
COMMENTS

HOW PENNSYLVANIA'S CHILD PROTECTIVE SERVICES LAW PUNISHES SURVIVORS OF DOMESTIC VIOLENCE*

I. INTRODUCTION

Three weeks before her husband killed her and her three children, Megan Short called the police saying that she was afraid of her husband, Mark Short.¹ Before this instance, she had called the police several times following “domestic disputes.”² Soon after the call, Megan decided to leave Mark.³ On the day Megan planned to leave Mark, he murdered Megan, the couple’s three young children, and the family dog.⁴ Megan’s story is consistent with evidence showing that the most dangerous time for a survivor of domestic abuse and her children is when the survivor leaves her abuser.⁵

A domestic violence (DV) survivor may, after weighing her options, choose not to leave her abuser or not to report the abuser’s violence toward her child for

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1. Christopher Brennan, *Pennsylvania Father Who Killed Family Purchased Murder-Suicide Gun the Day After Domestic Dispute*, N.Y. DAILY NEWS (Aug. 15, 2016, 4:00 PM), <http://www.nydailynews.com/news/national/pa-dad-bought-murder-suicide-gun-domestic-dispute-article-1.2752220> [perma: <http://perma.cc/9FCH-39KQ>].

2. *Id.*

3. *Id.*

4. *Id.*

5. Geneva Brown, *When the Bough Breaks: Traumatic Paralysis—An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 239–40 (2005). While Pennsylvania statutes generally refer to those who are abused by a partner as a “victim,” this article refers to these people as “survivors” in an effort to avoid speaking about those who have experienced domestic violence in a disempowering manner. *See, e.g.*, 23 PA. STAT. AND CONS. STAT. ANN. § 6102(a) (West 2017) (defining “victim” of, e.g., domestic violence under the Pennsylvania Domestic Relations Code as “[a] person who is physically or sexually abused by a family or household member”); *cf. The Language We Use*, WOMEN AGAINST ABUSE, <http://www.womenagainstabuse.org/education-resources/the-language-we-use> [perma: <http://perma.cc/RXQ4-THHZ>] (last visited Oct. 28, 2017) (explaining that “victim” is often used by law enforcement and in court proceedings, but the Women Against Abuse domestic violence crisis center uses “survivor” because the term “survivor” speaks to the sense of empowerment our coordinated response aims to encourage in the people we serve”).

a number of reasons.⁶ One fear is that leaving an abuser or taking another preventative action, such as reporting the abuse, may lead the abuser to retaliate, as Megan's husband did.⁷ A survivor may decide that living with an abusive spouse is the safest option—or at least the option most likely to avoid a tragic fate like Megan's.⁸

Despite the very real risks that survivors face when leaving or reporting their abuser, so-called failure to protect laws harshly punish survivors who choose to stay with or do not report their abusers, even when their decisions are based on a rational safety calculus.⁹ Commentators have noted the unfairness in punishing a survivor of DV under failure to protect laws.¹⁰ However, no commentator has discussed the specific context of placing survivors on a child abuse registry for failure to protect their child. This context is worth scholarly attention as it is a common occurrence, and placement on the child abuse registry causes unique harms to a survivor.¹¹ A survivor who is placed on the registry for failure to protect her child faces multiple collateral consequences,

6. E.g., Brown, *supra* note 5, at 222–23; Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 291–92 (2001).

7. See Fugate, *supra* note 6, at 291–93.

8. Telephone Interview with Cindene Pezzell, Legal Coordinator, Nat'l Clearinghouse for the Def. of Battered Women (Oct. 28, 2016).

9. *Id.* Throughout this Comment, “failure to protect laws” refer to statutes that create consequences for parents or guardians deemed to have insufficiently kept their child safe from some harm.

10. E.g., Justine A. Dunlap, *Sometimes I Feel Like a Motherless Child: The Error of Pursuing Battered Mothers for Failure to Protect*, 50 LOY. L. REV. 565, 575 (2004); “Failure to Protect” Working Grp., *Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 849 (2000); Rona Kaufman Kitchen, *Constrained Choice: Mothers, the State, and Domestic Violence*, 24 TEMP. POL. & C.R.L. REV. 375, 389 (2015); Margo Lindauer, *Damned if You Do, Damned if You Don't: Why Multi-Court-Involved Battered Mothers Just Can't Win*, 20 AM. U. J. GENDER SOC. POL'Y & L. 797, 797 (2012); G. Kristian Miccio, *A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings*, 22 HARV. WOMEN'S L.J. 89, 93 (1999) [hereinafter Miccio, *A Reasonable Battered Mother*]; Kristian Miccio, *In the Name of Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the “Protected Child” in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1090 (1995) [hereinafter Miccio, *In the Name of Mothers*]; Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 720 (1998); Myrna S. Raeder, *Preserving Family Ties for Domestic Violence Survivors and Their Children by Invoking a Human Rights Approach to Avoid the Criminalization of Mothers Based on the Acts and Accusations of Their Batterers*, 17 J. GENDER RACE & JUST. 105, 109 (2014); Evan Stark, *The Battered Mother in the Child Protective Service Caseload: Developing an Appropriate Response*, 23 WOMEN'S RTS. L. REP. 107, 108–09 (2002) [hereinafter Stark, *The Battered Mother*]; Evan Stark, *A Failure to Protect: Unraveling “the Battered Mother's Dilemma”*, 27 W. ST. U. L. REV. 29, 37–38 (2000) [hereinafter Stark, *A Failure to Protect*]; Heather R. Skinazi, Comment, *Not Just a “Conjured Afterthought”: Using Duress as a Defense for Battered Women Who “Fail to Protect”*, 85 CALIF. L. REV. 993, 999 (1997).

11. See Interview with Kathleen Creamer, Managing Attorney, Cmty. Legal Servs.; Janet Ginzberg, Senior Staff Attorney, Cmty. Legal Servs.; and Suzanne Young, Supervising Attorney, Cmty. Legal Servs., in Phila., Pa. (Nov. 3, 2016) [hereinafter Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young] (discussing the unique collateral consequences faced by those placed on a child abuse registry).

ranging from being denied employment to being unable to accompany her child on school trips.¹² This Comment proposes legislative reform in Pennsylvania: give survivors an affirmative defense to placement on the registry.¹³

This Comment proceeds in three sections. After this Introduction, Section II examines the current state of Pennsylvania's Child Protective Services Law (CPSL) and its implications for a survivor whose abusive partner harms the survivor's child.¹⁴ Due to a lack of Pennsylvania case law in the child abuse registry context, Section II also discusses failure to protect laws in the dependency and criminal contexts to illustrate how courts consider DV in these analogous situations.¹⁵ Once the state of the law is discussed, Section II finishes by setting forth the arguments both for and against holding survivors accountable under failure to protect laws.¹⁶ After examining the strongest arguments on both sides of this issue, Section III contends that holding survivors accountable under failure to protect laws is unfair and does not promote child welfare.¹⁷ Section III also proposes policy changes in Pennsylvania that would ameliorate some of the unfairness that survivors face under the current version of the CPSL.¹⁸ Section IV concludes.

II. OVERVIEW

A parent or guardian may be held responsible for failure to protect her child in a number of ways, such as by being charged criminally,¹⁹ having her child

12. *Id.* "Collateral consequences" refer to the effects of placement on the child abuse registry that flow from placement on the registry but are not the direct punishments imposed for failing to protect one's child. *Cf.* MODEL PENAL CODE § 6B.02A (AM. LAW INST., Discussion Draft No. 4, 2012) (defining collateral consequences in the criminal context as any "legally-authorized penalty, disability, or disadvantage, however denominated, that may be imposed on an individual as a result of conviction but is not part of the direct punishment imposed for the offense").

13. *See infra* Part III.B.1.

14. *See infra* Part II.C.1.

15. *See infra* Parts II.C.2–3. Proceedings that can result in the temporary or permanent removal of a child from parental care will be referred to as "dependency" proceedings hereinafter.

16. *See infra* Parts II.D–E.

17. *See infra* Part III.A.

18. *See infra* Part III.B.

19. *E.g.*, *State v. Williquette*, 385 N.W.2d 145, 152 (Wis. 1986). The author uses she/her/hers pronouns throughout this Comment for two reasons. The first is that for a long time, the default pronouns in academic writing were the male he/him/his, and this is a small way of tipping the scales so that scholarly work as a whole better affirms the existence of women. *See* Jen Doll, *The Rise of She: What a Shift in Gendered Pronouns Means*, ATLANTIC (Aug. 10, 2012), <http://www.theatlantic.com/entertainment/archive/2012/08/rise-she-what-shift-gendered-pronouns-means/324827/> [perma: <http://perma.cc/U6BS-CVZE>] ("[T]he default pronoun, as formerly taught in high school English classes, was for a long time the male one. When gender isn't known, when the pronoun stands in for either gender, when the pronoun just means one or a person, he was traditionally the pronoun used."). The second reason is that the pronouns she/her/hers more accurately reflect the fact that the majority of survivors of domestic violence are women. *See* Sally F. Goldfarb, *Violence Against Women and the Persistence of Privacy*, 61 OHIO ST. L.J. 1, 12 n.40 (2000) (noting that women are more likely to experience domestic violence than men).

removed from her care,²⁰ or by being placed on the child abuse registry.²¹ In many instances, it is appropriate for the parent or guardian to be held responsible for failing to protect her child. For example, in *L.H. v. Department of Public Welfare*,²² a father had been convicted for sexually abusing his minor children.²³ However, despite knowing about the conviction and having agreed with social services that the father should have no contact with the children, the grandparents allowed the father to have unsupervised contact with the children, leading to further sexual abuse.²⁴ Although the grandparents did not directly sexually abuse the children, the grandparents failed to protect their grandchildren from a known predator without extraneous circumstances influencing their decision.²⁵ This failure made the grandparents “abuse[rs] by omission” and led to the grandparents’ placement on Pennsylvania’s child abuse registry.²⁶ In that case, the grandparents’ placement on the registry was arguably just.

