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## LIZZIE'S LAW: HEALING THE SCARS OF DOMESTIC MURDER—AN EMERGING NATIONAL MODEL

*"This boy is Ignorance. . . most of all beware this boy, for on his brow I see that written which is Doom, unless the writing be erased."*<sup>1</sup>

### INTRODUCTION

On August 15, 1997 the Massachusetts State Legislature enacted House Bill No. 4689,<sup>2</sup> subsequently referred to as "Lizzie's Law."<sup>3</sup> In doing so, the Legislature not only denounced state ignorance toward the rights of child victims<sup>4</sup> of domestic murder<sup>5</sup> but also made national history in the process.<sup>6</sup>

In Springfield, Massachusetts during August of 1995, Charles R. Thompson, Jr., entered the bedroom of his estranged wife Andrea "Holly" Thompson, slit his wife's throat and stabbed her twenty-four times while his three year old daughter Elizabeth Thompson watched.<sup>7</sup> Charles Thompson then positioned his daughter Elizabeth within her deceased mother's arms, where she remained until morning and discovery dawned four hours later.<sup>8</sup> Thompson was arrested, tried, and convicted of the first degree murder of his wife and sen-

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<sup>1</sup> CHARLES DICKENS, A CHRISTMAS CAROL 98 (St. Martin's Press 1993).

<sup>2</sup> H.B. 4689, Ch. 77, 1997 First Annual Session (Mass. 1997).

<sup>3</sup> See Don Aucoin, *Murder Victim's Family Asks Lawmakers to OK "Lizzie's Law,"* BOSTON GLOBE, July 2, 1997, at B2.

<sup>4</sup> The term "child victim" represents a surviving child who may or may not be a witness to an act of domestic murder.

<sup>5</sup> Act of murder defined by the Massachusetts State Legislature wherein one parent is convicted of the murder of his or her child's other parent. H.B. 4689, reprinted in 1 Mass. St. Legis., 1st Sess., LEGISLATIVE HISTORY OF LIZZIE'S LAW, 1997, at 3101 (1997).

<sup>6</sup> See *Lizzie's Lasting Legacy*, BOSTON HERALD, August 18, 1997, at 24.

<sup>7</sup> See Margery Eagan, *After "Bad Man" Killed Mommy, Lizzie Deserves Law to Guard Her*, BOSTON HERALD, June 8, 1997, at 37.

<sup>8</sup> See *Massachusetts Expected to Enact "Lizzie's Law,"* BUFFALO NEWS, July 4, 1997, at A7.

tenced to life imprisonment without parole.<sup>9</sup> For Charles Thompson, the above ordeal came to a confined ending. For his daughter Elizabeth Thompson and similar child victims of domestic murder, the ordeal just began.

Upon incarceration, Thompson exercised his parental rights,<sup>10</sup> demanding that Elizabeth visit him in prison twice a month and accept telephone calls from him once a week.<sup>11</sup> This request was made against the wishes of Elizabeth Thompson, who allegedly referred to her father as the "bad man" and covered her eyes when she saw his face on television.<sup>12</sup> The Massachusetts State Legislature recognized Elizabeth Thompson's plight and thereupon decreed that under specific circumstances, a child's rights, namely, a child's wish not to visit his or her incarcerated parent convicted of domestic murder, may outweigh seemingly fundamental parental rights of visitation. On August 15, 1997 the Legislature enacted "Lizzie's Law,"<sup>13</sup> which provides child victims of domestic murder with a legal remedy when confronted with a convicted parent's unwelcome visitation request.<sup>14</sup> Specifically, Massachusetts General Laws, namely, chapters 119 (Section 35), 208 (Section 28), 209 (Section 37), and 209C (Section 3(a)) were amended to include Lizzie's Law, which suspends the visitation rights of incarcerated parents convicted of first degree domestic murder.<sup>15</sup> Lizzie's Law suspends such rights by prohibiting any court in the State of Massachusetts from making an order which would provide visitation rights to a parent convicted of murder in the first degree of the other parent of the child who is the subject of the order.<sup>16</sup> By providing stringent, legal pro-

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<sup>9</sup> See *Lizzie's Lasting Legacy*, *supra* note 6, at 24.

<sup>10</sup> The Supreme Court has recognized the right to raise one's children as a basic, fundamental civil right of man. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). See discussion *infra* Part II.C.

<sup>11</sup> See *Lizzie Deserves Better*, BOSTON HERALD, July 22, 1997, at 44.

<sup>12</sup> See Aucoin, *supra* note 3.

<sup>13</sup> The Massachusetts Act was termed "Lizzie's Law" in recognition of the plight of Elizabeth Thompson.

<sup>14</sup> See *Massachusetts Expected to Enact "Lizzie's Law," supra* note 8.

<sup>15</sup> See *infra* note 16.

<sup>16</sup> Section 35 of chapter 119, section 28 of chapter 208, section 37 of chapter 209, and subsection (a) of section 3 of chapter 209C of the General Laws provides: No court shall make an order providing visitation rights to a parent who has been convicted of murder in the first degree of the other parent of the child who is the subject of the order, unless such child is of suitable

tection to child victims of domestic murder, Lizzie's Law represents the first law of its kind in the nation.<sup>17</sup> As such, it has been hailed as not only a ground-breaking endeavor in the field of children's rights but also as an emerging national model.

Beneath the emotional hoopla, however, lie several conflicting issues that may threaten the seemingly secure foundation and/or future of Lizzie's Law. Specifically, a threshold question exists as to whether Lizzie's Law extends beyond reason the state doctrine of *parens patriae*.<sup>18</sup> Also, can a state government unequivocally impair the seemingly fundamental right of childrearing of those parents convicted of first degree domestic murder without violating their constitutional rights of due process, substantive due process and/or equal protection under the law? This Note seeks to answer not only the above questions but also whether Lizzie's Law may be further extended to limit the visitation rights not only of parents convicted of first degree domestic murder but also those convicted of lesser degrees of domestic murder and/or similar exceedingly violent acts against their child's other parent. Part I of this Note discusses the parental rights of parents who are incarcerated following their commission of the act of murder against their child's other parent. By surveying state case law, this Part examines under what circumstances the parental rights of incarcerated parents have been given priority by the courts over those of the child victim at issue. This Part further dis-

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age to signify his assent and assents to such order; provided, further, that until such order is issued, no person shall visit, with the child present, a parent who has been convicted of murder in the first degree of the other parent of the child without the consent of the child's custodian or legal guardian.

H.B. 4689, Ch. 77, 1997 First Annual Session (Mass. 1997).

<sup>17</sup> See Dick Case, "Don't Make Us Visit Our Father"—Grandparents Fight to Keep Children From Their Murderous Dad, SYRACUSE HERALD AM., August 10, 1997, at B1.

<sup>18</sup> *Parens patriae*, literally "parent of the country," refers to the role of the state as the guardian of persons under legal disability, such as juveniles or the insane. See *State of W. Va. v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1089 (2d Cir. 1971). Further, *parens patriae* refers to the role of the state as sovereign in child custody determinations, when acting on behalf of the state to protect the interests of a child. More succinctly, it is "the principle that the state must care for those who cannot take care of themselves, such as minors who lack proper care and custody from their parents." BLACK'S LAW DICTIONARY 1114 (6th ed. 1990); see also DONALD T. KRAMER, LEGAL RIGHTS OF CHILDREN, § 1.02, at 10 (1994).

cusses the specific role the judiciary has played in assessing the weight to be given parental rights, namely, which way have the courts swung in the past—toward recognizing child victims of domestic violence or toward upholding the parental rights of convicted parents? Part II of this Note examines Massachusetts' Lizzie's Law, including a more detailed discussion of the impetus behind Massachusetts' enactment of Lizzie's Law and the State's rationale for recognizing a child's voice in the specific instance of first degree domestic murder. Part II further considers the constitutional implications of Lizzie's Law, namely, whether Massachusetts may impinge upon the arguably fundamental childrearing right of parents convicted of first degree domestic murder without violating their constitutional rights in the process. Part III of this Note addresses Lizzie's Law's nationwide following and specifically examines one state's attempt, namely, New York, to rewrite and enact its version of a child protection act similar to Lizzie's Law (hereinafter termed "The Lee-Anne Cruz Memorial Act") along with the support and opposition it has encountered. Part IV addresses the problems inherent in Massachusetts' Lizzie's Law and proposes improvements to the legislation including, but not limited to, clarification of ambiguous language, broadening of the conviction base, and the inclusion of not only natural birth parents but of all persons occupying a distinctly parental role in a child's life who are subsequently convicted of violent offenses (e.g., first degree domestic murder, second degree domestic murder, and first degree sexual crimes) against the child's other parent. Finally, Part V of this Note evaluates public policy supporting the enactment of individual state's child protection acts similar to Lizzie's Law and the consequences, if any, of the failure of society to recognize the voice of child victims of domestic murder.

## I. BACKGROUND

### A. *Overview: National Treatment of Domestic Murder Cases*

Examining state case law, an inconsistent pattern of judicial decision-making is readily apparent in cases determining parental rights when one parent is convicted of killing his or her child's other parent and subsequently requests visitation

with the child victim. When a parent is murdered, a conflict of interest regularly arises as to who should retain access to, or custody of, the child victim at issue. This conflict operates between the surviving convicted parent and third party interests, such as the state, foster parents, other relatives, and the children, themselves.<sup>19</sup> When faced with such dilemma, state courts have commonly accorded preference to the incarcerated birth parent above and beyond third party interests.<sup>20</sup> This preference stems from the high degree of appreciation courts have attributed to the parent-child relationship above all others.<sup>21</sup> While it may be said that recognition of the rights of children has grown steadfastly over the last few decades,<sup>22</sup> in no way has such recognition surpassed courts' regard for the overwhelming rights of parents in general. In fact, many courts continue to assert that the rights extended to children should never be the same as those extended to adults. The reasoning behind this assertion rests on the belief that children often lack the necessary capabilities to make critical decisions.<sup>23</sup> Courts have had to grapple with many factors when determining parental rights disputes. As a result of the large array of considerations (not the least of which may be general public concern), it is not surprising then that an inconsistent line of state case law has developed in the area of visitation, custody and/or termination of parental rights following an incident of domestic murder.

Examining courts' approaches to termination of parental rights disputes following instances of domestic murder, several courts have demonstrated a reluctance to focus *solely* on the parent's act of murder as the definitive act requiring termina-

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<sup>19</sup> See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1077 (1991).

<sup>20</sup> See *In re Kristina L.*, 520 A.2d 574 (R.I. 1987) (lacking an unquestionable finding of unfitness, natural parents' right to bear and raise their child in a less than perfect way remains superior to the rights of foster parents who may be deemed exemplary nurturers).

<sup>21</sup> The right of a parent to maintain a relationship with his or her child has been described as transcending all other rights and being rooted in nature. See *In re J.P.*, 648 P.2d 1364, 1373 (Utah 1982); see also discussion *infra* Part II.C.

<sup>22</sup> See KRAMER, *supra* note 18, § 1.04, at 15-16.

<sup>23</sup> See, e.g., *Bellotti v. Baird*, 443 U.S. 622 (1979) (when applied to children, constitutional principles should be applied flexibly as children are often unable to make critical decisions).

tion of parental rights. Notwithstanding the degree of violence associated with such act, several courts have looked to other factors such as parental fitness, instances of abandonment, instances of neglect, etc., prior to disallowing a convicted parent contact with his or her children.<sup>24</sup> In *Bartasavich v. Mitchell*,<sup>25</sup> for example, the court found that the natural father's conviction of voluntary manslaughter in the death of his child's mother, by itself, did not meet statutory requirements for termination of parental rights. Instead, the court focused upon the Pennsylvania statutory criterium of parental fitness, stressing the importance of the father's parental care, as natural birth parent, to the child at issue. Moreover, the *Bartasavich* court found the father's incapacity as a parent due to his conviction and incarceration not to warrant termination of parental rights since his incapacity resulted from a one-time conviction and limited term of incarceration, which was not of a "repeated and continuous" nature—that state's statutory standard to terminate parental rights.<sup>26</sup> Thus, in determining whether to terminate parental rights, the *Bartasavich* court overlooked the domestic murder situation at issue, favoring instead an examination of state statutory factors. In addition

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<sup>24</sup> See, e.g., N.Y. SOC. SERV. LAW § 384-b (McKinney 1997).

<sup>25</sup> 471 A.2d 833 (Pa. 1984).

