services worker that she was no longer in contact with her abuser).

169. *See id.* at 351 (reasoning that the woman had more forewarning of her boyfriend’s violence toward her children than she had claimed). The court cited as evidence an incident in which the boyfriend punched her twice in the face and hit the baby she was holding. *See id.* (recounting an incident of abuse upon the mother). The court referenced the woman’s injuries suffered in this incident, only to show that she willfully chose to put herself and her

evidence of domestic violence toward the mother, the court did not consider that she may have stayed with her children and their abuser out of fear of leaving, or an inability to do so.¹⁷⁰ Further, the court gave no credence to the possibility that losing her children caused her emotional distress.¹⁷¹ Instead, the court viewed her emotional instability and her husband's abuse of her as evidence to support the conclusion that she willfully placed her children in danger and might do so again if the court returned her children to her.¹⁷² This court only recognized the existence of domestic violence in the context of blaming the mother and using it as evidence of her parental unfitness.¹⁷³

ASFA section 103's mandatory termination of parental rights for felony assault discourages courts from approaching the situation of a domestic violence victim differently than did the court in *In re B.R.*¹⁷⁴ The statutory language mandates that states begin TPR proceedings immediately if a woman has been convicted of felony abuse.¹⁷⁵ Therefore, a state must initiate TPR proceedings against a battered woman unless the state can articulate a compelling reason why initiating such proceedings does not serve the child's best interests.¹⁷⁶ However, this is unlikely due to both the preexisting stigma against

children in a position where they were harmed. *See id.* (taking into consideration the abuse suffered by the mother only in relation to the harmful environment that the mother and her child lived due to the mother's inaction).

170. *See In re B.R.*, 669 N.E.2d 347, 349-51 (Ill. App. Ct. 1996) (noting instances where the man abused his wife and claiming that her failure to leave supports the court's decision to terminate her parental rights without noting a possible correlation between his abuse and intimidation with her failure to leave him sooner).

171. *See id.* at 350-51 (recognizing that the woman claimed her depression was caused by the possibility of losing her children, but citing her depression to support the termination of her parental rights).

172. The court reasoned:

[T]he record reflects that Brown had more forewarning about Forest's violent tendencies toward herself and her children than she claims She stayed with Forest even after she told Detective Allen that she thought he had caused B.R.'s injuries. During this time, she had suicidal thoughts In sum, the trial court's decision to terminate Brown's parental rights was not against the manifest weight of the evidence.

Id. at 350-51.

173. *See id.* at 349-51 (relying in part on her partner's abuse of her to find the mother an unfit parent).

174. *See* ASFA § 103, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) (addressing situations in which courts must begin immediate TPR proceedings, and excluding any mention of situations in which courts may choose to forgo immediate TPR proceedings, such as in cases of domestic violence).

175. *See supra* note 41 (quoting text of ASFA § 103).

176. *See supra* note 41 (quoting text of ASFA § 103); *infra* section V.C (discussing the meaning of "compelling reason" under ASFA).

battered women and the Act's discouragement that courts view violence victims sympathetically.¹⁷⁷

In some cases, terminating an abused woman's parental rights may be the only way to ensure her children's safety.¹⁷⁸ However, in some cases termination may not be appropriate.¹⁷⁹ It seems unlikely that ASFA will always achieve the best interests of the child when much existing case law does not sufficiently consider domestic violence against a parent during TPR proceedings, and ASFA does nothing to change this.¹⁸⁰ Even though it purports to focus on the child's best interests, ASFA may result in the unjust separation of children from their non-abusive mothers.¹⁸¹

C. *The Meaning of "Compelling Interest" in ASFA Section 103*

Under ASFA section 103, if the state does not believe termination of parental rights is in the best interests of the child, it must provide a "compelling reason" to delay the onset of TPR proceedings.¹⁸² ASFA

177. See *supra* notes 72-78 and accompanying text (discussing misperceptions of battered women's behaviors and a systemic tendency of the courts to view battered women without sympathy).

178. See Becker, *supra* note 92, at 21 ("No matter how weak the mother, she is in a much better position than the child to prevent abuse and owes a duty of care to her children.").