However, in dependency and criminal contexts,²⁷ many commentators point out that holding a parent or guardian responsible for failure to protect her child is unfair when the child’s abuser is also the parent’s abuser.²⁸ In the criminal context, defendants have had some success arguing that, as survivors of DV, they should not be criminally culpable for the child abuse committed against their children by their abusers.²⁹

20. *E.g.*, *In re R.P.*, 957 A.2d 1205, 1208 (Pa. Super. Ct. 2008).

21. *E.g.*, *L.H. v. Dep’t of Pub. Welfare*, No. 1270 C.D. 2014, 2015 WL 5444918, at *3 (Pa. Commw. Ct. June 18, 2015), *appeal denied*, 130 A.3d 1293 (Pa. 2015).

22. No. 1270 C.D. 2014, 2015 WL 5444918, at *3 (Pa. Commw. Ct. June 18, 2015), *appeal denied*, 130 A.3d 1293 (Pa. 2015).

23. *L.H.*, 2015 WL 5444918, at *3.

24. *Id.*

25. *Id.* at *2.

26. *Id.* at *1.

27. In Pennsylvania, a child may be found to be dependent if the child “is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his physical, mental, or emotional health, or morals”; “has been abandoned by his parents, guardian, or other custodian”; “is without a parent, guardian, or legal custodian”; or “is habitually and without justification truant from school.” 42 PA. STAT. AND CONS. STAT. ANN. § 6302 (West 2017). Under this provision, a “determination that there is a lack of proper parental care or control may be based upon evidence of conduct by the parent, guardian or other custodian that places the health, safety or welfare of the child at risk.” *Id.* Dependency actions can, in extreme circumstances, lead to the termination of a parent’s parental rights. *See* 23 PA. STAT. AND CONS. STAT. ANN. § 2511(a) (West 2017) (providing grounds for the involuntary termination of a parent’s parental rights).

28. *E.g.*, Dunlap, *supra* note 10, at 621; “Failure to Protect” Working Grp., *supra* note 10, at 849; Kitchen, *supra* note 10, at 395; Lindauer, *supra* note 10, at 805; Miccio, *A Reasonable Battered Mother*, *supra* note 10, at 91; Miccio, *In the Name of Mothers*, *supra* note 10, at 1094–95; Murphy, *supra* note 10, at 745; Raeder, *supra* note 10, at 110–11; Stark, *The Battered Mother*, *supra* note 10, at 109; Fugate, *supra* note 6, at 290–91; Skinazi, *supra* note 10, at 995–96.

29. *See, e.g.*, Barrett v. State, 675 N.E.2d 1112, 1117 (Ind. Ct. App. 1996) (finding expert testimony regarding battered woman syndrome admissible to show that the defendant did not have the requisite intent to be culpable for neglect of a dependent, where the defendant’s boyfriend had killed her child). In Pennsylvania there is no statutory defense available for survivors of DV, but survivors may be able to use their experience of abuse to bolster another defense. *See infra* Part II.C.3.

In Part II.A, this Comment describes the process of a caseworker placing a parent on the child abuse registry and the parent's appeal of that placement.³⁰ Part II.B describes the unique collateral consequences one faces as a result of being placed on the registry.³¹ Part II.C overviews the current status of failure to protect laws.³² Lastly, Parts II.D and II.E summarize the arguments both for and against punishing survivors under failure to protect laws.³³

A. *Child Abuse Registry—How It Works*

In Pennsylvania, a parent is placed on the statewide child abuse registry when a caseworker from the county agency assigned to the parent's case believes the parent is a perpetrator of child abuse,³⁴ as defined by CPSL.³⁵ Under the CPSL, a parent is considered a perpetrator of child abuse if she harms her child or if she fails to act to protect the child from abuse.³⁶

When a caseworker determines that a parent is a perpetrator,³⁷ the caseworker checks a box on her paperwork indicating as much and then gives the paperwork to her supervisor for processing.³⁸ The investigation from which the caseworker makes their determination is one-sided and may not even include an interview with the parent/alleged perpetrator.³⁹ After the supervisor processes

30. See *infra* Part II.A. A caseworker in this context is one who investigates an allegation of abuse or neglect. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

31. See *infra* Part II.B.

32. See *infra* Part II.C.

33. See *infra* Parts II.D–E.

34. While the following analysis is applicable to any guardian who is placed on the registry for failure to protect a child, for ease of reading, this Comment refers to all guardians who are placed on the registry as “parents.”

35. See 23 PA. STAT. AND CONS. STAT. ANN. § 6362(a) (West 2017) (stating that county agencies are the only civil agency “responsible for receiving and investigating all reports of child abuse”); Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11 (describing the procedure through which a parent is placed on the child abuse registry).

36. § 6303.

37. The only guidelines the author could find on Pennsylvania's Department of Human Services website merely indicated that a caseworker should determine whether an alleged perpetrator committed abuse under the CPSL based on medical evidence, an admission from the alleged perpetrator, or the agency's investigation. See PA. DEP'T OF HUMAN SERVS., ANNUAL CHILD PROTECTIVE SERVICES REPORT: 2016, at 6 (2016), www.dhs.pa.gov/cs/groups/webcontent/documents/report/c_260865.pdf [perma: <http://perma.cc/38ZJ-VBHX>]. The author could not find any further guidance on the Department of Human Services' website detailing what information discovered subsequent to an investigation should be dispositive to a caseworker determining whether the alleged perpetrator committed abuse under the CPSL. See PA. DEP'T OF HUM. SERVS., <http://dhs.pa.gov/> [perma: <http://perma.cc/SZF6-WMS3>] (last visited Oct. 3, 2017). However, advocates at Community Legal Services, a Philadelphia-based legal aid organization, have heard testimony from caseworkers that there are internal agency documents that they rely upon in making their determinations. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

38. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

39. *Id.*

that paperwork, a solicitor from the county agency reviews the paperwork.⁴⁰ If the solicitor agrees with the caseworker's assessment of the case, the parent is then placed on the registry.⁴¹ That placement is permanent unless the parent exercises her right to appeal.⁴² It is noteworthy that, in Philadelphia, many parents who are placed on the registry are not even deemed by their caseworker to be a sufficient risk to their child to warrant removal of their child, even temporarily.⁴³ For example, one client of Community Legal Services (CLS),⁴⁴ who had been terrorized by her husband for years, was placed on the registry for failure to protect her child after her husband beat their youngest child, causing bruises.⁴⁵ However, the caseworker never interviewed the CLS client separately from her husband, never initiated proceedings to remove the children from the home, and never provided in-home services or a referral to resources for survivors.⁴⁶

After a caseworker places the parent on the registry, the parent may appeal the decision.⁴⁷ Specifically, after a parent receives notice of her placement on the registry, she may, within a designated period, request a hearing before an administrative law judge (ALJ); in this hearing, she has the opportunity to request that the ALJ amend or expunge the caseworker's report from the registry.⁴⁸

At the ALJ hearing, the Commonwealth has the burden of proving by substantial evidence that the parent is a perpetrator of child abuse as defined by the CPSL.⁴⁹ If the ALJ rules for the Commonwealth but the parent believes that

40. § 6368(e).

41. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

42. *Id.*

43. *Id.* This information, combined with observations discussed *infra* Part II.E.3.b, suggests that, in addition to legislative change, it may be helpful to train caseworkers on when it is appropriate to place a parent on the registry. However, the training of caseworkers as a possible solution to the impact of the child abuse registry on survivors is beyond the scope of this Comment.

44. Community Legal Services (CLS) is a Philadelphia-based legal aid organization that provides free civil legal services to low-income Philadelphians. See *About CLS*, COMMUNITY LEGAL SERVS. OF PHILA., <http://clsphila.org/about-cls> [perma: <http://perma.cc/7T6Z-QY3G>] (last visited Feb 2, 2018).

45. This information comes from the author's personal experience working with the client. The client's years of abuse were well documented with multiple hospital records detailing broken bones and instances of internal bleedings throughout the decade she and her husband were together. The client's husband threatened to kill her if she ever tried to leave, which is why it took her a decade to do so. The threat was not an empty one. When the client finally worked up the courage to leave, the husband beat the client so badly that he broke all of the ribs in her body. Thankfully, neighbors called the police before the husband's beating turned fatal.

46. See *supra* note 45.

47. 23 PA. STAT. AND CONS. STAT. ANN. § 6341(a)(2) (West 2017).

