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Tipping the Balance in Favor of Justice: Due Process and the Thirteenth and Nineteenth Amendments in Child Removal from Battered Mothers

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I. INTRODUCTION

After Sharwline Nicholson was assaulted by her boyfriend for the first time, the Administration for Child Services ("ACS") of New York took her children without a court proceeding and temporarily placed them with foster parents. This action was particularly surprising because the children had not been abused by either their father or their mother.[1] Without determining who was at fault, ACS concluded that Nicholson was unfit to parent because she had "engage[d] in acts of domestic violence," even though she had not assaulted her children or her boyfriend but was only assaulted herself.[2] ACS took Nicholson's children from her and charged her with neglect simply because her children witnessed abuse against her.[3]

Nicholson's experience was not unique, as she represented a class of mothers who had children removed under similar circumstances. In what has already been called a "landmark" ruling,[4] *Nicholson v. Williams* held that the ACS policy violated abused mothers' substantive due process rights by taking away their children "solely because the mother[s] [had] been abused."[5] Judge Weinstein held that the city violated substantive due process by infringing on the fundamental right to parent and be

1. Nicholson v. Williams, 203 F. Supp. 2d 153, 168–69 (E.D.N.Y. 2002). ACS reported that Nicholson's son was hit one time by his father because of a bad report at school. *Id.* at 169.

2. *Id.* at 171. ACS also found that other mothers had "engage[d] in domestic violence" when they were beaten by their partners. *See id.* at 186.

3. *Id.* at 171. ACS did not even tell Nicholson where her children had been placed, and when she was finally allowed to visit them, she was able to "locate her daughter within the building by following the sounds of her crying." *Id.* at 169, 172. When Nicholson found her daughter, she was "sitting on a chair by herself with tears running down [her face]." *Id.* at 172. She "had a rash on her face, yellow pus running from her nose, and she appeared to have scratched herself." *Id.* Her son had a swollen eye and was later reported to have asked his next foster mother if she was going to hit him. *Id.*

4. Chris Lombardi, *Justice for Battered Women*, THE NATION, July 15, 2002, at 24.

5. *Nicholson*, 203 F. Supp. 2d at 250. The court also found that the mothers' procedural due process rights were violated. *Id.*

raised by parents without a showing of a substantial state interest.[6] In addition to finding a Fourteenth Amendment substantive due process violation against the city, the court suggested that the Thirteenth[7] and Nineteenth[8] Amendments should be "added" to this Fourteenth Amendment analysis.[9] The court stated that "mothers are entitled to a particularly scrupulous protection of their rights to custody of their children in construing the Fourteenth Amendment in light of the . . . Thirteenth and Nineteenth [Amendments]."[10]

The *Nicholson* court also observed that "[t]he law cannot ignore the profound sexual connotations of the Thirteenth Amendment" and that the "exact language of the Thirteenth Amendment could be construed to cover children forcibly and unnecessarily removed without due process . . . ."[11] Additionally, the court found that the Nineteenth Amendment "bears on the [substantive due process] analysis . . . . particularly in the context of domestic abuse . . . . [since it] was designed to put females on the same legal constitutional plane as males."[12] While noting that the Thirteenth and Nineteenth Amendments could aid a Fourteenth Amendment analysis, the *Nicholson* court did not adequately articulate the precise impact either of the amendments could have on the substantive due process analysis or how this analysis would impact a future battered mother's substantive due process claim. Although existing case law and commentary discuss substantive due process in the context of child custody,[13] there have been no prior attempts in the

6. *Id.* at 251.

7. Section 1 of the Thirteenth Amendment provides that "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1. Section 2 provides that "Congress shall have power to enforce this article by appropriate legislation." *Id.* § 2.

8. The Nineteenth Amendment provides in part that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex." U.S. CONST. amend. XIX.

9. *Nicholson*, 203 F. Supp. 2d at 247–48. The Thirteenth and Nineteenth Amendments were not critical to the court's finding of a due process violation in *Nicholson*, but as shown in *infra* Part V of this Comment, these amendments should shape courts' substantive due process analyses in all similar cases.

10. *Id.* at 248.

11. *Id.*

12. *Id.*

13. Christopher L. Blakesley, *Comparativist Ruminations from the Bayou on Child Custody Jurisdiction: The UCCJA, the PKPA, and the Hague Convention on Child Abduction*, 58 LA. L. REV. 449, 450 (1998) (arguing that in some situations the Uniform Child Custody Jurisdiction Act (UCCJA) violates substantive due process); Erwin Chemerinsky, *Substantive Due Process*, 15

literature to articulate the connection between the Thirteenth and Nineteenth Amendments and a Fourteenth Amendment substantive due process analysis.[14] Furthermore, prior to Judge Weinstein in *Nicholson*, no commentator has argued that the Thirteenth and Nineteenth Amendments should be combined in the context of domestic violence.[15] This Comment builds on earlier writings by arguing that the Thirteenth Amendment's prohibition of slavery-like treatment and the Nineteenth Amendment's guarantee of autonomy bolster a battered mother's Fourteenth Amendment substantive due process claim when her children have been taken from her solely because she was abused. The Thirteenth

TOURO L. REV. 1501, 1501 (1999) (noting that the word "liberty" in the Due Process Clause indicates that "parents have a fundamental right to the custody of their children" (citation omitted)); Beth A. Diebel, Note, Mark G. v. Sabol*: S*ubstantive Due Process Rights, a Possibility for Foster Care Children in New York, 64 ALB. L. REV. 823, 850 (2000) (arguing that "[c]ustodial determination creates a special relationship with the state, obligating the state to protect the foster child's substantive due process rights").

14. This is perhaps because the Nineteenth Amendment was originally intended only to grant women the right to vote and not to grant women more independence in society. *See infra* note 71 and accompanying text. The Thirteenth Amendment was also intended to deal with African slavery rather than abuse. *See infra* notes 77–79, 108 and accompanying text. Legal scholars have argued that victims of abuse should be able to sustain a Thirteenth Amendment claim against their batterers for creating a slavery-like condition. *See* MICHAEL VORENBERG, FINAL FREEDOM: THE CIVIL WAR, THE ABOLITION OF SLAVERY, AND THE THIRTEENTH AMENDMENT 248 (2001) (Some scholars have argued that the Thirteenth Amendment "should protect . . . abused women . . . and all other victims of relationships reminiscent of slavery."); Akhil Reed Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403 (1993); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* Deshaney, 105 HARV. L. REV. 1359, 1365–66 (1992). Scholars have also argued that the Nineteenth Amendment can strengthen the Fourteenth Amendment Equal Protection Clause in creating a more solid constitutional basis for claims of violence by women against their batterers. Reva B. Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 947, 947–52, 1024–30 (2002); Sarah B. Lawsky, Note, *A Nineteenth Amendment Defense of the Violence Against Women Act*, 109 YALE L.J. 783, 786 (2000) (arguing that the Violence Against Women Act would be a valid constitutional exercise of power under the Nineteenth Amendment).

15. While courts often do not apply multiple constitutional amendments in a single analysis, the Supreme Court has relied on a penumbra theory of privacy rights that relies on multiple amendments. *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (noting that a birth control law concerned "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees"); *see also* Osborn v. United States, 385 U.S. 323, 341 (1966) ("Specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that give them life and substance."). The zone of privacy is created by the "right of association contained in the penumbra of the First Amendment," the Third Amendment prohibition "against the quartering of soldiers 'in any house' in time of peace without the consent of the owner," the Fourth Amendment affirmation of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" as well as the Fifth Amendment Self-Incrimination Clause that "enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment." *Id.* (citations omitted).

and Nineteenth Amendments bolster a battered mother's claim by recognizing the additional guarantees of autonomy under the Nineteenth Amendment[16] and freedom from slavery-like conditions under the Thirteenth Amendment within the scope of her substantive due process rights.[17]

Part II of this Comment describes the complex nature of a battering relationship and illustrates how state reactions may wrongfully punish and blame a victim for an abuser's actions. Part III sets forth the traditional substantive due process analysis and describes the challenges such an analysis presents for battered mothers who bring substantive due process claims against the state for removal of their children based solely on the fact that the mother was battered. Part IV explores the historical connection between the Thirteenth and Nineteenth Amendments. It first shows how the Nineteenth Amendment symbolized a movement to provide women with the opportunity to represent themselves legally and politically.[18] It then explains how the Thirteenth Amendment may cover slavery-like conditions such as coercive battering.[19] Part V incorporates the values derived from the discussion of the Thirteenth and Nineteenth Amendments into a substantive due process analysis that balances a state's interest in protecting children against a mother's parental right, right to autonomy, and right to freedom from slavery-like treatment in deciding whether removal of the children is proper. Part VI offers a brief conclusion.

II. COMPLEX DYNAMICS OF DOMESTIC VIOLENCE AND STATE ACTORS' CONTRIBUTION TO ENTRAPMENT OF BATTERED MOTHERS

In an attempt to guard the interests of children and families, courts and child protection agencies may unintentionally punish battered mothers for the abuse inflicted by their partners. As in *Nicholson*, where

16. *See infra* Part IV.

17. *See infra* Part V.

18. *See* Siegel, *supra* note 14, at 1007–19.

19. *See* Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J.L. & FEMINISM 207, 229 (1992). The term "coercive battering," which is coined in this Comment, will be used throughout to describe relationships that do not involve a single incident of violence but those that involve physical, emotional, and often sexual violence that escalates over a period of time. *Id.* "Coercive battering" also involves isolation and threats of injury or death to a woman over a period of time, including "degradation and isolation of the woman being battered." *Id.*

ACS removed the children after an incident of domestic abuse, state actors sometimes remove children from abused mothers or charge them with neglect or failure to protect their children simply because the mothers were unable to prevent their children from witnessing the abuse.[20] It is of utmost importance for the state to protect children from abuse, and sometimes state bodies must remove children from abusive homes in order to protect them from future harm.[21] In many states, statutes or common law require mothers and fathers to take *reasonable* steps to protect their children from abuse.[22] This Comment does not intend to undermine such laws that protect children from abuse. Instead, it suggests that when the children are not abused themselves, but only witness domestic abuse,[23] courts should consider what is *reasonable* for

20. Nicholson v. Williams, 203 F. Supp. 2d 153, 169–71 (2002) (holding that removal of children from battered mothers was improper when the children were not abused by the batterer and the mother did not participate in any violence). Other courts have blamed mothers for their partners' abuse when the children have not been abused. *See* State v. J.R.C. (*In re* C.D.C.), 455 N.W.2d 801, 807 (Neb. 1990) (terminating battered mother's parental right because mother did not separate from the batterer—despite the fact that the mother did nothing to harm her child and despite reports of the batterer kicking, punching, burning, and dragging the mother across a parking lot by her hair—and blaming the mother for failing in her parental responsibility to provide her child with a violence-free environment). After reporting abuse, some battered mothers are often treated as the cause of the abuse by being referred to domestic violence education and parenting classes. *See* Laura M. Fernandez, Domestic Violence and the Child Welfare System 2 (2002) (unpublished manuscript, on file with author). However, her abusive partner often gets a slap on the hand with either an anger management class or a parenting class and nothing further. 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, 101 (1999).