<sup>26</sup> *Id.* Specifically, the court stated that in order to terminate parental rights, a parent's incapacity must be repeated and continuous and that "appellant's action was not repeated, although it could be argued that it is continuous in effect." *Id.* at 836; see also *In re Adoption of M.J.H.*, 501 A.2d 648 (Pa. 1985) (One year following *Bartasavich*, the same court applied the same termination standard to a father convicted of killing the mother of his child. The father's parental rights were terminated as, unlike the father's limited incarceration in *Bartasavich*, defendant in *In re M.J.H.* was serving a life sentence.); *In re Abdullah*, 423 N.E.2d 915 (Ill. 1981) (court found single criminal conviction insufficient to terminate parental rights weighing instead several state statutory factors including the nature of the crime, the identity of the victim, and the severity of the sentence imposed); *In re H.L.T.*, 298 S.E.2d 33 (Ga. 1982) (court did not focus *solely* upon murder of child's mother when determining whether parental rights should have been terminated. Instead, the court was primarily concerned with the lower court's failure to satisfy a clear and convincing standard of proof mandated by state statute. Moreover, the court emphasized the statutory factor of parental fitness, i.e., the father's model inmate status, the fact that he would have a job and home following incarceration, and the father's interest in maintaining contact with his child, thereby disallowing termination of parental rights. Specifically, the court stated that when one parent kills another parent, such act does not, in and of itself, cause the forfeiture of the killer's parental rights as a matter of law.) *Id.* at 34 (citing *Sturkie v. Skinner*, 104 S.E.2d 417 (Ga. 1958)).

to weighing state statutory factors more heavily than the act of domestic murder, courts have utilized prior state case law to give preclusive effect to a consideration of domestic murder in a termination of parental rights dispute. For instance, in *In re Adoption by Benigno-White*,<sup>27</sup> prior case law<sup>28</sup> precluded the court from solely considering the father's murder conviction in the death of his child's mother in order to terminate his parental rights. Following precedent, the court stated that it would concentrate "on the consequences of the act, not on the nature of the act itself."<sup>29</sup> Thus, the *Benigno-White* court terminated the father's parental rights not on the basis of his murder conviction but on the basis of the consequences of his actions. Specifically, the father's long-term (thirty year) incarceration indicated an abandonment of his child under state statutory law and an inability of the father to perform the regular and expected parental functions of care and support<sup>30</sup> for the child.<sup>31</sup>

In addition to the above, several courts have failed to sufficiently consider domestic murder when fashioning visitation, custody and/or termination of parental rights orders even when they are *mandated* to consider the same by statute.<sup>32</sup> Other

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<sup>27</sup> 537 A.2d 1345 (N.J. 1987).

<sup>28</sup> The court in *Benigno-White* looked to the earlier court decision of *In re Adoption of J.*, 354 A.2d 662 (N.J. 1976) (case involved father's murder of his children's mother). The dissent of Judge Crahay, which was subsequently adopted by the New Jersey Supreme Court and the court in *Benigno-White*, stated, "[h]owever heinous the act of slaying may have been and however destructive of the family unit, it does not follow, . . . that it constitutes a failure to perform parental obligations . . . so as to allow the irrevocable cessation of all parental rights." *Id.* at 669. The original opinion in *In re Adoption of J.* held a contrasting view. Specifically, the majority opinion held, "[i]f the crime committed by a parent results in a conviction and is itself palpably hurtful to the child, then the commission of the crime should be a potent, if not determinative, factor in the evaluation of whether by that conduct the parent has forsaken his parental obligations." *Id.* at 666.

<sup>29</sup> *Benigno-White*, 537 A.2d at 1348.

<sup>30</sup> See *id.* at 1349.

<sup>31</sup> See *Heath v. McGuire*, 306 S.E.2d 741 (Ga. 1983) (court chose to terminate father's parental rights by strictly evaluating the *consequences* of the murderous act, i.e., the child was deprived by his mother's death; the father was unfit to care for the child because of his life sentence conviction; such deprivation caused the child to suffer physically, mentally and emotionally; and a future relationship between the father and son would be harmful to the child.); see also *Brown v. Department of Human Resources*, 276 S.E.2d 155 (Ga. 1981).

<sup>32</sup> See Mara Youdelman, *The Post-Separation Family Violence Relief Act: Its*



courts have discounted the act of domestic murder and reduced, by maneuvering around the absence of specific legislation addressing the issue, the degree of consideration given to such act. For instance, in *In re Lutgen*<sup>33</sup> an Illinois appellate court affirmed the lower trial court's grant of child custody to a man convicted in the manslaughter strangulation death of his wife stating that "a single criminal conviction, without more, will not support a finding of unfitness based upon depravity."<sup>34</sup> The court buttressed its conclusion by stating that since neither Illinois courts nor the state legislature had seen fit to enact a rule of law mandating that the killing of one parent by the other in the presence of their children would be sufficient, acting alone, to deprive that parent of his/her parental rights, the *Lutgen* court also would not *solely* consider said act.<sup>35</sup>

The above judicial reduction in the *degree* of consideration given to domestic murder situations, is not uncommon. State courts have often discounted the act of domestic murder by assessing the relative "seriousness" of the crime committed. For instance, in *In re James M.*,<sup>36</sup> the court held the father's second degree murder conviction in the stabbing death of his children's mother to not be the type of felony that would prove a person to be unfit to have the custody of his or her minor children<sup>37</sup> "as would, perhaps, have been the case had the kill-

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*Impact on Custody and Visitation Cases Involving Domestic Violence*, 13 PROB. L.J. 189 (1996).

<sup>33</sup> 532 N.E.2d 976 (Ill. 1988).

<sup>34</sup> *Id.* at 985. In lessening the degree of consideration given to the act of domestic murder, the *Lutgen* court gave great weight to the father's order to his children that they stay out of the living room so that they could not watch the murder take place. *Id.* at 985-86.

<sup>35</sup> *See id.* at 986. With regard to the domestic violence factor statutorily required to be considered, the court decided that the legislature had not accorded this factor any more weight than any other factor. *Id.* at 987; *see also* Cahn, *supra* note 19, at 1080.

<sup>36</sup> 135 Cal. Rptr. 222 (1976).

<sup>37</sup> *See id.* at 265-66. The court further qualified the father's second degree murder conviction by stating that "the crime was a crime of passion, not the product of a vicious and violent character, but comprehensible within the framework of human folly, weakness and imperfection." *Id.* at 266. Moreover, the court went on to state that beyond the murderous act, in order to deny custody it would be imperative that there be a showing of "failure on the part of the neglecting parent in his or her direct relationship with the child." *Id.*

ing been accomplished in the presence of the child victim."<sup>38</sup> The *James* court further stated that the lower court might reasonably have found that the father's second degree murder of his children's mother did not constitute direct neglect of the children<sup>39</sup> as the killing of the mother was not cruelty practiced upon the children despite the subsequent deprivation of care and love of a mother figure in their lives.<sup>40</sup> By stringently examining and qualifying the specific circumstances surrounding a domestic murder situation and subsequently diminishing the degree of seriousness attributed to the murder itself, courts have often either misplaced or reduced the relevance of such act when determining termination of parental rights disputes.

A similar practice appears to have developed in the area of parental visitation and/or custody disputes. Addressing convicted parents' requests for visitation, courts have been hard-pressed to completely deny visitation to such parents without specific legislative edicts and/or extraordinary circumstances which would make visitation clearly inappropriate.<sup>41</sup> In fact, visitation has often been limited or denied *only* in those instances where a parent convicted of domestic murder has been shown to suffer from severe mental or moral deficiencies that would constitute a "grave threat" to a child.<sup>42</sup> While it would seem that the label of "grave threat" would adequately attach to the act or even attempted act of domestic murder alone, in reality this has not been the case. For instance, in *Kim v. Kim*, a California court awarded a father unmonitored visitation with his daughter despite his attempted murder of the child's mother, a near fatal shooting rendering her paralyzed.<sup>43</sup>

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<sup>38</sup> *Id.*

<sup>39</sup> See *id.* at 265. The *James* court further stated, [u]ndoubtedly there may be felonies that, without more, prove a person to be unfit to have the custody of his or her minor children. Such may be crimes that show the depravity of the parent or involve abuse of the child . . . [s]econd degree murder is not necessarily among these." *Id.* at 265-66.

<sup>40</sup> *Id.*

<sup>41</sup> See Cahn, *supra* note 19, at 1092.

<sup>42</sup> See *Commonwealth ex rel. Bachman v. Bradley*, 91 A.2d 379 (Pa. 1952).

<sup>43</sup> 208 Cal. App. 3d 364, 256 Cal. Rptr. 217 (1989) (court therein subsequently restricted the father's visitation privileges only following substantial psychiatric evaluation over a period of some time).

In fact, even following an incident of clearly disturbing effect and seemingly grave consequences, state courts are reluctant to place a child's visitation interests above his or her parent's. In *Commonwealth ex rel. Lotz v. Betty Lotz*,<sup>44</sup> the Pennsylvania court overlooked a child's wish not to see her father following an alleged incident of physical abuse. While not a subtopic found within the category of domestic murder, physical abuse should arguably be considered of grave threat to a child. The *Lotz* court, however, overlooked both said threat and the child's wishes against visitation, instead compelling the child's mother to force the child to visit her father finding that the physical abuse between father and child was not of "such a serious nature that it should work a permanent estrangement."<sup>45</sup> When the issue is visitation (a less intense and extended form of parent-child contact), children's wishes in the past have largely gone ignored.

Considering the above, there fails to exist a clear cut line of judicial decision-making which unequivocally recognizes domestic murder as *prima facie* evidence rendering suspension or termination of visitation/custody privileges and/or termination of parental rights appropriate. Case law does exist, however, which recognizes the ramifications the act of parental murder may have upon the parent-child relationship.

For example, while the New Mexico court in *Matter of Adoption of Doe*<sup>46</sup> ultimately terminated parental rights on the basis of neglect, the court recognized and addressed the detrimental implications of the father's second degree murder of his child's mother stating that such murder struck at the heart of the family.<sup>47</sup> The court further added that the father's conviction proved his inability to appreciate the impact of his actions and to respect the emotional and physical needs

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<sup>44</sup> 146 A.2d 362 (Pa. 1958).

<sup>45</sup> *Id.* at 363; see also Illinois Dept. of Public Aid *ex rel. Dix v. Gagnon*, 680 N.E.2d 509 (Ill. 1997) (court found mother incorrect in stating that child's preference not to see her father is a primary factor relative to decrees of visitation); *Fernald v. Fernald*, 302 A.2d 470 (Pa. 1973) (court found father's abandonment of family and drinking fits in front of his children to not constitute a grave threat and thereby required children, against their wishes, to visit their father); *Commonwealth ex rel. Turner v. Strange*, 115 A.2d 885 (Pa. 1955) (fact that child does not wish visitation by a parent is not controlling).

<sup>46</sup> 657 P.2d 134 (N.M. 1982).

<sup>47</sup> See *id.* at 138.

of his child.<sup>48</sup> Similarly, while the court in *Nancy v. Randolph*<sup>49</sup> ultimately terminated parental rights largely based upon the father's history of violence toward the deceased mother and threats of violence toward the child, the court did recognize the father's first degree murder of the child's mother to be the ultimate act of savagery to that child.<sup>50</sup> In addition, the *Randolph* court, accounting for emotional and psychological scarring the child had sustained as a result of the child's mother's death at the hands of the child's father, stated it could "conceive of few circumstances in which the termination of parental rights would be more justified."<sup>51</sup>

Recognition of the detrimental effects of domestic murder on the parent-child relationship has led to similar recognition of the need to consider the wishes of child victims. Specifically, the court in *Daly v. Daly*<sup>52</sup> recognized a child's desire to be a "specific consideration" relative to determinations involving visitation disputes.<sup>53</sup> Honoring the child victim's wishes, the *Daly* court suspended a father's visitation rights when the child victim expressed emotional and mental disturbance at being in the presence of her father.<sup>54</sup> Thus, while state case

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<sup>48</sup> See *id.* Specifically, the court stated, "[i]t is painfully plain that the father's killing of the mother forever deprives the child of her maternal presence and being—the essence of childhood. A more horrendous wrong to a child is difficult to conceive." *Id.* at 137 (citing *Adoption of J.*, 354 A.2d 662, 667 (N.J. 1976), *rev'd*, 372 A.2d 607 (N.J. 1977)).

<sup>49</sup> 356 S.E.2d 464 (W. Va. 1987).

<sup>50</sup> *Id.* at 470.