179. See Murphy, *supra* note 18, at 745-56 (recounting situations in which women could not interfere with their partner's abuse of the children). In one situation, a woman did not interfere because when she did so previously, her abuser beat her and her children more severely. *Id.* at 747. After the beating, she took her children to her mother's house, and sought medical attention for them. *Id.* at 747-48. The hospital immediately turned the children over to the Department of Social Services. See *id.* at 748 (stating that the children were taken away from the mother even though she sought treatment for the abuse of her children). In this situation, the mother did not fail her children; rather, she acted to protect them as soon as she could, knowing that more immediate action would trigger more abuse and not be in the best interests of her child. *Id.* Initiating immediate TPR proceedings against her, as ASFA would require the state to do, does not serve the best interests of the child, because their mother is not a danger to them. *Id.* Another woman failed to seek immediate medical attention for her daughter because her abuser held a knife to her throat and bolted the door. See *id.* at 755 (detailing an incident in which a mother was unable to get medical attention for her abused child due to abuse inflicted upon her). As soon as the abuser left the apartment, the woman called the police, who arrested her for child abuse upon arrival. *Id.* In this situation, terminating the woman's parental rights in accordance with ASFA will not only be grossly unjust to the mother, but will not even further the Act's goal of protecting the child and moving her into a permanent, stable home; absent the father, this mother's home is permanent and stable. See also *In re C.D.C.*, 455 N.W.2d 801, 807 (Neb. 1990) (upholding a lower court's decision to terminate the parental rights of a mother who suffered severe abuse and was unable to sever the relationship with the abuser).

180. See *supra* Part III (discussing the separation of abuse and neglect law and domestic violence, which results in courts failing to consider domestic violence in abuse and neglect proceedings).

181. See *supra* notes 103-77 and accompanying text (addressing how ASFA transfers existing injustices in criminal law into abuse and neglect law).

182. ASFA § 103(a) provides:

The State shall file a petition to terminate the parental rights of the child's parents

does not define “compelling reason” or give examples of a compelling reason.¹⁸³ During debate on ASFA, several speakers stressed that ASFA addresses situations where states must pursue TPR immediately, but no one spoke at length about the inclusion of a “compelling reasons” standard for a state to forgo TPR proceedings.¹⁸⁴ This indicates that legislators did not consider the “compelling reason” exception a pivotal part of the Act. Although it provides the only possible way for a section 103 parent¹⁸⁵ to avoid immediate TPR proceedings, the statutory language and the states’ interpretation of “compelling reason” may not effectively protect the parent’s interests.¹⁸⁶

Upon initial review, the “compelling reason” exception appears to protect the parent’s interests in her child.¹⁸⁷ However, the language represents a semantic shift that may actually decrease a section 103 parent’s rights.¹⁸⁸ In the past, courts required compelling reasons to terminate parental rights.¹⁸⁹ This requirement assured that states

(or, if such a petition has been filed by another party, seek to be joined as a party to the petition), and concurrently, to identify, recruit, process, and approve a qualified family for an adoption, unless . . . a State agency has documented in the case plan (which shall be available for court review) a compelling reason for determining that filing such a petition would not be in the best interests of the child

ASFA § 103(a), Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

183. *Id.*; see also Hough, *supra* note 43, at 469 (“Presently, there is no guidance regarding what would be a ‘compelling reason’ for the state to opt not to file a petition to terminate parental rights.”).

184. See 143 CONG. REC. H2012-06, H2016 (daily ed. Apr. 30, 1997) (statement of Rep. Shaw) (noting that ASFA is comprised of three major sections, one of which is “aggravated circumstances” where states must not make reunification efforts, but not explaining this further); 143 CONG. REC. H2012-06, H2017 (daily ed. Apr. 30, 1997) (statement of Rep. Kennelly) (listing situations where a state must initiate TPR, but not offering any compelling reasons why a state would not do so).

185. I use the term “section 103 parent” to refer to any parent whose children have been in the state’s abuse and neglect system for 15 of the last 22 months, or, who, at the time her children enter foster care, has committed the murder or voluntary manslaughter of one of her children, or felony assault on one of her children. This categorization encompasses those individuals that ASFA section 103 includes. See ASFA § 103 Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) (listing the cases for the initiation of proceedings to terminate parental rights).

186. See *infra* notes 191-201 and accompanying text (discussing the failures of the compelling reason exception).

187. ASFA § 103(a), Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.). Compared to the other option of mandatory and immediate TPR proceedings, this narrow exception appears to contemplate and potentially protect a parent’s interest in raising her child. *Id.*

188. See *infra* notes 189-91 (discussing how the semantic shift affects section 103 parents’ rights).

189. See *Dawn D. v. Superior Court*, 952 P.2d 1139, 1146 (Cal. 1998) (Kennard, J., concurring) (“The due process clause of the Fourteenth Amendment to the federal Constitution, in its ‘substantive’ aspect, protects fundamental liberties from state interference absent a compelling reason for the state’s action.”); *Black v. Gray*, 540 A.2d 431, 435 (Del. 1988)

considered the repercussions of severing a child's biological ties with her parents before terminating parental rights.¹⁹⁰ ASFA uses the same language to subvert the logic behind this requirement, directing that states provide a compelling reason to *not* initiate TPR proceedings.¹⁹¹

