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Exposure to Domestic Violence as a Form of Child Abuse

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by

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Introduction

Children who live in families in which domestic violence is a part of their lives experience an insidious form of child abuse.¹ Some investigators have stated that up to eighty percent of men who inflict violence upon women also batter children.² The research team of Straus, Gelles and Steinmetz determined that battered women are fifty percent more likely to inflict physical violence on their children than are women who are not themselves victims of domestic violence.³ However, the issue of whether or not children suffer from physical violence by either or both of their parents is less significant than the psychological scars these children bear as a result of having to watch their fathers beat their mothers.⁴ These children learn to become complicit to a dishonest conspiracy of silence.⁵ They learn to lie, to suspend fulfillment of their own needs, and to expend energy in the avoidance of problems⁶ that can lead to further

¹ Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children through Statutory Termination of Parental Rights*, 84 CALIF. L. REV. 757, 789 (1996).

² Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW & PSYCHOL. REV. 137, 152 (1994) (citing Jean I. Layzer et al. *Children in Shelters*, 15 CHILD. TODAY 6, 7 (1986)).

³ *Id.*

⁴ Amy Haddix, *supra* note 1.

⁵ *Id.*

⁶ *Id.*

incidents of family violence. They tend to minimize or deny what is happening in the home.⁷ In short, they become used to living in a world of make-believe.⁸

Children who are raised in violent homes are also at significant risk of eventually adopting the behavior patterns of their parents, thus becoming batterers or victims themselves.⁹ The adult sons of fathers who batter their mothers show a dramatically higher incidence of becoming batterers than sons of non-violent fathers.¹⁰ Boys who have witnessed domestic violence while growing up are three times more likely to batter their own female partners than those who have not witnessed domestic violence, and sons from the most violent homes are 1,000 times more likely to beat their wives than sons from non-violent homes.¹¹ Also, women who have been victims of battering by their romantic partners have six times greater a chance of having witnessed domestic violence as children.¹²

A comprehensive and progressive definition of domestic violence is stated in the South African Domestic Violence Act of 1998.¹³ This definition states that domestic violence is “(a) physical abuse; (b) sexual abuse; (c) emotional, verbal, and psychological abuse; (d) economic abuse; (e) intimidation; (f) harassment; (g) stalking; (h) damage to property; (i) entry into the complainant’s residence without consent; or (j) any other controlling or abusive behaviour towards a complainant, where such conduct harms, or may cause imminent harm to, the safety,

⁷ *Id.* at 790.

⁸ *Id.* at 789.

⁹ *Id.* at 790-791.

¹⁰ *Id.*

¹¹ *Id.* at 791.

¹² Jean Ferguson, *Professional Discretion and the Use of Restorative Justice Programs in Appropriate Domestic Violence Cases: An Effective Innovation*, 4 CRIM. L. BRIEF 3, (2009).

¹³ Bonita C. Meyersfeld, *Reconceptualizing Domestic Violence in International Law*, 67 ALBANY LAW REV. 371, 378 (2004) (citing Domestic Violence Act no. 116 of 1998, 1998 SA CRIMINAL LAW 116 (BSRSA, LEXIS through June 2003 update)).

health or wellbeing of the complainant.”¹⁴ The Act further defines physical abuse to be “any act of physical violence towards a complainant;” sexual abuse to be “any conduct that abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant;” and economic abuse to include “the unreasonable deprivation of economic or financial resources to which a complainant is entitled under law or which the complainant requires out of necessity....”¹⁵ Domestic violence generally refers to acts committed by adults against adults,¹⁶ and statistics clearly indicate that women are overwhelmingly the victims of this type of violence and not men,¹⁷ justifying the general reference to the problem of domestic violence as a harm committed by men against women or husbands against wives or fathers against mothers, while understanding that these characterizations of the issue do not hold 100 percent of the time.

What it means to be exposed to domestic violence is generally a broader concept to define. Children can be exposed to domestic violence in numerous ways, some of them such that the parents may not even be aware of their children’s knowledge of the abuse.¹⁸ The most obvious exposure to domestic violence is the witnessing by children of their father striking their mother, but exposure also can mean hearing the sounds of the abuse, including not only the sounds of the violence itself but also the sounds of oral threats and crying, even if the parents are not in the line of sight of the children.¹⁹ Children will also often see the resulting signs of abuse in the aftermath of a domestic violence incident, such as bruises and evidence of blood on the victims.²⁰ Because children can observe domestic violence in all of these ways and more, and not just in the form of direct witnessing of events, a trend has developed to appropriately refer to the

¹⁴ *Id.*

¹⁵ *Id.* at § 1.

¹⁶ Bonita C. Meyersfeld, *supra* note 13.

¹⁷ Jean Ferguson, *supra* note 12.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

problem of this form of child abuse as exposure to domestic violence and not merely the allowing of the actual witnessing of the acts involved.²¹

The effects and statistics relating to the exposure of domestic violence to children define this problem as a form of child abuse. In addition, studies clearly demonstrate that such exposure has a perpetuating effect on the core problem of domestic violence itself. For these reasons, the act of exposing children to domestic violence should be prohibited under both domestic law on a worldwide basis, and under international law.