21. Cornhusker Christian Children's Home, Inc. v. Dep't of Soc. Servs. of Neb., 416 N.W.2d 551, 561–62 (Neb. 1987) (holding that while parents' natural rights to their children have been protected by the courts, "society also has a paramount interest in the protection of . . . children" when parents' discipline cause the child "emotional or physical harm").

22. *See* 750 ILL. COMP. STAT. 50/1 (2002); OKLA. STAT. ANN. tit. 10, § 7001-1.3 (West 2002); S.C. CODE ANN. § 20-7-736 (Law Co-op. 2002); Palmer v. State, 164 A.2d 467, 474 (Md. 1960) (holding that mother was criminally negligent when her partner beat her child and caused injuries that led to her child's death); State v. Walden, 293 S.E.2d 780, 787 (N.C. 1982) (upholding a conviction of a mother for assault with a dangerous weapon when she failed to take reasonable steps to protect her one-year-old son from an assault).

23. This analysis does not deal with removal situations where the batterer abused both mother and children. However, courts may also unfairly charge a mother criminally for her partner's abuse of her children. *See, e.g.*, *In re* Maricopa County Juvenile Action Nos. JS-4118/JD-529, 656 P.2d 1268, 1270 (Ariz. Ct. App. 1983) (applying Arizona statute to hold mother neglectful for failing to "defend herself or her children from abuse" and for failing to obtain a divorce from her husband). Courts may also terminate a battered mother's parental rights because she failed to protect the child from an abusive father without regard to how she treated the child. *See Walden*, 293 S.E.2d at 787–88 (applying North Carolina statute to hold mother guilty of assault because she was present while abuse occurred and failed to protect her child); *In re* J.L.S., 793 S.W.2d 79, 80–82 (Tex. App. 1990); Shapley v. Tex. Dep't of Human Res., 581 S.W.2d 250, 254 (Tex. Civ. App. 1979) (reversing

a battered mother to do to protect her children, considering the threat of harm by a batterer upon reporting abuse. Courts can only understand the reasonableness of a battered mother's efforts to protect her children from witnessing abuse when they understand the coercion that accompanies physical abuse in domestic violence.[24]

Unfortunately, courts sometimes fail to distinguish between cases where children are abused and cases where children witness abuse against their mother, which may result in further punishment of the mother when she is the victim of abuse.[25] Mothers in "coercive battering" relationships are often blamed and punished by the state, thus strengthening the batterer's control over the battered mother.[26] Such

termination of mother's parental rights where the father had physically abused their infant and mother delayed in reporting the abuse because of a legitimate "fear of her husband"); State v. Williquette, 385 N.W.2d 145, 147 (Wis. 1986) (convicting mother of child abuse for leaving her two children with her husband who abused the children).

24. See *supra* note 19 for definition of "coercive battering." Experts claim that men do not "lose control" and abuse their wives but often choose to batter women to gain control over their partners. *See* ELIZABETH M. SCHNEIDER, BATTERED WOMEN & FEMINIST LAWMAKING 12 (2000); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 57 (1991). These tactics include punishing partners for disobedience, playing mind games on them, leaving them economically vulnerable, and limiting partners' activities. Evan Stark, *A Failure to Protect: Unraveling "The Battered Mother's Dilemma,"* 27 W. ST. U. L. REV. 29, 70–74 (1999); EVE S. BUZAWA ET AL., UNIV. OF MASS. LOWELL, RESPONSE TO DOMESTIC VIOLENCE IN A PRO-ACTIVE COURT: FINAL REPORT 75 (1999), *cited in* Stark, *supra*, at 57 n.99 (citing study illustrating control in domestic violence where, "of 118 victims whose partners were arrested for domestic violence, 39.8% reported they were not free to come and go as they pleased, 45.8% were denied access to social support, 58.5% were denied access to money, and 46% experienced between three and fifteen other restrictions in their daily routines"). These tactics are especially important to understanding why battered mothers cannot escape from abusive homes. Batterers may threaten to harm the woman or the children or threaten the woman that the state will take her children and hold her accountable for the abuse if she leaves him or reports the abuse. Fernandez, *supra* note 20, at 2. In addition, "[b]atterers use the legal system as a new area of combat when they seek to keep their wives from leaving." SCHNEIDER, *supra*, at 169 (citation omitted).

25. In fact, sometimes the treatment by courts and state agencies is reminiscent of the blaming and threatening of batterers. *See* Stark, *supra* note 24, at 77. One detective interrogating a mother, threatened her that "she would never see her children again" unless she admitted that her husband had battered her. *Id.* The mother, reminded of her husband who would also pound on a table before he beat her, remembered her husband's prior threats and admitted to beating her children and denied any fault on the part of her battering husband. *Id.* Sometimes children are removed despite the mother's best efforts to protect them from abuse by her partner. *See In re* Dalton, 424 N.E.2d 1226, 1230 (Ill. App. Ct. 1981) (terminating a battered mother's parental right because her children were abused by their father, even though he kidnapped his children back after every escape attempt the mother made).

26. In *Nicholson*, ACS threatened and blamed mothers for their batterers' acts and reinforced the control tactics of the batterer. Nicholson v. Williams, 203 F. Supp. 2d 153 (E.D.N.Y. 2002). For example, one *Nicholson* mother whose partner violated a protection order and kidnapped her child was blamed by child services for "leaving [her child] with an abusive man." *Id*. at 186. The

blame and punishment may ultimately cause the mother and child more harm since the mother may be less likely to escape the abusive situation because of fear that abuse will increase if the state intervenes.[27] Not only do state agencies sometimes punish mothers for their partner's acts, but state agencies may even grant child custody to abusive fathers.[28] Under these circumstances, the batterer and the victim are unfairly characterized as a single parental unit and the battered mother is punished for her partner's abuse.[29] On the other hand, the batterer is treated as an

caseworker also intimidated the mother by telling her that her son now belonged to the state. When she protested that she was not at fault and that the judge would give her custody, the caseworker replied with surety that "the judge is always on ACS's side." *Id.*

27. A battered mother's expectations that her partner will fulfill his threats to injure or kill her upon separation are often fulfilled. Separation between the mother and father increases the frequency and severity of threats, assault, and harassment. Separation also dramatically increases chances that the woman and her children will be seriously injured, killed, or face retaliation, including rape or child abuse. SCHNEIDER, *supra* note 24, at 115; *see also* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of the Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1232–33 (1993); V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 244 (1996) (stating, "[t]he risk of violence that increases after separation requires many women to go into hiding" and often women "must completely relocate" to stay safe); Symposium, *Women, Children and Domestic Violence: Current Tensions and Emerging Issues*, 27 FORDHAM URB. L.J. 567, 585 (2000).

28. The abusive partner is often granted custody over his children, even when the court explicitly recognizes that the father abused his wife. It is estimated that at least 50% "of all contested custody cases involve families with a history of some form of family violence"; in approximately 40% of the cases, fathers were awarded custody despite their history of violence. Lenore E.A. Walker & Glenace E. Edwall, *Domestic Violence and Determination of Visitation and Custody in Divorce*, *in* DOMESTIC VIOLENCE ON TRIAL: PSYCHOLOGICAL AND LEGAL DIMENSIONS OF FAMILY VIOLENCE 127, 130 (Daniel J. Sonkin ed., 1990); *see also* Mahoney, *supra* note 24, at 45 ("In one study, fifty-nine percent of the judicially successful fathers had physically abused their wives . . . [and] thirty-six percent had kidnapped their children.") (citation omitted). Abusive fathers are even favored in custody proceedings when they have severely assaulted and been accused of killing the children's mother. *See* Simpson v. Brown, 79 Cal. Rptr. 2d 389 (Ct. App. 1998). By this act, the threats of battering men that they will obtain custody of the children come to fruition, further conveying the message that a battered mother should remain silent about abuse. By granting custody to an abusive father, courts suggest that abuse of the mother is only a relationship problem in determining a father's custody but that the abuse indicates neglect in a mother's custody determination.

29. In child abuse and neglect cases, parents often are treated as one actor, and non-abusive mothers often receive the same sentence and punishment as the individual who committed the illegal act. *See* SCHNEIDER, *supra* note 24, at 153, 158 n.29; Bernadine Dohrn, *Bad Mothers, Good Mothers and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 5, 7 (1995). However, in many cases, the courts rightfully separate the proceedings over parental rights, recognizing that parents are autonomous individuals who are capable of controlling themselves. *See, e.g.*, *In re* Glenn G., 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992) (refusing to hold a battered mother liable with her husband when she did not cause the harm to the children), *aff'd*, *In re* Josephine G., 63 N.Y.S.2d 348 (App. Div. 1995).

independent individual so that his spousal abuse is rarely considered when a court grants him custody of his children.

Such reactions to battering relationships illustrate that state actors sometimes violate a battered mother's Thirteenth and Nineteenth Amendment rights. By punishing a woman for her partner's abuse, state actors deny women an autonomous identity and treat them as co-abusers with their husbands, when, in fact, the women are not the abusers at all.[30] Also, by punishing a battered mother for abuses committed against her, state actors may perpetuate slavery-like conditions by enforcing the batterer's control over the mother, thereby making it less likely that the mother will report abuse and more difficult for her to escape. Decreasing the likelihood that a battered mother escapes from the abuse helps create a slavery-like condition because the woman is coerced into silence and into accepting the abuse since she fears retaliation from her partner if she reports the abuse.[31] The next section illustrates how the Thirteenth and Nineteenth Amendments establish battered women's rights to autonomy and freedom from slavery-like conditions.

III. SUBSTANTIVE DUE PROCESS AND STATE REMOVAL OF CHILDREN

The Due Process Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."[32] Substantive due process protects individuals from "certain government actions regardless of the fairness of the procedures used to implement them . . . ."[33] The "right to substantive due process conferred by the Fourteenth Amendment includes the right to be free from state and local government interference with certain constitutionally recognized fundamental rights."[34] One such

30. Courts and child protection agencies deny women an autonomous identity when they punish them for abuse that their partner committed and when they blame battered mothers for engaging in domestic violence when the mothers did not abuse but, instead, were abused. *See supra* note 20.

31. *See supra* notes 24, 27. "Coercive battering" can create a slavery-like condition where a battered mother is prevented from reporting abuse against her by her partner and is controlled and manipulated like a slave. *Id.*; *see also infra* Part IV.B.

