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# REQUIRING BATTERED WOMEN DIE: MURDER LIABILITY FOR MOTHERS UNDER FAILURE TO PROTECT STATUTES

MICHELLE S. JACOBS\*

*Pauline Zile allowed her daughter to die. During 7-year-old Christina Holt's terrifying last weeks of life, Pauline Zile wasn't a mother; she was a co-conspirator.<sup>1</sup>*

*I will never forget seeing Christina on the living room floor, nor her laying on the bed.<sup>2</sup>*

## INTRODUCTION

She was a sorrowful sight as she appeared before the nation on the evening news. A thin, modestly dressed woman with tired lines etched into her face. Every parent's worst nightmare had just come true for her. Her daughter disappeared that day from the bathroom in a flea market.<sup>3</sup> Pauline Zile looked into the camera and sent her daughter a consoling message: "Mommy's going to find you. I love her. Her little brothers miss her so much. We want her to come home."<sup>4</sup> She told her

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<sup>1</sup> *The Killing of Pauline: Rage Not Punishment*, PALM BEACH POST, Apr. 19, 1995, at 10A (comments from the State Attorney during the opening of Pauline Zile's murder case).

<sup>2</sup> Mike Folks, *Rubin Outlines Mom's Defense: Control by Spouse Who Beat Daughter*, FLA. SUN-SENTINEL, Nov. 4, 1994, at 1B (statement by Pauline Zile contained in a letter disclosed by her counsel).

<sup>3</sup> Stephanie Smith, *Prosecutor: Doing Nothing Makes Zile Guilty in Death, Rubin Says Pauline Prosecuted Only for Lying to Public on TV*, FLA. SUN-SENTINEL, Apr. 4, 1995, at 4.

<sup>4</sup> *Id.* See also Appellant's Initial Brief at 11, *Zile v. State* (Fla. Dist. Ct. App. 1995) (No. 95-2252).

daughter not to be afraid and encouraged her, if she could, to try and find a way to call home.<sup>5</sup>

This is how the public was first introduced to Pauline Zile of Rivera Beach, Florida, whose seven-year-old daughter, Christina Holt, was reported missing on October 22, 1994.<sup>6</sup> For three days, her neighbors, the police, and the public-at-large searched for Christina.<sup>7</sup> Fairly quickly after the announcement of little Christina's disappearance, however, suspicions about the veracity of Pauline Zile's disappearance report began to mount. A witness from the Swap Shop—the flea market where Pauline Zile first reported the disappearance—had some doubts about the missing child.<sup>8</sup> An early report that the child had been found evoked a strange response from her mother. Even before it was confirmed that the child was not Christina, Pauline Zile had expressed doubt that the child was her daughter.<sup>9</sup>

All too soon, the public came to understand why Christina's mother was so sure she had not been found. Christina was dead and had been dead for a month before Pauline Zile appeared on television and reported her missing.<sup>10</sup> She died during the course of a beating administered by John Zile, her stepfather.<sup>11</sup>

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<sup>5</sup> Appellant's Initial Brief at 11, *Zile* (No. 95-2252). It seems ironic now in light of our knowledge of the circumstances of Christina's death that at the time Pauline Zile seemed to be speaking to two audiences: her daughter and the public. My thanks to Paula Johnson for the observation.

<sup>6</sup> Christina Holt was Pauline's daughter through a previous marriage to Frank Holt. The Holts lived in Maryland and prior to June 1994, Christina lived with Frank Holt's mother and then his grandmother. See F.B.I. INVESTIGATIVE REP. No. 7A-MM-71836 (Oct. 28, 1994). In June of 1994, the Holts returned Christina to Pauline and John Zile with little or no notice. See Marego Athans, *Recalling a Charade: Friends of Christina's Family Re-create Incidents, Paint Portrait of a Family in Decline*, FLA. SUN-SENTINEL, Nov. 11, 1994 at 1A. At the time, Pauline was seven months pregnant with a child she and John had already decided to give up for adoption. *Id.*

<sup>7</sup> Immediately after the report of Christine's disappearance, 13 different social service and law enforcement agencies offered aid. Among them were the Ft. Lauderdale Police, the Broward County Sheriff's Office, the Florida Department of Law Enforcement, and the Federal Bureau of Investigation. Jenny Deam, *The Secret Death of Christina*, ST. PETERSBURG TIMES, Mar. 5, 1995, at 1A. The Adam Walsh Center distributed approximately 10,000 fliers throughout South Florida. *Id.*

<sup>8</sup> Stephanie Smith, *Many Doubted Ziles' Story: FBI Files Reveal Some Suspected Kidnapping Tale From Start*, FLA. SUN-SENTINEL, Dec. 31, 1994, at 1B. Pauline did not accompany the others when they rushed to determine whether the child was Christina. *Id.*

<sup>9</sup> *Id.*; Trial Tr. 16 at 1745, *Zile v. State* (Fla. Dist. Ct. App. 1995) (No. 95-2252) [hereinafter TR]; see also Appellant's Initial Brief at 15, *Zile* (No. 95-2252).

<sup>10</sup> Deam, *supra* note 7, at 1A.

<sup>11</sup> Folks, *supra* note 2, at 1A.

To stifle Christina's cries during the beating, he covered her mouth.<sup>12</sup> She choked to death on her own vomit.<sup>13</sup> Her body lay hidden in a bedroom closet for several days before John Zile buried her in a field behind a K-Mart store in Tequesta, Florida.<sup>14</sup> Pauline Zile's child died not by her mother's hand but as

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Dr. James Benz, the county medical examiner, testified the sole cause of death was asphyxia (lack of oxygen). Appellant's Initial Brief at 18, *Zile* (No. 95-2252).

<sup>14</sup> Athens, *supra* note 6, at 1A. The announcement of Christina's "disappearance" occurred two days before Susan Smith's boys were allegedly abducted in a car-jacking committed by an unknown black man in South Carolina. A teary-eyed Susan Smith also came before the public begging for the safe return of her children. See Kenneth A. Gailliard, *Man Takes Car with Children Inside*, ROCK HILL HERALD, Oct. 26, 1994, at 1A (describing the assailant as a black man in his late twenties or early thirties, wearing a plaid shirt, blue jeans and a toboggan-type hat). Yet, Smith's children would not be found alive either, as she had strapped them into their car seats and driven the car into a lake, where the boys drowned. *Id.* When it became apparent that both women had attempted to pull the wool over the public's eyes, there was a tremendous outpouring of hostility towards them. Calls were immediately made for the imposition of the death penalty against both women. See Athens, *supra* note 6, at 1A; see also *Donations to Prosecute Mother Will Be Returned*, S.F. CHRON., Feb. 1, 1995, at A3 (city officials in South Carolina had to return \$1,147 in donations that were made to help the city prosecute Smith; some of the notes accompanying the donations specifically called for the death penalty); Appellant's Initial Brief at 74-81, *Zile* (No. 95-2252).

Initially the two cases appeared to be very similar. Both women were young. Both were initially portrayed in media reports as being selfish: Pauline was supposedly more concerned about her husband than her child, while Smith reportedly thought her children would be inconvenient for a new boyfriend. But, as the facts developed, more became known about these mothers. Susan Smith's children died from an affirmative act by their own mother's hand. Yet, as a result of the pretrial and presentencing handling of the evidence by Smith's lawyer, as well as the evidence presented during the sentencing phase, the public learned many new things about Susan Smith. See Al Dozier, *Smith's Mental State "Fragile,"* ROCK HILL HERALD, Nov. 21, 1994, at 1A (reporting that Smith's lawyer immediately painted a picture of a fragile woman who had lost the ability to make decisions for herself); see also Jesse J. Holland, *Victim of Her Own Crime?*, ROCK HILL HERALD, July 9, 1995, at 1A [hereinafter Holland, *Victim of Her Own Crime*] (stating that from the first day the lawyers were hired they intended to focus on her mental state). She was sexually abused by her step-father for an extended period of time. She was separated from the father of the boys and had initially charged him with infidelity. During the trial there was testimony that after the separation he threatened Smith's boyfriend with physical harm and threatened to reveal her stepfather's incest to the public. See Jesse J. Holland, *Smith Trial: "It's like . . . TV,"* ROCK HILL HERALD, July 24, 1995, at 1A (stating that she suffered through bouts of depression); see also Henry Eichel, *Media Circus Never Really Came To Town For Fast Trial, Penalty Phase the "Real" Trial*, SUN. PATRIOT-NEWS, July 23, 1995, at A9 (noting that three law enforcement officers originally subpoenaed by the prosecution gave testimony for the defense, detailing Smith's despondent demeanor when she confessed). In light of the new information about Smith, the sentiment of her community softened towards her. Calls for the death penalty diminished and she was sentenced to life without the possibility of parole. See Holland, *Victim of Her Own*

a result of the affirmative act of John Zile. Yet, Pauline was charged with first degree murder.<sup>15</sup> The state alleged that she failed to prevent John's actions, which were classified as aggravated child abuse, an enumerated felony under Florida felony murder statute.<sup>16</sup> Thus, Zile is the first woman in Florida to be convicted by a jury for first degree murder based on failure to protect her child.<sup>17</sup>

Zile's counsel did little before the trial to develop the facts of her life.<sup>18</sup> Through a press release at the beginning of the representation, her counsel intimated that a defense would be fashioned which would focus on John's violent behavior toward Pauline; yet no evidence was produced for the press or at trial.<sup>19</sup> Other than her defense counsel's own opinions about the merit of the State's case, the only view the public had of Pauline Zile came in a letter that she wrote to Ellis Rubin, her lawyer, which was released to the press. In the letter Zile constructs a list of regrets she had in her life, including her failure to get help for Christina on the night of her death.<sup>20</sup> Rather than helping the public understand Pauline better, defense counsel's release of

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*Crime, supra* (one woman stated "I kept thinking of my own daughter when I think about her. . . . I just can't see coldly telling someone to kill someone I know").

<sup>15</sup> See Appellant's Initial Brief at 2, *Zile* (No. 95-2252).

<sup>16</sup> See *infra* discussion in Part III.

<sup>17</sup> Pauline was convicted of first degree felony murder on July 22, 1995. She is not, however, the first woman in the State of Florida to be charged with first degree murder for failure to protect. Others have been charged but entered pleas to second degree murder charges in order to escape exposure to the death penalty. Women in other states have been convicted of first degree murder on a failure to protect theory. See *People v. Novy*, 597 N.E.2d 273 (Ill. App. Ct. 1992) (first conviction in the United States for murder on a failure to protect theory); see also *People v. Peters*, 606 N.E.2d 1201 (Ill. 1992) (first degree murder established on the theory of accountability). See *infra* text accompanying notes 38-46 for discussion of failure to protect theory.

<sup>18</sup> Pauline Zile was represented by noted criminal defense attorney Ellis Rubin. Rubin had the reputation of defending clients on the basis of their "victim" status.