Part I of this paper will briefly note the extent of the problem of domestic violence worldwide, the incidence of exposure of domestic violence to children, and the effects on children of this exposure, presenting an argument as to why this exposure is a form of child abuse and should be criminalized as such. Part II will review the development of domestic and international law with regard to domestic violence in general, describing its current state. Part III will show the evolution of Canadian and U.S. law with respect to criminalizing the exposing of children to domestic violence by adults as examples of the development of domestic law on this issue. Part IV will show how children can be protected from exposure to domestic violence under international law as well, drawing parallels with the development of international law with respect to domestic violence in general and with the criminalization of the exposure of domestic violence to children under domestic law. Finally, the conclusion will state hope for the future in terms of further development of effective enforcement mechanisms for the crime of exposing children to domestic violence under domestic law and the protection of the rights of the child under international law to not be exposed to domestic violence.

²¹ *Id.* at 1129.

I. Domestic Violence and Exposure of Domestic Violence to Children as Child Abuse – Why Children Should Be Protected Against Such Exposure under Domestic and International Law

The United Nations has estimated that in each country, the percentage of women suffering some form of domestic violence is from twenty percent to fifty percent.²² Reported statistics vary,²³ but worldwide estimates range from at least thirty-three percent of women being subjected to domestic violence in their lifetimes²⁴ to as many as fifty percent of women being hit by their intimate partners every year.²⁵ Regardless of which studies produce the most valid estimates, the range noted above is indicative of a substantial worldwide problem regarding the perpetration of domestic violence against women.

Results of studies on the number of children exposed to domestic violence between their parents also vary, but indicate a substantial problem nonetheless. Studies in the 80s and 90s have produced results that show that between three million and ten million children between the ages of three and seventeen are exposed to domestic violence in the U.S alone every year.²⁶ More recent data have indicated that this figure is actually over 15 million.²⁷ This higher estimated incidence may be due to the use of more sound research methods, but may also be indicating that the problem is worsening, not improving. At least one study has revealed that eighty-seven percent of battered women have reported that their children have witnessed the domestic

²² UNICEF, *Domestic Violence Against Women and Girls*, 1, (United Nations Children’s Fund Innocenti Research Ctr.. Innocenti Digest No. 6, 2000).

²³ See Ctr. for Health and Gender Equity, *Population Reports, Ending Violence against Women* 4 tbl.1 (1999).

²⁴ Bonita C. Meyersfeld, *supra* note 13(citing Family Violence Prevention Fund, *Domestic Violence is a Serious, Widespread Social Problem in America: The Facts*, at <http://endabuse.org/resources/facts> (last visited November 11, 2003)).

²⁵ See Ctr. for Health and Gender Equity, *Population Reports, Ending Violence against Women* 4 tbl.1 (1999).

²⁶ Amy Haddix, *supra* note 1, at 760, also citing Roberta L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 190 n.12 (1995).

²⁷ See <http://www.futureswithoutviolence.org/content/news/detail/1625>, last visited May 8, 2011.

violence perpetrated against them.²⁸ This is reasonable to accept, given the close quarters in which families live. Again, regardless of which end of the spectrum of results is more accurate, the defined range of the incidence of exposure of children to domestic violence is indicative of the fact that a significantly problematic number of children are at risk of this form of child abuse.

Considering that the worldwide incidence of domestic violence is so high, and that the United States, estimated to have about 22 percent of its female population being victimized by domestic violence every year, is at the low end of the UN estimates of as low as 20 percent per year in some countries to as much as 50 percent per year in others,²⁹ the numbers cited above regarding exposure of children to domestic violence in the U.S. are likely to be significantly higher as a percentage of population in other regions of the world. In addition, when the percentages of women subjected to domestic violence on a worldwide basis are intertwined with the high rates of probabilities of boys becoming wife-batterers as men, a perpetuating cycle is revealed that may be on the rise and seemingly has no end. This fact alone points to the need for legislation, both international and domestic, which criminalizes the exposure of children to the domestic violence of their parents. Equal justification for such legislation comes from the view of domestic violence being a form of child abuse *per se*.

The direct effects on children of exposure to domestic violence can be gleaned from the following results of clinical and statistic studies: Children who grow up in homes beset by domestic violence are at greater risk of experiencing anxiety, depression, problems in school, and teenage pregnancy, while also engaging in substance abuse and attempts of suicide.³⁰ Of the numerous psychological studies that have been conducted to gain knowledge of the impact that

²⁸ Amy Haddix, *supra* note 1, at 760.

²⁹ UNICEF, *supra* note 22.

³⁰ Jean Ferguson, *supra* note 12.

exposure to domestic violence can have on children, some have shown that clinical problematic child behavior can lead to a misdiagnosis of attention deficit disorder where the true source of such problems is the exposure to domestic violence.³¹ In addition, the adoption of maladaptive behaviors such as acting out for the purpose of deflecting the attention of parents prone to domestic violence away from each other and toward the child may be adopted.³² Compounding the problem of exposure to domestic violence are age factors, as those who experience such exposure from pre-school years tend to display limited empathy for the distress of others, and develop low self-esteem.³³ Perhaps saddest of all, as noted earlier, adults who were exposed to domestic violence as children are at greater risk of engaging in conflict behavior and abuse than those who were not. All of the above further justifies the imposition of domestic and international legislation criminalizing the exposing of children to domestic violence.