<sup>51</sup> *Id.*; see also *In re Welfare of J.H.D.*, 416 N.W.2d 194, 196-97 (Minn. 1987) (where father shot wife in presence of children, court considered spousal abuse as substantial factor in parental rights termination proceeding); *In Interest of A.R.M.*, 750 S.W.2d 86, 89 (Mo. 1988) (court terminated parental rights on basis of abandonment yet specifically addressed father's murder of child's mother stating that the "nature of the crime . . . resulted in the disintegration of the family unit and left the child without even a modicum of parental nurturing during the incarceration of the remaining parent. It is difficult to conceive of a more calamitous event for a child than the murder of her mother by her father. It is absurd for the perpetrator of such a vile act to argue that he should retain his parental rights concerning that child."); *In re Opinion of Doe*, 657 P.2d 134, 135 (N.M. 1982) (court terminated parental rights on basis of neglect stating the "willful murder of the child's mother by the father constitutes a total neglect of his parental obligations toward the child in that he permanently removed the child's mother who could have provided for the child's needs.").

<sup>52</sup> 715 P.2d 56 (Nev. 1986).

<sup>53</sup> *Id.* at 58.

<sup>54</sup> See *id.*

law, in fact, appears to be pervaded with judicial opinions discounting the relevance of domestic murder, a minority of states have recognized the detrimental ramifications of such act and the subsequent relevance of recognizing the child victim's voice.

Inconsistencies readily exist within state case law when the element of domestic murder is a factor in a parental rights dispute. In practice, the degree of protection afforded parental rights varies greatly from state to state as a result of two truths: State legislatures have wide discretion in determining the criteria for suspension and/or termination of parental rights, and the states' judiciary possess even greater discretion in interpreting the criteria set forth by their legislatures, often, perhaps, imposing their own prejudices under the guise of exercising discretion.<sup>55</sup>

### B. *Role of Judiciary in Parental Rights Proceedings*

Judicial discretion reigns supreme in visitation, custody and termination of parental rights disputes.<sup>56</sup> Society has often argued, however, that harmful judicial misperceptions come to play in parental rights proceedings where one parent is convicted of domestic murder.<sup>57</sup> Specifically, the judiciary has been known to (1) be reluctant in removing a child from its parent's custody when a child has not *directly* witnessed a domestic murder;<sup>58</sup> (2) prefer natural birth parents' rights, even if incarcerated, over third party interests;<sup>59</sup> (3) discount domestic murder, or fail to give it proper weight, when weighing the act against other state statutory factors;<sup>60</sup> and (4) fail to issue visitation restrictions and/or supervised visitation episodes despite the suspicion such restriction may be necessary.<sup>61</sup>

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<sup>55</sup> See Mark Strasser, *Fit To Be Tied: On Custody, Discretion & Sexual Orientation*, 46 AM. U. L. REV. 841 (1997).

<sup>56</sup> See *id.* at 890-93.

<sup>57</sup> See *supra* text accompanying notes 19 and 55 (for a thorough discussion of judicial misconceptions in determining parental rights disputes involving heterosexual or homosexual parents).

<sup>58</sup> See *In re James M.*, 135 Cal. Rptr. 222 (1976).

<sup>59</sup> See Cahn, *supra* note 19, at 1060.

<sup>60</sup> See *id.* at 1060-61.

<sup>61</sup> See *id.* at 1087-88.

All of the above practices may exist because judges are rarely adequately trained to fully understand the act of domestic murder or the impact of domestic murder upon a child.<sup>62</sup> In fact, lack of adequate judicial training in the realm of domestic violence, *in general*, is often a hard-core reality. Violence between a child's parents, therefore, becomes a novel and difficult factor for the courts,<sup>63</sup> requiring the judiciary to examine the marital relationship.<sup>64</sup> Courts, however, are often reluctant to go beyond the marital and/or familial veil cloaking the marital relationship as a certain degree of sanctity has been attributed to it. This reluctance may result in members of the judiciary focusing on parental behavior only when it directly affects the child at issue and rejecting evidence of violence against the other parent.<sup>65</sup> When limited training in the area of domestic violence, including domestic murder, is often ignored, judges may find the murder of a child's one parent by his or her other parent to be irrelevant.<sup>66</sup> This approach largely ignores the psychological and sociological ramifications a murderous act may have upon the parent-child relationship.<sup>67</sup> It is improper, however, to place the charge of guilt fully upon the judiciary as the judiciary often draws its perceptions from societal beliefs. Specifically, judicial misconceptions may exist because society, itself, does not want to intervene in the private sphere of the family.

The torch of blame for the present line of inconsistent judicial decision-making in the area of domestic murder may be perpetually passed from varying state statutes, to an un-

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<sup>62</sup> Judicial enforcement of protections for battered women, for example, has often been said to be influenced by common law heritage and cultural stereotypes that treat wives as the property of their husbands and, therefore, seemingly sanction wife abuse. *Id.* at 1097; see also *Minnesota Supreme Court Task Force for Gender Fairness in the Courts, Final Report*, reprinted in 15 WM. MITCHELL L. REV. 825, 933 (1989) (even when properly set forth through the legislature, the judiciary may choose not to impose limits on visitation due to their failure to understand the ramifications of domestic violence).

<sup>63</sup> See Cahn, *supra* note 19, at 1097.

<sup>64</sup> See *id.* at 1082.

<sup>65</sup> See *id.* at 1084.

<sup>66</sup> See *id.* at 1093. (citing *Public Hearing on HB 1781 Before the Pennsylvania House Committee on Youth and Aging*, 1989 Sess. (statement of Judy Yupcavage, Pennsylvania Coalition Against Domestic Violence)).

<sup>67</sup> A more detailed discussion of the psychological, physical and emotional ramifications of domestic violence upon child victims is discussed *infra* in Part V.

trained judiciary, to societal stereotypes and back again. This torch, however, should be extinguished and the torch of uniform state recognition ignited if the needs of child victims of domestic murder are to be adequately addressed. Unless state courts act to uniformly recognize the implications of domestic murder to a child victim, what will likely remain will be an exhausting, yet inconclusive, array of case law that neither adequately addresses the seriousness of the issue nor protects the rights of children involved. Perhaps it is here that Massachusetts has taken up the charge and taken on the role of catalyst, attempting to produce a nationwide reaction.

## II. THE DRAMA AND DILEMMA OF LIZZIE'S LAW

### A. *The Drama of Lizzie's Law*

The Massachusetts' State Legislature's passage of Lizzie's Law provides child victims of domestic murder with the first ever legal right to say "No" to their convicted parent's unwelcome request for forced visitation. Prior to the enactment of Lizzie's Law,<sup>68</sup> no child protection act, statute or law existed in the State of Massachusetts that would have prevented, even in light of a child's opposition, visitation rights from being granted to a parent who was convicted of the first degree murder<sup>69</sup> of his or her child's other parent. Lizzie's Law, however, is not only ground-breaking legislation within the State of Massachusetts. It is the first law of its kind in the nation.<sup>70</sup> As such, Lizzie's Law has become an emerging model for comparison throughout the United States, with New York, Washington, California, New Jersey, Pennsylvania, Ohio, Texas,

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<sup>68</sup> Lizzie's Law was enacted by unanimous vote. See Henriette Campagne, "Lizzie's Law" *Unanimously Approved*, MASS. LAW. WKLY., Aug. 18, 1997, at 3.

<sup>69</sup> See MASS. MODEL PENAL CODE, § 1.03 (1997) (when a murder is committed with deliberately premeditated malice aforethought, or with extreme atrocity or cruelty, or in the commission or attempted commission of a crime punishable with death or imprisonment for life there exists murder in the first degree).

<sup>70</sup> This Author believes the sense of urgency attributed to the enactment of Lizzie's Law may have been based upon several factors, namely, the result of long-term third party frustrations over the court system's demonstrated reluctance to focus solely on the act of domestic murder in determining parental rights disputes, a sense of overdue national relevance or perhaps simply the emotional appeal (for politicians seeking reelection) of a child protection statute.

Indiana, Arizona, Georgia, Delaware, Iowa, Wisconsin, Illinois, Michigan, Florida and Rhode Island requesting copies from the Massachusetts State Legislature so as to develop their own similar child protection acts.<sup>71</sup> Thus, Lizzie's Law's dramatic arrival upon the family law scene has not only unprecedented but also potentially far-reaching effects.

1. Massachusetts' Rationale for Recognizing a Child's Voice in the Specific Instance of First Degree Domestic Murder

The Massachusetts State Legislature prefaced Lizzie's Law with an emergency preamble that immediately pushed the law into effect, thereby prohibiting a forced visitation petition submitted by a domestic murderer from ever being unexpectedly granted.<sup>72</sup> This emergency enactment was the direct result of the legislative belief that deferred operation of the law would defeat its purpose. It may also have been, however, the result of third party<sup>73</sup> fear of an impending judicial ruling in favor of

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<sup>71</sup> Telephone Interview with Paul E. Caron, Representative, Massachusetts House of Representatives (February 2, 1998) [hereinafter Feb. Interview with Caron].

In early 1998, U.S. Senator John F. Kerry began exploring ways in which Congress could enact a national version of Lizzie's Law. Similar to the strategic drive behind Megan's Law (legislation requiring notification of the surrounding general public when a convicted sex-offender moves into a neighborhood), Senator Kerry proposed that the federal government encourage each state to enact a child protection act similar to that of Lizzie's Law in order for said state to qualify for federal grant. For reasons unknown to this Author, Senator Kerry recently abandoned these efforts.

<sup>72</sup> Lizzie's Law emergency preamble states: "Whereas, The deferred operation of this act would tend to defeat its purpose, which is to prohibit court ordered visitation rights to certain persons convicted of first degree murder, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience." H.B. 4689, Ch. 77, 1997 First Annual Session (Mass. 1997) (prohibiting court ordered visitation rights to certain persons convicted of first degree domestic murder).

The emergency preamble was added to Lizzie's Law in an effort to, but not limited to, deliberately curb Charles Thompson's efforts to obtain a formal court order affirming his request for visitation. As of the date of the enactment, Mr. Thompson had not yet formally filed for forced visitation. Had Lizzie's Law failed to be enacted with an emergency preamble, however, the law would have not taken effect until 90 days later thereby giving Mr. Thompson ample time to effectuate his request through the court system.

<sup>73</sup> This Author uses the term "third party custodial representatives" to represent legal guardians or custodians of the child victim who are often relatives of



forced visitation.<sup>74</sup> The risk of encountering and relying upon a judge who might be aberrant enough to overlook the pleas of a child and grant visitation rights to a convicted parent has continually been cause for alarm. On this note, third party custodial representatives in Massachusetts voiced concern as to the physical, psychological, and emotional ramifications forced visitation produced upon the well-being of child victims.<sup>75</sup> The above factors encouraging emergency enactment were further supplemented by increasing numbers of domestic murder cases mirroring the Lizzie Thompson case (and their varied judicial resolutions).<sup>76</sup> The Massachusetts case of David Murphy vividly illustrates this latter concern.

Similar to Lizzie Thompson, during August of 1993, two and a half year old David Murphy witnessed his father Robert Murphy bludgeon, choke and stab to death his mother Patricia Gordon Aquino.<sup>77</sup> Subsequent to Robert Murphy's conviction and sentence of life imprisonment, he requested that the court, over his sons' objections, decree that both David and his brother Damian visit him in prison.<sup>78</sup> Robert Murphy's visitation request was denied. However, the rationale behind the judicial denial became the subject of concern for third party interests. Specifically, the judge ruled against Murphy's request for forced visitation *not* because of Murphy's conviction in the death of his sons' mother or Murphy's sons' objections to his visitation request but because Murphy had "left the children unattended, causing risk of neglect."<sup>79</sup> Arguing that the court relied primarily upon the issue of "neglect" so as to deny Robert Murphy access to his sons, third party custodial interests<sup>80</sup>

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the murdered parent retaining custody or guardianship of the child victim.

<sup>74</sup> See Strasser, *supra* note 55, at 842.

<sup>75</sup> See discussion *infra* Part V.

<sup>76</sup> See discussion *supra* Part I.A.-B.

<sup>77</sup> See Leslie Miller, *Lawmakers Hear Plea for Passage of "Lizzie's Law,"* PATRIOT LEDGER, July 1, 1997, at 3; see also Jordana Hart, *Custody Battle Compounds Boy's Loss,* THE BOSTON GLOBE, January 21, 1999, at B1; Lauren Markoe, *Granddad Pleads for Quincy Boy,* THE PATRIOT LEDGER, December 30, 1998; and Dianne Williamson, *Killer of Dad is Ill-Suited to be One—"Sperm Donor" Souza in Cruel Bid to Access Kids,* TELEGRAM & GAZETTE, September 13, 1998.

<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> Third party representative herein was victim Patricia Gordon Aquino's sister, Denise Gordon. See *id.*

asserted that the court espoused a questionable and unsound decision-making rationale which would be of clear detriment to future child victims of domestic murder.