48. *Id.*

49. *Id.* "Substantial evidence" is defined as "[e]vidence which outweighs inconsistent evidence and which a reasonable person would accept as adequate to support a conclusion." *Id.* § 6303(a). Generally, the Commonwealth will attempt to show that the parent is rightfully placed on the registry for failure to protect her child through testimony of the investigating caseworker and, where applicable, the investigating police officer. Interview with Kathleen Creamer, Janet Ginzberg &

the ALJ's finding is in error, the parent can appeal that decision to the Commonwealth Court of Pennsylvania, which reviews all such appeals.⁵⁰ The court of last resort for a parent's appeal of their placement on the child abuse registry is the Pennsylvania Supreme Court.⁵¹ The Pennsylvania Supreme Court has the discretion to allow the appeal.⁵²

B. Impact of Placement on the Child Abuse Registry

Placement on a child abuse registry can be extremely damaging for a survivor.⁵³ For example, placement on a child abuse registry can serve as a bar to employment.⁵⁴ Although not all employers check the child abuse registry before making employment decisions, the employers most likely to check the registry are those hiring caregivers.⁵⁵ For example, daycares, hospitals, schools, nursing homes, and companies that provide in-home health services are likely to check child abuse registries before hiring a new employee.⁵⁶ Indeed, a survivor may be barred from even studying to become a nurse if she is on the child abuse registry.⁵⁷ Women disproportionately apply for these caregiving positions, making them more likely than men to be denied employment on the basis of their placement on the registry.⁵⁸

Placement on the child abuse registry also has ramifications beyond employment.⁵⁹ For example, a parent on the registry may be unable to volunteer at her child's school or accompany her child on school field trips.⁶⁰ And, if members of a survivor's community discover that she is placed on the registry, she might experience social stigma and shame.⁶¹

C. Failure to Protect Laws

There is relatively little case law on failure to protect laws in the child abuse

Suzanne Young, *supra* note 11. CLS attorneys have found that the evidence that is most successful in refuting this evidence is testimony from the victim child that the child had not informed the parent of the abuse and that the parent had not witnessed it. *Id.*

50. § 6341(g).

51. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11; *cf.* § 6341(g) (providing a process to appeal to the Commonwealth Court).

52. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11. These cases are rarely considered by the Pennsylvania Supreme Court. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. See, e.g., *Labor Force Statistics from the Current Population Survey*, BUREAU OF LAB. STAT. (Feb. 8, 2017), <http://www.bls.gov/cps/cpsaat11.htm> [perma: <http://perma.cc/XC8B-EG3Y>] (reporting that 94.4% of people employed as childcare workers and 88.1% of people employed in the nursing, psychiatric, and home health aide professions are women).

59. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

60. *Id.*

61. *Id.*

registry context.⁶² However, the treatment of survivors charged with failure to protect their children in the dependency and criminal contexts is instructive for understanding how ALJs and appellate judges are likely to view a survivor's appeal of her placement on the child abuse registry.⁶³ Thus, this Part will begin by discussing the statute and case law that indicates how a Pennsylvania ALJ might consider a parent's history of surviving DV in the context of a parent's appeal of her placement on the child abuse registry.⁶⁴ This Part will then go on to look at the treatment of survivors in the dependency and criminal contexts.⁶⁵

1. Survivors in the Child Abuse Registry Context

As in the criminal and dependency contexts, failure to protect laws in the child abuse registry context hold a survivor responsible when her partner harms her child.⁶⁶ In Pennsylvania, a parent is a perpetrator of child abuse and thus eligible to be placed on the child abuse registry if she failed to act to protect her child from harm.⁶⁷ Although the statute provides that a child is not abused if injuries result "solely from environmental factors . . . that are beyond the control of the parent," the statute does not suggest that DV may be considered an environmental factor over which a parent does not have control.⁶⁸

No case in Pennsylvania explicitly addresses whether evidence of DV and fear of retaliation may result in a successful appeal of placement on the child abuse registry. However, *Bucks County Children & Youth Society Services Agency v. Department of Public Welfare*⁶⁹ suggests that the Pennsylvania Commonwealth Court would hold that DV is an environmental factor over which the survivor *has* control.⁷⁰ In that case, a caseworker placed a mother on

62. See *infra* Part II.C.1 for a discussion of the statutes and case law that have addressed this issue in Pennsylvania.

63. This Comment will continue to distinguish between three contexts in which a parent may be held liable for failure to protect her child. In the criminal context, a parent is criminally charged with failure to protect her child. *E.g.*, *State v. Williquette*, 385 N.W.2d 145, 152 (Wis. 1986). In the dependency context, a court considers whether to adjudicate a parent's child dependent and, possibly, terminate the parent's parental rights. See 23 PA. STAT. AND CONS. STAT. ANN. § 2511(a) (West 2017) (stating grounds for the involuntary termination of a parent's parental rights). The child abuse registry context is distinct but related to the dependency context. In Pennsylvania, one is placed on the child abuse registry when a caseworker determines that one is a child abuser. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11. A caseworker typically makes this determination in contexts in which she is investigating whether bringing a dependency action is appropriate. *Id.* However, the process of appealing one's placement on the registry is unrelated to whether a dependency action is initiated. *Id.* And it is tried by an ALJ, not by family court judges who hear dependency actions. *Id.*

64. See *infra* Part II.C.1.

65. See *infra* Parts II.C.2–3.

66. *E.g.*, § 6303(a) (defining perpetrator).

67. *Id.* (defining a perpetrator who has failed to act).

68. *Id.* § 6304(a). The statute lists "inadequate housing, furnishings, income, clothing and medical care" as environmental factors over which a parent may not have control. *Id.*

69. 616 A.2d 170, 172 (Pa. Commw. Ct. 1992).

70. See *Bucks Cty. Children & Youth*, 616 A.2d at 174.

the registry as a perpetrator by omission after the mother's boyfriend sexually abused her daughter.⁷¹ The mother appealed her placement on the registry, stating that she did not know and had no reason to know that the sexual abuse was taking place.⁷² The court noted that the trial court heard testimony that the mother's boyfriend abused the mother.⁷³ The child victim described the boyfriend as "a tyrant" who "had control over the entire household," and that the boyfriend had threatened and struck the mother.⁷⁴ The mother testified that the boyfriend had "pounded [the mother's] head on the floor," and that the boyfriend broke into her home after she told him she no longer wanted him on the premises.⁷⁵

Ultimately, the court remanded the case for the ALJ to make specific findings regarding whether the mother knew or should have known that the boyfriend was abusing her daughter.⁷⁶ The court reiterated that if the mother knew or should have known of the abuse and failed to take steps to protect her daughter, she would properly remain on the registry as a perpetrator by omission.⁷⁷ The court did not discuss whether the abuse may have led the mother to fail to act due to fear of retaliation, let alone whether evidence of fear of retaliation might result in a successful appeal of her placement on the registry.⁷⁸ On the contrary, the court suggested that the mother's experience of having been abused by her boyfriend made it more likely that she should have known her boyfriend was abusing her daughter, and, thus, more likely that the caseworker properly placed the mother on the registry as a perpetrator by omission.⁷⁹

2. Survivors in the Dependency Context

While *Nicholson v. Scoppetta*⁸⁰ is a New York case, it is considered a "landmark" for survivors whose children are involved in dependency proceedings⁸¹ and is thus illustrative of how courts could generally approach the

71. *Id.* at 172.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 174.

77. *Id.*

78. *See id.* at 171–74 (failing to consider fear of retaliation in concluding that the mother was a perpetrator).

79. *Id.* at 174. ALJ decisions are not generally available in searchable databases to which the author has access, so it is not clear what the findings of the ALJ were on remand.

80. 820 N.E.2d 840 (N.Y. 2004).

81. Lindauer, *supra* note 10, at 812. It is necessary for this Part to discuss relevant New York case law due to lack of Pennsylvania case law on this specific issue. The author chooses to discuss New York case law given that the *Nicholson* case is viewed by advocates for survivors as a "landmark" victory. *See, e.g.*, Brown, *supra* note 5, at 226 (using the case as an example of "the dangers of inferred blame that battered mothers shoulder while being victims"); Lindauer, *supra* note 10, at 812 (calling *Nicholson* a "landmark case"). Thus, an analysis of New York case law shows how the state at the forefront of considering a history of DV in dependency proceedings treats survivors accused of failing to protect their children.

issue. In *Nicholson*, the New York Court of Appeals held that a survivor's children may not be removed from her care purely on the basis of their having witnessed the survivor's abuser perpetrate DV against her.⁸² Prior to *Nicholson*, New York City's Administration for Children's Services (ACS) often charged mothers with neglect and removed the survivor's child from her if the child had witnessed DV, even when the child suffered no physical abuse from the survivor or her abuser.⁸³ After *Nicholson*, a child's exposure to her mother's abuse may be a factor in determining whether the child should be removed from her mother's care, but it may not be the sole factor.⁸⁴ Rather, ACS or an analogous county agency must show that the children were "actually or imminently harmed" by having witnessed the DV.⁸⁵ Such a showing may be made when, in addition to the children having witnessed DV, either (1) the mother knew that her child or children were afraid of the abuser but "allowed him several times to return to her home," or (2) caseworkers testify to both a long history of the child or children having witnessed DV and that they experienced "fear and distress" as a result.⁸⁶

In reaching its conclusion, the *Nicholson* court acknowledged that it may be very difficult for a survivor to protect her children from witnessing DV.⁸⁷ So, in a dependency proceeding, in evaluating whether the state has met its burden of showing that a survivor has not exercised the "minimum degree of care" required by the New York statute, the court may consider the risks of leaving the abuser, threats the abuser may have made to the survivor's life, risks of staying with the abuser, and risks of seeking help from the state.⁸⁸ However, New York courts have not applied the reasoning of *Nicholson* to those cases when a child is removed from a parent due to harm inflicted upon the child by her parent's abuser.⁸⁹

On the contrary, in *Green ex rel. T.C. v. Mattingly*,⁹⁰ the due process protections prescribed for survivors in *Nicholson* were not extended to the temporary removal of a child when a survivor's abuser physically abused her children.⁹¹ In *Green*, the mother had been physically assaulted by her husband and had successfully obtained a protective order against him.⁹² Later, the mother's husband moved back in with the mother and assaulted one of the

82. *Nicholson*, 820 N.E.2d at 849.