32. U.S. CONST. amend. XIV, § 1.

33. Daniels v. Williams, 474 U.S. 327, 331 (1986).

34. Phillips v. Borough of Keyport, 107 F.3d 164, 179–80 (3d Cir. 1997), *cert. denied*, 522 U.S. 932 (1997); *see* Wisconsin v. Yoder, 406 U.S. 205, 234 (1972) (holding that the Fourteenth Amendment prohibits "the State from compelling respondents to cause their children to attend formal high school to age 16"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that

fundamental right is the right to raise one's child.[35] Another is the right of a child to be raised and nurtured by his parents.[36] However, the constitutional right to familial integrity is not absolute.[37] Indeed, this fundamental right is "limited by the compelling governmental interest in the protection of children—particularly where the children need to be protected from their own parents."[38]

In certain narrowly-defined circumstances, the state's interest in a child's health and welfare may supersede a parent's fundamental right to custody over her children.[39] Thus, a balance must be reached between the fundamental right to family integrity and the state's interest in protecting children from abuse, especially in cases where children are removed from their homes.[40] In balancing these competing interests, courts have recognized that "a state has no interest in protecting children from their parents unless it has some reasonable and articulable evidence giving rise to a reasonable suspicion that a child has been abused or is in imminent danger of abuse."[41] The substantive due process balance requires a state to enforce its compelling interest of protecting children while respecting the substantive due process rights of parents.[42]

In *Nicholson*, the court found a substantive due process violation because ACS failed to demonstrate that its policy of separation was a

under *Meyer v. Nebraska*, 262 U.S. 390 (1923), "the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control"); *Meyer*, 262 U.S. at 401 (noting that "the individual has certain fundamental rights which must be respected").

35. *See* Michael H. v. Gerald D., 491 U.S. 110, 119–23 (1989) (discussing fundamental right of parents to raise children).

36. Santosky v. Kramer, 455 U.S. 745, 753 (1982) (holding that the "fundamental liberty interest of natural parents in the care, custody, and management of their child" is protected by the Fourteenth Amendment).

37. *See* Weller v. Dep't of Soc. Servs., 901 F.2d 387, 392 (4th Cir. 1990) (stating that "[s]ubstantive due process does not categorically bar the government from altering parental custody rights").

38. Croft v. Westmoreland County Children and Youth Servs., 103 F.3d 1123, 1125 (3d Cir. 1997). Thus, substantive due process provides the appropriate vehicle for evaluating the constitutionality of removal of children from their parents.

39. Stanley v. Illinois, 405 U.S. 645, 652 (1972) (recognizing that because the state has cognizable interests in the safety of children in its jurisdiction, "neglectful parents may be separated from their children").

40. *See* Miller v. City of Philadelphia, 174 F.3d 368, 373 (3d Cir. 1999) ("[The] fundamental liberty interest of natural parents in the care, custody, and management of their child . . . must be balanced against the state's interest in protecting children suspected of being abused." (citations omitted)).

41. *Croft*, 103 F.3d at 1126.

42. *Miller*, 174 F.3d at 373.

compelling state interest before removing children from their natural family.[43] The court found no compelling state interest when the removals actually "adversely affect[ed] the child's physical and psychic well-being" and when the ACS "automatically [held] both the abuser and the abusee liable as a unit and relie[d] on unfounded presumptions about the negative character and abilities of battered women" in removing children.[44] The *Nicholson* court also found that the unnecessary removals infringed on the mothers' fundamental parental rights by creating suffering and trauma through separation from their children.[45] Since ACS failed to prove that its policy was a result of a compelling state interest and since it violated the mothers' and children's right to family integrity, the court declared that it violated substantive due process.[46]

Although the *Nicholson* court found a substantive due process violation for child removal from battered mothers, battered mothers should not be optimistic about pursuing this claim under a traditional substantive due process analysis for three reasons. First, many courts are wary of substantive due process claims in general because the Supreme Court has expressed reservations about expanding the reach of substantive due process.[47] Accordingly, some courts may reject a

43. Nicholson v. Williams, 203 F. Supp. 2d 153, 211, 235, 245, 250 (finding "no indication that ACS effectively and systematically pursues removal of the abuser before seeking removal of the battered victim's child").

44. *Id.* at 250.

45. *Id.* at 251 (stating that all "the experts agree[d] that unnecessary removals harm children, and that children from homes with domestic violence are particularly sensitive to being separated from the non-abusive parent.").

46. *Id.*

47. *See* Albright v. Oliver, 510 U.S. 266, 288–89 (1994) (Souter, J., concurring) (The "rule of reserving due process for otherwise homeless substantial claims" applies in this case, which presents "no substantial burden on liberty beyond what the Fourth Amendment is generally thought to redress . . . ."); Whitley v. Albers, 475 U.S. 312, 327–28 (1986) (refusing to rely on the Due Process Clause when doing so would have duplicated protection that is provided under the Eighth Amendment and stating that "the Due Process Clause affords respondent no greater protection than does the Cruel and Unusual Punishments Clause").

Even though Judge Weinstein adopted substantive due process in *Nicholson*, other judges may not be as willing to do so since Weinstein is known for adopting creative solutions to difficult problems, solutions that are not widely accepted by the federal judiciary. *See* Stephen B. Burbank, *The Courtroom as Classroom: Independence, Imagination and Ideology in the Work of Jack Weinstein*, 97 COLUM. L. REV. 1971 (1997) (arguing that Weinstein is creative as well as unique in his judicial approach); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2010–11, 2015–16 (1997) (noting that "Judge Weinstein's technical rulings often depart from the common practice of courts to use procedural rules to sift, narrow, curb, or avoid altogether the lawsuits brought before" them and illustrate "a willingness to stretch, if not defy, existing rules"). Critics of Judge Weinstein "charge

substantive due process claim of a battered mother for the removal of her children as an expansion of a fundamental right.[48] Second, courts may find that residing in an abusive home or witnessing abuse is an adequate reason to remove children from battered mothers, regardless of their role in the abuse.[49] Also, a finding of a substantive due process violation for state actors has often been reserved for egregious state action.[50] The temporary removal of children from battered mothers that is not intended to harm mothers, but to protect children, is likely to be interpreted as negligent state action rather than egregious state action.[51] Therefore, courts will not likely find that temporarily removing children from a non-abusive mother is egregious state action and therefore not a substantive due process violation. Finally, simply using the lens of substantive due process to understand child removal from battered women does not treat domestic violence any differently than violations of liberty or property, which dramatically differ in scope from child removal cases of battered mothers and which require less contextual understanding.[52] Since

him with departing from the independence and detachment required of a judge because he seeks settlements to advance a vision of community values in the public interest" and is "too much the advocate." *Id.* at 2011.

48. *Albright*, 510 U.S. at 272 (noting that the "guideposts for responsible decision making in this unchartered area are scarce and open-ended" (citation omitted)); *see also* Reno v. Flores, 507 U.S. 292, 302 (1993) ("The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." (citation omitted)).

49. This is especially the case since courts tend to be deferential to caseworkers if they have a reasonable basis for removal of children. *See* Wilkinson v. Russell, 182 F.3d 89, 104 (2d Cir. 1999) (holding that as long as "caseworkers have a 'reasonable basis' for their findings of abuse," the removal of children does not violate due process). This Comment does not argue that abuse in the home is never an adequate reason to remove children or that children are not often benefited by removal from an abusive home. It does, however, argue that there must be a particularized finding of abuse or neglect in each case.

50. Shillingford v. Holmes, 634 F.2d 263, 265 (5th Cir. 1981) ("[N]ot every personal hurt [inflicted] by a state officer constitutes a violation of the [F]ourteenth [A]mendment." (citation omitted)); *see also* Daniels v. Williams, 474 U.S. 327, 330–32 (1986) (stating that the Constitution "does not purport to supplant traditional tort law" and that the Due Process Clause is not implicated by a negligent act of an official causing unintended loss of or injury to life, liberty, or property).

51. This distinction was drawn by *S.S. v. McMullen*, 225 F.3d 960, 963 (8th Cir. 2000), which held that state employees placing a child in the custody of his father even though the father was associated with a convicted pedophile "did not rise to the level of egregiousness that is required to support an action for a substantive due process violation" and makes "a case for negligence only."

52. *See supra* Part II. Battering relationships often involve control of a victim through threats of violence. Such relationships are often misunderstood by courts and state actors. *See supra* Part II. Courts and state actors often treat the abuser and the victim as a single parental unit by removing the children from both the abuser and the victim, simply because the victim was abused. *See supra* note 29 and accompanying text. In a non-battering situation where the mother often allows her children to witness violence, there may be no due process violation upon removal of the children because of the

substantive due process is a broad grant of rights that may be construed liberally or strictly depending on the court, it cannot provide the certainty or consistency in protecting a battered mother's right to her children.[53]

The Thirteenth and Nineteenth Amendments provide analytical guidance on child removal in domestic violence settings. The analysis that follows does not purport to resolve all the challenges faced by battered mothers with the traditional substantive due process analysis. However, adding a Thirteenth and Nineteenth Amendment analysis to the fundamental right of family integrity recognized in the Due Process Clause should help alleviate these challenges by adding the fundamental rights of autonomy and freedom from slavery-like conditions to the substantive due process balance. Before elaborating on how a new substantive due process analysis creates a more viable claim for battered women, the next section demonstrates the relevance of the Thirteenth and Nineteenth Amendments to coercive battering.

IV. LINKS BETWEEN THE THIRTEENTH AND NINETEENTH AMENDMENTS

Links between the Thirteenth and Nineteenth Amendments can be found in the amendments' legislative history. These links make joint application of the amendments to the Fourteenth Amendment historically apt. While the texts of the Thirteenth and Nineteenth Amendments are not similar on their face, as voting rights and slavery have little in common, the history of the abolitionist movement is very closely linked

state's interest in protecting children. However, in battering cases, an understanding of the complexity of the situation is required for courts and state bodies to recognize that they may be violating substantive due process through removal of children from the mother.

53. Courts have often rejected women's substantive due process claims after removal of their children by child protective agencies. *See* Miller v. City of Philadelphia, 174 F.3d 368, 375–76 (3d Cir. 1999) (rejecting a mother's claim for substantive due process when her child was removed because the social worker did not "exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed 'shocks the conscience'" (citation omitted)); Croft v. Westmoreland County Children and Youth Servs., 103 F.3d 1123, 1126 (3d. Cir. 1997) (noting that there are cases where a child protective agency is "justified in removing either a child or parent from the home, even where later investigation proves no abuse occurred"); Patterson v. Armstrong County Children and Youth Servs., 141 F. Supp. 2d 512, 525 (W.D. Pa. 2001) (finding no substantive due process violation when a child was temporarily removed from her mother after a physical fight). However, substantive due process is certainly alive and applicable in the family context. *See* Troxel v. Granville, 530 U.S. 57, 65, 67–73 (2000) (noting that the Due Process Clause "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests'" and holding that a Washington statute allowing broad visitation rights to people other than natural parents violates substantive due process rights of a mother (citation omitted)).

to the movement for women's suffrage. During and after the Civil War, abolitionists and suffragists worked together to abolish slavery.[54] Many abolitionists, particularly Elizabeth Cady Stanton and Susan B. Anthony, had broader goals of establishing universal equality that included women, rather than just abolishing slavery.[55]

Besides the union between the suffragist and abolitionist movements, congressmen also debated woman suffrage and slavery contemporaneously, recognizing the potential effects the Thirteenth Amendment would have on traditional marriage.[56] In fact, congressional debates prior to ratification of the Thirteenth Amendment were strikingly similar to those prior to ratification of the Nineteenth Amendment. During the Thirteenth Amendment debates, congressmen, noting parallels between the status of married women and African slaves, considered the potential reach of the term "involuntary servitude" in the text of the Thirteenth Amendment to disrupt men's positions in their families.[57] Senators voiced concern that if the Thirteenth Amendment were enacted, women would also be as free as men: "[A] woman would be equal to a man and . . . [a] wife would be equal to her husband and as free . . . before the law."[58] Proponents of the Thirteenth Amendment in

54. Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. Rev. 1456, 1469 (2001) (noting that many of the woman suffragists had participated actively in the abolition movement). *See generally* ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 41 (1975) (observing that the woman suffrage and abolitionist movements "nourished and strengthened one another" and that many woman suffragists learned to organize and speak in public during the abolitionist movement).