II. The Development of Domestic and International Law on Domestic Violence

The fight for the protection of women's rights in the western world can be traced in modern history to the defeat of the Celts, who'd created a culture known to have given empowerment to women, by the Romans, who were heavily influenced by the Roman version of Christianity, characterized as a patriarchal system based on the superiority of men.³⁴ Among the most morally reprehensible and unjust outgrowths of this dramatic change in societal foundation

³¹ Rachel L. Melissa, *Oregon's Response to the Impact of Domestic Violence on Children*, 82. OR. L. REV. 1125, 1130, (2003).

³² *Id.*

³³ *Id.* at 1132.

³⁴ Jerry von Talge, *Victimization Dynamics: The Psycho-Social and Legal Implications of Family Violence Directed Toward Women and the Impact on Child Witnesses*, 27 W. ST. U. L. REV. 111, 116-117 (citing Peter Berresford Ellis, *CELTIC WOMEN, WOMEN IN CELTIC SOCIETY AND LITERATURE* 99-118 (1996)).

has been a resulting pattern of behavior that has put women at significant risk of violence at the hands of men, including, perhaps most sadly, in the supposed safety of the home.

In the ensuing centuries after the defeat of the Celts by the Romans, the development of the British common law system, incredibly, actually advanced the notion of the right of husbands to perpetrate domestic abuse upon their wives.³⁵ Although some historical records exist showing some public protests against wife beating in Roman times and subsequently during the period of the French Revolution, such efforts were scarce until the feminist movement in Great Britain came about in the late nineteenth century.³⁶ This movement included the first well-documented social campaign against wife-beating.³⁷ While the U.S. justice system was already based on the British common law system, during this period of time a similar movement toward the protection of women from domestic violence was severely limited.³⁸ It was not until another feminist movement took root in the United States, based upon civil rights campaigns of the 1960s and 1970s,³⁹ that a campaign against domestic violence in the U.S. began to bear fruit, leading to reform in U.S. statutory law.⁴⁰ Similar movements developed concurrently in Canada and Western Europe.⁴¹

Although domestic law in the United States and elsewhere has been plagued by a lack of proper enforcement and effectiveness since it began to develop across the world, the creation of this law represented a major step forward in addressing the problem of domestic violence against

³⁵ Jean Ferguson, *supra* note 12, at 4.

³⁶ Jerry von Talge, *supra* note 34, at 117 (citing Ethel Klein at al., *ENDING DOMESTIC VIOLENCE, CHANGING PUBLIC PERCEPTIONS/HALTING THE EPIDEMIC*, 118 (1997)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ Jean Ferguson, *supra* note 12, at 4.

⁴¹ Jerry von Talge, *supra* note 34, at 118.

women, and led to similar developments under international law.⁴² While often the development of international law precedes that of domestic law, as instruments of international law impose obligations on states bound by these instruments and, through international pressure on compliance, such obligations may be enforced,⁴³ this order in the process of law development is does not always hold true. Sometimes the development of domestic law in certain areas of the law in various parts of the world occurs first, and then influences other nation-states to implement similar legislation, while at the same time influencing international legal organizations to create international law addressing the same concerns.⁴⁴ This latter scenario has been the case in the development of law regarding domestic violence against women.

As noted above, the development of domestic law protecting women against domestic violence began to occur as early as the late 1800s (in the case of Great Britain), and began in the U.S., Canada, and other parts of Western Europe in the 1970s. However, the protection of rights specific to women under international law as we know it today did not formally begin until the establishment of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1979.⁴⁵ CEDAW, together with the adoption by the CEDAW Committee of General Recommendation 19 in 1992 and the Optional Protocol to CEDAW in 1999, have created a formal foundation for the legal protection of women's rights in general and those rights specifically regarding violence against women worldwide.⁴⁶ While CEDAW did not mention violence against women,⁴⁷ General Recommendation 19 specifically addressed the matter, not

⁴² Jean Ferguson, *supra* note 12, at 4.

⁴³ Bonita C. Meyersfeld, *supra* note 13, at 376 (citing Harold Hongku Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 626 (1998))

⁴⁴ *Id.*

⁴⁵ See, generally, Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/830 (1979).

⁴⁶ Bonita C. Meyersfeld, *supra* note 13, at 393.

⁴⁷ Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 45.

only regarding gender-based violence in general but also regarding domestic or family violence.⁴⁸ In addition, the Optional Protocol established a procedure for individuals, groups, and groups on behalf of individuals from states which have ratified CEDAW to submit complaints when they believe their rights under CEDAW and General Recommendation 19 have been violated.⁴⁹ Those rights include the right to be protected from gender-based violence generally and domestic or family violence specifically.