83. *Id.*

84. *Id.* at 843-44.

85. *Id.* at 847.

86. *Id.*

87. *Id.* at 846.

88. *Id.* at 843-45.

89. See *Green ex rel. T.C. v. Mattingly*, No. 07-CV-1790 (ENV)(CLP), 2010 WL 3824119, at *8 (E.D.N.Y. Sept. 23, 2010) (ruling on parent's 42 U.S.C. § 1983 claim that arose out of a New York state criminal charge).

90. No. 07-CV-1790 (ENV)(CLP), 2010 WL 3824119 (E.D.N.Y. Sept. 23, 2010).

91. *Green*, 2010 WL 3824119, at *8.

92. *Id.* at *2.

mother's children while the mother was away.⁹³ According to a caseworker involved in the case, the mother was aware that her husband had "hit the child on the buttocks in the past."⁹⁴ The mother's husband was subsequently incarcerated.⁹⁵ Despite the husband's inability to hurt the children while in jail, the court held that the temporary removal of the children from the mother was proper because the mother had known that the father hit the child before and "did nothing to protect the child."⁹⁶ Even in New York, where *Nicholson* was decided, the state may still take away a survivor's children if her abuser harmed the children, even if the survivor herself never inflicted any abuse upon them.⁹⁷

3. Survivors in the Criminal Context

In the criminal context, such as child endangerment or child abuse prosecutions, a few states have codified statutory defenses that a survivor may invoke against criminal failure to protect charges.⁹⁸ Pennsylvania is not among

93. *Id.*

94. *Id.* at *3.

95. *Id.*

96. *Id.*

97. *See id.* at *6–10.

98. *See* ARK. CODE ANN. § 5-27-221(b) (West 2017) ("It is a defense to a prosecution for the offense of permitting abuse of a minor if the parent, guardian, or person legally charged with the care or custody of the minor takes immediate steps to end the abuse of the minor, including prompt notification of a medical or law enforcement authority, upon first knowing or having good reason to know that abuse has occurred."); HAW. REV. STAT. ANN. § 709-903.5(2) (West 2017) ("It shall be a defense to prosecution under sections 709-903.5(1) and 709-904(1) [relating to endangering the welfare of a minor] if, at the time the person allowed another to inflict serious or substantial bodily injury on a minor, the person reasonably believed the person would incur serious or substantial bodily injury in acting to prevent the infliction of serious or substantial bodily injury on the minor."); IOWA CODE ANN. § 726.6(1)(e) (West 2017) ("[I]t is an affirmative defense to this subsection [describing the crime of child endangerment] if the person had a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person or the child or minor."); MINN. STAT. ANN. § 609.378(subdiv. 2) (West 2017) ("It is a defense to a prosecution under subdivision 1, paragraph (a), clause (2), or paragraph (b) [relating to neglect or endangerment of a child], that at the time of the neglect or endangerment there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or the child in retaliation."); N.J. STAT. ANN. § 2A:61B-1(a)(1) (West 2017) ("A parent, resource family parent, guardian or other person standing in loco parentis within the household who knowingly permits or acquiesces in sexual abuse by any other person also commits sexual abuse, except that it is an affirmative defense if the parent, resource family parent, guardian or other person standing in loco parentis was subjected to, or placed in, reasonable fear of physical or sexual abuse by the other person so as to undermine the person's ability to protect the child."); OHIO REV. CODE ANN. § 2903.15(B) (West 2017) ("It is an affirmative defense to a charge under this section [describing the crime of permitting child abuse] that the defendant did not have readily available a means to prevent the harm to the child or the death of the child and that the defendant took timely and reasonable steps to summon aid."); TEX. PENAL CODE ANN. § 22.04(l) (West 2017) ("It is an affirmative defense to prosecution under this section [describing the crime of injury to a child, elderly individual, or disabled individual] . . . [that] there is no evidence that, on the date prior to the offense charged, the defendant was aware of an incident of injury to the child . . . and failed to report the incident; and the person . . . was a victim of family violence . . . committed by a person who is also charged with an offense against the child . . . ; did not cause [the harm] . . . and did not reasonably

them. However, analyzing these statutes is helpful to determine which legislative schemes might be effective in Pennsylvania.

Of the states that have enacted statutes with an affirmative DV defense to failure to protect crimes, New Jersey's statute is the most protective of survivors. The New Jersey statute lacks certain requirements that bar survivors in other states from using an affirmative DV defense—a requirement that a survivor fears a particular degree of harm,⁹⁹ take protective steps within a certain specified time frame,¹⁰⁰ or lacks prior knowledge of abuse.¹⁰¹ Rather, in New Jersey, a survivor may successfully plead an affirmative defense to the failure to protect her child from sexual abuse if the survivor “was subjected to, or placed in, reasonable fear of physical or sexual abuse by the other person [who actively sexually abused the victim child] so as to undermine [the survivor’s] ability to protect the child.”¹⁰² However, the New Jersey law’s affirmative defense only covers when a survivor fears harm to herself, not when she fears that a worse harm may befall her child were she to intervene or report the abuse.¹⁰³

In the states that have not codified such a defense (such as Pennsylvania), survivors may try to defend themselves against a failure to protect charge in one of two ways.¹⁰⁴ The first way is to use evidence of DV to bolster a duress defense, showing that the history of abuse caused the survivor to perceive an imminent threat if she were to either intervene or report the abuse of her child.¹⁰⁵ The second way is to use evidence of DV to rebut one of the elements of the crime, by showing that in the context of an abusive relationship, the survivor’s decision not to report the abuse was actually protective of her child.¹⁰⁶

believe at the time of the omission that an effort to prevent the person also charged with an offense against the child . . . from committing the offense would have an effect . . .”). Due to a lack of Pennsylvania case law discussing the various ways in which evidence of DV may be used as a defense in the criminal failure to protect context, this Part discusses, in general, nationwide trends to illustrate how courts are likely to treat evidence of DV as a defense in a criminal matter.

99. In comparison, section 709-903.5(2) of the HAWAII REVISED STATUTES, section 726.6(e) of the IOWA CODE, and section 609.378(subdiv. 2) of the MINNESOTA STATUTES require that a parent fear substantial bodily injury in order for the parent to be able to plead the affirmative defense successfully.

100. In comparison, section 5-27-221(b) of the ARKANSAS CODE requires that a parent take “immediate” steps upon discovering abuse, and section 2903.15(B) of the OHIO REVISED CODE requires that a parent make “timely” efforts to summon aid for the parent to be able to plead the affirmative defense successfully.

101. In comparison, section 22.04(*l*) of the TEXAS PENAL CODE requires that there is no evidence of a parent’s knowledge of prior abuse in order for the parent to be able to successfully plead the affirmative defense.

102. N.J. STAT. ANN. § 2A:61B-1(a)(1) (West 2017).

103. Compare *id.*, with IOWA CODE ANN. § 726.6(1)(e) (West 2017) (“[I]t is an affirmative defense to this subsection [describing the crime of child endangerment] if the person had a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person or the child or minor.”).

104. Interview with Cindene Pezzell, *supra* note 8.

105. *Id.*

106. *Id.*

a. *Using Evidence of DV to Bolster a Duress Defense*

In general, experiencing DV is not a stand-alone defense to a crime.¹⁰⁷ Rather, it can be used as evidence to bolster an affirmative defense, such as duress or self-defense.¹⁰⁸ In cases where a defendant/survivor has harmed or killed her abuser, evidence of abuse has been most often introduced to bolster a self-defense claim.¹⁰⁹ In failure to protect cases, however, evidence of having been abused by the person who physically harmed the victim child has been used to bolster a defense of duress, but with only minimal success.¹¹⁰

Survivors charged with a failure to protect crime face numerous hurdles in successfully pleading a duress defense.¹¹¹ Some courts have refused to hear evidence that the defendant/survivor was abused, finding that such evidence would confuse the objective standard a jury should use in assessing the reasonableness of the defendant's fear.¹¹² Those courts held that, on balance, the probative value of the evidence was less compelling than its prejudicial effect, diverting the jury's attention from other issues in the case.¹¹³ Other courts have refused to hear such evidence because a history of abuse between the survivor and the person who harmed the child merely proves a generalized fear, rather than the immediate threat necessary for a successful duress defense.¹¹⁴ Indeed, a court will not permit testimony of DV to bolster a duress defense absent a particular threat proximate to the criminal conduct alleged, even when, for example, a survivor fears her husband because he killed his first wife and "brutalized" the survivor.¹¹⁵

107. But see *supra* Part II.C.3 for a discussion of the statutes that provide for DV as a stand-alone defense.

108. Interview with Cindene Pezzell, *supra* note 8.

109. Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397, 435 (1999). While Dr. Lenore Walker's theory of battered woman syndrome is sometimes used to bolster a duress or self-defense claim, it is not a stand-alone defense and "the legal and empirical support for the syndrome have been sharply criticized." *Id.* at 431-40.