55. *See generally* 2 HISTORY OF WOMAN SUFFRAGE 687–88 (Arno Press, Inc. 1969) (Elizabeth Cady Stanton et al. eds., 1882); ELLEN CAROL DUBOIS, THE ELIZABETH CADY STANTON—SUSAN B. ANTHONY READER: CORRESPONDENCE, WRITINGS, SPEECHES 78–85 (1981); Karin Mika, *Self-Reflection Within the Academy: The Absence of Women in Constitutional Jurisprudence*, 9 HASTINGS WOMEN'S L.J. 273, 287–88 (1998). Susan B. Anthony said, "[a]s then the slaves who got their freedom must take it over, or under, or through the unjust forms of law, precisely so now must women, to get their right to a voice in this Government, take it[.]" HISTORY OF WOMAN SUFFRAGE, *supra*, at 688. With the urgency to push for emancipation of slaves after the Civil War, the woman suffrage and abolition movements joined together, and many suffrage leaders lost their place at the forefront of the movement. Mika, *supra*, at 287–88. Woman suffragists delayed their lobby for an amendment providing universal equal rights that included women until after the war. *Id.* However, by the time the Thirteenth Amendment was ratified, the woman suffrage movement lost momentum as supporters divided after the war, leaving woman suffrage without vital support. *Id.* at 289.

56. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864).

57. CONG. GLOBE, 38th Cong., 2d Sess. 242 (1865). Representative Cox noted that if lawmakers start with public affairs to abolish slavery then it will expand to domestic affairs and "change the relation of . . . husband and wife." *Id.*

58. CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864). A representative was also worried that

the Senate convinced their colleagues that the Thirteenth Amendment would not alter the marriage relationship.[59]

While legislative history illustrates the link between the Thirteenth Amendment and the role of women in the family, later implicated by the Nineteenth Amendment, the application of the two amendments to the modern context of child removal is not obvious. However, these amendments bear on the question of child removal because they recognize certain fundamental rights that are infringed when a woman's child is taken from her. As shown below, the Thirteenth Amendment guarantees freedom from slavery-like conditions,[60] and the Nineteenth Amendment guarantees a woman's right to autonomy.[61] These rights, established by the amendments, apply in the context of domestic violence.

A. The Nineteenth Amendment: Autonomy for Women in the Public and Private Realm

Coverture was a woman's condition after traditional marriage in which her husband legally had control over her person and estate.[62] Coverture marriage intertwined women's societal role with marriage, so courts often interpreted the gains in independent legal and political rights for women as displacing the "bondage" and "disability" of traditional marriage.[63] Since American jurisprudence evolved from English common law, the common law doctrine of coverture has influenced the

Congress would have the power to regulate "domestic slavery" under the term "involuntary servitude." CONG. GLOBE, 38th Cong., 2d Sess. 242 (1865).

59. CONG. GLOBE, 39th Cong., 1st Sess. 91 (1865) (statement of Sen. Sumner); *see also* CONG. GLOBE, 38th Cong., 2nd Sess. 193 (1865) (statement of Robert Kasson). Although it is clear that congressional intent favors a narrow view of the Thirteenth Amendment, later interpretation of the Amendment leaves room for a broader application. *See infra* notes 106–08 and accompanying text.

60. *See infra* Part IV.B.

61. *See infra* Part IV.A.

62. *See* Tong v. Marvin, 15 Mich. 60, 64–66 (1866) (explaining that under coverture, the husband also had a stronger right to the control and custody of the children of the marriage).

63. A wife's dependence on her husband's identity was referred to as a "disability of coverture," and traditional marriage was referred to as "bondage" for wives. *See* Gill v. McKinney, 205 S.W. 416, 418 (Tenn. 1918) (noting that the Tennessee Married Women's Act of 1913 "emancipated" married women by not imposing "any *disability* or incapacity, on a woman as to the ownership, acquisition, or disposition of property of any sort" (emphasis added)), *superseded by statute as stated by* Third Nat'l Bank v. Knobler, 1988 Tenn. App. LEXIS 655 (Tenn. Ct. App. Oct. 21, 1998); Yonner v. Adams, 167 A.2d 717, 727 (Del. Super. Ct. 1961) (explaining that the common law recognized a husband-wife status as one of a "chattel-wife in bondage to her feudal lord").

governance of families in enforcing the idea that husbands had ultimate power over the rights of their wives and children.[64] Under coverture principles, the husband and wife were one entity under the law. The husband was the legal head of the family, representing all familial interests.[65] The common law doctrine of coverture thus restricted a married woman to a public identity that was linked to her husband. She was represented by her husband in court[66] and was not held accountable for her own crimes when they were committed in her husband's presence.[67] However, prior and concurrent state legislation culminating in the ratification of the Nineteenth Amendment changed women's status, providing them with an autonomous legal personality.[68] When courts abolished the common law principles of coverture, they referred to it as "emancipating" women by abolishing common law principles, further drawing the link between slavery and women's legal status.[69]

Before women gained the right to vote, they gained the right to legally represent themselves with respect to their property.[70] State court interpretations of the acts granting limited legal rights to women foreshadowed the change in status for women that the Nineteenth Amendment symbolized. State courts also interpreted gains in the legal and political representation of women as freeing the woman from the

64. Miccio, *supra* note 20, at 92.

65. *See* Friburk v. Standard Oil Co., 68 N.W. 1090, 1091 (Minn. 1896) (recognizing the common law principle that under the law, the "husband is the head of the family").

66. JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 87–90 (1991); Kristin Collins, Note, *When Fathers' Rights are Mothers' Duties: The Failure of Equal Protection in* Miller v. Albright, 109 YALE. L.J. 1669, 1682 (2000) (noting that under coverture, "the wife lost the legal rights she had as a *feme sole*, such as rights to her property and her labor, access to courts, and the right to contract independently of her husband").

67. Morton v. State, 209 S.W. 644, 645 (Tenn. 1919) (noting "the rule at common law that a married woman was not responsible for crimes committed in the presence of her husband, except murder and treason").

68. Reva Siegel posits that when Americans ratified the Nineteenth Amendment and gave women the right to vote, they rejected traditional understandings of the family and changed women's role in the public and private sphere. Siegel, *supra* note 14, at 993, 1007. Siegel develops a synthetic reading of the Equal Protection Clause and the Nineteenth Amendment for constitutionally-based violence against women claims. *Id.* at 949. This Comment develops a joint reading of the Due Process Clause and the Thirteenth and Nineteenth Amendments.

69. *See* Neuberg v. Bobowicz, 162 A.2d 662, 663–64 (Pa. 1960) (noting that the abolishment of the last of the common law principles leads to the "complete and universal emancipation of women" from being her "husband's chattel" in which "[s]he owed him duties much the same as did a servant his master"), *overruled in part by* Hopkins v. Blanco, 320 A.2d 662 (Pa. 1974).

70. Such state statutes, enacted during the nineteenth century, were referred to as Married Women's Property Acts. *See* Gill v. McKinney, 205 S.W. 416, 418 (Tenn. 1918). These acts gave women the right to sue, to be sued, to contract, and to own property. *Id.*

common law disabilities of wifehood, thereby establishing broader autonomy for women.[71] While most congressmen undoubtedly intended the Nineteenth Amendment to grant nothing more than voting rights for women,[72] some courts interpreted the Nineteenth Amendment as establishing a woman's independent legal identity.[73] Additionally, over time, some states also overturned legislation that assumed that husbands and wives were one.[74] Most relevant to this Comment, as women gained broader public rights, they also gained a right to be held accountable for

71. In *Rosencrantz v. Territory*, 5 P. 305, 305–06 (Wash. 1884), the Washington Territory Supreme Court interpreted a state statute providing that all "householders" may serve on a grand jury in a criminal trial to cover married women. The court commented that the state statute was broad enough to "abolish all the disabilities of the wife as a member of the family which had been imposed upon her by the common law, and to provide, instead . . . , a new relation between husband and wife as members of the family." *Id.* at 306. Interestingly, the *Rosencrantz* court recognized that if women are separately represented in the term "household," this would abolish all of the common law disabilities of a wife, namely the fact that a husband must represent his wife under the law. This abolition, of course, would mean that wife could represent herself. The *Rosencrantz* court noted that the right to independent representation would not only allow women to serve on juries but would also alter relations between husbands and wives under the common law by providing women with an independent public identity. *Id.* at 306–07. *Rosencrantz* was overruled three years later. *See* Harland v. Territory, 13 P. 453, 455 (Wash. 1887).

72. The public debate over woman suffrage became known as "the woman question" and caused discussion among political leaders about resulting effects on the family. Siegel, *supra* note 14, at 950–51. The heated debates about woman suffrage largely came in the family context because voting was one way that men indirectly represented women and children in public, and some congressmen interpreted granting women an independent vote as a disruption of the traditional balance in the family and an end to marriage as an institution. *Id.* However, suffragists argued that men could not rightfully represent women in public and brought to light abuses by male representatives such as rape and domestic violence. *Id.* at 992.

73. The Supreme Court in *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), overruled in part by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), held that the Nineteenth Amendment embodied a "sex equality norm" and was an "emancipation from the traditions of reasoning about gender embodied in the common law of marital status." Siegel, *supra* note 14, at 1013. *Adkins*, which struck down a sex-based minimum wage law due to sex inequality, noted that "revolutionary" changes had taken place in the status of women "culminating in the Nineteenth Amendment." 261 U.S. at 553. The Court then noted that women must be "accorded emancipation from the old doctrine that she must be given special protection or be subjected to special restraint in her contractual and civil relationships." *Id.* The "old doctrine" referred to by the Court refers to the traditions of coverture that previously restricted a woman's liberty due to her relationship to her husband. *Id.* In the years following *Adkins*, courts interpreted the Nineteenth Amendment to signify the abandonment of coverture principles, allowing wives to have criminal liability for their own acts, holding that they would be able to establish their own residence, apart from their husband, for tax and voting purposes, and restricting other coverture concepts of the common law. Siegel, *supra* note 14, at 1016–17. At first, some courts interpreted the Nineteenth Amendment to establish autonomy for women from legal representation by their husbands, but it was soon interpreted as an amendment about voting, with no bearing on broader issues of women's citizenship. *Id.* at 953.