Also, the UN issued a report on Violence Against Women in the Family in 1989, and five years later the UN issued the Declaration on the Elimination of Violence Against Women, both helping to focus attention on violence against women across the world.⁵⁰ These developments are important not only because they helped place specific protected rights of women into the realm of international law, but also because they placed the act of committing domestic violence against women into the human rights sphere, where potentially it could be penalized under various human rights instruments. For example, if a successful argument could be created that certain acts of domestic violence meet the definitions of any of the numerous prohibited acts under the International Covenant on Civil and Political Rights (ICCPR) or the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), then the act of committing domestic violence could result in some form of redress for the victim under these instruments.⁵¹ While this was already a possibility on a case-by-case basis, the fact that the international human rights community had been given a lens through which to specifically look

⁴⁸ See generally, General Recommendation 19: Violence against Women, Committee on the Elimination of Discrimination Against Women, 11th Sess., U.N. Doc. A/47/38 (1992).

⁴⁹ *Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women*, G.A. Res. 54/4, U.N. GAOR, 54th Sess., Supp. No. 49, at 4, U.N. Doc. A/54/49 (1999).

⁵⁰ *Id.* at 394.

⁵¹ See, generally, Bonita C. Meyersfeld, *supra* note 13.

at the commission of the infliction of domestic violence meant that this heinous act had been given another realm of examination.

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women, established in 1994, and the Beijing Declaration and Platform for Action, issued in 1995, further verified that domestic violence against women was to be viewed as a violation of human rights. In addition, in 1993 the UN's Commission on Human Rights, for the first time, appointed a Special Rapporteur on Violence Against Women, who was charged with investigating the extent of the domestic violence problem throughout the world. Her report, issued in 1996, represented a strong condemnation of the great abundance of gender-based violence against women, and of domestic violence specifically, that has been in existence on a worldwide basis for so long.⁵²

Despite the fact that attitudes still exist in legal systems that continue to enable domestic violence, the aforementioned human rights instruments and developments, taken together, have served to elevate the recognition the problem of domestic violence against women across the world.⁵³ In addition, as noted above, although the incidence of this illegal act is still high, most countries today specially outlaw domestic violence⁵⁴ in an effort to protect women from its effects and to enforce women's civil and human rights. Thus, whereas effective and proper enforcement is still an issue,⁵⁵ the defining of domestic violence against women as a human rights violation under international law and as a crime under domestic law means that the act of

⁵² Report of Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. ESCOR, 52d Sess., U.N. Doc. E/CN.4/1996/53 (1996).

⁵³ UNICEF, *supra* note 26.

⁵⁴ Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 623 (2001).

⁵⁵ Bonita C. Meyersfeld, *supra* note 13, at 373 (citing Report of the Special Rapporteur on violence against women, its causes and consequences, U.N. ESCOR, 52nd Sess., U.N. Doc. E/CN.4/1996/53 (1996) (submitted by Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1995/85)).

perpetrating domestic violence on a spouse or intimate partner has been declared to be in violation of the law worldwide.

It is important to note that the development of current international law regarding domestic violence against women didn't begin the 1979 establishment of CEDAW, which served as the foundation for the subsequent addendums that specifically defined and protected against this behavior, namely 1992's General Recommendation 19 and the Optional Protocol to CEDAW of 1999, as stated above.⁵⁶ Thus, the time that elapsed from when the effort to codify women's rights under international law bore its first fruit until the time that domestic violence was specifically defined as a human rights violation and a complaint procedure was established to enforce this prohibition was twenty years. This means that domestic violence against women was codified as a human rights violation in a relatively short period of time, from a modern history perspective, once the effort to do so got underway. Although the advent of these efforts took centuries to finally come about, fortunately the results from these efforts did not occur with such an incredibly undue delay.

The same can be said of the development of domestic law on domestic violence across the world, which, although it took decades as described above, was still achieved in many domestic jurisdictions fairly quickly, once the various feminist movements that inspired these domestic laws came into being. Also, in many of these domestic jurisdictions the pertinent law was put in place in advance of the development of international law on domestic violence. These factors represent promise with respect to the task of defining the act of exposing children to domestic violence as a form of child abuse under international law, because the efforts to do are already at the stage of domestic law development, as noted below. Although the act of exposing

⁵⁶ Bonita C. Meyersfeld, *supra* note 13.

children to domestic violence has yet to surface as a human rights violation under international law, if efforts to achieve the criminalization of the act under domestic law are already underway, then protection from such exposure under international law is likely not far away, as will be seen from the discussion below.

III: The State of Domestic Law on Domestic Violence as a Form of Child Abuse and Its Impact on International Law Development

As referenced above, many studies have been undertaken on the issue of the exposure of children to domestic violence. Since at least the early 1980s, researchers have produced a considerable body of empirical data that reveals the negative effects on children's social functioning and psychological development due to exposure to domestic violence.⁵⁷ Experts in the field of child abuse have considered the act of exposing children to domestic violence to be a form of child abuse for almost two decades at least.⁵⁸ In addition, psychological research has suggested that the adverse effects on children of witnessing domestic battering are comparable in type, if not severity, to the negative effects of physical child abuse.⁵⁹ The very fact that numerous studies have been completed on the subject of the exposure of children to domestic as a form of child abuse can mean that the process of criminalizing the behavior has begun. Indeed, between 1978 and 1990, six Canadian provinces enacted laws characterizing the exposure of children to

⁵⁷ Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment*, 53 HASTINGS L.J. 1, 4-6 (2001).