<sup>19</sup> Folks, *supra* note 2, at 1B. The information, however, seemed readily available. Reporters for the *Sun-Sentinel* interviewed the Ziles' landlord who recounted that Pauline and the children seldom left the apartment. She recounted that John always answered the door, and he always delivered the rent money. See Robin Fields, *Experts Have No Easy Explanation Why Christina's Mom Did Nothing*, FLA. SUN-SENTINEL, Nov. 1, 1994, at 4B. In response to the public's disbelief that a mother could help conceal her child's murder, Dr. Elaine Ducharme, a consultant psychologist with West Palm Beach's Family Sexual Treatment Program, explained that "[t]he terror of being abandoned or of what he might do to her may have been so great that she became immobilized." *Id.*

<sup>20</sup> See Folks, *supra* note 2, at 1B. Pauline Zile listed six regrets in her letter, three of which referenced not knowing about John's violence and not being able to confront him. *Id.*

the letter backfired: the State Attorney's office used the letter to establish that Pauline knew she had a duty to do something to save her child.<sup>21</sup> Little of the State's case-in-chief focused on the Zile family life for any household member besides Christina.<sup>22</sup> Counsel for Pauline Zile presented no witnesses on her behalf, choosing to rest at the conclusion of the State's case. No more was known about Pauline Zile at the conclusion of her case than was known at its inception. She remained an enigma to the public and friends alike.<sup>23</sup> No one came to learn of the many markers which suggested that John Zile was violent towards Pauline as well as Christina.<sup>24</sup> Calls for the death penalty were unabated and when she was sentenced to life without the possibility of parole the public felt it had been cheated. People wanted her to die.<sup>25</sup>

Contrast the treatment Pauline Zile received to the public and legal response to a father similarly situated. David Schwarz was the father of A.J., a child who was killed during the same period of time as Christina Zile in a neighboring Florida commu-

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<sup>21</sup> Stephanie Smith, *Pauline Zile Trial To Begin Today; Meek Image Disappearing in Jail for Defendant in Death of Daughter*, FLA. SUN-SENTINEL, Mar. 27, 1995, at 1B. Prior to the release of the letter the State had little to back its theory that Pauline was equally responsible for the death of Christina. Prosecutors said Zile handed them their summation with the letter. *Id.*

<sup>22</sup> The State's main witness was an "ear" witness who alleged she overheard the sound of John Zile beating Christina and on a separate occasion overheard Pauline slap Christina. See Appellant's Initial Brief at 12, *Zile* (No. 95-2252). The State also attempted, unsuccessfully, to introduce testimony that Pauline was once observed hitting one of her sons with a stick. *Id.* at 89.

<sup>23</sup> See Athans, *supra* note 6, at 1A. Co-worker Bridget McKinlay stated that she hardly recognized the hardened face (Pauline's) she saw on the eleven o'clock news. It was a far cry from what she described as the "porcelain doll" who carried a key chain with pictures of all of her children. *Id.* See also Mike Folks & Terence Shine, *Differing Images Emerge in Zile Closing Arguments*, FLA. SUN-SENTINEL, May 15, 1996, at 1B. A local attorney noted that Pauline would have benefited if her jury heard some of the details about her made known only in John's trial.

<sup>24</sup> See Folks, *supra* note 2, at 1B; Athans, *supra* note 6, at 1A; Fields, *supra* note 19, at 4B.

<sup>25</sup> See, e.g., Christine Stapleton, *Zile Sentenced to Life Without Parole*, PALM BEACH POST, June 8, 1995, at 1A. Christina's great grandmother was quoted in the article as saying, "I want some of those inmates to be my heroes. I want them to beat her to death for what she put Christina through." *Id.* The media attention and the public's rage towards and obsession with Pauline was starkly different from the public and media indifference to the case of Clover Boykin who intentionally smothered two children, one of them her own child. She was sentenced to life in prison. *Id.*

nity.<sup>26</sup> The boy's stepmother, Jessica Schwarz, was arrested and charged with abusing him over an eighteen month period.<sup>27</sup> The abuse eventually caused the child's death.<sup>28</sup> David Schwarz lived with the family during the period of time Jessica abused the boy.<sup>29</sup> When the boy died, the stepmother was prosecuted for murder. No failure to protect charges were brought against David and there were no public outcries seeking his death.<sup>30</sup> David Schwarz was allowed to "get on with his life" and forget the tragic death of his son.<sup>31</sup> Pauline Zile and Jessica Schwarz, on the other hand, will spend the rest of their lives in prison.<sup>32</sup>

This article explores the legal dilemma of a growing number of women who find themselves—as perhaps Pauline Zile did—at the intersection of domestic violence and child abuse: women who are accused of murdering their children when spouses or significant others have actually killed the children in a household where violence rules. These women may have either a justification or an excuse defense available to them but are effectively precluded from taking advantage of such defenses either through the ignorance of their lawyers or by gender bias in the application of criminal law.<sup>33</sup>

Progress has been made in educating the public, law enforcement and the actors within the judicial system about the realities of violence against women and against children within

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<sup>26</sup> See Mike Folks, *A.J. Case Haunts Father: David Schwarz Says Wife Didn't Kill Boy*, FLA. SUN-SENTINEL, July 17, 1995, at 1B [hereinafter Folks, *A.J. Case Haunts Father*]. Pauline Zile and Jessica Schwarz were convicted on the same day. See Mike Folks, *Two South Florida Women Were Convicted on Tuesday in the Murders of Their Children*, FLA. SUN-SENTINEL, Apr. 12, 1995 at 1A.

<sup>27</sup> See Larry Barszewski, *A.J. Had No Chance For Life: Files Show Physical and Emotional Abuses*, FLA. SUN-SENTINEL, Nov. 14, 1993, at 1B.

<sup>28</sup> *Id.*

<sup>29</sup> However, he did work as a trucker and was away at times. Folks, *A.J. Case Haunts Father*, *supra* note 26, at 1B.

<sup>30</sup> In fact, the state only subpoenaed the father to testify at the stepmother's trial. He failed to appear to testify, but was not held in contempt. *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Jessica Schwarz was sentenced to 30 years for aggravated assault and 40 years for second degree murder. See Stephanie Smith, *Schwartz Sentenced to 40 More Years; Step-mother Shows No Remorse*, FT. LAUDERDALE SUN SENTINEL, Aug. 5 1995, at 1B.

<sup>33</sup> My discussion is restricted to non-abusing battered mothers. Criminal law theories of punishment are clearer for the actor who intentionally or purposefully engages in behavior that harms. Battered mothers who actively abuse present a more difficult moral and legal problem. While there may also be defenses available for battered mothers who actively abuse, an analysis of their behavior exceeds the scope of this article.

the home. However, the critical interconnections between violence against the mother and violence against her children have not been fully understood by our courts. No consistent theory has been developed for the defense of mothers that is based on the connection between the abuse that a mother is receiving at the hands of the violent partner and her ability to prevent harm to her children. In fact, though public awareness of child abuse increased at the same time as awareness of domestic violence increased, the two seem to work at odds with each other.<sup>34</sup> As awareness of the abuse increases, so does the likelihood of prosecution for the mother—despite the fact that both mother and child are abused by the same person. Courts have been reluctant to excuse the mother's failure to save the child from abuse on the grounds that she herself has been abused. In fact, the mother's encounter with violence in a sense heightens her dilemma. The courts reason that since she is aware of the violence that occurs in the home, she should do more to ensure that her children are shielded from that violence.<sup>35</sup>

Nor have advances in post-conviction relief benefited the women whose children have been killed by a violent intimate. Many states have developed post conviction remedies for women who can establish that they were battered by spouses whom they killed.<sup>36</sup> However, when a woman is convicted of the

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<sup>34</sup> See *infra* discussion in Part II.

<sup>35</sup> One would expect some cross analysis of the battered woman syndrome theory to determine whether the woman could have, or even should have attempted to intervene, given the partner's propensity for violence. Even when the cross analysis has been done, courts have held that the mother's own abuse was irrelevant to determination of whether or not she failed to protect her child. See, e.g., *In re Dalton*, 424 N.E.2d 1226, 1231 (Ill. App. Ct. 1981) (holding that a parent may be found unfit regardless of whether she "did everything possible" to protect her children; the determinative factors "should be the result of any efforts . . . rather than the mere fact that an effort was made"). But see *In re Glenn G.*, 587 N.Y.S.2d 464, 468 (N.Y. Fam. Ct. 1992), where the mother actually fled the state to avoid physical abuse, called a local child welfare agency and entered a battered women's shelter with her children. After hearing about the mother's abuse at her trial, the court found that the abuse rendered her incapable of protecting her children. *Id.* at 470.

<sup>36</sup> These are normally clemency projects whereby the governor's office establishes a review mechanism to screen cases where women may have been unjustly convicted after being subjected to violence within the home or sentenced inappropriately by courts that did not properly weigh the existence of violence within the home. For example, the State of Florida has a two tier clemency process. Since clemency is normally granted only after the defendant has completed her sentence, a petition to request a waiver must first be filed and then, if granted, the clemency petition can be prepared. In recognition of the problems women faced in using battered women's



murder of her child, she will not qualify for a clemency petition, despite the fact that the death of the child was actually caused by the same abuser the woman would have been justified in killing.<sup>37</sup> This article suggests that the mother should be able to assert that she is justified in not protecting the child because of the risk of death or serious bodily injury to herself.

Criminal liability for these mothers is increasingly based on a "failure to protect" or omissions theory. Ordinarily, a person accused of a crime is required to commit a voluntary act (*actus reus*) with a required state of mind (*mens rea*) before society will attach criminal significance or liability to the person's behavior.<sup>38</sup> There are crimes, however, which are either specifically defined in terms of failure to perform some specified act or failure to act when there is a legal duty to do so.<sup>39</sup> A parent's

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syndrome as a defense at the trial level, procedures were adopted for the special handling of applications for waiver effective January 1, 1995. In an application for clemency, the woman and her advocate may appeal to the Governor's office for a release from incarceration or a reduction in sentence. The inmate can demonstrate the existence of abuse through the clemency petition. At the trial level, this evidence may have been excluded by the trial court. Or, it may not have been developed by defense counsel. See Fla. Exec. Order No. 9-C-466 (1994); Fla. Exec. Order No. 92-92-80 (1992); Florida Battered Women's Clemency Project, Pro Bono Attorney Training Manual (Apr. 1995) (unpublished manual, on file with author).

In other states either the governor or the Parole Board makes clemency determinations. There are no national standards for processing clemency petitions. In fact, not all states have established clemency projects. See NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, CLEMENCY ORGANIZING PROJECTS INFORMATION PACKET 1 (1997).

<sup>37</sup> This creates a class of battered women in Florida that are not eligible to file for clemency. The criteria for filing specifically state that the woman seeking assistance of the Project must be:

- a. Serving an active sentence
- b. For a murder conviction
- c. Of a significant other
- d. Who has a claim of abuse . . . and
- e. A tentative release date beyond December 31, 1997.

See Florida Battered Women's Clemency Project: Project Eligibility Policy 1 (1995) (unpublished document, on file with author).

<sup>38</sup> WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 193 (2d ed. 1986). Accordingly, "bad thoughts alone cannot constitute a crime. There must be an act, or an omission to act where there is a legal duty to act . . . A bodily movement, to qualify as an act forming the basis of criminal liability must be voluntary." *Id.* at 195. The definition of an "act" has often been the subject of scholarly debate. For the purposes of this article, an act is described as "an affirmative voluntary action undertaken by the actor." *Id.* at 197-99. The meaning of "voluntary" has caused its own its own debate. *Id.* at 198.

<sup>39</sup> See, e.g., 50 U.S.C.A. App. § 453 (West 1990) (amending § 2M4.1 Military Service Act § 3); ALA. CODE § 32-10-2 (1984); ARIZ. REV. STAT. ANN. § 42-137 (West 1956);

common law duty to her child falls into this category. Both parents have a duty to clothe and feed their children and maintain basic necessities.<sup>40</sup> The parental duty to the child is, at least theoretically, not without limit. A duty to act is limited initially by the actor's ability to perform the expected act.<sup>41</sup> The primary issues for the parents are the extent and nature of the acts they must perform to satisfy this duty. While a parent is expected to expose herself to a greater degree of risk to save her child than would a stranger,<sup>42</sup> the parent is not required to risk death or serious bodily injury.<sup>43</sup> Parents are expected to take every step reasonably possible to prevent harm to their children.<sup>44</sup>

Though the law holds both parents to the same duty, society particularly expects that the mother will be the child's protector. The mother is expected to suppress any individual identity or needs of her own in order to serve and protect the needs of her child.<sup>45</sup> She is expected to use more than reasonable efforts to protect her child, to do more than the law requires. She is expected to use *every* effort. When a child dies through abuse at the hands of someone other than the mother, and the state determines that the mother failed to take reasonable steps to save her child, the mother can be prosecuted for "failure to protect." There appears to be no discussion in the cases of what constitutes "every reasonable" step possible to satisfy the duty to act.<sup>46</sup>

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Wayte v. United States, 470 U.S. 598 (1985) (failure to register for the draft); Burnett v. State, 494 So. 2d 200 (Ala. Crim. App. 1986) (leaving the scene of an accident—failure to report); State v. Averyt, 876 P.2d 1158 (Ariz. Ct. App. 1994) (failure to file income tax).