74. *See, e.g.*, *infra* note 75.

their own crimes.[75] Slowly, with the recognition of women's autonomy, many "disabilities" of the old doctrine of coverture marriage were abolished.[76] Even though the text and legislative history of the Nineteenth Amendment do not *explicitly* embody the principle of legal autonomy for women, court opinions interpreting the Nineteenth Amendment support the idea that the concept of autonomy is implicit in the amendment.

B. Parallels Between Slavery and Coercive Battering Shed Light on the Thirteenth Amendment

Coercive battering creates conditions like slavery that justify application of the Thirteenth Amendment. Batterers use beatings, threats, and coercion to control their victims. Similar tactics were used by slave masters to manipulate slave service as well as to deny autonomy to free blacks after the Civil War.[77] Battered women are, of course, not physically and legally bound to a master who owns them. However, the Thirteenth Amendment encompasses conditions "akin to . . . slavery,"[78]

75. Morton v. State, 209 S.W. 644, 645 (Tenn. 1919) (emancipating women from the disability of coverture in relation to being held criminally liable under Tennessee law for their own criminal acts).

76. *See, e.g.*, Detroit Newspaper Indus. Credit Union v. McDonald, 156 N.W.2d 62, 65 (Mich. Ct. App. 1967) (holding that a phrase in the first sentence of the Michigan Constitution of 1963 stating that "disabilities of coverture as to property are abolished" prohibits a woman from using coverture as a defense).

77. *See supra* Part II. The parallel between slavery and domestic violence was noted in congressional hearings on the Violence Against Women Act. Professor Neuborne said that "[g]ender-motivated violence is a . . . form of physical subordination that tracks the badges and incidents of slavery and involuntary servitude," while encouraging Congress to "apply the moral imperative of the Thirteenth Amendment to the victims of gender-based violence." *See Violence Against Women: Victims of the System: Hearing on S. 15 Before the Comm. on the Judiciary*, 102d Cong. 89–90 (1992) (statement of Burt Neuborne).

78. For example, the Supreme Court has held that "compulsory labor akin to African slavery" is abolished by the Thirteenth Amendment. Butler v. Perry, 240 U.S. 328, 332 (1916); *see also* Pollock v. Williams, 322 U.S. 4, 17 (1944) ("The undoubted aim of the Thirteenth Amendment as implemented by the Anti-peonage Act was not merely to end slavery but to maintain a system of completely free and voluntary labor throughout the United States."). A broader definition of slavery in the context of Section 1 of the Thirteenth Amendment is "[a] power relation of domination, degradation, and subservience, in which human beings are treated as chattel, not persons." Amar & Widawsky, *supra* note 14, at 1365. Slavery has not been limited to forced labor. *See* Griffin v. Breckenridge, 403 U.S. 88, 105 (1971) (holding that the Thirteenth Amendment expands to "varieties of private conduct . . . beyond the actual imposition of slavery or involuntary servitude" and stating that "[b]y the Thirteenth Amendment, we committed ourselves as a Nation to the proposition that the former slaves and their descendants should be forever free"); Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443–44 (1968) (upholding the use of the Thirteenth Amendment to guarantee equal property rights to blacks and whites and noting that the "end is legitimate . . .

and coercive battering qualifies as such because batterers physically and psychologically control their victims.[79] Viewing coercive battering in the same context as slavery evidences the severity of threats and physical violence faced by some battered mothers and the obstacles they confront in escaping these situations.[80] Although for some abolitionists the Thirteenth Amendment was the result of a struggle for universal equality,[81] the text of the Thirteenth Amendment does not single out women and children.[82] Nevertheless, early Supreme Court Thirteenth Amendment opinions discuss the application of the Thirteenth Amendment to all those who suffer conditions similar to African slavery.[83] The Supreme Court noted in several cases that abolishing slavery was intended to "establish [] universal freedom"[84] and was to be a denunciation of a "condition" reaching "every race" and every individual rather than a declaration in favor of a particular people.[85]

because it is defined by the Constitution itself. The end is the maintenance of freedom . . . . A man who enjoys the civil rights mentioned in this bill cannot be reduced to slavery." (citation omitted)); United States v. Harris, 106 U.S. 629, 640 (1883) (noting that "besides abolishing slavery and involuntary servitude," the Thirteenth Amendment "gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure").

79. *See supra* Part II.

80. *See infra* Part IV.B.1.

81. *See supra* notes 53–54 and accompanying text.

82. *See supra* note 7 (text of the Thirteenth Amendment).

83. For general intent to prohibit conditions akin to slavery under the Thirteenth Amendment, see *Butler v. Perry*, 240 U.S. at 332–33.

84. Civil Rights Cases, 109 U.S. 3, 20 (1883). Although the term "universal freedom" used in the *Civil Rights Cases* does not necessarily have gender connotations, it is strikingly reminiscent of "universal equality" that some abolitionists sought with the ratification of the Thirteenth Amendment. While there has been no reference to gender in court discussions of universal freedom, the principle logically covers some women who experience slavery-like conditions at the hands of battering partners.

85. Slaughter-House Cases, 83 U.S. 36, 70 (1873), *superseded by statute as stated in* United States v. Ruiz, 961 F. Supp. 1524 (D. Utah 1997). Emphasizing the reach of the Amendment, the Court referred to the Thirteenth Amendment as a "grand yet simple declaration of the personal freedom of all the human race . . . ." *Id.* at 69. The *Civil Rights Cases* interpreted the Thirteenth Amendment to authorize Congress to abolish not only chattel slavery but also to "pass all laws necessary and proper for abolishing all badges and incidents of slavery . . . ." 109 U.S. at 20. However, the *Civil Rights Cases* also suggested that "badges and incidents of slavery" might be a narrow category because the Court found that the Thirteenth Amendment did not give Congress the power to "adjust what may be called the social rights of men and races in the community." *Id.* at 22. Nevertheless, the court did interpret the Amendment "to secure to all citizens of every race and color . . . those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens." *Id.*

Since Thirteenth Amendment precedent indicates that the amendment applies to every individual suffering conditions similar to slavery, some battered women may qualify for Thirteenth Amendment protection.[86]

1. The connection between slavery and violence

There is widespread agreement among historians that slavery involves "permanent, violent domination of . . . generally dishonored persons."[87] In addition to the violent coercion that is commonly associated with slavery, including deprivation, beating, whipping, rape, murder, and starvation, masters also coerced slaves into various types of service by using the threat of violence as well as the threat of removing children.[88] Although there is no evidence of congressional discussion about the sexual exploitation of African slaves, there is evidence that the Thirteenth Amendment, which banned "anything with the characteristics of chattel slavery," prohibited coerced sexual service.[89] Masters provided slaves with an added incentive to obey by threatening African slave mothers with the constant threat of separation from children and other family members.[90]

Even after the abolition of slavery, violence against former slaves continued and was used to prevent the former slaves from exercising their newly obtained civil rights. After the Civil War, southern states instituted the Black Codes, which perpetuated the master-slave relationship to the "extent that . . . freedom was of little value" for

86. Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1163 (9th Cir. 1976) (holding that 42 U.S.C. § 1981, which gives all persons equal rights to the full benefits of all the laws, has been "liberally construed to effectuate the purpose of the Thirteenth Amendment"); *see also Butler*, 240 U.S. at 332 (recognizing that the undoubted aim of the Thirteenth Amendment was not merely to end slavery but "to cover those forms of compulsory labor akin to African slavery which in practical operation would tend to produce like undesirable results," while holding that services performed for the state do not constitute involuntary servitude).

87. ORLANDO PATTERSON, SLAVERY AND SOCIAL DEATH: A COMPARATIVE STUDY 13 (1982) (emphasis omitted) (noting that violence is one of the three elements of slavery); DAVID BRION DAVIS, SLAVERY AND HUMAN PROGRESS 11 (1984) (citing Patterson in explaining that slavery is primarily a "relationship of power and dominion originating in and sustained by violence").

88. Nicholson v. Williams, 203 F. Supp. 2d 153, 168–69 (E.D.N.Y. 2002).

89. McConnell, *supra* note 19, at 219 (noting that "[t]he word 'slavery' itself evoked a shared national consciousness of its horrors, including sexual exploitation for the pleasure of slave-owners and their financial benefit" and also was "best understood as the absolute control by white slaveholders over all aspects of the lives of their slaves").

90. *Id.* at 220 n.59.

blacks.[91] Even after the Thirteenth Amendment was ratified, violence was directed at free blacks who attempted to exercise the rights and habits of free persons.[92] The year after the ratification of the Thirteenth Amendment in December 1865, there was a wave of brutal, racially motivated violence against Southern blacks.[93] This post-Civil War violence against blacks illustrates that whites used private violence in an effort "to return freed slaves to a subjugated status" and discouraged free slaves from exercising their civil rights.[94]

Much of the coercion and violence witnessed in master-slave relationships is also prominent in battering relationships.[95] Conceding that there are obvious differences between the actual system of slavery and battering relationships, it can still be argued that some battered women endure slavery-like conditions and deserve the protection of the Thirteenth Amendment. The parallels between slavery and violence provide insight into coercive battering relationships where the husband uses threats and violence to obtain control and services.[96] Like the slave owners of African slavery, batterers often use violence to maintain control over their victims and ensure that they remain in a subjugated

91. *See* Slaughter-House Cases, 83 U.S. 36, 70 (1873), *superseded by statute as stated in* United States v. Ruiz, 961 F. Supp. 1524 (D. Utah 1997); DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS, 1865–1868, at 73–98 (1979) (explaining that the Black Codes passed apprenticeship laws, labor contract laws, vagrancy laws, and restrictive travel laws).

92. ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION 1863–1877, at 120 (1988). "The pervasiveness of violence [against blacks after the Civil War] reflected whites' determination to define [freedom in their own way,] . . . in matters of family, church, labor, or personal demeanor." *Id.* at 120. It sometimes included the beating or killing of blacks "for such 'infractions' as failing to step off sidewalks, objecting to beatings of their children, addressing whites without deference, and attempting to vote." RANDALL KENNEDY, RACE, CRIME, AND THE LAW 39 (1997).

93. FONER, *supra* note 92, at 119–20.

94. *See* United States v. Nelson, 277 F.3d 164, 190 (2d Cir. 2002). *Nelson* cited studies of post-Civil War violence to demonstrate that

> there exist indubitable connections (a) between slavery and private violence directed against despised and enslaved groups and, more specifically, (b) between American slavery and private violence and (c) between post Civil War efforts to return freed slaves to a subjugated status and private violence directed at interfering with and discouraging the freed slaves' exercise of civil rights in public places.

Id.

95. *See supra* notes 24, 27 and accompanying text.