⁵⁸ Jerry von Talge, *supra* note 51, at 172 (citing Lenore E. Walker, Report of the American Psychological Association Presidential Task Force on Violence and the Family 3 (1996)).

⁵⁹ Brooke Kintner, *The "Other" Victims: Can We Hold Parents Liable for Failing to Protect Their Children from Harms of Domestic Violence?* 31 N.E. J. ON CRIM. & CIV. CON. 271, 276 (2005) (citing Alan J. Tomkins et al., *The Plight of Children Who Witness Woman Battering: Psychological Knowledge and Policy Implications*, 18 LAW & PSYCHOL. REV. 137, 139 (1994)).

domestic violence as a form of child abuse.⁶⁰ As further evidence, U.S. states started to pass legislation on the matter in the 1990s.⁶¹ Given that the development of U.S. and Canadian domestic law on domestic violence took place concurrent with or before the development of domestic law on such violence in other parts of the world (as previously noted in Section II), and also preceded the development of international law on domestic violence (also as noted in Section II), arguably some promise can be gleaned from these facts, as North America might again be seen to be paving the way for the world to criminalize a particular behavior under domestic law and to establish the behavior as a violation of human rights under international law.

In addition, although often the U.S. has been criticized, sometimes heavily, for its own civil and human rights record,⁶² the United States has been a party to much but not all of the major developments in evolving international human rights law from the beginnings of this law until today, starting with the creation of the United Nations in 1945 in the aftermath of World War II,⁶³ as has Canada. As such, the U.S. and Canada can at least be said to be among the nation-states that tend to be at the forefront of international human rights law development. The U.S., in fact, sometimes precedes the establishment of international law instruments with enactments of its own, as in the case of its passage of the Civil Rights Act of 1964 two years prior to the adoption of the ICCPR and the ICESCR. If the path to sanctioning the act of exposing children to domestic violence under international law is mapped out parallel to the of the path of protecting women from domestic violence itself under international law, then domestic law on this subject in many nations across the world will develop before that of

⁶⁰ Lois A. Weithorn, *supra* note 57, at 101.

⁶¹ *Id.* at 101-123.

⁶² <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G11/100/69/PDF/G1110069.pdf?OpenElement>, para 21, last visited May 1, 2011.

⁶³ Mary Ellen O'Connell, Richard F. Scott, Naomi Roht-Abriaza, *THE INTERNATIONAL LEGAL SYSTEM, CASES AND MATERIALS*, 268.

international law, but the lesson learned is that eventually international law will develop in this area.

Among the various U.S. jurisdictions which have criminalized the act of exposing domestic violence to children is the state of Oregon, which amended its fourth-degree assault statute in 1997 to include this offense.⁶⁴ Under Oregon law, it is now a crime to intentionally, knowingly, or recklessly cause physical injury to another when the act is witnessed by the perpetrator's minor child or the victim's minor child residing within the household of the person or the victim, elevating the underlying crime to a Class C felony if the latter witnessing element is present.⁶⁵ This new legislation was further updated in 1999 with the introduction of two new bills by Congress which sought to amend the language of the Oregon law to include not only the direct witnessing of the domestic violence through sight but also the mere exposure to it.⁶⁶ During the debate on the content of the new bills, lawmakers argued the issue that merely being able to hear or feel the domestic violence through some means of touch also provided a case for a charge of exposing a child to domestic violence as a form of child abuse, yet these arguments were not supported unanimously.⁶⁷ Nonetheless, the resultant new law ended up containing the language of committing assault in the presence of, or while being witnessed by, the perpetrator's of the victim's minor child, and further defined the concept of a witnessed assault as any assault that is seen by or directly perceived by a such a child in any other manner, thus considerably broadening the new law's scope from what had been originally proposed.⁶⁸ This judicial history

⁶⁴ ORS 163.160.

⁶⁵ ORS 163.160.

⁶⁶ Rachel L. Melissa, *supra* note 31, at 1135.

⁶⁷ *Id.* at 1135-1136.

⁶⁸ *Id.* at 1136.

on Oregon's new law is illustrative of the evolution of U.S. domestic law in criminalizing the act of exposing children to domestic violence.

Like Oregon, the state of California also took action in 1997 to criminalize the act of exposing children to domestic violence, in this case using existing statutes to deal with the problem by prosecuting those who engage in domestic violence in front of children under these statutes.⁶⁹ First, California prosecutors began charging offenders with one count of child abuse for every child who witnessed an underlying assault, using California Penal Code section 273a(b), a misdemeanor child abuse statute, for causing mental suffering to the children.⁷⁰ In addition, prosecutors also began charging these same offenders with felony domestic abuse under California Penal Code Section 273.5.⁷¹ Thus, instead of introducing new bills which called for elevating the severity of an existing assault law, California used an innovative prosecution strategy to address the issue of the exposure of children to domestic violence.⁷² California also used an important difference between its child abuse statute and its domestic violence statute to attempt to cast a wider net over offenders who exposed children to child abuse.