<sup>40</sup> LAFAYE & SCOTT, *supra* note 38, at 208-09.

<sup>41</sup> *Id.* Just as one cannot be held criminally liable for bodily movement that is involuntary, one cannot be held criminally liable for failing to do an act which she is physically incapable of doing. *Id.* at 209 (providing an example of a father who cannot swim and the law's reluctance to require that he jump into a pool in order to save his drowning child).

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* See also State v. Walden, 293 S.E.2d 780 (N.C. 1982) (advising that requiring parents to place themselves in danger of death or great bodily harm in carrying out their common law duty to their children would require bravery beyond what can be expected).

<sup>44</sup> Walden, 293 S.E.2d at 786.

<sup>45</sup> See *infra* Part I.A for a discussion of societal views of motherhood.

<sup>46</sup> The severity of a court's interpretation of "every reasonable" step is demonstrated in *New Mexico v. Lucero*, 647 P.2d 406 (N.M. 1982) (holding failure to rescue a child from abuse by a partner is a strict liability crime; establishing *mens rea* is not required, all the state need do is demonstrate harm to the child). A full discussion of *Lucero* appears *infra* note 292.

The unspoken assumption may be that the mother can end the abuse by simply picking up the phone and calling the police. Such assumptions ignore the realities of violence by the significant other.<sup>47</sup> By making such assumptions, the courts are in fact requiring that mothers risk serious bodily injury or death before their duty to act is satisfied.

Societal views of mothers, children and violence, combined with gendered legal assumptions, contribute to an environment which is hostile to claims of a defense for battered mothers. In Part I of this article, I examine the multiple expectations that society and the law has of mothers. Initially I set forth societal requirements for women who are mothers. Secondly, I explore societal reactions to domestic violence. Next, I review society's understanding of child abuse, pointing out the tension between policies that were aimed exclusively towards protecting children, at all costs, from violence in the home and policies developed to protect women from violence in the home. Through an analysis of child protective policy I demonstrate that gendered assumptions about women's obligations to their children are embedded in the law and hinder battered mothers' ability to present defenses. Finally, I highlight the dilemmas the law has with evaluating victim status of battered women and mothers. The expectation that a mother will and should, at all costs and beyond what is simply reasonable, sacrifice everything for her child will be made apparent.

Part II of this article explores how the law on murder liability through a failure to protect analysis developed. I trace the development of the historical interest the state has for the welfare of its children. Throughout that development there were periods of time when civic-minded people engaged in campaigns to save children from bad home environments. The factors which contributed to a home being labeled as "bad" were often influenced by class and race. I draw a connection between the historical movements to save children and the modern failure to protect statutes.

In Part III, I critique the application of omissions or failure to protect theory of murder liability for battered mothers. Under an omissions theory, it is the failure to act to prevent injuries or preserve life which serves as the basis for liability. In

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<sup>47</sup> See *infra* discussion of domestic violence in Part IB.

order for murder liability to attach to the mother, the state must: (1) demonstrate a connection between the affirmative act of the abuser, the mother's failure to act, and the death of the child; (2) establish an appropriate *mens rea* for the mother;<sup>48</sup> and (3) demonstrate she was capable of performing an act which would have saved her child. I question whether the analyses above can be made properly without considering how battering affects the mother.

The issue of whether battered women's behavior is reasonable continues to be problematic for theorists. In Part IV, I examine the issue of standards of reasonableness. The ability of public and legal institutions to evaluate the behavior of battered mothers as reasonable is hampered by the failure to recognize the prevalence of violence within the home. I encourage legal scholars, jurists and lawyers to continue to struggle towards an understanding that the behavior of battered mothers who do not save their children may be reasonable. Finally in Part V, I propose an agenda for change. I recommend that several theoretical principles of criminal law be re-examined as insufficient scholarly attention has been devoted to the impact of the theories upon women. I suggest that the actions of some battered mothers may be justified according to standard criminal law theory. And, rather than seeing the mother's behavior as demonic, insane, reckless or neglectful, we should recognize it for what it may actually be: reasonable behavior based on factors known to the mother at the time of the child's death or injury. I also urge that judicial monitoring and training continue to ensure judges apply evidentiary and procedural rules in a consistent, non-biased manner. My third and last recommendation is that feminist scholars make better use of the political process to highlight the legal problems of this marginalized group of battered women.

## I. SOCIETY'S VIEWS OF MOTHERHOOD AND CHILD ABUSE

*It is horrifying to see mothers killing their children . . . The life and comfort of one's child should come above all else.*<sup>49</sup>

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<sup>48</sup> The *mens rea* requirement in failure to protect cases can run from requiring intentional conduct to strict liability.

<sup>49</sup> See *Lawyer's Remark on Verdict an Outrage*, PALM BEACH POST, Apr. 22, 1995, at 19A (commenting that first degree murder verdict was not too severe).

*All she ever wanted was to be a mother: a "good one" with patience, pride in her family, love of her husband and children.*<sup>50</sup>

#### A. SOCIETY'S VIEW OF MOTHERHOOD

The public and legal reaction to Pauline Zile is intricately related to societal concepts of women and their responsibilities as mothers. Social concepts of motherhood are complex. While motherhood itself is highly honored,<sup>51</sup> society does not generally value the women who become mothers.<sup>52</sup> For much of our history, mothers were not considered important aside from the influence they had on their children.<sup>53</sup> The status of motherhood was and is still seen not only as the ultimate but also as the only fulfillment of womanhood.<sup>54</sup> Failure to achieve the status can and does generate a negative effect.<sup>55</sup> There are several expectations that form the dominant ideology of motherhood.<sup>56</sup> First, motherhood is understood as the "natural,

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<sup>50</sup> Letter from Pauline Yingling, Pauline Zile's mother, to the court (Apr. 23, 1995) (on file with author).

<sup>51</sup> See, e.g., Catherine McBride-Chang et al., *Mother Blaming, Psychology and the Law*, 1 S. CAL. REV. L. & WOMEN'S STUD. 69 (1992).

<sup>52</sup> See Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993) (alleging that society assigns women the responsibility of childbearing, but does not pay women for the labor it entails while degrading that labor at the same time); see also M.M. Slaughter, *The Legal Construction of "Mother,"* in MOTHERS IN LAW 73, 73-74, 80 (Martha A. Feinman & Isabel Karpin eds., 1995) (analyzing the valuation of Ideal Workers versus Mothers, and arguing that Mothers are not valued by society because their labor is domestic and not viewed as contributing to production of wealth).

<sup>53</sup> McBride-Chang et al., *supra* note 51, at 71. The authors note that, while mothers were seen as causing negative behaviors in their children, they were not usually seen as causing any positive behaviors. *Id.* "Momism," a term coined by Phillip Wylie, blamed mothers not only for the problems of their own children, but for the problems of the whole society as well. *Id.*

<sup>54</sup> See Robbin S. Ogle et al., *A Theory of Homicidal Behavior Among Women*, 33 CRIMINOLOGY 173, 179 (1995); see also Martha A. Fineman, *Images of Mothers in Poverty Discourse*, in MOTHERS IN LAW, *supra* note 52, at 205, 207 (construction of motherhood is so interwoven in our culture that it affects all women independent of whether or not they choose to become mothers).

<sup>55</sup> *Id.*

<sup>56</sup> See Marlee Kline, *Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women*, in MOTHERS IN LAW, *supra* note 52, at 118, 119; see also Fineman, *supra* note 54, at 205-23. Fineman defines ideology as a system constituted by a collection of symbols, beliefs and assumptions that, in combination, rationalize and give meaning to discourses in the context of power. Fineman, *supra* note 54, at 219. A dominant ideology is relatively stable although it alters over time, in response to tensions generated by too violent or prolonged demands from discourses without power. *Id.* at 220.

desired and ultimate goal of all normal women."<sup>57</sup> Also included within the dominant ideology is the nature of good behaviors expected of "good mothers"—that they will be available to the children, spend time with them, love and care for them physically, and be responsible for the cleanliness of the home environment.<sup>58</sup> A mother's own wants and needs, apart from those of her children, are never considered. However, "to the extent that society values women's roles as mothers, it does so only when the events of motherhood attach to a legal father."<sup>59</sup> A "good mother," therefore, is expected to be in a family that is nuclear, heterosexual and that has a man (whom the mother married) as head of the house.<sup>60</sup> Finally, the ideal of motherhood is also culturally specific, in that it reflects the normative value of white, middle class,<sup>61</sup> Anglo-European society.<sup>62</sup> Not all women are entitled to share in the "natural, desired and ultimate goal" of motherhood. Historically, women of color, poor women, lesbians, immigrant and unmarried women have been defined as "unfit" to carry the banner of motherhood.<sup>63</sup> For

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<sup>57</sup> Kline, *supra* note 56, at 119.

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

<sup>59</sup> See Roberts, *supra* note 52, at 95. Fineman points out a Wisconsin statute that may possibly subject a mother to criminal prosecution if she does not assist the state in establishing paternity for her child, even when the child will not be on the state welfare rolls. The legislature of Wisconsin declared that every child has a "legal right to have a father." Fineman, *supra* note 54, at 214, 221; *id.* at 221-23.

<sup>60</sup> Kline, *supra* note 56, at 120.

<sup>61</sup> *Id.* See also Roberts, *supra* note 52, at 108.

<sup>62</sup> Some scholars argue that the ideology of motherhood is tied to historic notions of western capitalist nations of the early 19th century, in that the "good mother" remained at home with the children and did not enter the gritty workplace of newly industrialized nations. Kline, *supra* note 56, at 120. Modern economies have tempered the ideology to the extent that some version of the working mother is now acceptable. The dominant theory, however, still does not envision a *working class* mother working full-time to support her family. *Id.*

<sup>63</sup> See Dorothy E. Roberts, *Racism and Patriarchy*, 1 AM. U. J. GENDER & L. 1 (1993). Historically, black motherhood has been devalued and discouraged, principally to disregard and subordinate blacks. *Id.* at 11. Roberts also argues that single motherhood is regarded as pathological, an explanation for poverty, and a facilitator for governmental intrusion into the lives of single mothers that would otherwise be illegal. See Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141 (1995). There is a similar castigation of lesbian mothers. Because they violate the traditional gender norm and reject the historically subordinated position of the female role, lesbian mothers are characterized as "outlaw mothers." See BETH E. RICHIE, COMPELLED TO CRIME: GENDER ENTRAPMENT OF BATTERED BLACK WOMEN 2-3 (1996); Jenny Wald, *Outlaw Mothers*, 8 HASTINGS WOMEN'S L.J. 169 (1997); see also Naomi R. Cahn, *Representing Race Outside of Explicitly Racialized Contexts*, 95 MICH. L. REV. 965 (1997) (detailing how welfare is presently constructed to mean race); Doro-

these women procreation has been devalued and discouraged, as these women are deemed unworthy of the privileges of motherhood.<sup>64</sup> Society considers women who fail to meet the ideal of motherhood as deviant or criminal.<sup>65</sup>

Despite recent changes in the structure and economics of family life, the burdens of raising children still fall primarily on women. They are the ones most penalized by limited availability of child care services and the lack of resources committed to securing child-support payments.<sup>66</sup> As a result, mothers and children—particularly mothers of color and their children—increasingly predominate in the ranks of the poor.<sup>67</sup>

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thy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equity, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436-44 (1991) [hereinafter Roberts, *Punishing Drug Addicts*].