96. *See supra* note 77. In addition to being subject to physical violence, which was used against African slaves to obtain economically productive labor, slaves were also required to provide reproductive and sexual services for their masters. McConnell, *supra* note 19, at 217–18.

status.[97] Just like slave masters, batterers physically abuse and degrade their victims to demonstrate their dominance and to obtain sexual "services" by force.[98] Slavery and coercive battering both rely upon humiliation to remind the slave or battered woman of who is in control.[99] In addition, just as violence against freed blacks increased during the post-Civil War era,[100] violence against battered women often increases after they leave their batterers.[101] As with slave masters after the Civil War, the batterer often threatens the life of the woman or her children and uses violence to bring her back under his control.[102] The violence and coercion used by both batterers and slave masters illustrate that coercive battering should be viewed as a slavery-like condition.[103]

2. Section 2 of the Thirteenth Amendment

Section 2 of the Thirteenth Amendment has often been used to prohibit slavery-like conditions, even though the Thirteenth Amendment is an absolute prohibition of slavery that requires no additional state

97. SCHNEIDER, *supra* note 24, at 115 (noting that "male physical violence is part of a larger framework of power and coercive control over women, which includes restriction of fundamental rights of freedom, choice, and autonomy").

98. McConnell, *supra* note 19, at 217–18.

99. *See supra* notes 19, 24. Batterers use violence as well as mind tricks and other humiliating tactics to control their partners. *See supra* notes 19, 24.

100. Some former slave owners used violence against their former slaves to stop them from leaving their plantations. *See generally* CONG. GLOBE, 39th Cong., 1st Sess. 339–40 (1866) (statement of Sen. Wilson) (noting that the purpose of The Freedmen's Bureau was to prevent post-Civil War violence against blacks); FONER, *supra* note 92, at 119–23 (discussing post-Civil War violence against free blacks and the anger of Southern whites when they were not treated with the same deference as they were "accustomed to" under slavery).

101. *See supra* note 27. Although it is possible that there are independent reasons that violence increases after a slave is freed as well as after a battered woman leaves her partner, since there are documented similarities in the coercion existing in both relationships, there is a likelihood that the violence upon separation is likely to be linked as well.

102. *See supra* note 27.

103. JAMES OAKES, SLAVERY AND FREEDOM: AN INTERPRETATION OF THE OLD SOUTH 4, 6 (1990) ("[V]iolence was a universal characteristic of slavery. For good reason, the master's whip has long served as a ubiquitous symbol of slavery everywhere."). In addition, "[r]acism and violence were closely linked. . . . [as] black slaves were deemed inherently more responsive than whites to the motivating force of physical coercion . . . ." Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1327 (2000). Obedience was central to slavery and its importance was "absolutely central" to Southern literature. *Id.* at 1327–28 (noting that "[t]he Farmers' Register counseled masters that slaves 'must obey at all times, and under all circumstances. . . . [and that u]nconditional submission is the only footing upon which slavery should be placed'" (citation omitted)).

action for enforcement.[104] This section grants Congress power to enforce the Thirteenth Amendment "by appropriate legislation."[105] In recent years, the Thirteenth Amendment has been enforced through federal criminal statutes enacted to abolish the "badges and incidents" of slavery as well as involuntary servitude,[106] but no additional state legislation is required. Therefore, no separate federal criminal statute abolishing domestic violence is necessary to apply the Thirteenth Amendment to coercive battering in the context of substantive due process. Furthermore, examining the reach of the Thirteenth Amendment under Section 2 illustrates that the Amendment has been expanded from American slavery to other contexts.

While the Supreme Court has not spoken on whether "badges and incidents of slavery" were prohibited by the text of the Thirteenth Amendment, several courts, including the Second Circuit Court of Appeals, have held that Congress may, under the Section 2 enforcement power, adopt legislation designed to eliminate the "badges and incidents" of slavery, which include various forms of discrimination.[107]

In *United States v. Nelson*, the Second Circuit recently declared that a federal statute outlawing violence motivated by race or religion properly prohibited violence as a "badge or incident of slavery" under the Thirteenth Amendment.[108] In *Nelson*, a man who assaulted a random

104. *See* Civil Rights Cases, 109 U.S. 3, 20 (1883). Since coercive battering is a slavery-like condition, some commentators have argued that battered women deserve a private right of action against their batterers under the text of the Thirteenth Amendment. *See generally* Sally F. Goldfarb, *"No Civilized System of Justice": The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499 (2000). However, to date, no court has found a private right under Section 1 of the Thirteenth Amendment for enduring slavery-like conditions. In addition, the Supreme Court has not decided whether to broaden the reach of the Thirteenth Amendment to "badges and incidents of slavery" or racial discrimination. Jones v. Alfred H. Mayer Co., 392 U.S. 409, 439 (1968) (declining to decide whether the Thirteenth Amendment abolished badges and incidents of slavery as well as actual slavery).

105. *See supra* note 7 (text of the Thirteenth Amendment).

106. One of these statutes is 18 U.S.C. § 1584 (2000), which prohibits selling or maintaining an individual in involuntary servitude. It has been used most often in the employment context to prohibit forced agricultural labor and domestic or sexual service.

107. United States v. Nelson, 277 F.3d 164, 164, 181, 184–85 (2d Cir. 2002), notes that it is "clear from many decisions of the Supreme Court that Congress may, under its Section Two enforcement power," now prohibit conduct besides actual slavery and involuntary servitude, including various forms of discrimination.

108. Even the *Nelson* dissent agreed with the majority conclusion that "Congress's power to enforce the elimination of slavery in this country is not limited to enslavement, or its badges and incidents, by virtue of race." *Id.* at 214. The dissent further indicated that since the Thirteenth Amendment makes no reference to race, and because "throughout history enslavement has occurred without regard to race . . . the Thirteenth Amendment is not limited to slavery that is imposed by

Jewish couple walking on a predominantly Jewish street was charged with violating 18 U.S.C. § 245(b)(2)(B), which prohibits violent acts against individuals using public facilities on the basis of race or religion.[109] The court found that the statute comfortably fit within Congress's power to enforce the Thirteenth Amendment as a "badge or incident of slavery,"[110] even though it targeted religiously-based violence as well as race-based violence.[111]

The court further noted that although the Thirteenth Amendment was enacted in the historical context of American slavery, which applied almost exclusively to African Americans, the "text of the Amendment nowhere identifies or otherwise singles out those whose servitude the Amendment had specifically been enacted to address."[112] In holding that the Thirteenth Amendment applies to violence against religious groups, the court stated that "there is nothing in the conceptual or linguistic structure of the prohibition of 'slavery' and 'involuntary servitude'—which appears in the Thirteenth Amendment, . . . that limits the banning of these evils only when they are imposed along racial lines."[113] The court, emphasizing that the Thirteenth Amendment does not include the adjective "racial" in front of slavery, found it was broad enough to cover religious violence.[114]

Since religious violence qualifies for Thirteenth Amendment protection as a "badge or incident of slavery," gender violence should

virtue of race." *Id.*

109. *Id.* at 170–71.

110. Civil Rights Cases, 109 U.S. 3, 22 (1883) (suggesting that "badges and incidents of slavery" might be a narrow category). Because of this narrow interpretation of "badges and incidents of slavery" that limited the Amendment to slavery alone, some courts may feel justified in not extending the protection of the Thirteenth Amendment to battered women. *See id.* at 20–22.

111. *Nelson*, 277 F.3d at 179–80 n.15. The court held that Congress's power under the Thirteenth Amendment extends to enacting legislation regulating private conduct. *Id.* at 176 (citation omitted). *See also* Runyon v. McCrary, 427 U.S. 160, 179 (1976) (holding that the power granted to Congress by the Thirteenth Amendment includes the power to regulate the acts of individuals), *superseded by statute as stated by* Clark v. Sears, Roebuck & Co., No. 77-1251 (E.D. Pa. Mar. 1, 1993). But several courts have also concluded that there is no direct, independent cause of action under the Thirteenth Amendment. *See* Sanders v. A.J. Canfield Co., 635 F. Supp. 85, 87 (N.D. Ill. 1986); Westray v. Porthole, Inc., 586 F. Supp. 834, 838–39 (D. Md. 1984); Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan, 518 F. Supp. 993, 1012 (S.D. Tex. 1981).

112. *Nelson*, 277 F.3d at 176. The Supreme Court held early on that "although 'negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter,' and would apply equally to 'Mexican peonage or the Chinese coolie labor system.'" *Id.* (citation omitted).

113. *Id.* at 179.

114. *Id.* at 179–80.

also qualify.[115] Considering the history of the Thirteenth Amendment and its goal of "universal freedom" as well as the Amendment's link to woman suffrage, courts may appropriately recognize that the Thirteenth Amendment applies to gender violence. Additionally, Thirteenth Amendment involuntary servitude may also apply to women forced to perform "compulsory labor akin to African slavery . . . ."[116] Section 2 of the Thirteenth Amendment has been used to ban involuntary servitude in the employment and religion contexts where individuals have been held or forced to perform labor against their will.[117] Since the Supreme Court has not eliminated the use of involuntary servitude precedent in the family context, lower courts may properly apply the Thirteenth Amendment in a coercive battering situation where a battered mother has faced child removal.[118]

Courts have found involuntary servitude in Thirteenth Amendment cases where physical violence rather than psychological coercion is used to obtain servitude.[119] The line of cases dealing with criminal

115. Both race and gender are considered suspect classes that deserve heightened scrutiny under the Fourteenth Amendment Equal Protection Clause. J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128–29 (1994). 18 U.S.C § 245(b)(2)(B) (2000) creates a federal remedy for any person who by force or threat interferes with an individual's participation in a "service . . . provided or administered by any State . . . ." Some of the *Nicholson* mothers who had their children removed may have been able to maintain a § 245 claim because a disproportionate majority of mothers were African American and faced interference by state employees from obtaining services provided by the state for their children. However, it may have been difficult for the mothers to prove that they were prevented from using a state service because of their race rather than their status as battered mothers.

116. *See* Butler v. Perry, 240 U.S. 328, 332 (1916). Nevertheless, courts have held that the Thirteenth Amendment was not intended to disrupt "military and naval enlistments, or to disturb the right of parents and guardians to the custody of their minor children or wards." *See* Robertson v. Baldwin 165 U.S. 275, 282 (1897).

117. Modern-day examples of involuntary servitude include labor camps, child abuse within isolated religious sects, or forced confinement. *See, e.g.*, United States v. King, 840 F.2d 1276, 1278–80 (6th Cir. 1988) (finding that members of the House of Judah, a religious sect, violated 18 U.S.C. § 1584 when they "repeatedly used and threatened to use physical force to make the children [at their camp] perform labor and . . . the children believed they had no viable alternative but to perform such labor"), *cert. denied*, 488 U.S. 894 (1988); United States v. Booker, 655 F.2d 562, 563, 566 (4th Cir. 1981) (holding that owners of a migrant labor camp violated 18 U.S.C. § 1583's prohibition of involuntary servitude where they forbade workers from leaving without paying their debts and enforced the rule by threats of physical harm and physical injury and by forcefully returning workers who attempted to leave).