110. *Id.* at 435-40. To successfully plead a duress defense, a criminal defendant must show that the abuser threatened the survivor and that the threat produced in the survivor a reasonable fear of imminent death or other serious harm. *Id.* at 435-36.

111. See Brown, *supra* note 5, at 207 (describing a court case in which the court refused to hear evidence of DV because a history of abuse between the survivor and the person who harmed the child merely proves a generalized fear); Liang & Macfarlane, *supra* note 109, at 437 (describing *United States v. Willis*, 38 F.3d 170 (5th Cir. 1994), in which the court excluded evidence of DV on the grounds that it would confuse the objective standard a jury should use in assessing the reasonableness of the defendant's fear).

112. Liang & Macfarlane, *supra* note 109, at 437.

113. Interview with Cindene Pezzell, *supra* note 8; see *People v. Humphrey*, 921 P.2d 1, 6 (Cal. 1996) ("If the belief subjectively exists but is objectively unreasonable, there is 'imperfect self-defense,' i.e., 'the defendant is deemed to have acted without malice and cannot be convicted of murder,' but can be convicted of manslaughter." (quoting *In re Christian S.*, 872 P.2d 574, 583 (Cal. 1994))).

114. Brown, *supra* note 5, at 207.

115. *Id.* at 222-23.

b. Using Evidence of DV to Negate Elements of the Crime

Using evidence of DV to rebut elements of a failure to protect crime has seen more success than using DV to bolster a duress defense.¹¹⁶ However, even this defense strategy has received little to no success at the trial level, but rather has produced positive results in plea bargains and other negotiations with district attorney offices.¹¹⁷

For example, a defendant/survivor may use evidence of her history of abuse to argue that she did not have the requisite mens rea.¹¹⁸ If the state argues that the survivor had mens rea because she recklessly failed to act, evidence that the survivor had been abused could negate that theory.¹¹⁹ For example, the survivor, based on her prior history with the abuser, may not have reported the abuse because she knew that the abuser would cause even greater harm to the child were the survivor to intervene.¹²⁰ Thus, the survivor did not have the requisite reckless state of mind when she decided not to report the abuse.

D. Arguments for Holding Survivors Accountable for Failure to Protect

Some commentators argue that allowing a survivor's experience with DV to serve as a defense to failure to protect charges is against public policy.¹²¹ Their policy arguments include both deterrent and retributive rationales.¹²²

Among these commentators, some argue that when a survivor is charged with a crime related to a failure to protect her child, states should not permit DV to serve as a defense.¹²³ These commentators argue that allowing such a defense would not "discourage[] the mother from entering another battering relationship nor encourage[] her to protect the child from further abuse."¹²⁴ In so doing, the commentators assume that holding survivors responsible for failing to protect their children would both make it less likely that a parent will begin a relationship with an abuser and more likely that a parent would report child abuse committed by her partner.¹²⁵

116. Interview with Cindene Pezzell, *supra* note 8.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *E.g.*, Liang & Macfarlane, *supra* note 109, at 440–45; Tobin P. Richer, Note, *Placing Proper Limits on Battered Woman Syndrome in Areas Beyond Self-Defense: An Argument Against Admission in Child Abuse and Neglect Cases*, 1 DEPAUL J. HEALTH CARE L. 855, 909 (1997).

122. *See* Liang & Macfarlane, *supra* note 109, at 440–45 (arguing that using evidence of DV to bolster a defense to a child abuse related crime would be contrary to the goals of deterrence, retribution, and prevention of future child abuse); Richer, *supra* note 121, at 908 (stating that the use of evidence of DV as a defense in a child abuse context could result in a slippery slope and create other defenses to child abuse).

123. Liang & Macfarlane, *supra* note 109, at 442.

124. *Id.*

125. *See id.* (arguing that prosecuting mothers that do not report when their abusers harm their children will discourage them from entering another relationship with an abuser and will not discourage them from reporting child abuse in the future).

These commentators contend that experiencing DV should not allow survivors to avoid punishment for failure to protect.¹²⁶ They state that when a parent “intentionally places herself in an abusive relationship [she] should not be characterized as a victim of that relationship,” but rather is “no more a ‘loving and good parent’ than the abuser.”¹²⁷ In other words, they argue that when a parent decides to enter or stay in a relationship with someone who is an abuser, that parent made a conscious decision that placed her children in jeopardy and should be held accountable for that choice.¹²⁸ These commentators cite statistics that show a strong correlation between a man’s abuse of a woman and the man’s abuse of the woman’s children, arguing that a woman places her children in danger when she opts to begin or continue a relationship with an abuser.¹²⁹

Another commentator argues that allowing DV to serve as a defense to a survivor’s failure to protect her children creates a slippery slope.¹³⁰ The commentator worries that allowing DV as a defense may lead to intoxication or stress serving as defenses to child abuse.¹³¹ The commentator argues that opening the door to the liberal use of defenses in child abuse cases would risk the state returning children to abusive homes and jeopardizing their welfare.¹³²

Anticipating common counterarguments,¹³³ the commentator states that inaction is not the last resort for a survivor.¹³⁴ In illustrating this point, the commentator points to a particular case when a survivor delayed seeking medical attention for her child for fear that her child would be taken away from her or that her boyfriend would suffer consequences for having abused the child.¹³⁵ In that instance, the child died, a result that the mother likely could have prevented had the mother gotten treatment for the child earlier.¹³⁶ The commentator notes that the survivor had the ability to seek medical attention earlier and should not escape punishment for her inaction merely because she has experienced DV.¹³⁷

Other commentators similarly anticipate counterarguments,¹³⁸ stating that “[i]t is a weak argument that such a woman is trying to protect the child from some greater harm.”¹³⁹ Those commentators contend that, given the survivor’s

126. *Id.*

127. *Id.* at 443.

128. *See id.* (arguing that the survivor is as much a perpetrator of DV as the abuser who harmed the survivor’s child).

129. *Id.*

130. Richer, *supra* note 121, at 908.

131. *Id.*

132. *Id.*

133. *See infra* Part II.E for a discussion of arguments in favor of allowing DV to serve as a defense for failure to protect one’s child.

134. Richer, *supra* note 121, at 886.

135. *Id.* at 886–87.

136. *Id.*

137. *Id.*

138. *See infra* Part II.E for a discussion of arguments in favor of allowing DV to serve as a defense for failure to protect one’s child.

139. Liang & Macfarlane, *supra* note 109, at 442 (arguing that the survivor is as much a

prior experience with the abuser, the survivor should realize that “submission will not result in less abuse, but more” because the survivor should have known through experience that placating the abuser does not stop the abuser from harming her in the future.¹⁴⁰

E. Critiques of Holding Survivors Accountable for Failure to Protect

Those who argue against holding survivors liable under failure to protect laws refute the idea that survivors necessarily fail to protect their children when they decide not to report abuse or leave the abusive relationship.¹⁴¹ On the contrary, the safest option for a particular survivor and her children may be to stay in a relationship with the abuser and not report abuse.¹⁴² These writers also note that rather than encouraging parents to report, the threat of failure to protect liability actually discourages survivors from reporting when their child is abused.¹⁴³ They also observe that, although failure to protect laws are race and gender neutral on their face, the enforcement of these laws is racist and sexist.¹⁴⁴

1. Survivors Are Engaging in a Rational Safety Calculus

There are several reasons why a survivor may, after weighing her options, choose not to leave her abuser or not to report the abuser’s violence toward her child.¹⁴⁵ One fear is that leaving an abuser or taking another preventative action, such as reporting the abuse, may create a bigger risk for the survivor and her children.¹⁴⁶ From past experience with the abuser, the survivor may know that reporting the abuse or intervening when the abuser harms the child would only result in the abuser retaliating and inflicting greater harm on the child.¹⁴⁷

Unfortunately, the current legal system does little to allay a survivor’s fears that her abuser will retaliate if she leaves him or reports his behavior.¹⁴⁸ If the survivor obtains a protective order, her safety is not guaranteed.¹⁴⁹ Indeed,

perpetrator of DV as the abuser who harmed the survivor’s child).

140. *Id.* (arguing that excusing a survivor’s role in DV on the basis of battered woman syndrome discourages women from reporting child abuse).

141. But see *infra* Part II.E.1 for further explanation of why survivors may not necessarily fail to protect their children when deciding whether to report or leave an abusive relationship.

142. See *infra* Part II.E.1 for a discussion of how survivors engage in a rational safety calculus when in an abusive relationship.