<sup>64</sup> See Kline, *supra* note 56, at 121; see also JOEL HANDLER, *THE POVERTY OF WELFARE REFORM* (1995) (historical analysis of the characteristics of the unworthy poor). The historic view that poor women are unworthy is mirrored in the current debate on welfare reform. HANDLER, *supra*, at 28-29. At the same time that conservative politicians decry the deterioration of "family values"—implying that such deterioration is caused by the increasing number of selfish women entering the workforce rather than staying at home with their children—mothers on welfare are criticized for attempting to stay home with their preschool aged children. The mother on welfare is not entitled to participate in the dominant ideology of motherhood which allows her to nurture her children. See also Roberts, *Punishing Drug Addicts*, *supra* note 63, at 1442-44 (detailing historical denial of Black Women's right to bear children through forced sterilization and transferring stereotype of unworthy blacks to modern stereotype of the lazy welfare mother); Fineman, *supra* note 54, at 211.

<sup>65</sup> Roberts, *supra* note 52, at 5 (noting that legal rules reward conduct that fulfills a woman's maternal role and punishes conduct that conflicts with mothering). Fineman notes that single motherhood is often viewed as "dangerous" and even "deadly" not only to those who are single mothers and their children, but society as a whole. Fineman, *supra* note 54, at 214.

<sup>66</sup> Ogle et al., *supra* note 54, at 179.

<sup>67</sup> *Id.* (citing BUREAU OF CENSUS, *MEDIAN INCOME LEVELS BY SEX* (1988); NATIONAL CENTER FOR CHILDREN IN POVERTY, *HOUSEHOLD STATISTICS ON FAMILIES AND POVERTY RATE* (1987)). The disparity between children of color and white children similarly situated was pointed out by Senator Moynihan when he compared children supported by survivor's benefit insurance (under social security) and children whose mothers received AFDC. He noted that survivor's benefit insurance had increased by 53% while the benefits of children on AFDC had decreased by 138%. The only difference between the children was that those on survivor's benefits were white and their mothers enjoyed the privilege of marriage, while the children on AFDC were primarily children of color born or raised by single mothers. *Id.* See Fineman, *supra* note 54, at 212.

## B. SOCIETY'S VIEW OF CHILD ABUSE

In light of society's views about mothers, it is not surprising to find that child abuse is primarily viewed as a female crime.<sup>68</sup> Women are considered responsible for child abuse whether they directly commit the abusive acts or fail to prevent the abuse of others. Health care professionals and society as a whole have traditionally believed that mothers who abused or permitted abuse were "sick" women.<sup>69</sup> Few attempts were made by social scientists to correlate the incidence of child abuse with other factors, such as poverty, lack of health care or benefits, lack of support services or the existence of violent fathers or other intimates within the home.<sup>70</sup> In reality, child abuse is not exclusively a female crime. It may not even be primarily a female crime. Studies which focus specifically on the gendered analysis of child abuse are beginning to indicate the extent of male participation in child abuse. Sample surveys indicate that fathers may be as likely as or more likely than mothers to abuse children.<sup>71</sup> One survey estimates that 40% of children in a national

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<sup>68</sup> See Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVICES 97, 98 (1988) (even work that considers the gender aspects of child abuse accepts the claim that child abuse is a female crime). Men are of course primarily and routinely charged with sexual abuse of children. However, even when the male perpetrates the sexual abuse, the courts will ask why the mother permitted the abuse. See also Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357, 364 (1995) (attorney stated that in 16 years of practice she had never seen a father charged with failing to protect). The absence of a body of case law defining fathers' and stepfathers' liability is all the more interesting as women were believed at one time to be primarily responsible for child abuse. If the obligations of parenthood as reflected by failure to protect laws were being applied in a gender neutral manner, one would expect to see a substantial body of cases evaluating liability for fathers.

<sup>69</sup> Stark & Flitcraft, *supra* note 68, at 98; see also Suzanne P. Starling et al., *Abusive Head Trauma: The Relationship of Perpetrators to their Victims*, 95 PEDIATRICS 259-60 (1997) (early reports suggested that women were most often perpetrators of fatal child abuse). However, even though society deplors child abuse, it tolerates infanticide. See Michelle Oberman, *Mothers Who Kill: Coming To Terms With Modern American Infanticide*, 34 AM. CRIM. L. REV. 1 (1996) (pointing out that society decries the act but sympathizes with the mother, as is evidenced by lenient sentencing in cases of infanticide). But see Roberts, *supra* note 52, at 107-08 (indicating only middle class white women get the sympathy).

<sup>70</sup> Stark & Flitcraft, *supra* note 68, at 98 (acknowledging that while a significant minority of cases where child abuse occurs have multi-problem backgrounds, the typical context for child abuse is a battering relationship where the woman can exercise little control over the violent behavior of the intimate).

<sup>71</sup> *Id.* at 99. See also Starling et al., *supra* note 69, at 260 (citing a 1986 study finding that fathers are 2.2 times more likely than mothers to be perpetrators of abuse resulting in permanent injury or death). In Starling et al.'s studies of abusive head



survey were abused by their fathers,<sup>72</sup> while another survey found that males are the assailants in 55% of reported cases of child abuse.<sup>73</sup> A 1986 study indicates that the number of hospitalized cases has not declined, and the proportion of severe injuries has increased as has the proportion of known male perpetrators reported.<sup>74</sup> Similarly, the proportion of female perpetrators decreased from 32% to 20% in all cases and from 20% to 6% in severe cases.<sup>75</sup> A correlation can be drawn between the increase in the number of cases with known male perpetrators and the decrease in the number of cases attributable to women or categorized as unknown.<sup>76</sup> More recent studies, controlled to detect differences specifically based on gender, found that single fathers had higher abuse rates than did single mothers.<sup>77</sup>

Men, either as fathers or significant others, are invisible in the traditional analysis of child abuse. Male invisibility is evidenced by the lack of scholarly information focusing on the subject of male child abuse.<sup>78</sup> Men are also invisible in programs for abusing parents, which tend to focus on developing appro-

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trauma—also known as shaken baby syndrome—fathers and mothers' boyfriends accounted for 57.5% of the occurrences of abuse, while mothers accounted only for 12.6%. *Id.*

<sup>72</sup> DAVID D. GIL, *VIOLENCE AGAINST CHILDREN: PHYSICAL ABUSE IN THE UNITED STATES* 116 (1970).

<sup>73</sup> See Stark & Flitcraft, *supra* note 68, at 99. Stark and Flitcraft cite the AMERICAN HUMANE SOC'Y, NATIONAL ANALYSIS OF OFFICIAL CHILD NEGLECT AND ABUSE REPORTING (1978), and then contrast it with E. BAHER ET AL., AT RISK: AN ACCOUNT OF THE WORK OF THE BATTERED CHILD RESEARCH DEPARTMENT (1976) (National Society for the Prevention to Children), a smaller study where the number was placed at 25%. Stark and Flitcraft believe that even a level of 25% is extraordinary considering the division of labor between men and women gives women almost exclusive child-rearing responsibilities. Stark & Flitcraft, *supra* note 68, at 99.

<sup>74</sup> Stark & Flitcraft, *supra* note 68, at 98. The numbers rose from 38% to 49% for all cases and from 30% to 64% for severe cases. Additionally, from 1989 to 1993, the percentage of infants abused by men nearly doubled. Starling et al., *supra* note 69, at 260.

<sup>75</sup> Stark & Flitcraft, *supra* note 68, at 99.

<sup>76</sup> *Id.* at 100.

<sup>77</sup> Glenn D. Wolfner & Richard J. Gelles, *A Profile of Violence Toward Children: A National Study*, 17 CHILD ABUSE & NEGLECT 197-212 (1993); Richard J. Gelles, *Child Abuse and Violence in Single Parent Families*, 59 AMER. J. ORTHOPSYCHIATRY 492-501 (1989).

<sup>78</sup> Stark & Flitcraft, *supra* note 68, at 102. The authors indicate that previous searches only yielded two articles which spoke of male child abusers and that no studies controlled for gender. *Id.* at 101. The use of the phrase "abusing parent" is often a euphemism for mother. *Id.*

priate gender behavior, such as mother-child bonding.<sup>79</sup> If a man harms a child, the mother is often blamed for not being present or for allowing others to care for the child while she works.<sup>80</sup> Traditionally, and still even today, there is no broad based belief that fathers have the same level of responsibility for the care of their children as do mothers.<sup>81</sup> Echoes of these sentiments can be found very clearly in the judicial opinions condemning women whose children have been killed by intimate others.<sup>82</sup>

Despite the fact that women are not solely responsible for child abuse, stereotypic and patronizing images of women stubbornly remain among experts in the child abuse field.<sup>83</sup> Child

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<sup>79</sup> *Id.* at 102. See also Starling et al., *supra* note 69, at 261 (pointing out that current abuse prevention methods are largely targeted at young and expectant mothers and questioning whether prevention methods will be successful if programs are not established to target the fathers, stepfathers, and boyfriends).

<sup>80</sup> See Stark & Flitcraft, *supra* note 68, at 101; see also *People v. Peters*, 586 N.E.2d 469 (Ill. App. Ct. 1991) (mother held liable for knowledge of abuse that occurred while she was at work). Compare the treatment of the mothers to David Schwarz, whom the state excused from liability because he was "on the road" a lot during the period of abuse. See Folks, A.J. *Case Haunts Father*, *supra* note 26, at 1B.

<sup>81</sup> See Roberts, *supra* note 52, at 100 n.24 (citing Karen Czapanskiy, *Volunteers and Draftees: The Struggle for Parental Equality*, 38 UCLA L. REV. 1415 (1991) (recognizing that courts view women as "draftees" and men as "volunteers" to parenthood); Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 648 (1993) (noting the law's treatment of the father's social relationship to their children as a cultural creation and choice, "not an automatic correlate of a biological ties"); Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 996-97 (1984) (indicating that courts treat fathering in terms of "opportunity" and mothering in terms of "responsibility").

<sup>82</sup> In many of the cases where the father, stepfather or paramour killed the child, the mother worked more than one job while the active abuser did not work at all. The mother was sometimes engaged in other legitimate activity at the time of the fatal injury. See, e.g., *Phelps v. State*, 439 So. 2d 727 (Ala. Crim. App. 1983) (mother had taken another child to the hospital and stayed with that child on the night her son was killed by her boyfriend). But see *Cardwell v. State*, 461 So. 2d 754 (Miss. 1984) (where mother's conviction is upheld but stepfather's reversed because he was working at time of the fatal injury).

<sup>83</sup> See Martha Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 27 (1991) (stating that, even though a feminist approach to child abuse has developed in the social sciences, there is still a reluctance to attribute violence within the home exclusively to the abuser). Gender neutral approaches to violence infer that both the abuser and victim are equally to blame for the incidents of violence within the home.

Among feminist legal scholars, conflicting opinions over women and the role of biology in setting limitations for women has hindered the development of a feminist working theory on child abuse. See Marie Ashe & Naomi Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993). Professors Ashe and Cahn discuss the strands of feminist theory that have developed. They note that cultural feminism,

abuse is alternatively interpreted as a failure or an exaggerated maternal function, a lack of parenting skills, or an inappropriate resentment on the mother's part of the vulnerability of her child.<sup>84</sup>

Child abuse policies have been formulated by workers who have an inherent bias against mothers.<sup>85</sup> The total fixation on the child's interests alone cause the workers to make determinations about the child's best interest without reference to contextual reality.<sup>86</sup> These actions can lead the workers and the child's legal representatives to argue that the child should be removed from the mother, despite the fact that the mother and the child have a real emotional attachment and despite the fact that the state may be unable to provide an adequate alternative placement for the child.<sup>87</sup> The child victims in these situations are

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which embraces the imagery of mothers as nurturers, has difficulty with mothers who abuse or allow their children to be abused. These mothers cannot be described as nurturers—they are “bad” mothers. *Id.* at 103-05. Liberal feminists, on the other hand, were more concerned with individual autonomy and fulfillment of personal ambitions. Liberal feminists did not devote much theoretical attention to the problem of mothers who might be overwhelmed by childrearing responsibilities. *Id.* at 101-03. Radical feminists reject the idea that a woman's fate or identity is controlled by biology. They too devoted little theoretical discussion to the examination of “bad” mothers. After being criticized for the failure to incorporate the problems of women who are also mothers into their theoretical work, radical feminists are beginning to look at issues such as the prosecution of drug addicted mothers. *Id.* at 105-07. Post modern feminists attempt to demonstrate the complexities of women's existence by reference to subjective factors of their lives, such as using women's narratives in the theoretical work. Under post modern feminism, more attention is being given to the “bad” mother, if only to make clear that she exists and needs legal theories to help explain her reality to the legal world. *Id.* at 107-09. *See also* William J. Turner et al., *Cultural Feminism and Redistributive Justice*, 45 AM. U. L. REV. 1275, 1279-99 (1996); Marie Ashe, *Bad Mothers, Good Lawyers, and Legal Ethics*, 81 GEO. L.J. 2533 (1993); Marie Ashe, *The Bad Mother in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992); Patricia A. Gain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829-41 (1990).