In addition to the above factors encouraging the enactment of Lizzie's Law, the implications of long-term judicial tenure may have been of some concern. In Massachusetts, family court judges are appointed until the age of retirement at 70.<sup>81</sup> As such, they are not subject to recall and are not required to publicly campaign for reelection.<sup>82</sup> Due to their extended terms, those members of the judiciary appointed twenty, thirty or forty years ago (an era when domestic violence was little understood and/or recognized) would likely have continued in their failure to adequately recognize domestic murder as a serious matter requiring judicial intervention. This fact, coupled with the nonexistent goal of reelection may have left many in the Massachusetts Legislature with the belief that there failed to exist any viable impetus for Massachusetts' long-term judges to alter any dated, stereotypical beliefs that they may have acquired concerning domestic violence (i.e., that the curtain of family life should remain drawn to judicial or public scrutiny).<sup>83</sup> As the implications of long-term judicial tenure might possibly impact upon Massachusetts' courts visitation and custody decisions in a seemingly negative way, with children's fate appearing to be left to the whim of the court system, Lizzie's Law was thereby enacted.

### B. *The Dilemma of Lizzie's Law*

Despite the seemingly fervent impetus for enactment, Lizzie's Law has been, and continues to be, the subject of substantial controversy and opposition. Specifically, special interest groups, including divorce attorneys and Fathers' National Rights Groups, argue that Lizzie's Law removes the role of the judge in parental rights disputes, replacing him or her with the desire of a minor child.<sup>84</sup> These groups further argue that a parent who is incarcerated following a conviction in the

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<sup>81</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1995 68, 73, 75, 76 (1996).

<sup>82</sup> See Feb. Interview with Caron, *supra* note 71.

<sup>83</sup> See Cahn, *supra* note 19, at 1044.

<sup>84</sup> See Feb. Interview with Caron, *supra* note 71.

death of his or her child's other parent has satisfactorily paid their debt to society through their incarceration.<sup>85</sup> Thus, by allowing Massachusetts' courts to suspend visitation privileges of parents convicted of first degree domestic murder, the above groups and their supporters opine that Lizzie's Law represents a form of second punishment thereby running afoul of double jeopardy jurisprudence.<sup>86</sup>

In addition to the above, critics of Lizzie's Law urge that the law, along with similar child protection acts, will establish a dangerous precedent with the public at large who may subsequently seek to curb the parental rights of other "convicted" parents such as, for example, drug abusers.<sup>87</sup> Moreover, critics allege that by allowing states to mandate suspension of visitation rights upon conviction of first degree domestic murder, a chipping away at the basic constitutional protections afforded to parental rights will undeniably occur.<sup>88</sup> Finally, critics assert that the implementation of Lizzie's Law will ultimately act to reduce the success rate of prison rehabilitation programs as a prisoner's incentive for self-betterment, i.e., visitation privileges with his or her child, will be removed, rendering rehabilitation a lackluster endeavor.<sup>89</sup>

The above arguments have been rejected by Lizzie's Law supporters who argue that Lizzie's Law and other similar child protection acts do not remove the role of the judge in child visitation disputes but instead supply an additional legal protection safeguarding the wishes and best interests of the child victim.<sup>90</sup> Further, while supporters espouse their belief that, by virtue of the violent crime which occurred, the parent con-

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<sup>85</sup> See *id.*

<sup>86</sup> Fifth Amendment guarantee, enforceable against states through Fourteenth Amendment, protects against second prosecution for the same offense after acquittal or conviction and against multiple punishments for same offense. BLACK'S LAW DICTIONARY 491 (6th ed. 1990).

Note: Battered women's advocates have expressed their concern that Lizzie's Law may, in fact, harm those women suffering from domestic abuse who subsequently kill their abusers (their child's other parent), by possibly denying them visitation access to their child in the confusing aftermath of the murder. See discussion *infra* Part IV.D.

<sup>87</sup> See Feb. Interview with Caron, *supra* note 71.

<sup>88</sup> See *id.*

<sup>89</sup> See *id.*

<sup>90</sup> See Telephone Interview with Colleen Mastine, Senate Aide, New York State Senate (Oct. 1, 1997) [hereinafter Interview with Mastine].

victed of murdering his or her child's other parent has lost his or her claim to parental rights, they do not agree with Lizzie's Law being touted as a form of double jeopardy. Supporters' reasoning extends to the fact that courts implementing Lizzie's Law will not in any way prevent visitation *if* the child is of age to assent to such visitation.<sup>91</sup> Proponents, therefore, assert that Lizzie's Law acts not as a second punishment but merely as a remedial<sup>92</sup> measure for the protection of children involved in parental murder situations.<sup>93</sup> Finally, while Lizzie's Law supporters may acknowledge the alleged risks to the rights of parents, they argue that the ends justify the means; namely, when the rights of domestic murderers are weighed against the rights of child victims, the child victims come first.<sup>94</sup>

### C. *Balancing Lizzie's Law Against State and Constitutional Doctrines*

#### 1. *Parens Patriae*

Notwithstanding the aforementioned arguments, a larger threshold inquiry exists as to whether Lizzie's Law takes the state doctrine of *parens patriae*<sup>95</sup> too far and whether a state government may impair the fundamental right of childrearing of those parents convicted of first degree domestic murder without violating their constitutional rights under the Due Process, Substantive Due Process and/or Equal Protection Clauses.

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<sup>91</sup> The question remains, however, whether Lizzie's Law may be deemed a form of second punishment for convicted parents of those children who are not of suitable age to signify their assent to visitation. See problems discussed *infra* in Part IV.B.

<sup>92</sup> "Remedial" may be defined as that which is designed to correct any existing law, redress an existing grievance, or introduce regulations conducive to the public good; a legislative action giving a party a mode of remedy for a wrong, where said party had none, or a different one, than before. See *In re Estate of McCracken*, 224 N.E.2d 181 (Ohio 1967).

<sup>93</sup> See *supra* note 71; see also *In re Female S.*, 111 Misc. 2d 313, 444 N.Y.S.2d 829 (Family Ct. N.Y. County 1981) (similar to within situation, New York statutory scheme for the termination of parental rights is not intended as punishment but rather should be seen as a protective measure for a destitute and dependent child).

<sup>94</sup> See *supra* note 71.

<sup>95</sup> See KRAMER, *supra* note 18, § 1.02.

Prior to undertaking the above analysis, a brief examination of the constitutionality of parental rights is warranted. The Supreme Court has in recent years acknowledged that a person's decision concerning the manner in which to conduct his or her family life may be deemed a fundamental right.<sup>96</sup> Specifically, the Supreme Court has recognized a parental (or childrearing) right of parents under the Fourteenth Amendment, which includes, but is not limited to, the areas of religion, citizenship (including morals), and sexual issues.<sup>97</sup> The state doctrine of *parens patriae*,<sup>98</sup> however, allows a state to usurp this childrearing right whenever a compelling state need exists to protect a child's interests.<sup>99</sup> Specifically, where there may be evidence that parental choices will jeopardize the health and safety of a child, the doctrine of *parens patriae* may make parental rights subject to limitation<sup>100</sup> as the protection of a child's vulnerability is of compelling interest to the state.<sup>101</sup> More specific to the issue at hand, the Supreme Court has noted that the state may burden the childrearing right of parents so as to protect the physical, mental and emotional health of children.<sup>102</sup> A violation of the doctrine of *parens patriae* by individual states has been found only where the state interference has a coercive effect,<sup>103</sup> namely, where the governmental action is unquestioningly mandatory and provides no outlet for the parents.<sup>104</sup> This does not appear to be the case with Lizzie's Law which provides an outlet for the

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<sup>96</sup> See *Bellotti v. Baird*, 443 U.S. 622, 637-39 (1979).

<sup>97</sup> See, e.g., *Bellotti*, 443 U.S. at 622 (parental consent to abortion); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (religious objection to compulsory school attendance); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (religious freedom); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (educational choices); *In re Alfonso v. Fernandez*, 195 A.D.2d 46, 606 N.Y.S.2d 259 (2d Dep't 1993) (category of sexual issues has developed gradually, often being considered an area of parental control protected by the Constitution).

<sup>98</sup> See *supra* note 18 and accompanying text.

<sup>99</sup> See *id.*

<sup>100</sup> See *Yoder*, 406 U.S. at 205.

<sup>101</sup> See *Bellotti*, 443 U.S. at 635.

<sup>102</sup> See *Prince*, 321 U.S. at 166-67.

<sup>103</sup> See *Doe v. Irwin*, 615 F.2d 1162 (6th Cir. 1980) (finding rights of parents not infringed by family planning—the practice of distributing contraceptives to minors without notice to parents).

<sup>104</sup> See *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (Mass. 1995) (finding no violation of rights when school distributed condoms to students).

parents, represented by their child's assent to visitation. Thus, as opposed to taking the state doctrine of *parens patriae* too far, Lizzie's Law reasonably recognizes and utilizes said doctrine in the circumstance of domestic murder.

## 2. Due Process and Equal Protection

Despite the seemingly proper assumption of the doctrine of *parens patriae*, the question remains as to whether Lizzie's Law impairs the constitutional childrearing right of parents. Prior to reviewing what due process, substantive due process and/or equal protection protections are available under Lizzie's Law, an examination is warranted as to what due process protections are mandated by the courts in every-day parental rights proceedings (i.e., visitation, custody and/or termination).

In *Santosky v. Kramer*,<sup>105</sup> the United States Supreme Court clearly defined the procedural due process protections afforded parents facing termination of parental rights, namely, parental rights may not be terminated absent a showing, by clear and convincing evidence, that the parent is "unfit."<sup>106</sup> Governing termination proceedings by a clear and convincing standard, the *Santosky* Court considered the risk of erroneous factual determinations attributed to parental rights proceedings.<sup>107</sup> Specifically, parental rights proceedings often employ imprecise substantive standards that leave determinations open to the subjective values of the judiciary.<sup>108</sup> Moreover, such proceedings are often vulnerable to judgments based on cultural or class bias.<sup>109</sup> The reason for such vulnerability may be attributed to the "difficulty associated with these cases, such as . . . the complicated feelings children may have about their parents' confinement and the need to make special ar-

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<sup>105</sup> 455 U.S. 745 (1982).

<sup>106</sup> See Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757, 764 (1991) (citing *Santosky v. Kramer*, 455 U.S. 745 (1982); see also *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972); and Susan E. Simanek, *State Must Offer Clear and Convincing Proof of Unfitness to Cut Off Parental Rights*, 66 MARQ. L. REV. 585 (1983).

<sup>107</sup> See *Santosky*, 455 U.S. at 757, 768-70.

<sup>108</sup> *Id.* at 762-63, 769.

<sup>109</sup> See *id.*

rangements for visitation."<sup>110</sup> Faced with such fragile situations, courts may attempt to run roughshod over due process interests of incarcerated parents, writing them off as unfit.<sup>111</sup> By using a clear and convincing evidence standard, courts have attempted to eradicate such over-simplification.<sup>112</sup> Procedural due process protections in termination proceedings also commonly mandate that the parent affected thereby be allowed a proceeding before a neutral fact-finder. Procedural protocol before this fact-finder becomes murky, however, when addressing the question of whether to recognize past crimes as proof of parental unfitness. Courts differ in their opinions. Critics assert that any acknowledgment of a parent's past crime as *per se* proof of parental "unfitness" in termination proceedings flies in the face of constitutional protections to be afforded to convicted parents under due process.<sup>113</sup> In contrast, supporters argue that crimes involving the murder of one parent by the child's other parent inevitably cause lasting damage to the parent-child relationship.<sup>114</sup> As such, these crimes may be so reprehensible that the possibility of the convicted parent ever again providing the child with the intangible qualities of a positive, nurturing family relationship may be nonexistent.<sup>115</sup> Thus, supporters conclude that as the parent-child relationship is likely beyond repair due to the domestic murder, parental rights should be severed despite running the risk of infringing upon the convicted parent's constitutional due process rights.<sup>116</sup>

A similar discussion ensues with regard to procedural safeguards employed in custody and visitation proceedings. Due process procedural protections in custody disputes man-

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<sup>110</sup> See Genty, *supra* note 106, at 770.

<sup>111</sup> See Genty, *supra* note 106, at 770.

<sup>112</sup> See Genty, *supra* note 106, at 781.

<sup>113</sup> *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972) (holding that termination of parental rights on the basis of past criminal conduct flies in face of practice that courts should not presume an incarcerated parent is unfit, either implicitly or explicitly); see also Genty, *supra* note 106, at 797 (the judge must go "beyond the facts of the parent's crime" and determine the extent to which that crime impairs the parent-child relationship today).