Also, ASFA dictates that the *state* provide a compelling reason to forego termination, not the parent.¹⁹² If state agencies continue the insensitivity to domestic violence issues that they have shown in the past,¹⁹³ a state worker might not even consider presenting the woman's abuse as a compelling reason to delay termination of her parental rights, where she has been convicted of a felony under the "failure to protect" doctrine.¹⁹⁴ The statute does not grant the parent

("The termination of a parent's rights is a drastic, final measure to be invoked only for the most compelling reasons."); *In re the Adoption of K.S.H.*, 442 N.W.2d 417, 419-21 (N.D. 1989) (upholding the trial court's ruling that deprivation, with no chance of improvement, did not provide a compelling reason to terminate parental rights.); *In re C.R.D.*, 897 P.2d 181, 184 (Kan. Ct. App. 1995) (asserting that parental rights are fundamental rights protected by the Fourteenth Amendment of the United States Constitution, and only to be terminated for compelling reasons); *Worm v. Worm*, 573 N.W.2d 148, 153 (Neb. Ct. App. 1997) (Siewers, J., concurring) (agreeing with majority's decision that the prosecution presented no compelling reason to terminate a father's parental rights, where the father abandoned his daughter); *Deegan v. Jefferson County*, 525 N.W.2d 149, 155 (Wis. Ct. App. 1994) (noting that a parent's rights can only be terminated if the child is abused, neglected, or there are other compelling circumstances).

190. See *In re the Adoption of K.S.H.*, 442 N.W.2d at 420 (noting the trial court's logic for not terminating parental rights. The trial court found that, although the child was deprived by his father, he was not harmed because his grandparents were his primary caretakers. Therefore, the deprivation was not "sufficient reason to cut the parental bond."); Cressler, *supra* note 97, at 796 (contending that children look to their biological family to understand their physical selves and to develop their self-perception); Rosemary Shaw Sackett, *Terminating Parental Rights of the Handicapped*, 25 FAM. L.Q. 253, 262-63 (1991) (asserting that when a child's biological relationships are severed, he may suffer "physical deprivations," and that the distinction between the parent's interests and child's interests may be difficult to discern); see also Mark Strasser, *Legislative Presumptions and Judicial Assumptions: On Parenting, Adoption, and the Best Interest of the Child*, 45 U. KAN. L. REV. 49, 52-53 (1996) (discussing courts' articulations of the parent-child bond that develops when a biological parent raises his child).

191. ASFA § 103(a) Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.). This semantic shift, combined with the general guiding philosophy behind ASFA that states focus on the child, may encourage courts to view termination of parental rights less stringently for section 103 parents. *Id.* While ASFA addresses the TPR proceedings, not the termination itself, the semantic shift changes the discourse regarding section 103 parents. *Id.* When a section 103 parent finally gets to the termination hearing, the parties might infer a presumption of parental unfitness for two reasons. *Id.* First, the statute lays out acts that are carte blanche reasons to initiate termination, rather than leaving this assessment to the discretion of the state agency. ASFA § 103(a)(E). Second, if no compelling reason existed to forgo TPR proceedings when the child entered foster care, a court may view the parental rights of a section 103 parent less stringently than it views other parents' rights. *Id.*

192. See *id.* (outlining the requirements placed upon states in proceedings to terminate parental rights).

193. See *supra* Part III (discussing common misperceptions of battered women held by state child abuse and neglect workers).

194. See *supra* Part III (addressing state agencies' failure to address domestic violence).

power to advocate for herself in this situation, and the state seems unlikely to advocate for her.¹⁹⁵

Furthermore, as states codify ASFA, the meaning of "compelling reason" remains oblique.¹⁹⁶ States seem to either share the federal legislators' ambivalence regarding what constitutes a compelling reason,¹⁹⁷ or seem to move toward a definition that focuses on the child's circumstance, rather than the parent's actual behavior leading to the criminal conviction.¹⁹⁸ While consideration of a child's present living situation may provide a compelling reason to not terminate parental rights, the child-focus seems to be achieved at the expense of considering the parent's circumstances.¹⁹⁹

It remains unclear whether a woman's abuse by her husband may provide a compelling reason to not proceed with TPR proceedings.²⁰⁰ Further, because abuse and neglect agencies are generally ill-equipped to deal with domestic violence issues, their desire to pursue the option of reunifying the children and the mother on this ground remains unlikely.²⁰¹

VI. PROPOSED SOLUTIONS

As stated previously, ASFA does not create the legal separation of domestic abuse from child abuse.²⁰² This problem is systemic within abuse and neglect law nationwide.²⁰³ However, ASFA's failure to address domestic abuse within abuse and neglect law may increase

195. See *supra* Part III (addressing states' sometimes unjust treatment of battered women, which seems based on systemic misperceptions and assumptions).