<sup>84</sup> *See* Stark & Flitcraft, *supra* note 68, at 109.

<sup>85</sup> *Id.* at 113.

<sup>86</sup> *Id.* at 109. “Mary Francis,” a poem by Gwendolyn Brooks, provides a child's perspective of domestic violence:

Home is a shape before me. I travel three blocks to Home, Are the dishes in the sink, still, with the morning yellow dried on? And is there *another* color in the kitchen? (The kitchen is where he whips her.) Is red all over Mama once again? Is pa still Home, with a mean and sliding mouth? With hands like hams. With stares that are scissors, tornadoes.

Gwendolyn Brooks, *Mary Francis*, quoted in Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1 (1995).

<sup>87</sup> *See* Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—An Empirical Analysis in Two States*, 29 FAM.

frequently described as innocent<sup>88</sup>—indicating however subtly that the mother is not. Although we can forgive or maybe excuse the mother for remaining in a violent relationship, on some level we may still view her as an implicit agent in her own abuse. We cannot forgive or excuse her for failing to prevent the abuse or death of her child. If forced to compete for the sympathies and interest of the public, a totally innocent child trumps a battered woman any day. We find this sentiment expressed, though not in those terms, in the works of Alice Miller, a Swiss psychologist.<sup>89</sup> As Miller points out, “[t]he situation of an adult woman confronted by a brutal man is not the same as that of a small child.”<sup>90</sup> Miller’s work has been quoted by some feminists as well, who seek to explain why it is appropriate to hold the mothers criminally responsible for failure to protect. For example, Professor Mary Becker advocates that:

Adults in a household should be responsible for injury to the child if they knew or should have known about the abuse and could have taken steps to prevent the abuse by leaving with the children or reporting the abuse to the authorities. The assumption should be that the adult who was not literally a hostage—not literally coerced at every available second—*could* have acted to end abuse. Although the adult might have found herself or himself in circumstances such that protection of the child seemed impossible, the child is still a child. No matter how weak the mother, she is in a much better position than the child to prevent abuse and owes a duty of care to her children.<sup>91</sup>

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L.Q. 121 (1995). The recent history of foster care centered on a policy of removing children from unsafe environments. The policies resulted in what became known as “foster care drift”—children who spent significant periods of time drifting from placement to placement. *Id.* at 122. Criticism of the system led to reforms such as the 1980 Federal Adoption Assistance & Child Welfare Act. However, Guggenheim’s study of the effects of the Act 15 years later indicated the well-intentioned reform efforts have caused the unnecessary destruction of families and created a class of legal orphans. *Id.* at 134.

<sup>88</sup> Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13, 21 (1995).

<sup>89</sup> ALICE MILLER, *BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES* (Leila Vennewitz trans., Doubleday, 1st ed. 1990) (1988).

<sup>90</sup> *Id.* at 77.

<sup>91</sup> Becker, *supra* note 88, at 21. Becker, as well as other feminists who echo this argument seem heavily influenced by Alice Miller, who writes movingly of the effects of abuse on children in her book. Becker concludes that “[u]nless we are willing to recognize a general diminished capacity defense . . . criminal liability is appropriate.” *Id.* at 21-22. However, she acknowledges that incapacity, duress and insanity are hard to prove and generally are not defenses that are successfully used. *Id.* at 22. See *supra* discussion of incapacity and duress in Part III; see also Elizabeth Schneider, *Resistance to Equality*, 57 U. PITT. L. REV. 477 (1996) (pointing out that misunderstandings and

Professor Becker's language echoes the language of some court opinions holding abused mothers liable for failing to protect their children.<sup>92</sup> By focusing exclusively on what is happening to the child—without considering the full context of how the abuser's violence affects every member of the household—agencies perpetuate the continuance of violence within intimate space. Blaming the mother avoids the necessity of examining the ways in which the courts, police and public unwillingness to address the issue of violence within the home contributes to the ongoing empowerment of the abuser.<sup>93</sup> The image presented of the mother of abused children is that she does not care about or take seriously her personal circumstances and how they affect her children.<sup>94</sup> Therefore, it is easy to reach the conclusion that

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limited information about the experiences of battered women lead some feminists to advocate that battered women take an "either-or" approach to formulating a defense rather than allowing them the full range of defenses) [hereinafter Schneider, *Resistance*]. There is tension in Becker's work as she states: "[A]nd even were we to recognize such a defense in other contexts, its application would be troubling here, where the crime is injury to a child who is more vulnerable than the defendant and whose life has been ended or permanently damaged by the defendant's action or inaction." Becker, *supra* note 88, at 22. She notes that such liability is likely to be imposed in a gendered, raced and class conscious way given biases in our culture, yet appears willing to accept disparate treatment to save the child. *Id.*

A similar argument, made to the Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987), asserts that racial discrimination in the application of the death penalty cannot be remedied because of the systematic bias in our culture. This is a disconcerting argument, particularly for a feminist. See also Schneider, *Resistance*, *supra*, at 487 (criticizing feminists for not analyzing issues in terms of gender parity); Dorothy E. Roberts, *The Meaning of Gender Equality in Criminal Law*, 85 J. CRIM. L. & CRIMINOLOGY 1, 3-4 (1994) (encouraging feminists to be mindful of the ways race and class affect gendered analyses).

<sup>92</sup> *People v. Novy*, 597 N.E.2d 273, 295-96 (Ill. App. Ct. 1992).

<sup>93</sup> See *Commonwealth v. Cardwell*, 515 A.2d 311 (Pa. Super. Ct. 1986). Julia Cardwell was charged with "violating a duty of care, protection and/or support" due to her failure to "protect" her daughter from her husband's repeated sexual abuse. *Id.* at 313. When Cardwell learned of the abuse she moved with her daughter into her parent's home, transferred her daughter to a distant school, and wrote to her husband alerting him that she knew of the abuse and would not tolerate it. *Id.* at 315-16. Her husband continued to abuse the daughter. Despite testimony outlining his abuse of Julia and the fear that she and her daughter had of him, the court noted that Julia's duty to protect her daughter was not discharged by ineffectual action. *Id.* Moreover, the court stated that her actions could not reasonably be expected to protect her daughter's safety, and thus resulted in a failure to protect her daughter. *Id.*

<sup>94</sup> See Fineman, *supra* note 54, at 213 (citing AMERICAN ENTERPRISE INSTITUTE, *THE NEW CONSENSUS ON FAMILY AND WELFARE: A COMMUNITY OF SELF-RELIANCE REPORT* (1987), which concludes that poverty, crime and drugs are results of poor people failing to prepare themselves). Fineman also uses as an example a newspaper columnist's op-ed essay entitled, "Illegitimacy Biggest Killer of Our Babies." *Id.* at 215. See

she is somehow deviant or unfit because she keeps her children in a household where there is violence. The service provider's inquiry may go no further. The agency, psychologist or lawyer is not required to ask whether the mother had an alternative to remaining in a violent household. The fact that no alternatives exist is irrelevant.<sup>95</sup> In fact, legal, social service practice, and psychological theory all hold women responsible for child abuse even when a male assailant is clearly identified and is also battering the mother.<sup>96</sup>

At the other end of the spectrum, some feminist scholars are reluctant to attribute any blame to the mother for a child's injury or death at the hands of a violent intimate.<sup>97</sup> The reluctance to do so is bound up in the unwillingness to allow children (their existence and relationship to women) to define women's actions, status or conditions of existence.<sup>98</sup> They seek to free women from permanent attachment to the status of mother, thereby eliminating what can be viewed as a major component of the oppression of women.<sup>99</sup>

Both approaches are acontextual. To deny that harm has been done to the children by the mother forces the mother's advocate to represent her as the "good" mother to gain the court's and the public's sympathy, understanding and trust.<sup>100</sup> This position is troublesome. A "good" mother would never find herself in a situation where she was being abused, and even if she did, she would never "allow" her children to be abused. As more becomes known about the plight of children living within violent homes, the feminist legal community has been conflicted in its theoretical examination of the ties between mothers who have either actively abused their children or who

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also Joanne Jacobs, *Illegitimacy Biggest Killer of Our Babies*, Wis. St. J., Feb. 9, 1990, at 11A.

<sup>95</sup> See Kline, *supra* note 56, at 126 (citing *K.B. v. Alberta Director of Child Welfare* (A.J. No. 840 [1992] [Q.L.]), where the judge admonished mother to overcome "her problems with . . . relationships with abusive men").

<sup>96</sup> See Stark & Flitcraft, *supra* note 68, at 101.

<sup>97</sup> Ashe & Cahn, *supra* note 83, at 101-09.

<sup>98</sup> Mahoney, *supra* note 83, at 46 (noting liberal feminist legal reforms fought to make motherhood less central to women's identities).

<sup>99</sup> Ashe & Cahn, *supra* note 83, at 101-09; see also SUSAN SCHECTER, *WOMEN AND MALE VIOLENCE* 323-25 (1982) (advocating against merging the battered women's shelter movement into child protective agencies; problems of child abuse were believed to have different origins than the problems of battered women).

<sup>100</sup> See Ashe & Cahn, *supra* note 83, at 112.

have failed to protect children from known abusers.<sup>101</sup> This conflict and the silence which it generates is quite apparent when viewed in contrast to the activity of feminists in the development of laws and theories to help women who have been raped<sup>102</sup> or who have themselves been battered in the home.<sup>103</sup> It has been suggested that the silence may be partially attributable to the absence of a compelling female adult victim in the failure to protect cases.<sup>104</sup> The cultural orientation and pressure to place

<sup>101</sup> See Elizabeth M. Schneider, *Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse*, 67 N.Y.U. L. REV. 520, 551-52 (1992) [hereinafter Schneider, *Particularity and Generality*] (discussing the split in the feminist community over support for Hedda Nussbaum, the battered mother of Lisa Steinberg who was killed by Joel Steinberg).

<sup>102</sup> The very concept of "date rape" and the development of laws to criminalize it is a product of feminist efforts to name a type of violent assault that was traditionally viewed as acceptable male behavior. Mahoney, *supra* note 83, at 6 n.25. The so-called rape shield laws, which prohibit the defense from inquiring into a rape victim's past sexual experiences, were similarly spearheaded by women's advocates. See Beverly Balos & Mary L. Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 600 (1991).

<sup>103</sup> Concepts such as "battered" woman and Battered Women's Syndrome (BWS) were unknown before the women's movement brought them to the attention of the courts. See SCHECTER, *supra* note 99, at 157-69. Although concepts such as BWS have been criticized for having theoretical gaps as well as for essentializing women who are battered, the fact that conditions of battered women were named at all created a challenge to the legal system to re-evaluate its treatment of women trapped in such relationships. See Mahoney, *supra* note 83, at 71.