California's child abuse statute calls for the prosecution of *any person* who "willfully causes or permits the child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care and custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered."⁷³ Prosecution under this statute therefore requires under certain circumstances that the state prove that a child has undergone

⁶⁹ Gina L. Kershaw, *The Child Witness as a Victim of Domestic Violence: Prosecuting the Batterer under California's Child Abuse Statute*, 19 J. JUV. L. 196, 204 (1998).

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ CAL. PENAL CODE § 273a. (West 1997).

mental suffering by witnessing the domestic abuse of someone by another person.⁷⁴ However, without a specific reference to a requirement that a legally defined relationship must exist between the child victim and the offending adult under the child abuse statute where mental suffering can be proven, the offending adult can be any adult, regardless of whether or not that adult has a special relationship with the child victim. Prosecution under the domestic abuse statute involves only offenders who are spouses or cohabiters, or the requirement that the offender and the victim of the underlying abuse have had a child together.⁷⁵ Thus, while California's domestic abuse statute allows protection of children from exposure to domestic violence of the type that is usually suffered, meaning that between the parents of the child victim or that between adults who have legal custody of the child victim, California's child abuse statute allows for the capture of a larger pool of violators, including those with whom a mother may have a romantic relationship but with whom she and her child are not living, thus enhancing the scope of the protection of the victims of exposure to domestic violence. Because no law existed to specifically criminalize the targeted behavior, California law enforcement simply began interpreting existing law to accomplish its goals, using two types of law instead of one in order to be more effective in accomplishing its goal.⁷⁶

A major difference between Oregon's approach and California's approach to criminalizing the act of exposure of domestic violence to children is that Oregon has specifically defined the targeted behavior as a crime, and its new laws entail broad meanings of the words *exposure* and *witnessing*, whereas California made no such distinctions, possibly leading to a higher level of challenge for prosecutors to prove their cases, as they would be required under

⁷⁴ Gina L. Kershaw, *supra* note 69, at 205.

⁷⁵ CAL. PENAL CODE § 273.5. (West 1997).

⁷⁶ Gina L. Kershaw, *supra* note 69, at 205.

any circumstance under the child abuse statute to prove either that the child victim incurred mental suffering or that the child victim's health was endangered or injured.⁷⁷

The obvious challenge to policymakers, practitioners, and researchers has been to find the best ways to prevent the exposure of domestic violence to children.⁷⁸ This has been the case ever since the problem started to be brought to light a few decades ago. While growing consensus has come about amongst the non-legal, social forms of systems designed to deal with societal problems such as the protection of children from having to witness their fathers brutally beat their mothers, much less clear has been the answer to the question of what is the best way for lawmakers to respond to this problem of tragic dimension.⁷⁹ Oregon and California may have led the way in criminalizing the act of exposure of children to domestic violence, but by the beginning of the 2000s the overwhelming majority of states had begun adopting language in their family law statutory schemes which allowed for the consideration of parental perpetration of domestic violence to be considered as a factor in child custody cases.⁸⁰ Also, similar approaches to that of Oregon have led to sentencing upgrades for domestic violence offenses committed in the presence of children in many domestic U.S. jurisdictions.⁸¹

Buttressing the legal devices and strategies highlighted above, which enable jurisdictions to directly or indirectly address the exposing of domestic violence to children, many states in the U.S. have laws in place requiring the protecting of children from child abuse which can be revised to directly address the problem of parents exposing their offspring to domestic violence.⁸² These laws establish an affirmative duty on the part of parents to protect their

⁷⁷ *Id.*

⁷⁸ Lois A. Weithorn, *supra* note 57, at 8.

⁷⁹ *Id.* at 8-9.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Brooke Kintner, *supra* note 59, at 274-275.

children from domestic violence.⁸³ Thus, the jurisdictions which created and which enforce these laws could use the extensive research that has already shown the harmful effects of exposure of domestic violence on children to hold the perpetrator of the violence responsible for failing to protect their children from this harm by causing the exposure.⁸⁴ Child abuse statutes which criminalize the failure to report child abuse can be easily revised to address the act of exposing children to domestic violence committed by their parents. This could be done by revising these laws to include the exposing of children to domestic violence as a form of child abuse.

Many jurisdictions in the U.S. also now have laws which establish an affirmative duty on the part of those who have knowledge of child abuse to report the abuse.⁸⁵ These laws can be modified to require victims of domestic violence to report it to authorities when it occurs in front of their minor children. For example, Florida's Reporting Child Abuse Statute states that "a person who is 18 years of age or older and lives in the same house or living unit as a child who is known or suspected to be a victim of child abuse [or] neglect... and knowingly and willfully fails to report the child abuse commits a felony...".⁸⁶ Alaska has a similar statute.⁸⁷ The only change necessary to these and other laws enabling them to address the exposure problem would be to include the act of exposing a child to domestic violence as a form of child abuse covered by the laws, thus requiring the victim to report any such exposure.

At least one jurisdiction has already undertaken to hold the parent who is the victim of the violence liable for the harms suffered by children for their parents' exposure of domestic violence to them.⁸⁸ *In re Lonell J., Jr.* resulted in the first case in New York in which the court

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* citing *Fla. Stat. Ann. 39.205(2)* (West 2003).