196. See Hough, *supra* note 43, at 466 (explaining that Missouri codified ASFA as Missouri Revised Statutes § 211.183). There are currently no guidelines in assessing what is a compelling reason, but "[i]deally, the primary consideration in that determination will be the needs of children." *Id.* at 469.

197. See Hough, *supra* note 43, at 469 (explaining that the statute provides no guidance for interpreting "compelling reasons").

198. See Jerry Ann Donaldson, *Legislative Update*, J. KAN. B.A., Aug. 1998, at 14, 36 (stating that Kansas bill H.B. 2820, the state's version of ASFA, allows for compelling reasons to cease TPR proceedings, such as when "the child is in a stable placement with a relative").

199. See ASFA § 103, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.) (discussing compelling reasons for forgoing TPR proceedings, and failing to mention any reason connected to the parent's circumstance, such as domestic violence).

200. *Id.*; see *supra* notes 196-98 and accompanying text (explaining that the legislative history and states' interpretation of the act do not indicate that domestic violence is a possible compelling circumstance to forgo TPR).

201. See Enos, *Prosecuting Battered Mothers*, *supra* note 18, at 250-51 (asserting that Child Protective Services and the police are often unresponsive to battered women's needs).

202. See *supra* Part III (discussing the systemic separation of domestic violence from abuse and neglect proceedings).

203. See Babb, *supra* note 23, at 38-46 (outlining how each jurisdiction addresses family law, and concluding that most do not adopt a comprehensive approach).

the division between the two areas of law, rather than join them to work in the best interests of the child.²⁰⁴ Because ASFA does not create the situation, changing the Act will not fix the problem entirely.²⁰⁵ However, revising ASFA provides an important step in bringing together domestic violence and abuse and neglect law.²⁰⁶

ASFA section 103 requires that a state initiate or join immediate termination of parental rights proceedings where a parent aided or abetted the killing of a child or committed felony assault against a child.²⁰⁷ When adopting ASFA, states should include in this section an explanation of what constitutes aiding and abetting. Legislators should cite cases that demonstrate how an abused woman could be convicted for a felony assault she did not commit.²⁰⁸ They should caution judges and CPS against blaming an abused woman for acts she did not commit and could not stop because of a legitimate fear of greater harm to her child based on threats, physical injury, physical restraint, or past experience with her abuser.²⁰⁹ The section should instruct that whenever immediate TPR proceedings take place due to aiding and abetting murder or manslaughter or because of felony assault, the state agency will be *required* to do an investigation into possible domestic violence in the family and offer a woman aid in leaving her abuser. This would not be too drastic a move, considering the overwhelming correlation between child abuse and domestic violence.²¹⁰

Further, states should define "compelling reason." This definition should provide a list of possible compelling reasons to forego immediate TPR proceedings, including the woman's actions or inactions explained by the domestic violence dynamic that controls

204. See *supra* Part V (discussing how ASFA could transfer existing injustices in criminal law into abuse and neglect proceedings).

205. See *supra* Parts III & IV (discussing the need for unified family courts and the current failure of the abuse and neglect system to address domestic violence).

206. See *infra* notes 207-10 and accompanying text (discussing how state legislatures could insert language into ASFA that would mandate or encourage courts to consider domestic violence).

207. ASFA § 103, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

208. See *supra* Part V.B (discussing felony assault under the aiding and abetting doctrine and noting cases in which women were unjustly prosecuted under this doctrine).

209. See *supra* Parts IV & V (explaining that battered women may act in ways that a person not familiar with battering relationships considers irresponsible, and ASFA encourages those working in the abuse and neglect system to blame women for behavior without understanding it).

210. See *supra* Part III (addressing the statistical correlation between domestic abuse and child abuse).

the family.²¹¹ A woman's status as a domestic violence victim, however, should not automatically excuse her inability to protect her children.²¹² However, if she is willing to leave her abuser with the state's help, and does not herself present a threat to her children, the state will not serve her children's best interests by severing their relationship with their mother.²¹³

Placing the child in foster care wrenches him from whatever small amount of stability exists in his life and sends him the message that both of his parents are inadequate.²¹⁴ By statutorily instructing judges and people who work within the abuse and neglect system to consider the impact of domestic violence, the risk of unjustly removing a child from his nonabusive parent decreases, and we will begin to offer just results to both parents and children.²¹⁵

VII. CONCLUSION

The distinction between laws that reflect societal mores and assumptions and those that attempt to dictate them has become blurred. This Comment suggests that the law should move faster than social attitudes. If our legal system continues to reflect false societal assumptions and assigns blame where it should instead provide aid, there may never be an impetus for change; static jurisprudence will never truly work toward the best interests of the child.