<sup>104</sup> The feminist reluctance to endorse the victimhood of the battered mother of a battered child surfaced in Susan Brownmiller's comments that Hedda Nussbaum should share some liability with Joel Steinberg, an abusive father who killed their adopted daughter, despite the fact she herself was severely abused by him. See Schneider, *Particularity and Generality*, *supra* note 101, at 551. Schneider states that the "'victim' description seems most accurate to the battered woman's experience . . . . Yet, the woman's role as mother makes characterizing her as a victim far more problematic." *Id.* at 552. Moreover "mothers are expected to transcend their victimization, to act on behalf of their children regardless of their own situations." *Id.* The critique of radical feminism's failure to consider mother's issues led radical feminists to examine the problems of drug addicted mothers. The mothers were then identified as "victims" despite radical feminism's rejection of the victim analysis. Asche & Cahn, *supra* note 83, at 107.

The tensions produced within the feminist community by the desire to have a compelling victim have surfaced in other areas, for example, in the debates about pornography. See, e.g., Joan Kennedy Taylor, *Does Sexual Speech Harm Women?: The Split Within Feminism*, 5 STAN. L. & POL'Y REV. 49 (1994); Jeanne L. Schroeder, *Catharine's Wheel: Mackinnon's Pornography Analysis as a Return to Traditional Christian Sexual Theory*, 38 N.Y.L. SCH. L. REV. 225 (1993); Nadine Strossen, *A Feminist Critique of "The" Feminist Critique of Pornography*, 79 VA. L. REV. 1099 (1993). In the debate on prostitution, see, e.g., Alexandra Bongard Stremmler, *Sex For Money and The Morning After: Listening to Women and The Feminist Voice in Prostitution Discourse*, 7 U. FLA. J.L. & PUB. POL'Y 189

total responsibility on the mother seems overwhelming. When faced with two individuals who might compete for the title of victim, even some feminists will pick the child as being the "truly" innocent person and therefore deserving the title.<sup>105</sup> We are backed into this choice because of the insistence of relying on the dichotomy of victim versus independent agent.<sup>106</sup> What is the feminist theoretical view of women who are both victims and agents, who want to be seen as reasonable, but at the same time commit acts which even women find difficult to understand?<sup>107</sup> It would seem that courts have more readily accepted the view that battered women are victims, as opposed to agents. There are legitimate reasons why a court would be attracted to characterizing women as victims. "The stories of victims are attractive because they arouse attractive emotions. . . . [t]here is an elemental moral requirement to respond to innocent suffering. If we were not to respond to it and its claim upon us, we would be without conscience, and in some basic sense, not completely human."<sup>108</sup> Through hearing the stories, the listeners in a sense possess some of the victims' lives, and the sense of possession can engender a sense of one's capacity to respond, whether or not that capacity is exercised in any practical way.<sup>109</sup> Professor Minow states that "victimhood is attractive then because it se-

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(1994); Margaret A. Baldwin, *Strategies of Connection: Prostitution and Feminist Politics*, 1 MICH. J. GENDER & L. 65 (1993).

<sup>105</sup> Society has frequently required that the underdog be deserving of our sympathy and support. See HANDLER, *supra* note 64, at 20-31. Children are traditionally considered deserving, as are widows and retirees. Single mothers, working mothers, and women of color have never been viewed as deserving. *Id.* at 22-23. Consequently, the courts are willing to see failure to protect as ongoing deviance by the same women who had already been deemed undeserving of the court's or society's sympathy, tolerance or understanding.

<sup>106</sup> This is not a new problem for feminists but has been an ongoing one as the movement struggles to define battering and continues to refine our understanding of violence towards women. See Schneider, *supra* note 101, at 549. Should a woman who is battered be viewed as a victim who is weak and unable to help herself, or is she an independent actor, capable of making reasoned choices? The view of woman as victim makes the courageous and sometimes heroic effort women make to survive under violent circumstances invisible. However, woman as independent agent makes a difficult sell for a jury who will ask why she didn't leave. See also Martha Mahoney, *Victimization or Oppression?: Women's Lives, Violence, and Agency*, in THE PUBLIC NATURE OF PRIVATE VIOLENCE 59, 74 (Martha A. Fineman & Roxanne Mykitiuk eds., 1994).

<sup>107</sup> See Marie Ashe, *Postmodernism, Legal Ethics, and Representations of "Bad Mothers,"* in MOTHERS IN LAW, *supra* note 52, at 142, 152-54 (1995) (describing the difficulty and ambivalence of representing mothers charged with child abuse).

<sup>108</sup> Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1141, 1413 (1993).

<sup>109</sup> *Id.* at 1414.



cures attention from otherwise disinterested people. Victimhood can solicit expressions and acts of sympathy, relieve responsibility, promote a sense of solidarity, and cultivate compassion whether or not it is acted upon."<sup>110</sup>

However, part of the problem of victimhood is that it perpetuates counter-victim talk,<sup>111</sup> and it suppresses the strengths and capacities of people who are victims.<sup>112</sup> This presents a dilemma for feminist theory in the areas of violence in the home.<sup>113</sup> Part of the dilemma, as Professor Mahoney sees it, is that the law requires a dichotomous nature that does not exist.<sup>114</sup> On the one hand, the law perceives victimization as a unilateral exercise of power: harm imposed on the victim who is without strength. However, agency implies freedom from victimization.<sup>115</sup> Neither concepts of agency nor concepts of victimization fully take account of women's experiences of oppression and resistance in relationships.<sup>116</sup> Early calls were made to reject the "all victim" or "all agent" approach to women's experiences, particularly as these terms relate to the experiences of battered women.<sup>117</sup> The concern was well warranted as courts and social agencies have consistently imposed cultural stereotypes to create an image of a battered woman as a victim without agency.<sup>118</sup>

<sup>110</sup> *Id.* at 1428-29.

<sup>111</sup> *Id.* at 1429.

<sup>112</sup> *Id.*

<sup>113</sup> Mahoney, *supra* note 106, at 61 (describing feminists' concerns regarding the use of victimization to perpetuate stereotypes about women's helplessness versus calls from the right to stop talking about women as victims because it sounds like "whining").

<sup>114</sup> *Id.* at 62.

<sup>115</sup> *Id.*

<sup>116</sup> Elizabeth Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387 (1993). Schneider recounts that although recognition of women's experiences as victims is necessary, an exclusive focus on victimization ignores their real efforts to protect themselves and their children. *Id.* at 389. Similarly, an exclusive focus on agency—which is shaped by liberal notions of autonomy and mobility—is overly simplistic. *Id.* A singular approach to each fails to account for the struggle and resistance women experience in their daily lives. *Id.* See also Elizabeth Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REP. 195 (1986) (cautioning against the use of agency vs. victim language, pointing out the tension between the two and the difficulty juries might have in reconciling a woman's supposed lack of agency with the use of violent acts in self defense) [hereinafter Schneider, *Describing and Changing*].

<sup>117</sup> See Schneider, *Describing and Changing*, *supra* note 116, at 221.

<sup>118</sup> See Schneider, *Resistance*, *supra* note 91, at 500; Schneider, *Particularity and Generality*, *supra* note 101, at 548-50; Mahoney, *supra* note 83, at 52.

Mothers who are battered face the same victim/agent dichotomy. However, in their case, the victim analogy is of no benefit. The battered mothers can never achieve a higher victim status than the dead child. Unlike the battered woman who kills her violent intimate partner, the mother charged with allowing her child to be killed will not invoke sympathy from society for her own victim status. We expect her to transcend her victimization and to act on behalf of her children regardless of her own situation.<sup>119</sup> When the mother is evaluated as an independent agent, her actions are harshly judged. The courts will assume the mother could have protected her child simply by separating the child from the abuser or by seeking assistance.<sup>120</sup> The law treats women as autonomous actors unaffected by the interaction of power and control, domination and subordination, in the battering relationship,<sup>121</sup> and therefore views them as completely capable of saving their children. Such a view ignores the complexity of mothers who are both victims and agents.<sup>122</sup> It presents us with difficult cases from both a moral and legal perspective.<sup>123</sup> However, the difficulty of the undertaking does not excuse our unwillingness to grapple with finding a more coherent and fundamentally fairer way to evaluate these cases.

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<sup>119</sup> Schneider, *Resistance*, *supra* note 91, at 552.

<sup>120</sup> See V. Pulani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 240-58 (1996). Enos identifies three assumptions courts make when evaluating the behavior of women whose children have been injured: (1) courts equate knowledge of abuse with ability to stop abusive behavior or protect the child in some way; (2) the battered women's fear is unjustified, unbelievable and exaggerated; and (3) parents should be treated as a unit. *Id.* at 240, 258, 260.

Enos further identifies five myths associated with the assumptions: (1) the mother could protect the child by taking the child away from abuser, removing abuser from home or separating child from abuser by other means; (2) if mother wanted or needed help, such assistance would be readily available from police, social services or judicial system; (3) family, friends, neighbors and religious institutions would have supported and assisted the mother, if only she truly desired to protect her children; (4) battered women should risk their lives in an attempt to protect their children; and (5) a mother who fails to protect her child from harm is responsible for that harm regardless of her efforts to stop it. *Id.* at 240, 249, 253, 255-56. Though the examples Enos examines occur mostly in termination of parental rights cases, the assumptions and myths are equally applicable in homicide cases.

<sup>121</sup> Mahoney, *supra* note 83, at 54. The law pretends women have autonomy and that they are able to leave without taking into consideration the needs of others connected to them, such as the needs of their children. See *id.* at 19, 64.

<sup>122</sup> See Schneider, *Resistance*, *supra* note 91, at 499.

<sup>123</sup> *Id.*

The complex societal views discussed above regarding mothers and child abuse provide the context to analyze the reactions of the public as well as the legal actors to Pauline Zile's case.

### C. BATTERED MOTHERS AND THE LAW

Society's view of mothers is compounded by our inability to fit the dynamics of the battered woman's life experience within a contextual legal framework. Though scientific understanding of the causes and effects of violence within the home continues to grow, on a practical level a struggle to determine the value of battered women continues.<sup>124</sup> Legally, we are mired in a vision of the battered woman as the creature of "learned helplessness" who, because of repeated cycles of violence is unable to act to escape her violent home life.<sup>125</sup> Rigid legal concepts and images

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<sup>124</sup> See *id.* at 480 (referring to society's views of resistance as opposed to ambivalence and that resistance implicates issue of gender equality); see also Mary Ann Dutton, *Understanding Women's Responses To Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1213 (1993). Dutton describes studies, including one where hospital emergency room physicians, before sensitivity training, recognized only 5% of domestic violence cases. Dutton reports that only 10% of domestic violence incidents result in calls to the police. *Id.*

Lawyers, including those who serve as defense counsel, are not immune from the inability to recognize their clients as victims of domestic violence. In Florida, a lawyer assigned to represent a woman who was pre-screened and qualified for filing a clemency petition questioned the woman's statement that she was a frequent victim of marital rape. The lawyer explained that the husband was only having sex with her "before she was ready." Interview with Jenny Greenberg, Executive Director, Battered Women's Clemency Project, in Tallahassee, Fl. (May 1996).

<sup>125</sup> See Mary Ann Dutton, *Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women*, in NATIONAL INST. OF JUST. RESEARCH REPORT: THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS 18-19 (1996) (indicating that empirical evidence can contradict the theory of "learned helplessness;" not all women experience "cycles of violence;" and not all women experience the post traumatic stress types of reactions to battering); see also Schneider, *Describing and Changing*, *supra* note 116, at 195. As a result, women whose personal strengths are apparent do not appear to the courts and jurors to fit the syndrome image, despite the fact these women have been battered. The image of the passive woman conflicts with the image of a woman capable of attempting to defend herself physically.