⁸⁷ Brooke Kintner, *supra* note 59 (citing Alaska Stat. 47.17.020(a) (Michie 2002)).

⁸⁸ *Id.*, at 281.

ruled that a non-abusing mother may be held liable for failing to protect her children from witnessing domestic violence.⁸⁹ However, the soundness of employing the law to hold victims of domestic abuse responsible for allowing their children to be exposed to the domestic violence that they have suffered is vulnerable to at least significant debate within the psychology community, because underlying this use of law is the premise that the victim of domestic violence has the power to extricate herself and her children from her situation freely and easily and at any time. The act of reporting the exposure of the child to domestic violence would amount also to reporting the underlying abuse. Research has shown that a multitude of reasons exist for why a woman might remain in a relationship that entails her being abused by her mate and not report it, including a lack of financial resources or other options as to where to live and care for her children, a desire to maintain the family unit, denial, a hope that the violence will someday stop, and, perhaps most significantly, the very real fear of retaliation by her abuser.⁹⁰ However, this approach, especially if taken by other domestic jurisdictions, would widen the scope of law that could feasibly lead to reducing the incidence of children's exposure to domestic violence. Support for this approach is provided by the view that holding domestic abuse victims liable for protecting their children from exposure to domestic violence would provide additional incentive for the victim to seek help and extricate herself and her children from the abusive relationship.⁹¹ Given the difficulties that women have in reporting the abuse

⁸⁹ *Id.* (citing *In re Lowell J., Jr.*, 673 N.Y.S.2d 116, 118 (App. Div. 1998) (citing Lynne R. Kurtz, *Protecting New York's Children: An Argument for the Creation of a Rebuttable Presumption Against Awarding a Spouse Abuser Custody of a Child*, 60 ALBANY L. REV. 1345, 1351 n.45 (1997))).

⁹⁰ Jacqueline Syrnick, *Shifting The Burden: An Argument for A Rebuttable Presumption Against Visitation During a 209A Restraining Order Proceeding*, 43 NEW ENG. L. REV. 645, 650 (2009) (citing Elizabeth M. Schneider et al., DOMESTIC VIOLENCE AND THE LAW: THEORY AND PRACTICE 59-62 (2d ed. 2008) (citing Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a. Why Abuse Victims Stay*, 28 COLO. LAW 19 (1999))).

⁹¹ Brooke Kintner, *supra* note 59, at 289.

that they themselves suffer, this approach could not be successful unless and until something could be done to encourage women to report the domestic violence that they suffer.

As shown above, many existing laws can be used to combat the exposure of children to domestic violence by revising them to define this exposure as a form of child abuse, thus proving a ready template for reform in this area of growing concern. This concept forms an important part of the process that needs to be put in place to bring international law in line to protect children from exposure to the domestic violence of adults.

IV. Protecting Children from Exposure to Domestic Violence under International Law

Efforts have been underway for many years now to formalize the protection of women from domestic violence under international law.⁹² One effective approach may be to incorporate new definitions of existing violations of human rights into the international legal framework for human rights in general, and for violence against women in particular, for the purpose of accomplishing this goal, similar to the approach taken in many domestic law jurisdictions.⁹³ For example, in an effort to bring forward the movement to protect women from domestic violence under international law, the possibility of redefining private torture to include the more severe forms of domestic violence has been put forth, which, if done, would have the effect of immediately gaining the same protections under international law for some forms of domestic violence as that which has been afforded to sufferers of torture.⁹⁴ This would mirror the approach that has been taken in many state jurisdictions under U.S. domestic law, in which existing statutes criminalizing child abuse in general and the failure to protect children from child abuse

⁹² See, generally, Bonita C. Meyersfeld, *supra* note 13.

⁹³ *Id.*

⁹⁴ *Id.*

have been revised to incorporate the exposure of children to domestic violence as crimes under both types of statutes, as described in Section III above. This approach was also taken in Canada, where existing Canadian domestic law on child abuse was revised in several provinces in order to criminalize the act of exposing children to domestic violence as a form of child abuse, also as described in Section III.

A look at existing international law that protects women's rights is illuminating. For example, under Articles 2 through 23 of CEDAW General Recommendation no. 19 of January 19, 1992, many acts of violence ordinarily considered to be within the family sphere or in the confines of the private home are noted as being violations of the human rights of women.⁹⁵ Because the right of women to be protected from these specific violations of human rights was not mentioned in CEDAW when it was established in 1979,⁹⁶ an addendum was needed in order to codify these important protections. Thus, General Recommendation No. 19 has represented a strong step toward the ultimate codification of women's right to be free of domestic violence. Clearly, another instrument could be created as an addendum to CEDAW for the purpose of incorporating additional acts as violations of international human rights law, including the act of exposing children to domestic and/or gender-based violence, thus formalizing the right of a woman under international law to have her children protected from exposure to domestic violence. In this scenario, the right of a child to be protected from exposure to domestic violence would be gained through defining it in terms of the rights of the mother.