143. See *infra* Part II.E.2 for a discussion of common consequences of failure to protect laws.

144. See *infra* Part II.E.3 for an analysis of how failure to protect laws disproportionately impact women and black families.

145. See, e.g., Brown, *supra* note 5, at 216–17; “Failure to Protect” Working Grp., *supra* note 10, at 849, 858–62; Kitchen, *supra* note 10, at 382–89; Lindauer, *supra* note 10, at 798–800; Miccio, *A Reasonable Battered Mother*, *supra* note 10, at 102–04; Murphy, *supra* note 10, at 721; Fugate, *supra* note 6, at 272, 291–93.

146. Fugate, *supra* note 6, at 293.

147. Interview with Cindene Pezzell, *supra* note 8.

148. See Kitchen, *supra* note 10, at 376.

149. *Id.*

“[a]busers often violate protective orders.”¹⁵⁰ Additionally, leaving her abuser may result in the abuser filing for custody of their children.¹⁵¹ Custody statutes, which favor co-parenting, may punish the survivor with a less favorable custody order if she did not encourage her child’s relationship with his father.¹⁵²

In Pennsylvania, there are a number of factors a judge must consider to determine the best interests of the child and how to apportion physical custody of the child.¹⁵³ Although DV is a factor listed in the statute, so is “[w]hich party is more likely to encourage and permit frequent and continuing contact between the child and another party.”¹⁵⁴ If a survivor worries that an abuser would harm her child and thus keeps the child from the abuser, that evidence could be used against the survivor in custody court.¹⁵⁵ Nationally, “family courts often trivialize the significance of abuse in custody determinations,” so it is possible that, in balancing the custody factors, a court would award the abusive father, rather than the survivor, primary custody of the child.¹⁵⁶ Indeed, judges frequently do not consider abuse between the parties in making a custody determination and will only consider child abuse if the child is old enough to testify to the abuse or if there is a third-party witness.¹⁵⁷

Avoiding a custody dispute by fleeing with her child is often not a viable option for a survivor.¹⁵⁸ If a survivor attempts to flee with her children without a custody order, she risks both criminal and civil liability.¹⁵⁹ Under Pennsylvania’s

150. *Id.*

151. *Id.*

152. *Id.*

153. 23 PA. STAT. AND CONS. STAT. ANN. § 5328(a) (West 2017) (listing sixteen factors a judge must consider when awarding custody).

154. *Id.*

155. Leigh Goodmark, *Law Is the Answer? Do We Know That for Sure?: Questioning the Efficacy of Legal Interventions for Battered Women*, 23 ST. LOUIS U. PUB. L. REV. 7, 28 (2004) (“Battered mothers must also contend with ‘friendly parent’ provisions when they bring custody cases. These provisions require courts to consider which parent will be more likely to foster continuing, meaningful contact between the children and the other parent. Most statutes are silent as to the relative weight to be given friendly parent and DV provisions. Courts can therefore find that the battered mother’s unwillingness to foster continuing contact (based on her experiences with the batterer as spouse and parent) is more relevant to the custody determination than the history of violence that has rendered her ‘unfriendly.’ Opposing joint custody, which requires the victim to interact regularly with the batterer, or asking for supervised visitation to protect the child and herself from violence can mark the victim of violence as an ‘unfriendly parent.’” (footnotes omitted)).

156. Kitchen, *supra* note 10, at 397; *see, e.g., Vachon v. Pugliese*, 931 P.2d 371, 377 (Alaska 1996) (reversing lower court order awarding custody of the child to the father based on the mother’s failure to encourage contact between the father and the child even though mother alleged that she fled with child due to father’s domestic abuse).

157. Interview with Susan Pearlstein, Supervising Attorney, Family Law Unit, Phila. Legal Assistance, in Phila., Pa. (Dec. 12, 2016). Judges often do not consider abuse absent testimony from the child or a third-party witness in part because there is a misconception that mothers frequently fabricate a history of domestic violence to gain an upper hand in custody disputes. *Id.* However, in the experience of advocates, it is rare that women lie about having experienced abuse. *Id.*

158. Kitchen, *supra* note 10, at 397.

159. *Id.*

relocation statute, a parent who relocates with her child without providing proper notice to the other parent risks having that relocation used as a factor against her in a custody proceeding, the child being returned to the other parent, and the imposition of sanctions.¹⁶⁰

If a survivor attempts to call the police, it is not guaranteed that the abuser will be arrested.¹⁶¹ Indeed, depending on the state's laws and local police policy, it is possible that the survivor herself will be arrested if she argues with a police officer or if she is in a jurisdiction with a mandatory arrest policy that requires an officer to arrest someone if there is probable cause to believe DV has been committed.¹⁶² Even in instances when an abuser is arrested, charged, and convicted, most DV-related crimes are only misdemeanors and abusers are unlikely to receive more than a minimal sentence.¹⁶³ Indeed, some judges are hesitant to give abusers any jail time and instead opt to give perpetrators probation.¹⁶⁴ This preference for probation is consistent with "evidence that prosecution of abusers puts victims at increased long-term risk of harm" because abusers are more likely to retaliate after their victim files a criminal report, and it is unlikely that abusers will be incarcerated long enough to prevent them from retaliating.¹⁶⁵

Additionally, if a mother either reports her partner's abuse or seeks medical attention for her child, she risks removal of her child from her care.¹⁶⁶ Placement of her child in foster care may not result in a safer environment for her child.¹⁶⁷ On the contrary, compared to the general population, children in foster care are more likely to experience maltreatment, inadequate medical care, sexual abuse,

160. 23 PA. STAT. AND CONS. STAT. ANN. § 5337(j) (West 2017). Any move that significantly impacts the other parent's ability to see the child is considered a relocation in Pennsylvania. *See id.* § 5322(a) (defining "relocation" as "[a] change in a residence of the child which significantly impairs the ability of a nonrelocating party to exercise custodial rights").

161. Kitchen, *supra* note 10, at 386.

162. *Id.* Perversely, mandatory arrest policies seem to increase the risk that a survivor will be arrested or that she will lose custody of her children. *Cf. id.* at 387 n.81 ("[I]n Minnesota County, victims comprised thirteen percent of the arrests in the first year after adoption of the mandatory-arrest policy and in Wisconsin the rate of referring women to abuser programs increased twelve-fold after the State adopted a mandatory-arrest policy.").

163. *Id.* at 387.

164. Goodmark, *supra* note 155, at 34 n.150.

165. Kitchen, *supra* note 10, at 387–88.

166. *See* Lindauer, *supra* note 10, at 805 ("Charges are brought against the victim of violence, often the mother and custodial parent, for failing to protect her children from the domestic abuse. In essence, the allegation charges the mother, who is also the victim of violence, for not preventing the violence or for 'allowing' their child to be exposed to it." (footnote omitted)).

167. *See id.* at 811–12; Jill M. Zuccardy, Nicholson v. Williams: *The Case*, 82 DENV. U. L. REV. 655, 667 (2005) ("There is a notion that foster care provides safety for children. This is simply not true. It's not just me who says so with my anecdotal experience. I won't go through all of the data but it's out there. There are reports from the Department of Health and Human Services that the rate of child maltreatment is more than seventy-five percent higher in foster care than in the general population; that a child is twice as likely to die of abuse in foster care as in the general population; that the rate of substantiated cases of sexual abuse in foster care is more than four times higher than the rate in the general population, and so on and so forth.").

and physical abuse resulting in death.¹⁶⁸

Survivors also may choose to stay in relationships with their abusive partners for reasons beyond those directly related to her or her child's physical safety.¹⁶⁹ Because welfare benefits are "becoming increasingly difficult to obtain," some women may stay in abusive relationships out of financial dependency.¹⁷⁰ And immigrant women are particularly vulnerable because they may lack other social support, may have difficulty understanding English-language resources, or may be dependent on their partners for their legal status in this country.¹⁷¹

2. The Threat of Failure to Protect Laws May Discourage Reporting

While some commentators argue that failure to protect laws are necessary to encourage survivors to report child abuse,¹⁷² others note that the threat of being held liable under failure to protect laws can actually deter survivors from reporting child abuse.¹⁷³ Some abusers even use the threat of calling child protective services to exert control over the survivor, adding to a survivor's fear that her child could be taken away from her if she were to report her abuser's behavior.¹⁷⁴

Scholars point to statistics to support the notion that increasing liability of survivors who fail to protect their children only further discourages other survivors from reporting.¹⁷⁵ When the Massachusetts Department of Social Services began identifying DV between a parent and the parent's partner as a sign that the survivor's child could also be experiencing abuse, child abuse reports increased but fewer survivors sought services.¹⁷⁶ Scholars have explained that when the state removes children from survivors, other survivors interpret that "to mean that any time a battered mother goes to a social worker, talks to her children's teacher, goes to her doctor or calls the police to report DV, she may be placing the custody of her children in jeopardy."¹⁷⁷ Thus, these scholars suggest that failure to protect laws actually discourage, rather than encourage, survivors from reporting child abuse.¹⁷⁸

168. Lindauer, *supra* note 10, at 811–12.

169. *E.g.*, "Failure to Protect" Working Grp., *supra* note 10, at 859.

170. *Id.* at 859–60.

171. *Id.*

172. See *supra* Part II.D for the argument that failure to protect laws are necessary to encourage survivors to report child abuse.