Conflicting imagery can prevent a battered woman from effectively presenting an affirmative case of self-defense—a traditional justification for killing another. In considering the assessment of criminal liability, an actor may not be held liable if her behavior was justifiable or excusable. JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 176-77 (1987). In both justifiable and excusable conduct crimes, the actor admits that she committed the *actus reus* of the crime. *Id.* The issue becomes whether or not the trier of fact attaches social utility to her actions. *Id.* Philosophically, if her actions are justifiable, it is because society views her behavior as acceptable, perhaps even de-

of battered women prevent legal professionals from recognizing other significant but less severe reactions. In the battered mother's case, she may try to become a buffer, placing herself between the children and the abuser, or she may engage in other coping mechanisms, such as cutting back on her working hours so that she can be home more frequently. The myriad alternative responses have not been understood or thoroughly evaluated to determine whether they meet a reasonableness test. Judges, prosecutors and defense attorneys are all dissatisfied with the exclusive use of battered woman syndrome to explain the lives of battered women.<sup>126</sup> While the theories are being fine tuned, the legal fate of mothers and all women trapped in violent relationships rests on shaky ground and the safety of their children cannot be guaranteed.<sup>127</sup>

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sirable. *Id.* If her actions are excusable, it is because her behavior has been viewed not as desirable, but understandable under the circumstances. Justifiable actions mandate an acquittal. Actions that are excusable may bring an acquittal, or under certain circumstances may mitigate liability.

As a result of the critique and ongoing development of our knowledge about battering, most courts now recognize that the history of abuse in a relationship may be relevant to an analysis of whether the woman was justified in using deadly force in an interaction with an intimate. How the evidence comes in and what it is intended to prove varies from jurisdiction to jurisdiction. An individual state's evidentiary rules on expert testimony combined with standards defining reasonableness and definitions of imminence define the parameters for the admission of evidence of battering. See Janet Parrish, *Trend Analysis: Expert Testimony on Battering and its Effects in Criminal Cases*, in NATIONAL INST. OF JUST.: THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS (1996); Holly Maguigan, *Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals*, 140 U. PA. L. REV. 379 (1991). The Supreme Court of North Carolina, for example, held that as a matter of law imminence cannot be established if the deceased was asleep at the time of the killing. *State v. Norman*, 378 S.E.2d 8 (N.C. 1989). Imminence implies that, unless combated, the force will occur immediately. DRESSLER, *supra*, at 198. See *infra* Part II (discussing the parallel development of the law protecting children and noting the absence of consideration of the dynamics of the battery within the home).

<sup>126</sup> See Dutton, *supra* note 125. Prosecutors want a better way to explain to juries why the battered woman witness did not leave, did not call the police, or why she returned to the relationship. *Id.* at 3. Defense lawyers want to be able to introduce expert testimony in cases that do not fit the "learned helplessness" format of BWS. *Id.* at 2.

<sup>127</sup> Recent studies show that in households where there was violence against a female adult, that violence was more likely to occur in households with children. See John Fantuzzo et al., *Domestic Violence and Children: Prevalence and Risk in Five Major U.S. Cities*, 36 J. AM. ACAD. CHILD ADOLESC. PSYCHIATRY 116 (1997). The authors found that the domestic violence groups had a significantly higher proportion of households with children and that the violence within these households evidenced a greater proportion of risk factors to the children. *Id.* at 118.

## II. DEVELOPMENT AND EXPANSION OF FAILURE TO PROTECT LAWS

*Pauline Zile chose her husband over her daughter and did nothing as her first-born died suffering a final beating. She did not lift as much as a finger to protect Christina.*<sup>128</sup>

*Regrets: Not knowing he was being so rough when I wasn't there . . . . Not being able to confront John. . . . Not being able to walk out the door and call the cops that night.*<sup>129</sup>

### A. HISTORICAL BASIS OF THE LAW'S PROTECTION OF CHILDREN

The underlying basis for the development of failure to protect laws is the expression of the state's concern for the welfare of its children.<sup>130</sup> The family occupies a unique position in American legal jurisprudence. Our courts recognize that the family's autonomy and freedom from state interference are crucial to its own integrity and the welfare of the nation.<sup>131</sup> Constitutional law affords parents wide latitude in deciding how to raise children.<sup>132</sup> Courts have consistently held that the primary responsibility for child care rests with the parents themselves and, with the exception of abuse or severe neglect, courts have been unwilling to scrutinize any particular style of parenting.<sup>133</sup> The American legal system inherited this concern and respect for the privacy of the parent-child relationship from its common law roots. Under common law it was believed that parental authority over children was a natural right which existed prior to the rights of the state.<sup>134</sup> The right to have authority and con-

<sup>128</sup> Smith, *supra* note 3, at 4 (opening Statement of State Attorney Scott Cupp).

<sup>129</sup> Athans, *supra* note 6, at 1A. Pauline's co-workers commented that she worked two and three jobs when John was unemployed. When they were without a car Pauline would walk four miles to buy groceries and diapers. She was eight-and-one-half months pregnant when Christina was killed. *Id.*

<sup>130</sup> S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain Violence By and Against Children*, 139 U. PA. L. REV. 1123, 1127 (1991).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (right to select the schooling of children under one's control); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (right to determine language taught to one's children).

<sup>133</sup> See Humm, *supra* note 130, at 1128; see also Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 37-39 (1994) (arguing that the law characterizes the parent's right to punish as being within the scope of the parent's constitutionally protected right to direct the custody, care and control of their children).

<sup>134</sup> See Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61, 62 (1995).

trol over the children gave parents the obligation to care for their children.<sup>135</sup>

Legal concern with the welfare of children was and still is episodic.<sup>136</sup> The common law theory of parent-child relationships did not always inure to the benefit of the child. Children were exposed to many cruel practices without legal intervention.<sup>137</sup> However, there were times when the state did intervene on behalf of a child. Such intervention was made under the authority of *parens patriae*.<sup>138</sup>

The modern American juvenile court system grew out of the development and expansion of the notion of *parens patriae*.<sup>139</sup> Juvenile courts were established to handle the needs of neglected and abused children as well as to exert control over children who were disobedient and engaged in criminal activity.<sup>140</sup> The establishment of the juvenile courts was fueled by an era of social reform.<sup>141</sup> Ironically, many of those advocating for the development of the system were women who considered themselves leaders in the fight for women's rights.<sup>142</sup> The agenda for many of these women was to save children from the ills of poor parenting. They were commonly referred to as the "child savers."<sup>143</sup>

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<sup>135</sup> See *id.*

<sup>136</sup> See Roberts, *Punishing Drug Addicts*, *supra* note 63, at 1446 (highlighting the hypocrisy of the state's concern for the fetus at the same time that it turns a blind eye towards the health needs of living black children).

<sup>137</sup> See Neal, *supra* note 134, at 63 (citing infanticide, abandonment, exposure, mutilation, physical and mental cruelty as examples of the perils to which children were exposed).

<sup>138</sup> MEDA CHESNEY-LIND & RANDALL G. SHELDEN, *GIRLS, DELINQUENCY, AND JUVENILE JUSTICE* 102 (1992). The principle of *parens patriae* was initially used to authorize the king to administer the estates of orphaned children or children whose parents had been declared unfit. *Id.* The doctrine evolved however into the ability of the state to assume wardship over a minor child. *Parens patriae* allowed the state to "bind out" children of poor or unfit parents for service in the colonies. *Id.* The concept of *parens patriae* was deeply rooted in the principles of patriarchy which established the father as having authority over both women and children. *Id.* at 103.

<sup>139</sup> *Id.* at 106.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Id.* at 107-08. These were primarily white middle-class to upper-class women. The campaign to protect children was viewed as an arena where the new political voices could be heard and where their energies would be used and accepted. *Id.* at 107.

<sup>143</sup> *Id.* at 106. The "child saver" movement occurred against the backdrop of an influx of immigrants into the United States. These immigrants were largely the working

From the beginning, the juvenile justice system intervened in the lives of destitute women to regulate and monitor their behavior.<sup>144</sup> Immigrant and poor mothers were seen as deviants, and the legal and social welfare apparatus developed to regulate these "bad" mothers by "saving" their children.<sup>145</sup> Poverty and ethnicity often determined which families would be charged with neglect and abuse.<sup>146</sup> Fathers were largely absent in these environs, as the responsibility for raising children was thought to properly rest on the shoulders of the mothers.<sup>147</sup> Thus, the very creation of the juvenile justice system institutionalized the notions that mothers are primarily responsible for the care of the children, and that mothers primarily would be held legally responsible when care was wanting. The normative standard included the assumption that the mothering skills of women of color and poor women would be deficient enough to warrant regular state intervention.<sup>148</sup> On the other hand, the state remained reluctant to extend its "protection" to those children in

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class and poor of Europe who fled to American shores to find better economic opportunities. *Id.* at 103. Unlike the women of the child saver movements, many of the immigrant mothers were required to work to help feed and clothe their families. Moreover, many of them were Catholic, as opposed to Protestant—the religion of many of the child savers. *Id.* at 105.

<sup>144</sup> Dohrn, *supra* note 86, at 6.

<sup>145</sup> *Id.* Despite carrying the name the "child savers," many of the actions taken by state officials on "behalf" of these children could hardly be termed beneficial. Children were incarcerated for indeterminate periods of time and until 1967 they were required to serve longer sentences than an adult would serve for a comparable offense. See, e.g., *In re Gault*, 387 U.S. 1 (1967). Courts routinely denied extending constitutional protection to children. See, e.g., *Ex Parte Crouse*, 4 Whart. 9 (Pa. 1839) (holding that the Bill of Rights did not extend to juveniles). The state could, "in the best interest of the child," commit him to a work house or other detention facility for training and correction, even so if criminal offense had occurred. This was particularly true for female juveniles. See CHESNEY-LIND & SHELDON, *supra* note 138, at 110-12. Child savers were particularly interested in protecting the sexual mores of female children. As a result, females were subjected to intrusive interference which would under other circumstances shock the conscience. For example, girls as young as nine were forced to submit to full gynecological exams if they were caught running away from home. *Id.* at 108. The ruling in *In re Gault* still only provided some constitutional protection and only in the context of a criminal proceeding. The right to trial by jury is an example of a constitutional right which is still not afforded to juveniles in a criminal case. See *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971).

<sup>146</sup> See Dohrn, *supra* note 86, at 5-6; see also HANDLER, *supra* note 64, at 23 (discussing the prejudices against immigrant women, poor women, poor working women, single mothers and women of color; all were seen as undeserving, unfitting for motherhood or deviant in some other way).

<sup>147</sup> Dohrn, *supra* note 86, at 6.

<sup>148</sup> *Id.*

homes which appeared to fit the more traditional concept of stable home: two parent households with father as titular and economic head, non immigrant and middle class. For children in those households, courts deferred to the sanctity and privacy of the household.<sup>149</sup>

## B. CURRENT THEORY ON FAILURE TO PROTECT

The attitudes that prevailed historically are still very much a part of the current systems that evaluate whether a child is being abused or neglected within a home. Current failure to protect laws are the most recent reincarnation of the child saving phenomenon. Beginning in 1974, Congress committed its time and resources to the issue of child protection.<sup>150</sup> Over the next several years legislation was enacted to provide additional funds toward the effort to reduce child abuse.<sup>151</sup> Despite the addition of Congressional funds, the incidence of child abuse and neglect in this country continued to increase.<sup>152</sup> The apparent increase led individual states to strengthen their laws regarding abuse and neglect of children. In an effort to extend maximum protection to children, many legislatures decided that parents and others could be subject to abuse or neglect petitions or civil actions when injury to the child was unintentional.<sup>153</sup>

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<sup>149</sup> See Anne T. Johnson, *Criminal Liability for Parents Who Fail To Protect Their Children*, 5 LAW & INEQ. 359, 362 (1987) (indicating the historical tension between deferring to the family unit as having broad authority over the minor children and the state's responsibility to insure the valid rights of the children).