Just as is the case of the protection of women's rights in general, which has been codified under international law beginning with the establishment of CEDAW in 1979,⁹⁷ the rights of

⁹⁵ General Recommendation 19: Violence against Women, Committee on the Elimination of Discrimination Against Women, *supra* note 48.

⁹⁶ *See, generally*, Convention on the Elimination of All Forms of Discrimination Against Women, *supra* note 45.

⁹⁷ *Id.*

children in general have been protected under international law, beginning with the Convention on the Rights of the Child (CRC), established in 1989.⁹⁸ The right of women to be specifically protected from violence came about with the establishment of General Recommendation 19⁹⁹ and the Optional Protocol,¹⁰⁰ both follow-ups to CEDAW which represented significant steps forward in the fight to protect women from violence in general and specifically from domestic violence. Although further efforts must be undertaken to solidify these protections through proper and more effective enforcement, now that the necessary instruments have been put in place to begin this process, the path has been established by which this can be done. The same can be said of the rights of the child.

The CRC contains thirteen provisions directing nation-states as to how to protect children from abuse.¹⁰¹ These provisions afford children protection in a variety of ways, ranging from establishing a standard for what is the best interests of the child with respect to government intervention to recognizing and protecting parental rights to recognizing the importance of parental involvement after their separation from the family unit.¹⁰² Under Article 19 of the CRC, governments are required to protect children from all forms of abuse.¹⁰³ Specifically, Article 19 requires states to take appropriate administrative, educational, legislative and social measures to protect children from “physical or mental violence”, among other forms of abuse, while in the care of parents and legal guardians or any other person charged with care of such children.¹⁰⁴

⁹⁸ See, generally, Convention on the Rights of the Child, G.A. Res. 44/25, U.N. GAOR, 44th Sess., U.N. Doc. A/44/25 (1989).

⁹⁹ See generally, General Recommendation 19: Violence against Women, Committee on the Elimination of Discrimination Against Women, supra note 48.

¹⁰⁰ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, supra note 49.

¹⁰¹ Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child and its Consistency with United States Law*, 5 GEO. J. FIGHTING POVERTY 185, 186 (1998).

¹⁰² *Id.*

¹⁰³ Convention on the Rights of the Child, supra note 98 at Supp. No. 49, at art. 19, U.N. Doc. A/RES/44/736 (1989).

¹⁰⁴ *Id.* at para. 1.

Article 19 also mandates that states enforce the reporting of the cited forms of abuse of children.¹⁰⁵ Mental violence is not defined in the CRC.¹⁰⁶ However, because mental violence is not defined, arguably the protection of children from exposure to domestic violence by parents and legal or other guardians is already governed by the CRC. Barring a statement to the contrary, certainly a case could be made that the act of exposing a child to domestic violence is a form of mental abuse of the child.

Another approach that would enable the prohibition of the exposing of children to domestic violence is the issuance by the human rights council of a General Comment as an addendum to the CRC, specifically defining mental violence as including the act of exposing children to domestic violence. Alternatively, this General Comment could state that the act of exposing children to domestic violence is a form of abuse of children that states must take measures to guard against. Thus, just as in the case of General Comment 19, which complemented CEDAW in the governance of violence against women, a General Comment could complement the CRC in the protection of children from exposure to domestic violence.

Finally, although enough research and literature citing studies regarding the harmful effects of the exposure of domestic violence to children has been done to warrant a General Comment addendum to the CRC, the appointment of a Special Rapporteur on child abuse could also feasibly address this problem and provide the impetus for international law reform in this important area, just as the Special Rapporteur on Violence Against Women put a lens on that important issue years ago.

¹⁰⁵ *Id.* at para. 2.

¹⁰⁶ *See, generally*, Convention on the Rights of the Child, *supra* note 103.

Conclusion

Few situations can be more traumatic for children to witness than a violent attack on someone they love by someone they love, by one parent on another parent, on their mother by their father. Not only can this trauma lead to a host of potentially debilitating psychological problems, but the lessons learned from witnessing or being exposed to such violent attacks in the supposed safety and sanctity of the home can also lead to exposed boys engaging in the same behavior in their own marriages and romantic relationships in adulthood. These are the reasons why the act of exposing children to domestic violence must be criminalized under domestic law and codified under international law as a human rights violation.

Over time, much of international human rights law has been implemented by domestic courts.¹⁰⁷ The domestic courts of the world are thus a major enforcement mechanism for international human rights law. As seen from the discussion above, though, the development of international law norms can come about after the development of and as a result of the influence of the domestic law of nation-states, which in turn then influences other nation-states to develop their domestic law in response. This process has already begun with respect to criminalizing the act of exposing children to domestic violence, as domestic law prohibiting such behavior has already come into existence in some jurisdictions. The process must now carry forward into the international law realm, where the act of exposing children to domestic violence should be codified under international human rights law and then, in turn, further criminalized by domestic jurisdictions across the world.

¹⁰⁷ Bonita C. Meyersfeld, *supra* note 13 at 376 (citing Judge Edward D. Re, *The Universal Declaration of Human Rights: Effective Remedies and the Domestic Courts*, 33 CAL. W. INT'L L.J. 137, 153-156 (2003)).