Children in the abuse and neglect system cannot advocate for a change in societal assumptions regarding their abused mothers.²¹⁶ Abused mothers who live in fear and danger in their own homes are unlikely to advocate effectively for themselves.²¹⁷ We cannot assume that judges and others involved in the abuse and neglect system will

211. See *supra* notes 66-71 (discussing how domestic violence dominates family relationships and is inextricably linked to child abuse).

212. See Becker, *supra* note 92, at 21 (asserting that custodial adults should be responsible for their children, even if they are themselves battered).

213. See Chris Watkins, *Beyond Status: The Americans with Disabilities Act and the Parental Rights of People Labeled Developmentally Disabled or Mentally Retarded*, 83 CAL. L. REV. 1415, 1458 (1995) (asserting that courts often fail to consider the importance children place on their relationships with their parents).

214. See *supra* notes 88-96 and accompanying text (addressing the harm children suffer when they enter foster care, and advocating avoiding that harm where possible).

215. See *supra* Parts III & IV (discussing current injustices that result from the separation of domestic violence from abuse and neglect situations, and noting situations in which separating a child from his nonabusive parent creates an unjust result for both the child and parent).

216. See 143 CONG. REC. H2012-06, H2015 (daily ed. Apr. 30, 1997) (statement of Rep. Shaw) (noting that children in the foster care system are "the most fragile among us").

217. See Ashe & Cahn, *supra* note 70, at 112 (noting "the limited ability of 'bad mothers' to speak for and about themselves").

incorporate domestic violence considerations into abuse and neglect law of their own volition.²¹⁸ We cannot expect those who work within the abuse and neglect system to assume a sensitive attitude toward battered women as they follow ASFA if they remain unaware of the effect that domestic violence has on women's behavior.²¹⁹

ASFA, although in many ways much needed legislation,²²⁰ fails to incorporate domestic violence law into abuse and neglect proceedings.²²¹ However, states have the opportunity to expand on the statutory language as they incorporate the Act into their state codes. ASFA cannot, nor should it have to, fix all the problems in our nation's abuse and neglect system, from fragmentation of family court proceedings, to the sometimes unjust application of criminal liability for the failure to protect.²²² However, as it exists, ASFA may actually exacerbate some of the systemic problems those working in abuse and neglect law have been trying to rectify for years.²²³

State legislatures should insert language into ASFA that draws attention to some of these problems and encourage states to view child abuse and neglect in the context of family abuse. Adopting a comprehensive approach compels states to approach abuse and neglect cases with a sensitivity to domestic violence and encourages states to unify family courts, while keeping the child's health and well-being paramount. In these ways, we may truly begin to work in the best interests of the child, her parents, and ultimately, to the American society of which these persons form a part.

218. These institutions are often ignorant of domestic violence symptoms and effects of domestic violence on women's actions or apparent inactions.

219. See *supra* notes 72-78 and accompanying text (explaining that ignorance of domestic violence breeds insensitivity to its victims and their realities).

220. See *supra* notes 24-37 and accompanying text (outlining the current state of foster care in the United States); see also Dana Mack, *We Can't Help Kids by Destroying Families: Foster Care Legislation Would Take Children From Parents Who Are Poor*, L.A. TIMES, Dec. 1, 1997, at B5 ("Child abuse is a serious and rising problem Yet of the 120,000 adoptions in this country each year, only 20,000 are from foster care."); Gene Warner, *County Launches Pilot Program Aiming to Reduce Children's Time in Foster Care, Expedite Adoptions*, BUFFALO NEWS, May 15, 1998, at C5 (quoting one judge asserting, "[w]e all recognize that children are spending far too long in foster care without finding a permanent home" and discussing how ASFA attempts to rectify this).

221. See *supra* Parts II & V (discussing ASFA's intense child focus and failure to address all parents' situations, especially those who are battered women).

222. See *supra* notes 59-65 and 81-86 and accompanying text (discussing states' diverse systems of addressing family law matters and battered women's potential criminal liability for failure to protect their children from their partner's abuse).

223. See Babb, *supra* note 23, at 36 (reporting that the Standard Court Act suggested unifying family courts as far back as 1959); Ross, *supra* note 23, at 15 (noting that the ABA suggested the unification of family courts in 1980).