<sup>114</sup> See Genty, *supra* note 106, at 803.

<sup>115</sup> See Genty, *supra* note 106, at 803.

<sup>116</sup> See Genty, *supra* note 106, at 804.

date court hearings to evaluate the fitness of each parent<sup>117</sup> and to determine what environment may be within the child's best interests.<sup>118</sup> This best interest test carries over to determinations governing visitation.<sup>119</sup> A court, therefore, is primarily charged with considering the best interests of a child and making orders for custody and visitation that will promote the child's welfare. When determining visitation requests from incarcerated individuals, however, certain state courts have found that prisoners may lack an inherent "liberty" or "property" interest in being able to meet with visitors, even their own family members.<sup>120</sup> As such, visitation privileges of incarcerated individuals may sometimes not require strict due process safeguards unless state law or prison regulations explicitly render prisoners entitled to such visitation.<sup>121</sup>

Based upon the above review, it is unlikely that Lizzie's Law would infringe upon the due process rights of parents convicted of first degree domestic murder. First, Lizzie's Law is not a permanent blanket ban on all prison visitation, which might readily implicate the protection of the due process clause.<sup>122</sup> Instead, it is a much more precise and individual temporary suspension of visitation rights which is lifted the moment the child assents to visitation. Second, similar to the due process protections mandated by the *Santosky* court in termination proceedings, Lizzie's Law affords protection in that it similarly mandates some finding of parental unfitness, namely, the conviction of a parent for first degree domestic murder. Third, hearing requirements under Lizzie's Law may be adequately met by both the convicted parent's criminal trial (and constitutional protections afforded therein (i.e., the right to counsel, jury trial, protection against self-incrimination)<sup>123</sup> and the subsequent procedural evaluation of a neutral fact-finder with regard to the separate issue of visitation.<sup>124</sup> Thus,

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<sup>117</sup> See Cahn, *supra* note 19, at 1058-59.

<sup>118</sup> See *id.* at 1059.

<sup>119</sup> See *id.*

<sup>120</sup> See Kentucky Dep't of Corrections v. Thompson, 490 U.S. 454, 460 (1989).

<sup>121</sup> See *id.*

<sup>122</sup> See *id.* at 465 (Kennedy, J., concurring).

<sup>123</sup> See U.S. Const. amends. V, VI, VII.

<sup>124</sup> The stringent procedural protections afforded to convicted parents in the criminal courts are actually more extensive than those afforded parents in regular parental rights termination proceedings under civil law.



Lizzie's Law would likely not violate a parent's constitutional rights under the Due Process Clause.

The Due Process Clause of the Fourteenth Amendment, in addition to addressing the procedural safeguards discussed above, acts as a limitation upon the substantive power of state legislatures to regulate various areas of the public's economic and noneconomic life.<sup>125</sup> The doctrine which relies on the Fourteenth Amendment to invalidate a state regulation is commonly called the substantive due process doctrine.<sup>126</sup> Under this doctrine, courts can engage in a detailed analysis to determine if a noneconomic fundamental right has been improperly impaired by a state statute. In the substantive due process area, those rights established by the Supreme Court as fundamental have tended to be in the related areas of sex, marriage, childbearing and childrearing.<sup>127</sup> Where a court finds such fundamental rights to be impaired, it applies a strict scrutiny level of review, namely, the state's objective must be *compelling* and the relation between that objective and the means must be very close so the means can be said to be *necessary* to achieve the ends.<sup>128</sup> In the within matter, Massachusetts may be said to be impairing childrearing by prohibiting incarcerated parents convicted of first degree domestic murder a chance to visit with their children. However, the state's objective—protecting the vulnerability of child victims of domestic murder from further physical or emotional scarring brought about by forced visitation—may be deemed of a compelling nature.<sup>129</sup> Moreover, as no other means exist within Massachusetts law which would supply such protection, the means chosen to achieve such protection, i.e., *temporary* suspension of visitation privileges, may be said to be necessary. Thus, as Lizzie's Law may be found to meet even a strict scrutiny review, it would likely survive a constitutional attack based upon substantive due process grounds.

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<sup>125</sup> See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978).

<sup>126</sup> See *id.*

<sup>127</sup> See *Pierce v. Society of Sisters*, 268 U.S. 510, 518 (1925) (establishing the right of parents to direct the upbringing and education of their children); see also *Parham v. J.R.*, 442 U.S. 584 (1979) (establishing the right of parents to commit their child to a mental institution).

<sup>128</sup> See *Pierce*, 268 U.S. at 515.

<sup>129</sup> See *Bellotti v. Baird*, 443 U.S. 622, 634 (1979).

The Equal Protection Clause is found within the Fourteenth Amendment as well and as such, is limited to state action.<sup>130</sup> The clause guarantees that people who are similarly situated will be treated similarly and that no state shall make or enforce any law which shall deny to any person equal protection of the laws.<sup>131</sup> As such, the Equal Protection Clause imposes a general restraint on (1) governmental use of classifications, not just classifications based on race but also those based on sex, alienage, illegitimacy, wealth or any other classification<sup>132</sup> and (2) governmental impairment of any fundamental rights.<sup>133</sup>

A review of the Equal Protection Clause in the context of this Note is imperative as the question must be whether the government has behaved reasonably in setting up the classification of "first degree domestic murderers" and saying that all first degree domestic murderers must give up their visitation rights unless their child assents.<sup>134</sup> As discussed *supra*, the Supreme Court has established that parents retain a fundamental right to raise and care for their children.<sup>135</sup>

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<sup>130</sup> The Fourteenth Amendment constitutional guarantee of equal protection of the laws means that no persons or class of person shall be denied the same protection of the laws that is enjoyed by other persons or other classes in like circumstances in their lives, liberty, property, and in their pursuit of happiness. Moreover, equal protection prohibits a state from denying to any person within its jurisdiction the equal protection of the laws thereby requiring that persons involved in similar circumstances be given equal protection in the enjoyment of personal rights and the redress of wrongs. BLACK'S LAW DICTIONARY 537 (6th ed. 1990).

<sup>131</sup> See Const. amend. XIV, § 1.

<sup>132</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>133</sup> See *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663 (1966).

<sup>134</sup> Notwithstanding recent Supreme Court case law recognizing childrearing as an arguably fundamental right, individual rights deemed fundamental have traditionally been the right to vote, the right of access to the courts, and the right to migrate interstate. See *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right to migrate interstate); *Harper*, 383 U.S. at 663 (right to vote); *Griffin v. Illinois*, 351 U.S. 12 (1956) (right of access to court system).

<sup>135</sup> See *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833 (1992) (constitutional protection is afforded to family relationships and childrearing); *Santosky v. Kramer*, 455 U.S. 745 (1982) (termination of parental rights interferes with a fundamental liberty interest and state is required to exercise fundamentally fair procedures when destroying familial bonds); *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18 (1981) ("decisions have by now made plain . . . that a parent's desire for and right to the companionship, care, custody and management of his or her children is an important interest that undeniably warrants deference and, absent a powerful countervailing interest, protection." (quoting *Stanley v. Illinois*, 405 U.S.

While this right is not absolute,<sup>136</sup> it cannot be abridged by the state unless the state can bear an especially high burden of justification for the infringement.<sup>137</sup> When a fundamental right is impaired, the Equal Protection Clause requires a strict level of scrutiny.<sup>138</sup> This strict scrutiny review requires that the state's action be both *necessary* to achieve a *compelling* governmental purpose as well as *narrowly drawn*.<sup>139</sup> The suspension of visitation rights mandated by Lizzie's Law must, therefore, serve a compelling state interest. Courts reviewing similar equal protection queries (e.g., state statutes terminating parental rights due to parental mental illness or parental mental retardation which may act to harm the child) have unequivocally responded that no equal protection violation has occurred.<sup>140</sup> Since the Supreme Court has held that a state

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645, 651 (1972)); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) (childrearing is liberty interest guaranteed by Fourteenth Amendment).

<sup>136</sup> See *In re J.M.J.*, 379 N.W.2d 816 (S.D. 1986) (despite parents' fundamental right to their children, it is not an absolute and conditional right); *In Interest of J.W.T.*, 872 S.W.2d 189 (Tex. 1994) (natural parents' rights are not absolute; protection of the child is paramount); *In re Sumey*, 621 P.2d 108 (Wash. 1980) (parent's constitutional rights fail to afford absolute protection against state interference with the family relationship).

<sup>137</sup> See GERALD GUNTHER, CONSTITUTIONAL LAW 446 (12th ed. 1991).

<sup>138</sup> Some favor the intermediate scrutiny test (a less stringent level of review) in the area of childrearing wherein a determination is made as to whether the statute set forth by the legislature is substantially related to an *important* government objective. Proponents assert that where a child suffers harm from witnessing domestic violence, the state's interest in protecting the child is sufficiently strong and the violent parent's interest in continuing the conduct sufficiently weak, the application of intermediate scrutiny is warranted. See, e.g., Amy Haddix, *Unseen Victims: Acknowledging the Effects of Domestic Violence on Children Through Statutory Termination of Parental Rights*, 84 CAL. L. REV. 757 (1996). Even considering Lizzie's Law under such intermediate scrutiny, Lizzie's Law would surely survive such analysis.

<sup>139</sup> See *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>140</sup> See, e.g., *In re Nereida S.*, 57 N.Y.2d 636, 439 N.E.2d 870, 454 N.Y.S.2d 61 (1982) (scheme which states that parental rights should be terminated when parent is presently and for foreseeable future unable, due to mental illness, to provide proper and adequate care for their child—when said scheme provides significant procedural safeguards for the natural parent's rights and authorizes termination of parental rights only when specific criteria are met and when necessary in the best interest of the child—does not violate Equal Protection Clause); see also *In re Sylvia M.*, 82 A.D.2d 217, 83 A.D.2d 925, 443 N.Y.S.2d 214 (1st Dep't 1981) (class created by this section concerning termination of parental rights in case of mentally ill parent does not include all mentally ill parents but only those whose children would be in danger of suffering neglect if returned to them, and difference in treatment is not between all mentally ill and all sane parents but between

has both a legitimate and compelling interest in the vulnerability, safety and welfare of children,<sup>141</sup> Massachusetts may be found to meet the first prong of the equal protection strict scrutiny review. Moreover, Lizzie's Law may be deemed necessary due to the Legislature's and judiciary's consistent failure to recognize through enactment of protective legislation and proper interpretation, respectively, the detrimental ramifications that both domestic murder and subsequent forced visitation have upon a child victim. Also, Lizzie's Law may be said to be narrowly drawn in that a convicted parent's visitation rights are not suspended indefinitely, or even within a given statutory time frame, but only until such time as the child victim freely assents to visitation. Finally, while Lizzie's Law may appear discriminatory, a discriminatory effect alone is not enough to violate the Equal Protection Clause. Any allegation of legislative discriminatory motive must be shown by evidence of a history of discrimination. No such evidence exists. Thus, based upon the foregoing, Lizzie's Law would likely survive a constitutional attack resting upon equal protection grounds.

### III. REVIEW OF NEW YORK'S ATTEMPT TO ENACT CHILD PROTECTION ACT SIMILAR TO LIZZIE'S LAW

#### A. *Discussion of New York's Lee-Anne Cruz Memorial Act*

As discussed earlier in Part II, Lizzie's Law has become a model for use throughout the United States with, to date, over seventeen states drafting their own similar child protection acts.<sup>142</sup> We will now examine New York's efforts to enact its version of Lizzie's Law.

The issue of parental murder reached the State of New York most directly through the plight of the Scaccia family.<sup>143</sup>

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parents who whether mentally ill or not can care for their children and those parents who are so mentally ill that they cannot, and in view of the substantial interest of the state and strict standards of clear and convincing quantum of proof required for termination, this section does not violate equal protection); and *Berman v. Helen H.*, 49 A.D.2d 327, 374 N.Y.S.2d 693 (2d Dep't 1975).

<sup>141</sup> See *In re R.B.*, 566 A.2d 1310 (Vt. 1989) (state has an interest in the safety and welfare of the child); see also *Stanley v. Illinois*, 405 U.S. 645 (1972) (state has "duty" to protect children through judicial determinations of their interests).

<sup>142</sup> See generally Feb. Interview with Caron, *supra* note 71.

<sup>143</sup> See Case, *supra* note 17.