118. The Thirteenth Amendment may be a viable option for battered women who are coerced to provide services against their will. The modern-day enslavement of some battered women is similar to involuntary servitude in the employment context. The biggest difference between these cases is that battered women are enslaved by a husband or boyfriend rather than an employer.

119. For examples of psychological coercion, see *Garcia v. United States*, 421 F.2d 1231, 1232 (5th Cir. 1970) (explaining that ordering taxpayers to pay taxes and penalties to United States

involuntary servitude between an employer and employee is relevant in a coercive battering context because criminal and civil Thirteenth Amendment cases use the same definition of involuntary servitude and usually involve similar conditions.[120] Criminal involuntary servitude cases parallel coercive battering and are thus a useful guide to proper analysis of involuntary servitude in the family context.

The Court in *United States v. Kozminski* held that under the Thirteenth Amendment, physical or legal coercion is necessary for finding involuntary servitude between employer and employee.[121] Justice Brennan concurred in this judgment but suggested that involuntary servitude prohibits any means of coercion that succeeds in breaking another's will such that he or she is reduced to a condition of servitude resembling that of a chattel slave.[122] In explaining why psychological coercion was too broad, Justice Brennan used the examples of coercion by an impassioned religious leader, a threatening employer, and an oppressive husband.[123] In distinguishing psychological threats by a husband against his wife from a physical "beating," Justice Brennan implied that if the husband's threats were accompanied by physical and legal force, then it would fall under the definition of involuntary servitude.[124] Since Justice Brennan used examples outside the employment context to properly define "involuntary servitude," his concurrence suggests that involuntary servitude can occur between individuals other than an employer and employee.[125] While Justice Brennan's concurrence actually spelled out the possibility of involuntary

government does not violate the Thirteenth Amendment), and *Clark v. Clark*, 278 S.W. 65, 68 (Tenn. 1925) (holding that court-ordered alimony payments do not violate the Thirteenth Amendment).

120. The Supreme Court has held that the term "involuntary servitude" as used in one of the federal criminal statutes enforcing the Thirteenth Amendment has the same meaning as it does under the Thirteenth Amendment. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court held that the phrase "involuntary servitude" in 18 U.S.C. § 1584 "clearly was borrowed from the Thirteenth Amendment[,]" therefore, rendering it "logical, if not inevitable" that Congress intended the phrase to have the same meaning in both places. *Id.* at 944–45.

121. *Id.* at 952–53 (Brennan, J., concurring).

122. *Id.* at 952–55 (Brennan, J., concurring).

123. *Id.* at 960 (Brennan, J., concurring).

124. *Id.*

125. No case law addresses whether the relationship between husband and wife can be precluded from a Thirteenth Amendment analysis; however, a strict textualist would not adopt this type of argument because it requires a broad interpretation of the Thirteenth Amendment. *See generally* ANTONIN SCALIA, A MATTER OF INTERPRETATION, FEDERAL COURTS AND THE LAW (1997).

servitude existing within a physically abusive family, as long as there is physical or legal coercion, the *Kozminski* majority leaves this issue unanswered.

Kozminski and other involuntary servitude cases in the employment context inform the discussion of involuntary servitude in the context of domestic violence. Involuntary servitude may arise in a relationship that initially was freely entered into.[126] In addition, where coercive battering exists, the fact that an individual held in involuntary servitude fails to take advantage "of an opportunity to escape" does not indicate that the person was not held in involuntary servitude.[127]

An employee used threats and coercion against a domestic servant in *United States v. Ingalls*, where the servant entered into the employment voluntarily.[128] In *Ingalls*, a servant was forced by her employers to perform household labor without wages or any vacation time.[129] She was physically abused at times, threatened with imprisonment, and blackmailed with information of an adulterous relationship and an illegal abortion.[130] The domestic worker believed the threats and remained against her free will.[131] She was isolated from her friends and unable to leave the house except on errands. She escaped once, but after the employer renewed the threats, the domestic worker returned to the home.[132] In determining that the domestic worker was held in involuntary servitude, the court did not find it relevant that the domestic worker freely moved to the home, was at times able to leave the house, or even returned after escaping once. Even though the worker was not physically trapped in the house, the court convicted the family of inducing the domestic worker to move into the home with the intent to keep her as a slave.[133]

126. McConnell, *supra* note 19, at 225–26.

127. *Id.* at 226.

128. 73 F. Supp. 76, 77 (S.D. Cal. 1947).

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* at 77–78.

133. *Id.* at 77; *see also* United States v. Booker, 655 F.2d 562, 562 (4th Cir. 1981) (upholding involuntary servitude conviction for operator of a migrant agricultural labor camp where employers withheld wages, openly displayed guns, and physically abused and threatened employees if they attempted escape); Bernal v. United States, 241 F. 339, 341–42 (5th Cir. 1917) (holding that a foreign domestic worker was held in involuntary servitude when the hotel she was recruited to work for turned out to be a prostitution house, even though she came to the hotel voluntarily, was allowed to leave the hotel for errands, and wrote a letter to a relative during her time of isolation).

Although many of the involuntary servitude cases take place in the employee-employer context, the physical violence and coercion taking place in these cases is not generally more severe or frequent than that involved in many cases of coercive battering.[134] However, since the banning of slavery with the Thirteenth Amendment signified the banning of slavery-like conditions, severe battering relationships fit within this context.

One striking similarity between employers and batterers who inflict involuntary servitude on their victims is that they both physically threaten their victim and enforce these threats through physical abuse.[135] The threats, abuse, and forced labor endured by many battered women are as serious, if not more serious, than those endured by the employee in *Ingalls*. In both contexts, women were threatened, physically abused, and sometimes forced to provide services involuntarily.[136] That the servitude for the battered woman occurs with a domestic partner rather than a boss and that the battered woman performs unpaid work does not negate the fact that the labor is coerced by physical force.[137] In addition, batterers employ tactics of intimidation, threats, and physical abuse used by employers convicted of involuntary servitude.[138]

Thus, under the Section 2 "badges and incidents" and involuntary servitude cases, several principles are revealed that are relevant to battered mothers. First, since the Thirteenth Amendment intended to ban all conditions akin to slavery and since it has been held to ban violent forms of religious discrimination, the Amendment may also be extended to cover gender violence.[139] Second, the fact that a battered mother voluntarily entered into a battering relationship has no bearing on whether she was held in involuntary servitude, and like a domestic worker, she should not be punished for the initial undertaking of the

134. *See* McConnell, *supra* note 19, at 209 n.13.

135. *See supra* notes 24, 27. In *State v. Norman*, 366 S.E.2d 586, 587 (N.C. Ct. App. 1988), *rev'd*, 378 S.E.2d 233 (N.C. 1988), a batterer abused his wife physically and forced her to prostitute herself. He beat her almost every day for over twenty years, withheld food from her, extinguished cigarettes on her skin, made her eat dog food, and threatened to kill her and mutilate her body. *Id.* When she tried to leave he brought her back and beat her. *Id.* She believed she could not escape and feared his retaliation for her attempts. *Id.* at 589. The battered woman's expert testified that her situation was like that of a "prisoner of war" and that the only means of escape she could see was to kill him. *Id.* at 587–89.

136. McConnell, *supra* note 19, at 231–32.

137. *Id.* at 231.

138. *See supra* notes 24, 27 and accompanying text.

139. *See supra* notes 82, 106 and accompanying text.

relationship.[140] Third, threats of physical violence against battered women should be interpreted as an adequate restraint on the battered women's ability to escape, even though it may be physically possible for them to do so.[141] These three principles contribute to the creation of a substantive due process analysis that incorporates both the Thirteenth and Nineteenth Amendments.

V. ADDING THE THIRTEENTH AND NINETEENTH AMENDMENTS TO THE FUNDAMENTAL RIGHT TO FAMILY INTEGRITY

The principles extracted from the Nineteenth and Thirteenth Amendments create an improved Fourteenth Amendment due process analysis for use in claims by battered mothers. This analysis tips the balance of interests in favor of justice to battered mothers and protection of the state's compelling interest of protecting children. While other courts may follow *Nicholson*'s lead and find that the Due Process Clause alone justifies battered mothers' claims against child removal, judges' wariness in expanding rights under substantive due process and some courts' tendency to blame victims of abuse calls for a stronger constitutional basis for battered mothers' claims against child removal.[142] This stronger constitutional basis may be provided by adding the Thirteenth and Nineteenth Amendments to the substantive due process analysis.

The following three principles revealed from the forgoing review of the Thirteenth and Nineteenth Amendments may justify alteration of the traditional substantive due process analysis. First, conditions akin to slavery, which are prohibited under the Thirteenth Amendment, exist within the coercive battering context. Battered women are often trapped by batterers' violence and threats of physical and legal force against them and their children. The substantive due process violations involved

140. *See supra* notes 127, 132 and accompanying text.

141. *See supra* notes 131, 132 and accompanying text.

142. Many courts may not conclude that finding a substantive due process violation for temporary removal of children from battered mothers is an expansion of fundamental rights. However, as noted above, courts often require egregious state action to find a violation in the traditional substantive due process analysis, and temporary removal of children may not qualify. However, if the courts consider the Thirteenth and Nineteenth Amendments, they may find the state action relatively more egregious because they will see how punishing battered mothers may increase the batterers' control over battered women and decrease the likelihood that battered women will leave abusive situations.

in a separation of a battered mother from her child further add to her slavery-like conditions in violation of the Thirteenth Amendment. The removal of children by caseworkers, sometimes accompanied by verbal threats, creates slavery-like conditions for both mother and child. Further, caseworkers perpetuate the coercion and enslavement of battered women by blaming and punishing them for being abused. This blame allows batterers to successfully use threats of legal repercussions to stop mothers from escaping abusive situations. Also, removing children from a battered mother increases the likelihood that the battered mother will continue to be trapped in a slavery-like condition because it makes her less likely to obtain help due to fear of repercussion from her batterer.

Second, holding battered mothers accountable for their partners' abuse by blaming, threatening, and punishing them denies women the legal and civil autonomy established through the Nineteenth Amendment and contemporaneous changes in a woman's legal status. Child protection agencies sometimes fail to distinguish between domestic partners in treating the couple as a single unit that engaged in domestic violence.[143] State agencies may also charge a battered mother for the abuse she suffered by her batterer, whether he abused her children, and terminate her parental rights. Blaming battered mothers for their partner's abuse invokes the coverture principles that a husband and wife are "one" and that they must be accountable for each other's crimes. Such treatment violates the spirit of the Nineteenth Amendment. By presuming that a battered mother and her abusive partner are one unit, state agencies deny the battered mother an autonomous legal status. Since the Nineteenth Amendment provides women with independent representation and freedom from the "old doctrine" of coverture, a woman's guarantee of autonomy under the Nineteenth Amendment is violated when a state body uses coverture principles to punish a wife for her husband's acts.