173. See Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11 (stating that many of their clients do not report abuse for fear that the Department of Human Services would take their children away).

174. Stark, *A Failure to Protect*, *supra* note 10, at 41.

175. "Failure to Protect" Working Grp., *supra* note 10, at 857–58.

176. *Id.*

177. *Id.* at 857.

178. *Id.* at 857–58.

3. The Enforcement of Failure to Protect Laws Has a Disproportionate Impact on Women and Black Families

Critics of failure to protect laws point out that these laws have punished women more than men and black parents more than white parents.¹⁷⁹ Some commentators argue that the interplay of sexist and racist stereotypes means that black mothers are more likely to be mistreated by the dependency system than parents representing other demographics.¹⁸⁰

a. Gender

Many scholars argue that failure to protect laws are enforced in a gender-biased way that reflects courts' unrealistic expectations of mothers.¹⁸¹ When a survivor does not report child abuse for fear that the abuser would retaliate by harming her, courts generally hold that she should have put her child's well-being before her own.¹⁸² Similarly, scholars suggest that there is a trend of courts finding that women that are absent during the abuse nonetheless fail to protect their child if their child has visible injuries and they do not report possible abuse.¹⁸³ Conversely, the trend is that men charged with failure to protect successfully use the fact that they were not present during the abuse as exculpatory evidence.¹⁸⁴ Those charged criminally under failure to protect laws are almost exclusively women, a discrepancy that is only partially explained by the increased likelihood that a woman would have custody of her children.¹⁸⁵

Commentators have explained the difference in how mothers and fathers are treated under failure to protect laws as the product of sexist assumptions about parenting.¹⁸⁶ Specifically, commentators postulate that society will "accept nothing less than complete sacrifice" from a mother.¹⁸⁷ These commentators state that our culture presumes that "a mother will protect her children at all costs, even if it results in further risk to herself," but only expects relatively "thin" levels of personal sacrifice from fathers.¹⁸⁸ Similarly, courts do not expect a boyfriend of a female abuser to know that he violates the law when he does not

179. See, e.g., Starla J. Williams, *Violence Against Poor and Minority Women & the Containment of Children of Color: A Response to Dorothy E. Roberts*, 24 WIDENER L.J. 289, 296 (2015) (stating that black families are more likely to be in the dependency system than white families); Fugate, *supra* note 6, at 285 (pointing out that these laws punish women more than men).

180. E.g., Beth A. Mandel, Comment, *The White Fist of the Child Welfare System: Racism, Patriarchy, and the Presumptive Removal of Children from Victims of Domestic Violence in Nicholson v. Williams*, 73 U. CIN. L. REV. 1131, 1150–56 (2005).

181. See, e.g., Miccio, *A Reasonable Battered Mother*, *supra* note 10, at 95–97; Fugate, *supra* note 6, at 285.

182. Stark, *The Battered Mother*, *supra* note 10, at 124.

183. See, e.g., Fugate, *supra* note 6, at 295–97.

184. See, e.g., *id.*

185. *Id.* at 286–87.

186. E.g., Brown, *supra* note 5, at 230–31; Miccio, *A Reasonable Battered Mother*, *supra* note 10, at 96–98.

187. Brown, *supra* note 5, at 231.

188. Miccio, *A Reasonable Battered Mother*, *supra* note 10, at 118.

report the severe abuse of an infant with whom he resides.¹⁸⁹

b. Race

A disproportionate number of black survivors are reported for child abuse.¹⁹⁰ Indeed, that has been the experience of advocates who represent parents who are placed on the registry for abusing their child.¹⁹¹ In 2013, 22% of the children in the child welfare system were black and 45% were white.¹⁹² However, during the same period in the United States, 15% of all children were black and 73% were white.¹⁹³ Thus, black children are significantly overrepresented and white children are significantly underrepresented in the child welfare system.¹⁹⁴

Scholars debate why black families are disproportionately involved in the child welfare system. Elizabeth Bartholet argues that black children are simply maltreated at higher rates than white children and that the rate of involvement with the child welfare system is roughly proportionate to the rate of maltreatment in black and white families.¹⁹⁵ However, in response to Bartholet's assertions, Dorothy Roberts notes that there is a correlation between which children caseworkers classify as mistreated and the class of the parents being investigated, rather than the level of injuries the children suffered.¹⁹⁶ Roberts points to studies that show that the removal of a child from a home is more strongly correlated with the socioeconomic status of the family than the severity of a child's injuries.¹⁹⁷ Since black families are disproportionately likely to experience poverty, it might not be that black children are more likely to be mistreated, but that they are more likely to be labeled as mistreated by caseworkers.¹⁹⁸ Thus, failure to protect laws applied against survivors may prejudice black parents disproportionately because the threshold to classify a black child as abused may be lower than the threshold to do the same to a white child.

189. Stark, *A Failure to Protect*, *supra* note 10, at 43 n.52.

190. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11; cf. Joanne N. Wood et al., *Disparities in the Evaluation and Diagnosis of Abuse Among Infants with Traumatic Brain Injury*, 126 PEDIATRICS 408, 410–16 (2010) (finding that children with black parents and children who are uninsured or on public insurance are overdiagnosed with and overevaluated for abusive head trauma while children with white parents and children on private insurance are underdiagnosed and underevaluated).

191. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

192. Williams, *supra* note 179, at 297. In this Comment, “child welfare system” refers to any involvement with social services, from an initial investigation to placement in foster care.

193. *Id.* at 298.

194. *Id.*

195. Elizabeth Bartholet, *Thoughts on the Liberal Dilemma in Child Welfare Reform*, 24 WM. & MARY BILL RTS. J. 725, 729 (2016).

196. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 175–76.

197. *Id.*

198. *Id.* See also Wood et al., *supra* note 190, at 410–16.

III. DISCUSSION

Failure to protect laws should not be used to punish survivors. These laws recognize that survivors may have engaged in a rational safety calculus when deciding not to report the abuse,¹⁹⁹ actually discourage the reporting of child abuse,²⁰⁰ and have a disparate impact on women and black families.²⁰¹ Pennsylvania should add an amendment to the CPSL to prevent this unfair and dangerous result that arises in the child abuse registry context.²⁰² The proposed amendment would create an affirmative defense for parents appealing their placement on the registry.²⁰³ This Section will first refute the argument that failure to protect laws should punish survivors who do not report child abuse at the hands of their abuser.²⁰⁴ This Section will then propose an amendment to the CPSL.²⁰⁵

A. *Failure to Protect Laws Should Not Punish Survivors*

Commentators who support punishing survivors under failure to protect laws argue that doing so deters parents from entering abusive relationships and encourages parents to take protective measures when a third party harms their child.²⁰⁶ However, failure to protect laws actually discourage survivors from reporting abuse because survivors worry that doing so will result in the removal of their children from their care.²⁰⁷ This fear is a rational one: social service agencies have a history of removing children from survivors even when the survivor did not herself harm her child.²⁰⁸ This fear is particularly rational for black survivors, who are disproportionately likely to have their children involved in the child welfare system.²⁰⁹ These survivors fear having their children removed not just because they would miss their child but because their child may suffer more severe abuse in foster care than at home.²¹⁰ Also, failure to protect laws do not deter survivors from entering abusive relationships. A survivor often cannot simply leave the relationship once it turns abusive.²¹¹ The systems currently in

199. See *supra* Part II.E.1 for a discussion of why a survivor may not report abuse after engaging in a rational safety calculus.

200. See *supra* Part II.E.2 for a discussion of how failure to protect laws may discourage the reporting of child abuse.

201. See *supra* Part II.E.3 for a discussion of the disparate impact of failure to protect laws on women and black families.

202. 23 PA. STAT. AND CONS. STAT. ANN. § 6303(b.1)–(d) (West 2017) (defining child abuse under the statute and referencing *id.* § 6304, which provides exclusions to the definition).

203. See *infra* Part III.B for a discussion of how the proposed amendment will allow for parents to plead an affirmative defense.

204. See *infra* Part III.A.

205. See *infra* Part III.B.

206. Liang & Macfarlane, *supra* note 109, at 440–45.

207. “Failure to Protect” Working Grp., *supra* note 10, at 857–58.

208. *Nicholson v. Scoppetta*, 820 N.E.2d 840, 843 (N.Y. 2004).