Cole Cruz was three years of age when he and one of his sisters witnessed their father Larry Cruz stab their mother Lee-Anne Scaccia Cruz to death.<sup>144</sup> Larry Cruz was found guilty of second degree murder. Following incarceration, Cruz requested that his children—Cole and twin daughters Amanda and Natalie—visit him in prison for six hours every other weekend.<sup>145</sup> In June, 1997, the court denied Cruz's request<sup>146</sup> at the urging of Cole, Amanda, Natalie, their grandparents and the children's therapist. Nonetheless, under then-current New York law, Cruz could have re-petitioned for visitation every six months.<sup>147</sup> Moreover, while courts are generally charged with considering the best interests, safety and welfare of the child at issue when making visitation orders, at the time of this case there existed no statutory provision in the State of New York barring a court from granting a petition for visitation which was been submitted by a parent who is convicted of murdering his or her child's other parent, even when the child objects.<sup>148</sup> Thus, New York drafted and filed its own version of Lizzie's Law hereinafter termed the "Lee-Anne Cruz Memorial Act."<sup>149</sup>

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<sup>144</sup> See *id.*

<sup>145</sup> See Interview with Mastine, *supra* note 90. Larry Cruz plead guilty to lesser charge of second degree murder. Lee-Anne Cruz's parents, who retain custody of the couple's children, agreed to a lesser sentence in exchange for allowing the children to avoid being forced to testify to the slaying at trial. *Id.*

<sup>146</sup> See *id.*

<sup>147</sup> See *id.*

<sup>148</sup> See S. Mem. No. 11615-04-7, at 1 (N.Y. 1997).

<sup>149</sup> The Lee-Anne Cruz Memorial Act was filed by Senator John DeFrancisco of New York, 49th District, and provides:

Section 1: Short title. This act shall be known and may be cited as the "Lee-Anne Cruz Memorial Act".

§ 2. Section 240 of the domestic relations law is amended by adding a new subdivision 1-C to read as follows:

1-C. (A). Notwithstanding any other provision of this chapter to the contrary, no court shall make an order providing for visitation or custody to a person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, of a parent, custodian or guardian of any child who is the subject of the proceeding. Pending determination of a petition for visitation or custody, such child shall not visit and no person shall visit with such child present, such person who has been convicted of murder in the first or second degree in this state, or convicted of an offense in another jurisdiction which, if committed in this state, would

Similar to Lizzie's Law, the Lee-Anne Cruz Memorial Act does not bar a child from visiting the parent convicted of murdering that child's other parent, if the child is of age to assent to such visitation.<sup>150</sup> The foremost impetus behind New York's Act was removing child victims' burden of being required to repeatedly return to court to show that they should not be forced to visit with their convicted parent when they do not wish to do so.<sup>151</sup> As the Act presently stands, New York child victims of domestic murder will only have to act, by assenting, when they decide to reestablish, or continue, contact with a convicted parent.<sup>152</sup> Where a court finds there is a mutual desire for, and benefit to be realized from, reestablished contact and visitation between the parent and child, the court will institute a structure for communication.<sup>153</sup> Thus, similar to Lizzie's Law, the Lee-Anne Cruz Memorial Act is based upon the premise that repeated legal attempts by a convicted parent to force visitation only act to repeatedly victimize the child at issue.

The New York and Massachusetts' Acts differ, however, in that the Lee-Anne Cruz Memorial Act prohibits forced visitation to a parent convicted of either domestic murder in the first

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constitute either murder in the first or second degree, of a parent, custodian or guardian of such child without the consent of such child's custodian or legal guardian.

(B) Notwithstanding paragraph (A) of this subdivision a court may order visitation or custody where: (i) (a) such child is of suitable age to signify assent and such child assents to such visitation or custody; or

(b) If such child is not of suitable age to signify assent, the child's custodian or legal guardian assents to such order; or

(c) The person who has been convicted of murder in the first or second degree, or of an offense in another jurisdiction which, if committed in this state, would constitute either murder in the first or second degree, can prove by a preponderance of the evidence that there was a history of domestic violence committed by the victim of such murder against such convicted person or a family or household member of either party, as such family or household member is defined in Article Eight of the Family Court Act, and that such history of domestic violence was a substantial contributing factor in such murder; and

(II) The court finds that such visitation or custody is in the best interests of the child.

S. 5799, 221st Leg., 1997-1998 Reg. Sess. (N.Y. 1997) [emphasis added].

<sup>150</sup> *Id.*

<sup>151</sup> See Interview with Mastine, *supra* note 90.

<sup>152</sup> *Id.*

<sup>153</sup> S. Mem. No. 11615-04-7, at 1 (N.Y. 1997).

or second degree.<sup>154</sup> This broadening in terms of degree of conviction may be the result of the fact that New York penal law restricts first degree murder convictions to instances of murder involving state employees of title such as police officers, judges, peace officers, and/or employees of correctional facilities.<sup>155</sup> This penal definition differs greatly from Massachusetts' definition of first degree murder which is not restricted in any way to murder of state employees of title.<sup>156</sup> Recognizing the limitations which would exist, therefore, by only addressing first degree domestic murder convictions, New York's Lee-Anne Cruz Memorial Act included the broader category of second degree domestic murder convictions as well.<sup>157</sup>

The Acts also differ in that the New York Act covers custody determinations and recognizes equivalent crimes in other states. Moreover, the Lee-Anne Cruz Memorial Act recognizes as an exception to the law instances where the killer is a former victim of domestic violence. Thus, by including second degree murder, including custody determinations and recognizing equivalent crimes in other states,<sup>158</sup> New York's Lee-Anne Cruz Memorial Act has far surpassed the scope of protection afforded by Massachusetts' Lizzie's Law.

A discussion of New York's Lee-Anne Cruz Memorial Act would be incomplete, however, without examining New York's past treatment of incarcerated parents involved in parental rights proceedings (visitation, custody and termination). New York has gained recognition as possessing a comprehensive and constitutionally acceptable approach toward treatment of parents, specifically incarcerated parents involved in parental rights disputes.<sup>159</sup> Prior to termination of one's parental

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<sup>154</sup> See *supra* note 149.

<sup>155</sup> See N.Y. PENAL LAW § 125.27 (McKinney 1996).

<sup>156</sup> See *supra* note 69 and accompanying text.

<sup>157</sup> See *supra* note 149. New York penal law defines second degree murder as including, but not limited to, a defendant evincing a depraved indifference to human life whereby he or she recklessly engages in conduct which creates a grave risk of death to another person and thereby causes the death of another person. See N.Y. PENAL LAW § 125.25 (McKinney 1996).

<sup>158</sup> New York's inclusion of second degree murder in the Lee-Anne Cruz Memorial Act, however, has not been without controversy, namely, the impact the inclusion of second degree murder in this Act will have upon battered women and men who kill their abusers, the co-parent of their child. See discussion *infra* Part IV.D.

<sup>159</sup> See Genty, *supra* note 106, at 828.

rights, the State must prove certain allegations (otherwise termed "extraordinary circumstances") by a strict standard of clear and convincing evidence.<sup>160</sup> These extraordinary circumstances include: (1) death of both parents without lawful appointment of a guardian; (2) abandonment of the child for a period of six months immediately prior to the date the termination petition is filed in the court; (3) inability of parents due to mental illness or mental retardation to provide proper care for a child, presently and for the foreseeable future, and said child has been in the care of an authorized agency for a period of one year immediately prior to the date the termination petition is filed with the court; (4) permanent neglect of the child; or (5) severe or repeated abuse by the parent where the child has been in the care of an authorized agency for the period of one year immediately prior to the initiation of the termination proceeding.<sup>161</sup> Prior to termination, New York law sometimes requires a threshold showing that the agency seeking termination has exercised diligent efforts to repair, maintain and strengthen the injured parental relationship.<sup>162</sup> Such "diligent efforts" refer to the agency's attempt to resolidify the ruptured parent-child relationship by, but not limited to, arranging rehabilitative services for the convicted parent, informing the parent of his or her child's progress at appropriate intervals, and making suitable arrangements with the correctional facility and other appropriate personnel for an incarcerated parent to visit his or her child within the correctional facility.<sup>163</sup> The State's responsibility does not end here, however, as it further retains affirmative duties to the child at issue when encouragement of the parent-child relationship may be detrimental.<sup>164</sup>

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<sup>160</sup> *Santosky v. Kramer*, 455 U.S. 745, 746 (1982).

<sup>161</sup> See N.Y. SOC. SERV. LAW § 384-b (McKinney 1997); see also *Bennett v. Jeffreys*, 356 N.E.2d 277, 283 (N.Y. 1976) (New York Court of Appeals found that a state may terminate parental rights if there is first a judicial finding of surrender, abandonment, unfitness, persistent neglect, unfortunate or involuntary extended disruption of custody, or other equivalent but rare extraordinary circumstances which would drastically affect the welfare of the child. Most common allegations of which incarcerated parents are found to be guilty of are abandonment or permanent neglect).

<sup>162</sup> See *Genty*, *supra* note 106, at 829. Diligent efforts are usually not required where an agency is proceeding on grounds of parental abandonment.

<sup>163</sup> See *Genty*, *supra* note 106, at 829.

<sup>164</sup> See *In re Matter of Jamie M.*, 63 N.Y.2d 388, 472 N.E.2d 311, 482 N.Y.S.2d 461 (1984) (consideration of the best interests of a child is usually considered only



Specifically, diligent efforts on behalf of an incarcerated parent are implemented to mend a torn parent-child relationship *only* in the event such efforts are in the best interests of the child.<sup>165</sup>

New York employs similar safeguards in the areas of visitation and custody. New York custody determinations look to the fitness of the parents and then to the best interests of the child at issue while visitation determinations largely look to the best interests of the child.<sup>166</sup> As such, arrangements for an incarcerated parent to visit his or her child outside of a correctional facility are not required unless it is within the best interest of the child.<sup>167</sup> Moreover, formulating arrangements with correctional personnel for an incarcerated parent to visit with his or her child within the confines of a facility is done only when such visitation episodes are in the best interests of the child.<sup>168</sup> In fact, New York supplementary statute commentary states that "where an agency has reason to believe that the continuation of a parent-child visitation [schedule] in prison would cause imminent danger to the child or would not be in the best interests of the child, the agency should make a motion, on notice to all the attorneys [of record] . . . requesting an order discontinuing visitation."<sup>169</sup>

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when it would actually be detrimental to encourage and strengthen the parental relationship).

<sup>165</sup> *Id.*; see also N.Y. SOC. SERV. LAW § 384-b(1)(b) (McKinney 1997) (It "is the intent of the legislature in enacting this section to provide procedures not only assuring that the rights of the natural parent are protected, but also, where positive, nurturing parent-child relationships no longer exist, furthering the best interests, needs, and rights of the child by terminating parental rights . . . ."); *In re Abdul W.*, 224 A.D.2d 875, 638 N.Y.S.2d 249 (3d Dep't 1996) (where father received extended prison sentence for shooting mother's paramour in child's presence and experts recommended against forcing child to have any contact with father, the court found that diligent efforts to maintain contact were no longer justified as they would be injurious to the child at issue); *Dickson v. Lascaris*, 75 A.D.2d 47, 428 N.Y.S.2d 544 (4th Dep't 1980) (court's finding of abandonment, persistent neglect or other extraordinary circumstances drastically affecting welfare of child, trigger the best interest of the child test and will determine the future custody of the child even though event may have taken place in the past).

<sup>166</sup> See N.Y. SOC. SERV. LAW § 384-b (McKinney 1997).

<sup>167</sup> See *id.*

<sup>168</sup> See *id.*

<sup>169</sup> See N.Y. SOC. SERV. LAW § 384-b (McKinney 1997) (Joseph R. Carrieri, Supp. Prac. Comm. 1996).

As a result of New York's comprehensive approach toward the treatment of all parents, incarcerated or not, involved in parental rights disputes, New York's enactment of the Lee-Anne Cruz Memorial Act is not surprising. What is surprising is that even in such a fair environment, proponents of the Act have met much resistance. Prisoners' rights advocates believe the Lee-Anne Cruz Memorial Act is a "one size fits all" approach to a system where each case is fact specific.<sup>170</sup> Other opponents of the Lee-Anne Cruz Memorial Act assert that the Act crosses into the realm of double jeopardy.<sup>171</sup> Supporters rebut this argument asserting that the Act is not a form of second punishment but is a legal mechanism removing the burden borne by child victims of domestic murder of repeatedly having to appear before the courts so as to protest their convicted parent's unwelcome requests for visitation.<sup>172</sup> Supporters have fortified their position by asserting that the Lee-Anne Cruz Memorial Act will assist not only the child victims in their legal battles but also surviving members of the crime victim's family, who are likely held responsible for funding a child victim's court appearances and, as such, are also considered to be victims suffering in the aftermath of a domestic murder.<sup>173</sup> Finally, supporters argue that it is the responsibility of the court not only to make judgments on custody and visitation that do not harm the welfare or happiness of the child but also to recognize that the wishes of the crime victims should have precedence over those of the criminal.<sup>174</sup>

The Lee-Anne Cruz Memorial Act, hereinafter termed "Lee-Anne's Law," was signed into law by New York Gov. George Pataki on July 7, 1998.<sup>175</sup>

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<sup>170</sup> See Erik Kriss, *New Law Signed as a Family Looks On, Relatives of Murder Victim Lee-Anne Cruz Witness the Signing of a Measure Limiting the Custody and Visitation Rights of Parents Who Kill the Other Parent*, THE POST-STANDARD, July 8, 1998, at B1.