Third, the Nineteenth and Thirteenth Amendments together suggest that since married women have shed the bondage of coverture and have gained legal autonomy from their husbands, any sexual or domestic service coerced from women by physical violence may be considered

143. Child protection agencies often distinguish between the abusive and non-abusive parent. *See In re* Jeremiah M., 738 N.Y.S.2d 585 (2002) (affirming a finding of neglect against a father because he had abused his wife in the presence of her child); *In re* Kayla B., 690 N.Y.S.2d 444 (App. Div. 1999) (dismissing neglect petition against mother because her children witnessed an isolated domestic violence incident).

involuntary servitude under the Thirteenth Amendment. Once the condition of involuntary servitude is identified, the court can analogize the mother's condition to that of employees held in involuntary servitude by their employers. This observation should lead the court to focus on the physical and legal threats made by the batterer rather than on the battered mother's initial decision to enter into the relationship or her failure to escape when she was physically able to do so.[144] By focusing on the batterer's threats, the court will recognize that battered mothers are sometimes trapped in slavery-like conditions and are usually not the cause of violence witnessed by their children.

The Thirteenth and Nineteenth Amendment principles described above lead to a Fourteenth Amendment due process analysis that focuses on additional fundamental rights along with the fundamental right to family integrity. These principles also address the challenges presented by the traditional substantive due process analysis. In addition to the traditional factors used to determine whether a child should remain in his parent's custody, this analysis adds two fundamental rights to the substantive due process balance for determining whether removal from battered mothers is a compelling state interest that overrides a mother's fundamental right to raise her children.

First, autonomy must be provided for both parents, meaning that each parent's actions towards one other and towards the children should be considered individually. In making this determination, the court must examine which parent performed the abuse and which parent faced removal of children or was charged with assault, neglect, or failure to protect children. If an abusive boyfriend or husband performed the abuse on the mother alone and the mother and her children are separated, the scale tips towards a due process violation.[145] While consideration of autonomy of the mother does not always point to a due process violation when children are removed, the Nineteenth Amendment still provides

144. This analysis may also provide an explanation of a battered mother's reluctance to escape from the battering situation and her failure to prevent abuse to her children. Nevertheless, when a child is being battered, the restraints posed on a mother do not indicate that the child should not be removed from the mother.

145. While situations in which the batterer abused the children and the mother are not the focus of this paper, this analysis suggests that if the mother took reasonable steps to protect her children from abuse in such a situation, the scale would tip towards a due process violation when removal occurs. The court must decide whether the mother took reasonable steps to protect her child. In cases where the children are also abused by the batterer, the court should heavily weigh the state's compelling interest in protecting the children from abuse in determining whether the removal violated due process.

that the court will consider the autonomy of both parents to be held accountable for their individual actions, not each other's abuse.

Second, constraints on a battered mother must be accounted for when her children are removed by state actors for witnessing domestic violence. Such constraints may include threats of physical injury by the batterer on the mother or children if the mother separated from the batterer, reported abuse, or sought services to escape. Also, the court must examine whether the batterer violated a court order or police instruction by being in the vicinity of the mother and children. Lastly, the court must examine whether the batterer physically abused the mother on a regular basis with escalating violence and threats. If the court answers any of these inquiries affirmatively and the children were not abused, then any resulting child removal violates due process because the mother is restrained from acting. The more factors that are met, the more the scale tips towards a due process violation since the Thirteenth Amendment bans slavery-like conditions. Moreover, not considering constraints on the mother further perpetuates coercive abuse by punishing the mother and making it less likely she will report the abuse.[146] The more that autonomy and freedom are infringed, the more compelling the state interest must be to justify removal. Substantive due process analysis is a balancing test and therefore does not create a bright-line rule for what the state should do in every case in which it is considering child removal from a battered mother. However, a state agency should consider the additional factors provided here to determine the right course of action in each case.

Not only does this new substantive due process analysis create additional factors for consideration in a substantive due process claim, but it may also alleviate the challenges battered mothers face in alleging a due process violation. The first challenge to traditional substantive due process is that courts are guarded about creating new fundamental rights under substantive due process.[147] This is not a challenge here because it can be argued that courts do not need to create new rights. The fundamental right to parent and be raised by parents is not a new right

146. When the children are abused, removal of the children may not constitute a due process violation since the restraints on the mother do not override the compelling state interest in removing a child in danger from an abusive home. However, when charging the mother criminally for failure to protect her children from her partner, the court should consider the restraints on the mother in determining whether to criminally charge the mother with a failure to protect her children.

147. *See supra* note 47 and accompanying text.

but has been long established by the Supreme Court.[148] It also can be argued that the rights to autonomy and freedom from slavery-like conditions have been protected by the Supreme Court in a different setting for many years and can be expanded to the domestic violence context because of the many similarities.[149] This Comment does not argue that a new fundamental right should be created for battered women because battered women already have access to due process rights. Courts may also legitimately fear adopting this due process analysis because they anticipate it leading to abused women suing for private rights of action under the Thirteenth and maybe Nineteenth Amendments. However, the intent of this analysis is not to advocate the creation of a private right of action under either the Thirteenth or Nineteenth Amendment.[150] Again, the intent of this Comment is only to educate the current Fourteenth Amendment due process analysis to make it more responsive to women's rights of autonomy and freedom from slavery-like conditions.

The second challenge to the traditional substantive due process analysis is that courts may find that protecting children from witnessing abuse is a compelling state interest which justifies removal of children from battered mothers, regardless of the mothers' role in the abuse. To overcome this challenge, courts should not be as deferential to the assessments of caseworkers who work on child removal cases. Rather, courts must determine whether removal violates the Nineteenth Amendment by holding mothers accountable for the actions of abusive partners. However, the Nineteenth Amendment analysis provided here would not prohibit the state from removing children from abusive homes when the children are abused by their father and their mother failed to take reasonable steps to protect them from the abuse.

This new substantive due process analysis may also alleviate the last

148. *See supra* notes 34–36.

149. *See supra* note 22; *supra* Part IV.A–B. However, this new analysis does alter the application of the existing right to parent by adding Thirteenth and Nineteenth Amendment analysis. A court may not see any distinction between altering the application of a right and creating a new fundamental right.

150. Some commentators have suggested using the Thirteenth Amendment as the basis for the federal civil remedy set forth in the Violence Against Women Act, which provides that eligible victims may obtain injunctive relief as well as unlimited awards of punitive and compensatory damages. *See* Marcellene Elizabeth Hearn, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1100 (1998) ("If the Thirteenth Amendment is an abolition of slavery and involuntary servitude for all time, then it should abolish any form of servitude found in the twentieth century. Congress has the authority to legislate against 'badges and incidents' of slavery and involuntary servitude," which includes violence against women.).

challenge—that substantive due process violations against state actors are reserved for egregious state action, rather than negligent acts that cause unintended loss of liberty. With the new substantive due process analysis, courts will realize that removal of children from battered mothers is more "egregious" than it seems on its face, since it results in blaming and punishing victims of violence. Removal will also be considered more egregious since it may have worse long-term effects in that a battered mother may be less likely to report or escape abuse in order to keep her children.

It may also be argued that the analysis of the Thirteenth and Nineteenth Amendments outside of the context of African slavery and voting rights lacks respect for tradition, legislative authority,[151] and faithfulness to the text of the Constitution. While respect for tradition and constitutional text are vital to our common law judicial system, our courts have been willing to interpret constitutional rights from the Constitution that have not been traditionally recognized or found anywhere in the text of the Constitution.[152] The Supreme Court has considered certain guarantees in the Bill of Rights as a "penumbra" of rights when the Constitution does not explicitly specify the right that the Court recognized.[153] Therefore, the court could also use a similar multiple amendment analysis in the area of substantive due process.

VI. CONCLUSION

The Nineteenth Amendment provided women with an independent identity and autonomy in the public realm. It also disposed of the coverture concepts that legally subordinated a woman to her husband. Through the Nineteenth Amendment and other state statutes, women gained the ability to represent themselves in public as well as hold a more prominent place in the public sphere. In addition, a woman's

151. Justice Scalia objects to the use of legislative history and legislative intent as proper tools to interpret the law. SCALIA, *supra* note 125, at 38. Here the texts of the Thirteenth and Nineteenth Amendments alone do not provide adequate basis for the substantive due process analysis provided in this Comment.

152. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that the freedom to marry is one of the "basic civil rights of man" that cannot be violated by states); Edwards v. California, 314 U.S. 160, 178 (1941) (noting that although "the right to move freely from State to State" is not "specifically granted by the Constitution," it was "recognized as a right fundamental to the national character of our Federal government").

153. *See* Griswold v. Connecticut, 381 U.S. 479, 482–85 (1965) (stating that although the "association of people is not mentioned in the Constitution nor in the Bill of Rights" the "First Amendment has a penumbra where privacy is protected from governmental intrusion").

autonomous identity ensured that married and unmarried women would be held independently accountable for crimes committed. The ACS's practice of punishing battered mothers for the abuse of their husbands reverts back to the coverture concept that a husband and wife are "one" under the law and denies women legal autonomy.

The Thirteenth Amendment prohibits slavery, involuntary servitude, and all conditions akin to slavery. Coercive battering is a slavery-like condition that often entails physical abuse, death threats, and control in every aspect of a woman's life. Battered mothers who endure coercive battering often act only to please their batterer in order to survive and save the lives of their children. However, unlike hostage situations where victims are expected to obey the orders of the threatening guard to minimize bodily harm, battered mothers under threat of death are sometimes expected by courts to accomplish heroic feats in an attempt to shield their children from witnessing them being battered.

Unfortunately, child protection agencies and even courts often blame and criminally punish battered mothers for abuse to themselves and their children as well as terminate their parental rights. Blaming and punishing battered women only decreases the chances that a battered woman will risk her life to report her partner's abuse. In order to ensure a more specialized analysis that will protect both the rights of battered women and the state's compelling interest to protect children, the substantive due process analysis advocated in this Comment views a battered mother's substantive due process violation for forcible removal of her children by the state in light of the Thirteenth and Nineteenth Amendments. The analysis provided in this Comment suggests that courts consider two additional fundamental rights in determining the state's compelling interest in protecting children has overcome a mother's fundamental parental right. First, the court must consider whether the removal of children denies the mother autonomy by blaming her for another individual's actions. Second, the court must consider the constraints on the mother posed by a batterer and whether the removal of her children will further prevent the mother from escaping the abuse.

The Thirteenth and Nineteenth Amendments, under this due process analysis of the Fourteenth Amendment, not only enhance a mother's substantive due process claim in the context of child removal, but serve to sensitize courts to the signs of coercive battering. Sensitizing courts to coercive battering allows them to see the similarities between a battering situation and slavery. Through judicial intervention on behalf of battered mothers, government agencies will become sensitized to coercive

violence, and, rather than mechanically separating battered mothers from their children, state agencies will instead provide support to ensure their safety and liberty.

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