209. Roberts, *supra* note 196, at 175–76.

210. Lindauer, *supra* note 10, at 811–12.

211. See, e.g., Kitchen, *supra* note 10, at 376.

place to protect survivors are imperfect and often cannot guarantee a survivor's safety if she were to leave the abuser.²¹²

Commentators also argue that punishing survivors under failure to protect laws dispenses appropriate retribution to wrongdoers who did not report child abuse.²¹³ However, this assumes that survivors are engaging in a reprehensible act when they do not report their abuser. This assumption is often incorrect. Rather, many survivors choose not to report the abuse because, if they were to do so, their abuser could enact greater harm upon the child or the survivor.²¹⁴ Given that reality, it would be perverse to punish a survivor for making a calculated safety decision to do her best to mitigate harm to herself or her child. Some may argue that failing to report abuse for fear of retribution is only forgivable when the retribution the survivor fears is harm to her child, rather than herself. However, the state's expectation that a survivor would martyr herself for her child is unfairly gendered.²¹⁵ It is unjust for state laws to effectively require a mother to sacrifice her own physical safety for her child's when that same expectation is not usually placed upon the father.²¹⁶

Lastly, those who favor punishing survivors under failure to protect laws worry that to allow DV to excuse a survivor's failure to report child abuse would result in a slippery slope of defenses to failure to protect.²¹⁷ One commentator argues that if experiencing DV is an excuse to not report child abuse then perhaps intoxication or extreme stress could be allowed as defenses to failing to protect one's child.²¹⁸ This slippery slope argument is unfounded because the difference between intoxication or stress and physical assault at the hands of a loved one is stark. Only DV places one who witnesses child abuse in the predicament of having to choose between reporting abuse or risking retaliation and greater harm to either the witness or the child if she were to report.²¹⁹ Given the unique predicament in which survivors are placed, it is unlikely that an affirmative DV defense will result in a slippery slope of other defenses to failing

212. See, e.g., *id.*

213. Liang & Macfarlane, *supra* note 109, at 440–45. This Comment does not discuss those instances where it may be appropriate to hold someone responsible for failure to protect a child, such as the grandparents in *L.H. v. Department of Public Welfare*, No. 1270 C.D.2014, 2015 WL 5444918, at *3 (Pa. Commw. Ct. June 18, 2015), *appeal denied*, 130 A.3d 1293 (Pa. 2015), discussed *supra* in Section II. Of course, there are instances when it is appropriate and just to punish people who fail to protect their child. A parent or guardian should be placed on the child abuse registry when she willfully refuses to protect her child from an abuser, as opposed to engaging in a rational safety calculus to mitigate harm to herself or her child. See, e.g., *L.H.*, 2015 WL 5444918, at *3 (ruling that the grandparents should continue to be placed on the registry where they permitted a sexual abuser to have contact with their grandchildren despite notice that the abuser was a danger to the children and without presenting any evidence that their decision to allow the abuser to see the children was calculated to prevent harm).

214. Fugate, *supra* note 6, at 293.

215. Brown, *supra* note 5, at 230–31.

216. Miccio, *A Reasonable Battered Mother*, *supra* note 10, at 118.

217. Richer, *supra* note 121, at 908.

218. *Id.*

219. Fugate, *supra* note 6, at 293.

to protect one's child.

Holding survivors accountable under failure to protect laws does not have the positive outcomes that some commentators suggest, and the survivors who are punished under these laws experience severe and unfair consequences.²²⁰ The punishment seems particularly unfair when not reporting the abuse may be the safest choice for a survivor and her family.²²¹ Specifically in the child abuse registry context, placement on the registry for failure to protect their child means survivors will face consequences including being denied employment, being unable to accompany their child on field trips, and being unable to adopt or foster a child.²²²

B. Legislative Reforms Can Help Prevent Unfair Outcomes for Survivors

To prevent any more survivors from unfairly remaining on the child abuse registry for failure to protect their children, the Pennsylvania legislature should amend the state's Child Protective Services Law²²³ to include language like that of New Jersey's criminal sexual assault statute.²²⁴ This Comment also proposes that at the administrative evidentiary hearing, ALJs should use factors like those enumerated in *Nicholson v. Scoppetta* to determine if the continued placement of a survivor on the child abuse registry is appropriate.²²⁵

1. Proposal for Legislative Amendment

The proposed amendment would allow for parents who are placed on the child abuse registry for failure to protect their child to plead an affirmative defense if they experienced DV. This defense would require that they were "subjected to, or placed in, reasonable fear of physical or sexual abuse, either to themselves or others."²²⁶ It would define "reasonable fear" as a fear that would "undermine the person's ability to report the abuse to the appropriate authorities."²²⁷

This language slightly alters the operative language in the relevant New Jersey criminal statute to apply the affirmative defense to the child abuse

220. See *supra* Part II.E for a complete discussion on the consequences survivors face under failure to protect laws.

221. See *supra* Part II.E.1 for a discussion of survivors not reporting abuse after engaging in a rational safety calculus. Note also that the survivor, as someone who has spent significant time with her abuser, may be in a better position than third parties, such as a judge or a caseworker, to determine the safest way for both her and her child to avoid physical harm at the hands of her abuser. Interview with Susan Pearlstein, *supra* note 157.

222. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

223. 23 PA. STAT. AND CONS. STAT. ANN. § 6303(c) (West 2017).

224. N.J. STAT. ANN. § 2A:61B-1(a)(1) (West 2017).

225. See *Nicholson v. Scoppetta*, 820 N.E.2d 840, 843 (N.Y. 2004) (enumerating factors a judge may use in determining whether a child should be adjudicated dependent from a parent/survivor).

226. This language is modified from section 2A:61B-1(a)(1) of the NEW JERSEY STATUTES ANNOTATED, as is explained *infra* notes 228–30 and accompanying text.

227. This language is modified from section 2A:61B-1(a)(1) of the NEW JERSEY STATUTES ANNOTATED, as is explained *infra* notes 228–30 and accompanying text.

registry context. The language in the New Jersey statute states that the fear should be such that would “undermine the person’s ability to protect the child.”²²⁸ However, as discussed above, a survivor may be protecting her child by *not* reporting child abuse.²²⁹ Thus, the language proposed here—“so as to undermine the person’s ability to safely report the abuse to appropriate authorities”—recognizes that some survivors do not report abuse in order to shelter their *children* from retribution and worse abuse.²³⁰

2. Proposal for Guidelines in Evidentiary Proceedings

In determining when fear is “reasonable” under the proposed amendment, ALJs should evaluate the history of threats and abuse between the survivor and abuser. In the duress context, reasonableness is based only upon threats immediately preceding the instant child abuse.²³¹ However, a survivor assesses whether to report a given instance of child abuse perpetrated by her abuser based on her entire history with the abuser.²³² It is possible that the abuser did not explicitly threaten retaliation and harm against the survivor or the child if the survivor reported the abuse, but the survivor may nevertheless expect retaliation or harm based on prior experience with the abuser.²³³ Thus, ALJs should allow testimony about prior threats or abuse that informed a survivor’s decision not to report the abuse when the survivor pleads this affirmative defense.

In evaluating whether the history of abuse between a survivor and her abuser created a reasonable fear at the time of the instant child abuse, the ALJ may consider the factors enumerated in New York case law for whether the survivor exercised a minimum degree of care.²³⁴ Although the New York court enumerated these factors to determine whether a survivor exercised a minimum degree of care when her child had merely witnessed abuse,²³⁵ these factors are equally applicable when a survivor chooses not to report her abuser’s physical harm to her children.²³⁶ As discussed above,²³⁷ in evaluating whether the state has met its burden of showing that a survivor has not exercised the “minimum degree of care” required by the New York statute, the court may consider the risks facing the survivor if she were to leave the abuser, threats the abuser may have made to the survivor’s life, risks of staying with the abuser, and risks of

228. § 2A:61B-1(a)(1).

229. Fugate, *supra* note 6, at 293.

230. See *supra* Part II.E.1 for a discussion of how a survivor may not report abuse due to a rational safety calculus.

231. Brown, *supra* note 5, at 222–23.

232. Interview with Cindene Pezzell, *supra* note 8.

233. Lindauer, *supra* note 10, at 817.

234. See *Nicholson v. Scopetta*, 820 N.E.2d 840, 843, 845 (N.Y. 2004) (enumerating factors to be considered in DV-related dependency proceedings).

235. *Id.* at 833–34.

236. See *supra* Parts II.E.1–2 for a discussion of the factors that survivors may consider in their decision not to report abuse or to remain in abusive relationships.

237. See *supra* Part II.C.2.

seeking help from the state.²³⁸ A survivor may decide not to report that her abuser harmed her child because she rationally believes that the abuser would retaliate if she left or sought services, particularly when the state-provided services are often inadequate.²³⁹ Looking at the credible fears the abuser instilled in the survivor, the resources available to the survivor, and the risks the survivor faced both if she left and if she stayed with the abuser will allow Pennsylvania courts to determine whether a survivor truly failed to protect her child.

IV. CONCLUSION

Failure to protect laws are ineffective and unjust as applied to survivors, and Pennsylvania's CPSL is no exception.²⁴⁰ In the child abuse context, survivors face lifetime stigma and barriers to employment because of their placement on the registry.²⁴¹ To prevent any more survivors from unfairly being placed on the registry, Pennsylvania should amend the CPSL.²⁴² The amendment should allow for the consideration of the entire context in which the survivor made her decision not to report the abuse so that survivors will no longer be punished for trying to make the safest choice for their families.²⁴³

238. *Nicholson*, 820 N.E.2d at 846.

239. See *supra* Part II.E for a discussion of the risk of retaliation if a survivor chooses to leave her abuser and how the resources the state provides are inadequate to guarantee safety for the survivor and her child.

240. See *supra* Part III.A for a discussion of the inefficacy and injustice of failure to protect laws as applied to survivors.

241. Interview with Kathleen Creamer, Janet Ginzberg & Suzanne Young, *supra* note 11.

242. See *supra* Part III.B for a discussion and analysis of why Pennsylvania should amend the CPSL.

243. See *supra* Part III.B.2 for a discussion of the evidentiary considerations and guidelines to be taken into account in these proceedings.