<sup>171</sup> See Interview with Mastine, *supra* note 90.

<sup>172</sup> See S. Mem. No. 11615-04-7, at 1 (N.Y. 1997).

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See *supra* note 170.

#### IV. INTERPRETING THE LANGUAGE OF LIZZIE'S LAW

As discussed, states nationwide are attempting to draft individual versions of child protection acts similar to Lizzie's Law. Shadowing these drafting sessions is the conflicting vision that Lizzie's Law may be seen as both a saving grace in the field of children's rights legislation and as a possible troublemaker in future judicial decision-making. This dichotomy exists as a result of the fact that the commendable principles supporting Lizzie's Law are, themselves, supported by ambiguous language which is narrowly drawn and subject to varying interpretations. Thus, in interpreting and revising the language of Lizzie's Law so as to meet each state's particular needs, individual states must recognize the challenge that lies within Lizzie's Law and implement revisions within the language of subsequent acts which will clarify and strengthen the foundation of the law.

##### A. *Addressing Commendable Principles*

Notwithstanding Massachusetts' praiseworthy recognition of the voice of child victims of domestic murder, of notable commendation within Lizzie's Law is the fact that nowhere in its language does one find the requirement that killer and victim be married.<sup>176</sup> As such, Lizzie's Law recognizes an individual's role and responsibility as parent regardless of whether the institution of marriage has ever been solemnized. Moreover, Lizzie's Law does not mandate that the child actually view the killing of his or her parent in order to find shelter under the law.<sup>177</sup> It may be argued that where a child is *not* a direct witness to a domestic murder, the facts of the case may not be as clear as where a child *is* a direct witness to the

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<sup>176</sup> The original statutory language which prohibited forced visitation where the parent was convicted of killing his or her "spouse" was deliberately changed in the enacted version of Lizzie's Law to the present term "parent" so that the victim and the convicted parent did not have to be married in order for Lizzie's Law to apply. See Telephone Interview with Paul E. Caron, Representative, Massachusetts House of Representatives (Oct. 2, 1997) [hereinafter Oct. Interview with Caron].

<sup>177</sup> See *supra* note 16 and accompanying text. This is in direct contrast to the particular circumstances surrounding the cases of Lizzie Thompson, David Murphy and Cole Cruz where the child victims were present and direct witnesses at the scene of the crime.

event. Lizzie's Law rejects this assertion. The law recognizes that whether a child is affected directly, by viewing the murder, or indirectly, by permanent parental loss, he or she has been equally injured.<sup>178</sup> Further note should be taken of the fact that a parent is affected by Lizzie's Law only in the event he or she is *convicted* of the crime of first degree domestic murder. Should a parent be involved in anything short of conviction (e.g., arraignment, under suspicion, held for questioning, etc.), Lizzie's Law would not extend to that situation. By limiting the application of Lizzie's Law to instances of actual conviction, Lizzie's Law not only reinforces the belief of innocent until proven guilty but also reaffirms the constitutional belief in the value of parental rights<sup>179</sup> and the protection of the parent-child relationship.<sup>180</sup> Based upon the foregoing, Lizzie's Law may be said to be built upon a foundation of commendable principles which recognize equally both the convicted parent's and the child victim's rights.

#### B. *Addressing Ambiguous Language and Limited Construction*

As hinted upon earlier, a large degree of the weakness inherent in Lizzie's Law may be found in its ambiguous language and limited construction. This Note suggests addressing these problem areas and subsequently rectifying them through amendment, thereby rendering Lizzie's Law a more appropriate model for other similar newly drafted child protection legislation.

Addressing ambiguous language, the terminology utilized by the Massachusetts State Legislature in drafting Lizzie's Law is subject to varying judicial interpretations. Specifically, the Legislature failed to define key terms within the law, such as "parent," "suitable age," and "assent."<sup>181</sup>

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<sup>178</sup> Children living in close proximity to violence suffer severe emotional consequences, even if they do not directly witness the abuse. See Haddix, *supra* note 138, at 785.

<sup>179</sup> See discussion *supra* Part II.C.

<sup>180</sup> See *Santosky v. Kramer*, 455 U.S. 745, 760 (1982). The Supreme Court in *Santosky* stated "[s]ome losses cannot be measured. . . . [t]he judge's finding [against the parent] effectively foreclosed the possibility that [the child] would ever know his natural parents." *Id.* at 761 n.11.

<sup>181</sup> See *supra* note 16. Author notes that the Massachusetts' Legislature is currently considering expanding Lizzie's Law to include second degree murder,

The query remains unanswered as to whether the term "parent"<sup>182</sup> includes *only* natural birth parents or also adoptive parents, long-term foster parents, and couples (married or common law<sup>183</sup> married) who take on the role of parent to their partner's child without ever actually adopting that child. Further questions exist as to whether the term "parent" applies where same-sex couples adopt children or where one member of a same-sex couple has a child from an earlier heterosexual relationship to whom a new same-sex partner becomes a parental figure. More directly, if the term "parent" is gender specific<sup>184</sup> (meaning one parent must be male and one parent must be female), this would render children of same-sex couples without redress in the instance of domestic murder and thus subject to forced visitation.

A similar inquiry exists with regard to the term "suitable age." Lizzie's Law states that a court shall not force a child to visit his or her parent unless the child is of "suitable age" to assent to visitation.<sup>185</sup> This term, however, is not properly defined. Nowhere is it illustrated how "suitable" may be determined, namely, what factors or criteria establish suitability and/or what agency, court officer, psychological expert, other court-appointed individual or third party custodial representative, if any, makes the determination as to suitability. For example, at age two a child does not assent to visitation with his incarcerated father. At age five the child enters school, suffers from peer embarrassment due to the lack of a father figure (who remains incarcerated following his conviction for domestic murder), and thereby assents to reinstate visitation

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attempted murder or conspiracy to commit murder. House Bill No. 3100 was introduced by Representative Paul Caron in January, 1999.

<sup>182</sup> Parent merely defined as father or mother. WEBSTER'S NEW WORLD POCKET DICTIONARY 209 (2d ed. 1993).

<sup>183</sup> Common law marriage commonly involves mutual agreement to enter into a marriage relationship, cohabitation sufficient to warrant fulfillment of the necessary relationship of man and wife and an open assumption of marital duties and obligations. See *Marshall v. State*, 537 P.2d 423, 429 (Okla. 1975); see also BLACK'S LAW DICTIONARY 277 (6th ed. 1990) (marital living not solemnized in ordinary way (i.e., non-ceremonial) but created by an agreement to marry, followed by cohabitation).

<sup>184</sup> Gender specific classification might also imply an equal protection violation. With gender, an intermediate scrutiny standard would apply (law upheld must be substantially related to an important government purpose).

<sup>185</sup> See *supra* note 16.

with the convicted father. Does the five year old child's peer-induced decision to change his prior position indicate a sudden emotional/mental maturity rendering him of "suitable age" to reinstate visitation? Lizzie's Law's failure to set forth the necessary criteria for determining "suitable age" only lends to the weakness of the legislation.

Finally, Lizzie's Law fails to properly define the term "assent."<sup>186</sup> Assent<sup>187</sup> to a given event is commonly indicated either expressly<sup>188</sup> or impliedly,<sup>189</sup> by written and/or verbal means, yet Lizzie's Law fails to set forth a description for "assent." As such, the law fails in its duty to apprise children, along with their third party custodial representatives or guardians, of exactly what type of assent will qualify as adequate to continue and/or reinstate visitation following a parent's conviction for domestic murder.

In addition to the above, further weakness may be found in the fact that Lizzie's Law operates under a limited construction. Specifically, only those parents convicted of first degree domestic murder will fall under its control. This Note suggests that the conviction base of Lizzie's Law be expanded. While murder in the first degree is commonly defined as a deliberate attempt to cause the death of another person,<sup>190</sup> second degree murder should be recognized as well, as this degree of murder also involves a recognized indifference to human life which results in the death of an individual.<sup>191</sup> Moreover, of equal destructive effect to the parent-child relationship are those crimes committed by one parent against the other parent, whether or not in direct view of the child, which are of a forcible sexual nature (e.g., rape in the first degree).<sup>192</sup> Such offense involves a forcible sexual act resulting in physical, emotional and psychological scarring in addition to the risk of

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<sup>186</sup> See *supra* note 16.

<sup>187</sup> A declaration of willingness to do something in compliance with a request. Assent implies a conscious approval of facts actually known, as distinguished from mere neglect to ascertain facts. BLACK'S LAW DICTIONARY 115 (6th ed. 1990).

<sup>188</sup> To declare something expressly means a statement which is openly declared. BLACK'S LAW DICTIONARY 115 (6th ed. 1990).

<sup>189</sup> Implied assent means that which is presumed by law and proved by the conduct of the party. BLACK'S LAW DICTIONARY 116 (6th ed. 1990).

<sup>190</sup> *Supra* note 155 and accompanying text.

<sup>191</sup> *Supra* note 157 and accompanying text.

<sup>192</sup> See N.Y. PENAL LAW § 130.35 (McKinney 1998).

death associated with spreading of the HIV virus, sexually transmitted diseases and/or internal bleeding. It may be argued that sexual crimes do not permanently deprive a child victim of one parent, as does physical death in the case of domestic murder, and, as such, should not be addressed in this legislation. However, the emotional and mental death which commonly follows the occurrence of sexual crimes undoubtedly acts to permanently cripple the parent-child relationship, removing a parent indefinitely from his or her child's life, growth and development. Lizzie's Law should be broadened and strengthened to include not only first degree murder but second degree murder and first degree rape as well, so as to adequately protect all child victim's of domestic murder (whether that murder be the physical, mental or emotional death) of the child's other parent. By broadening Lizzie's Law to include other violent criminal offenses, Lizzie's Law will avoid the disturbing result which is currently possible whereby children of parents convicted of first degree domestic murder are protected from forced visitation but children of parents convicted of equally violent crimes against the child's other parent remain at the mercy of the court's discretion concerning forced visitation.

Further, the possibility presently exists whereby a parent may commit a crime recognized under Lizzie's Law outside the State of Massachusetts and then subsequently return to his or her Massachusetts residence believing he or she has avoided the wrath of Lizzie's Law. In order to address such scenario, Lizzie's Law should be amended to recognize that whether or not the criminal act took place in the State of Massachusetts or in another jurisdiction, the criminal parent will be held accountable under Lizzie's Law if such act, had it been accomplished in the State of Massachusetts, would have constituted an offense recognized under Lizzie's Law.

Finally, some confusion remains as to why the second clause of Lizzie's Law prohibits, prior to issuance of a visitation order, any person from visiting, with the child present, a parent convicted of first degree domestic murder without the consent of the child's custodian or legal guardian.<sup>193</sup> In this secondary clause, the voice of the child victim has been quieted

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<sup>193</sup> See *supra* note 16.

and replaced with that of his or her custodian or legal guardian. The altering of authority regarding visitation found within this secondary clause may be attributed to the fact that in this instance, the law may be referring to the visitation desire of an adult figure outside the immediate family. As such, the child victim may possess merely a secondary voice to his or her custodian or guardian in such situations. This reasoning, however, would contradict the premise behind Lizzie's Law—that it was enacted to give children a controlling voice when faced with a forced visitation request. By providing that a person may visit with an incarcerated parent, with the child present, *if* the child's custodian or legal guardian consents, the courts have presented themselves with a complex problem. For example, if prior to the issuance of a visitation order, a child victim's legal guardian (who happens to be both the child's grandmother and the incarcerated parent's mother) consents to allow the child's grandfather to visit the incarcerated parent with the child victim present (even though the child victim does not consent), Lizzie's Law has somehow failed to operate properly.<sup>194</sup>

By leaving the above-discussed terms and clauses open to varying individual understandings, random judicial interpretation is, once again, invited to creep in. This will doubtlessly continue the legacy of inconsistent case law which existed prior to Lizzie's Law and which Lizzie's Law has attempted to eradicate. Thus, unless the above ambiguities are recognized and corrected in Lizzie's Law and similar newly drafted child protection acts, Lizzie's Law and its successors may inadvertently hurt the child victims these acts have been designed to protect.

### *C. Proposal for Improvements to Lizzie's Law*

Lizzie's Law would do well to emulate New York's Lee-Anne Cruz Memorial Act and recognize custody along with visitation. This Note, however, advocates three additional

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<sup>194</sup> See similar scenario in *Guardianship of Norman et al.*, 670 N.E.2d 414 (Mass. 1996) (despite court visitation order mandating that children not see father who was convicted of murdering children's mother, guardian paternal grandparents allowed such visitation to take place. Probate and family court thereupon removed guardianship role from paternal grandparents yet expanded their visitation privileges. Appeals Court subsequently vacated such visitation privileges).



goals: the broadening of Lizzie's Law's conviction base from first degree murder to include second degree murder and first degree rape; clarification of the terms "parent," "suitable age," and "assent"; and qualification of the guardian's role in allowing/disallowing visitation. Set forth below are specific suggestions for improvement.

Lizzie's Law might be amended to read as follows:

No court shall make an order providing visitation rights to a **parent\*** who has been convicted of **first degree murder, second degree murder or first degree rape\*\*** of the other parent of the child who is the subject of the order, unless such child is of **suitable age\*\*\*** to signify his **assent\*\*\*\*** and assents to such order; provided, further, that until such order is issued, no person shall visit, with the child present, a parent who has been convicted of **murder in the first degree, murder in the second degree or first degree rape** of the other parent of the child without the consent of the child's custodian or legal guardian **and despite custodial or guardian consent, should the child object to being present at such visitation episode with such third person, the child's wish shall govern and no visitation by the child will occur.\*\*\*\*\***

#### Definitions

**\*"parent"**: The term parent includes not only natural birth parents but also individuals acting as parents through legal adoption, long-term (minimum of 2 years continuous) foster care, and individuals lacking biological parental rights yet acting or having acted as a parental figure to the child victim at issue (minimum of 2 years continuous). The person occupying the parental role may be bonded to the other parent through heterosexual marriage, same-sex marriage, or common law marriage (heterosexual OR same-sex, if recognized).

The above person may occupy the role of parent provided said individual occupies a place in the child victim's life for a substantial period of time and influence. In determining substantial period of time and influence, the judicial figure presiding over the visitation proceeding shall give equal weight and consideration to the following, nonexclusive, factors:

1. Individual's monetary support of the child's health, welfare and education.
2. Whether individual ever resided with child at one residence and term of residency.
3. Status and nature of individual's relationship to child's other parent and length of that relationship.
4. Child's recognition, or lack thereof, and child's classification of individual's role in child's life (i.e., does child refer to convicted parent as mother/father or some derivative thereof).

**\*Conviction Base:** This child protection act shall control whether or not the criminal act at issue occurred within the State of Massachusetts or in another jurisdiction so long as said act would constitute murder in the first degree, murder in the second degree or rape in the first degree under Massachusetts penal law and provided parent committing said crime is a resident of the State of Massachusetts.

**\*\*\*"suitable age":** Whether a child is of "suitable age" to signify his or her assent remains at the discretion of the presiding judicial figure following an evaluation of (1) the child's biological years; (2) the child's academic progress (or lack thereof); and (3) a private conference between the judiciary and both the child at issue, in one instance, and his or her custodian or guardian, in a latter instance. This conference shall be used to assess the mental and emotional response of the child toward the convicted parent, the mental and emotional response of child toward the guardian/custodian, and the reasons for consenting to visitation at this juncture. Should these considerations fail to adequately satisfy the court that the child is of suitable emotional and mental maturity to signify assent, a court appointed child psychiatric expert and/or custodial appointed child psychiatric expert shall be allowed to direct an opinion to the judicial figure as to the child's understanding of his or her assent as well as the child victim's level of emotional and mental maturity.

**\*\*\*\*"assent":** Express assent must be given to the presiding judicial figure through verbal or written means. In the event the child lacks capacity (e.g., due to handicap, extreme youth, or physical/mental disability) to indicate express consent through written or verbal means, implied assent may be determined at the discretion of the presiding judicial figure through evaluation of the conduct of the child at issue when placed in the presence of the convicted parent or based upon testimony of the child victim's guardian/custodian.

**\*\*\*\*Guardian/Custodial Right to Assent to Visitation:** Prior to a visitation order being issued, a person shall be allowed to visit, with the child present, a convicted parent by acquiring consent of the child's custodian or legal guardian *unless* the child objects to being present at such visitation. In such instance, the visitor must visit alone. At no time should the wishes of the guardian or custodian override those of the child concerning the child's presence at any visitation episodes and prior to issuance of a visitation order.

#### D. *Expansion of Lizzie's Law: Addressing Concerns of Victims' Rights and Battered Women's Groups*

Upon expansion of Lizzie's Law to encompass parents convicted of not only first degree murder but also second degree murder and first degree rape, the risk emerges that Lizzie's Law will harm parental victims of domestic violence

who subsequently kill their abusers.<sup>195</sup> Addressing such concerns, Massachusetts' Lizzie's Law was revised five times prior to enactment so as to adequately represent the concerns of advocates of battered women.<sup>196</sup> The final version of Lizzie's Law was specifically limited to first degree murder based upon the belief that it would probably not apply in cases of a parent who kills an abusive spouse as such murderers are not commonly convicted of first degree murder<sup>197</sup> but of a lesser degree of murder due to the defense of "battered women's syndrome."<sup>198</sup> Therefore, should Lizzie's Law and similar child protection acts be expanded to include more than first degree murder, it is important to note that these laws act merely as mechanisms giving child victims added legal protection.<sup>199</sup> Lizzie's Law and its successors will not perpetually strip the visitation rights of a convicted battered parent if the child at issue assents to visitation.<sup>200</sup> It is highly unlikely, even with a broadening of the conviction base, that Lizzie's Law would hurt the visitation rights of a formerly battered parent as a child cohabitating with an abusive (now deceased) parent and an abused (now incarcerated) parent would likely recognize the innate incorrectness of any such abuse (unless, of course, the abused was also an abuser). As such, the child would likely not have any objections to visiting the formerly abused parent in prison and would assent to visitation. Thus, while expansion of Lizzie's Law to include offenses beyond first degree domestic murder is feared by some and lauded by others in the victim's rights arena, where the parent-child relationship between a

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<sup>195</sup> See Oct. Interview with Caron, *supra* note 176.

<sup>196</sup> *Id.*

<sup>197</sup> See Henriette Campagne, *Visitation Bill Overwhelmingly Approved*, MASS. LAW. WKLY., July 21, 1997, at 5.

<sup>198</sup> See *Battered Women's Expert Testimony, Past and Present* (PLI N.Y. Prac. Skills Course Handbook Series No. F0-001V, 1998) (battered women act in ways that are incomprehensible to the average person); see also Cahn, *supra* note 19, at 1097. Even when criminal court has dismissed evidence and testimony relating to battered women's syndrome, such evidence remains relevant to custody proceedings (and thus, likely visitation proceedings) in family court. See Cahn, *supra* note 19, at 1097.

<sup>199</sup> See Oct. Interview with Caron, *supra* note 176.

<sup>200</sup> See *supra* note 16.

child victim and formerly abused (presently convicted) parent is sufficiently strong, any subsequent expansion in Lizzie's Law will not act to break what cannot be broken.<sup>201</sup>

#### V. POLICY REASONS FOR ACKNOWLEDGING VOICE OF CHILD VICTIMS OF DOMESTIC MURDER

Several valid policy reasons exist for developing and enforcing child protection acts similar to Lizzie's Law. First, implementation of such acts will prevent the legal system, which is often inadequately responsive to the needs of minors, from further harming child victims of domestic murder (and other similar criminal acts) through episodes of forced visitation.<sup>202</sup> While some may argue that harm continues to befall a child victim through suspension of visitation privileges and subsequent estrangement of the parent-child relationship, the rights of the child to visit the convicted parent are not suspended indefinitely. Should the child victim choose to visit with the incarcerated parent when he or she is of age to properly assent, visitation would ensue.<sup>203</sup> Moreover, any impairment of the parent-child relationship through implementation of Lizzie's Law runs secondary to the primary harm which came into existence the moment the violent act of murder occurred disrupting the child's life and leaving them sans one parent.

Policy favoring Lizzie's Law also addresses the harm a domestic murder brings to the surviving adult family members of the crime victim. Specifically, Lizzie's Law, by mandating suspension of visitation rights until the child assents to visitation, alleviates third party custodial fear of a given judge's discretion in a fragile visitation determination<sup>204</sup> and guarantees against the unpredictability of the judiciary.<sup>205</sup> Moreover, by disallowing visitation rights (and continued court appear-

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<sup>201</sup> Subsequent concerns of victims' rights groups can be adequately addressed by adopting the domestic violence exception clause such as that found within New York's Lee-Anne Cruz Memorial Act. See *supra* note 149.

<sup>202</sup> See *Lizzie's Lasting Legacy*, *supra* note 6.

<sup>203</sup> See *supra* note 16; see also *Cellucci Signs Bill to Protect Child Victims of Domestic Murder*, *PATRIOT LEDGER*, Aug. 16, 1997, at 26.

<sup>204</sup> See Case, *supra* note 17.

<sup>205</sup> See Aucoin, *supra* note 3.

ances) until the child assents to visitation, Lizzie's Law prevents the continual harassment of the crime victim's family<sup>206</sup> by the convicted parent through his or her repeated petitions for forced visitation.<sup>207</sup> These repeated petitions have an emotional impact upon the child victim and invite the convicted parent to exercise control over the crime victim's family, throwing them, once again, into turmoil by forcing them to relive their family member's murder.<sup>208</sup> Lizzie's Law not only serves the interests of the child and the crime victim's family but also the interests of society by saving taxpayers' dollars. Prior to Lizzie's Law, guardian's funds earmarked for the health, safety, and welfare needs of child victims were being utilized for needless courtroom battles.<sup>209</sup> This fact is made even more unconscionable when one realizes that the convicted parent's requests for forced visitation were supported by state funds (i.e., taxpayers).

Finally, the ramifications of forcing a child to visit with a parent whom the child associates with past episodes of domestic violence are well documented. Specifically, children revisiting violent environments suffer physical, psychological, behavioral and developmental harm.<sup>210</sup> Moreover, authorities have agreed that witnessing domestic violence within a household environment may create trauma, shock, fear and guilt closely resembling post-traumatic stress disorder.<sup>211</sup> As children's values, attitudes and coping mechanisms suffer due to domestic violence in the household, they are more likely to be violent with their mates and tolerate more violence as adults.<sup>212</sup> Thus, forcing a traumatized child to visit a parent convicted of

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<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> See Associated Press, *Parental Rights of Killers at Issue*, TELEGRAM & GAZETTE, July 2, 1997, at 110. Moreover, repeated appeals brought by convicted and incarcerated parents of denial of visitation rights may in certain instances block adoption proceedings of the child's guardian. See Eagan, *supra* note 7.

<sup>209</sup> In New York, for example, Larry Cruz may re-petition the court for visitation every six months as prisoner's legal fees are footed by taxpayers.

<sup>210</sup> See Yudelma, *supra* note 32, at 200.

<sup>211</sup> See *id.* at 201.

<sup>212</sup> See LENORE WALKER, *THE BATTERED WOMAN* 16-17 (1979).

the murder of that child's other parent merely acts to perpetuate the murderous event in the child's mind, and as such, defies all logic.<sup>213</sup>

## CONCLUSION

Massachusetts' Lizzie's Law is a relevant piece of family law legislation which will likely bring extensive changes to the world of children's rights.<sup>214</sup> Lizzie's Law recognizes the larger state duty to protect the voice of children today in order to secure the voice of the nation in the future. In determining the weight to be placed upon a child's wish relative to visitation, Lizzie's Law has not overlooked the two foremost edicts of family law legislation in the area of domestic violence, namely, violence against a parent predates violence against a child<sup>215</sup> and each generation learns to be violent by being a participant in a violent family.<sup>216</sup> Remaining ignorant in the present to the voice of children will only leave us unsteady in the future, and "that which is written is Doom. Unless the writing be erased."<sup>217</sup>

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<sup>213</sup> See *Lizzie Deserves Better*, *supra* note 11.

<sup>214</sup> Lizzie's Law has been compared to Megan's Law (which requires that neighbors be notified when a sex offender moves into their community) as a result of its interest in the protection of children and the fast-moving pace by which it has influenced copycat legislation throughout the individual states.

<sup>215</sup> See Youdelman, *supra* note 32, at 189, 199.

<sup>216</sup> See *id.* at 198.

<sup>217</sup> DICKENS, *supra* note 1, at 98.