<sup>150</sup> *Id.* at 363. In 1974, Congress adopted the Child Abuse Prevention and Treatment Act, P.L. 93-247 (codified at 42 U.S.C. §§ 5101-06 (1994)). The Act established a National Center on Child Abuse and Neglect and provided state grants to develop child abuse prevention programs. *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at 364. It is unclear whether actual incidents of abuse increased or whether reporting of incidents increased. Historically, there have been published cases of severe abuse of children. However, earlier in American history there were no agencies to handle such incidents. *Id.* at 362. For example, in 1874, the Society for the Prevention of Cruelty to Animals was petitioned to take up the case of an abused child. *Id.* The 1984 amendments to the Child Abuse Prevention Act required that states must have a law which provided for reporting and investigating known and suspected cases of abuse. *Id.* at 364. These laws imposed a duty of reporting on professionals working with children and exposed them to criminal liability for failure to report. *Id.*

<sup>153</sup> State task forces were established to investigate the problem of child abuse and to propose legislative initiatives. As a result, public and professional awareness of child abuse increased. In 1993, approximately 2.81 million children were abused or neglected in the United States. See *Study: Child Abuse Has Doubled*, NEWSDAY, Sept. 19, 1996, at A18 (citing report released at the National Conference on Child Abuse and Neglect which indicates that reported cases of abuse doubled between 1986 and



The push towards developing legislation and safeguards for abused children paralleled the development of greater protection for abused and battered women from their batterers. The process of educating the public and the judicial system to the prevalence of violence within intimate space was and continues to be a slow and painful one. Spearheaded by the activities of grass roots women's organizations beginning in the 1970s, lawmakers and the courts were forced to recognize that violence against women exists in our society and should not be tolerated.<sup>154</sup> Massive public, legal and judicial information campaigns have been and continue to be conducted around the issue of women abuse.<sup>155</sup> As a result, it would be mind boggling for a judge to take the position that a man (husband) would have the right to beat a wife to "keep her in place."<sup>156</sup> Calls for increases in resources are made and victims and their supporters have become the "cause celebre" of the moment.<sup>157</sup> While

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1993). *But see Getting to Know America One State At a Time*, *NEWSDAY*, Dec. 8, 1996, at A8 (indicating that 1,011,628 cases were confirmed abuse reports in 1994).

<sup>154</sup> For a history of the grass roots movement and the development of shelters for battered women, see Elizabeth Schneider, *The Violence of Privacy Violence*, in *THE PUBLIC NATURE OF PRIVATE VIOLENCE* 36, 38-42 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). Yet, it is not clear that we have recognized the true pervasiveness of violence against women in the home. *Id.* The notion that violence is or can be so pervasive still shakes the foundation of our assumptions about family and the ability of any woman to be safe in the home. *Id.* at 42.

<sup>155</sup> *Id.* at 41-42.

<sup>156</sup> It was long ago that courts supported Blackstone's position on marital control: "The husband is authorized to control his wife's behavior through the use of physical force because he is responsible for her 'misbehavior' just as a man is allowed to correct his apprentices or children." 1 WILLIAM BLACKSTONE COMMENTARIES \*444. However, it is still possible to find remarks made by judges indicating their low opinions of the seriousness of domestic violence. *See, e.g.*, Deirdre M. Childress, *Maryland Judge Cleared of Bias in Remarks at Sentencing*, *WASH. POST*, May 4, 1996, at B3; Elaine Tassy, *Cahill Says Remarks at Killer's Sentencing Not Meant to Offend*, *BALTIMORE SUN*, Feb. 22, 1996, at 2B. The judge remarked during the sentencing of a man convicted of manslaughter for killing his unfaithful wife, "I seriously wonder how many men married five years or four years would have the strength to walk away, but without inflicting some corporal punishment." Tassy, *supra*, at 2B. He also referred to the defendant as a "non-criminal." *Id.* The defendant was sentenced to 18 months, well below the three to five years the sentencing guidelines allow.

<sup>157</sup> Witness the increase in visibility of the fight against domestic violence engendered as a result of the killing of Nicole Brown Simpson. *See State Laws on Abuse of Spouses Reworked*, *OREGONIAN*, June 23, 1994, at C12 (describing efforts of many states to rework their domestic violence laws in the wake of the Nicole Brown Simpson and Ronald Goldman murders); Maria L. LaGanga & Elizabeth Mehren, *Simpson Case Compels Nation to Look at Domestic Violence*, *L.A. TIMES*, June 20, 1994, at 1. The example is itself an example of how ambivalent society may really be on this issue. It took a case of this profile to get the public's full attention—attention rivaled only in intensity

the occurrence of violence against women in the home is still difficult to understand, there is some movement towards recognizing that a woman involved in a battering relationship cannot always exercise choices that we assume would be "normal" and rational. In fact exercising those choices may actually endanger her.<sup>158</sup>

Despite the growing evidence and awareness regarding the relationship between violence against women and abuse or neglect of children within the family, few courts or agencies have effectively used this awareness to the benefit of either the children or their abused mothers.<sup>159</sup> The more we learn about family violence, the more victims are re-victimized.<sup>160</sup> Mandatory reporting laws for health care providers, which were enacted to help protect women and children, may end up putting both in jeopardy. Too often the courts rely on poorly educated and ill informed personnel to make a determination about the welfare of the child.<sup>161</sup> The paradox for battered mothers is such that if

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with that generated after the airing of *The Burning Bed*, the Francis Hughes story. See Karen Burstein, *Naming the Violence: Destroying the Myth*, 58 ALB. L. REV. 951, 965-66 (1995). Yet, funding for safe shelters for women is inadequate. See, e.g., Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 249-50 (1994); see also Mahoney, *supra* note 83, at 2. Thus, though we have a greater public awareness, it is not as clear that we have a concrete commitment to the eradication of violence within the home.

<sup>158</sup> Mahoney, *supra* note 83, at 61-65.

<sup>159</sup> See, e.g., Fantuzzo et al., *supra* note 127, at 117 (showing that children are disproportionately present in households where there was a substantiated incident of adult female assault and young children were disproportionately represented among witnessing children); Susan M. Ross, *Risk of Physical Abuse to Children of Spouse Abusing Parents*, 20 CHILD ABUSE & NEGLECT 589-98 (1996) (the relationship between marital violence and child abuse is three times greater for husbands than for wives; even women who are the most chronically violent have only a 38% probability of physically abusing a male child, whereas the most chronically violent husbands are almost certain to physically abuse their children); see also *White Ribbon Campaign Support Effort to Stop Domestic Violence*, POST-STANDARD, June 6, 1997, at A11 (estimating that child abuse may be present in 30-40% of homes where spouse abuse is also occurring).

<sup>160</sup> Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connection*, 58 ALB. L. REV. 1109, 1111 (1995) (mothers face: (1) loss of custody of children to the batterer; (2) initiation of neglect proceedings against them; and (3) risk of prosecution for violating statutory duty to report known incidents of child abuse).

<sup>161</sup> *Id.* at 1114-15. See also Jean Koh Peters, *The Roles and Content of Best Interests in Client-Directed Lawyering For Children in Child Protective Proceedings*, 64 FORDHAM L. REV. 1505, 1536-37 (1996) (observing the irony that the people closest to understanding the needs of the children are farthest from the decision making process).

she reports domestic violence in her home, her children may be removed.<sup>162</sup>

Most jurisdictions have now codified a "failure to protect" standard in their child protective statutes.<sup>163</sup> Actions can be taken against mothers in either the abuse or neglect context.<sup>164</sup> A civil finding of abuse or neglect does not mandate a corresponding criminal inquiry.<sup>165</sup> In civil proceedings mothers can be held liable for "allowing" physical or sexual abuse, or "allowing" an environment where such abuse could take place.<sup>166</sup> The distinction between abuse and neglect is based on the degree of harm to the child.<sup>167</sup> Neglect findings are made when the parent fails to exercise a minimum degree of care and that failure results in physical, emotional or psychological impairment to the child.<sup>168</sup> "Minimum degree of care" is a purposely low threshold of responsibility.<sup>169</sup> In setting the low level threshold, little judicial or legislative attention was paid to the ways in which institutional inaction created or increased the hazards and hardships for the mothers of abused or neglected children and minimized a woman's attempts to take action or to get

<sup>162</sup> Rabin, *supra* note 160, at 1111-12.

<sup>163</sup> See Kristian Miccio, *In the Name of the Mothers and Children: Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings*, 58 ALB. L. REV. 1087, 1088 (1995).

<sup>164</sup> In New York, for example, parents may be held liable for abuse or neglect, depending on the degree of harm to the child. Specifically the New York Family Courts Act defines abuse as "causing or creating a substantial risk of death or serious or protracted disfigurement." N.Y. FAM. CT. ACT. § 1012(e) (McKinney 1983 & Supp. 1995). Section 1012(f) defines neglect as "a failure to exercise a minimum of care, resulting in the child's physical, mental, or emotional impairment or imminent danger of impairment." *Id.* § 1012(f). See also Miccio, *supra* note 163, at 1090 n.13.

<sup>165</sup> Consequences include removal of the child from the home, termination of parental rights, destruction of the family unit, as well as social consequences that flow from the stigma of being found to be "unfit" to raise children. See Rabin, *supra* note 160, at 1112.

<sup>166</sup> See, e.g., N.Y. FAM. CT. ACT § 1012(e) (McKinney 1983 & Supp. 1995).

<sup>167</sup> Miccio, *supra* note 163, at 1089-90.

<sup>168</sup> *Id.* at 1089.

<sup>169</sup> *Id.* at 1089-90. The object of the civil statute was to provide a safety net for as many children as possible regardless of the effects on the parents. *Id.* The repercussions to a parent in a civil matter with a low threshold do not carry sanctions as severe as criminal sanctions such as the loss of liberty and commensurate social recrimination. However, in this instance, the low threshold could still be viewed as problematic since it eases the intrusion into one of the most cherished and closely guarded rights we have—family autonomy. See discussion of treatment of rights of family *supra* notes 129-48 and accompanying text.

help.<sup>170</sup> The low threshold approach has moved so far that some states have established strict liability for neglect cases.<sup>171</sup> A showing that the child suffered harm would therefore be sufficient to enter a finding of neglect or abuse against one or both parents. The ease with which findings of neglect or abuse may be made creates a public perception that effective steps are being taken to protect children, despite the reality that both children and their mothers may be victimized in the process.

### C. CRIMINAL LIABILITY

Without failure to protect legislation, a state could choose to prosecute a non-abusing mother for murder, involuntary manslaughter or aggravated child abuse. The mother could be charged as an aider or abettor under each category. Each of these theories would require proof that the non-abusing mother had the requisite *mens rea*, as well as all other elements commonly associated with the criminal offense. *People v. Novy*<sup>172</sup> provides an example of the type of prosecution mothers face under a traditional common law crime analysis. Kimberly Novy was charged with first degree murder, aggravated battery to a child, and cruelty to a child as a result of the death of her stepson.<sup>173</sup> The child died from massive internal injuries and swelling of the brain.<sup>174</sup> The state prosecuted Novy on the theory that either she or the child's father was responsible for his injuries.<sup>175</sup> If Novy had not inflicted the injuries herself, then she was considered accountable for the actions of Keith Novy, the boy's fa-

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<sup>170</sup> Miccio, *supra* note 163, at 1090-92, uses the case of Cynthia D. as an illustration. Despite Cynthia's repeated attempts to keep her abusive husband out of the home via restraining orders (which he repeatedly violated), Cynthia lost custody of her child. *Id.* at 1091-92. In effect, Child Protective Services and the courts held Cynthia liable for her failure to stop her own abuse and keep her husband out of the home. *Id.* The fact that Cynthia was stymied by the failure of the police to arrest her husband when he violated a restraining order was not deemed relevant. *Id.* at 1092. When Cynthia's husband came to visit their child, during a period of unsupervised visitation, as ordered by the court, and beat her in front of the child, Cynthia was charged with neglect since *she* could not prevent her husband from beating her. *Id.* at 1091.

<sup>171</sup> *Id.* at 1092-93 (synopsizing a New York case where the court finally recognized that the lower courts had been applying a strict liability standard in neglect cases without expressly stating); *see also* State v. Lucero, 647 P.2d 406 (N.M. 1982) (finding New Mexico's strict liability child abuse statute constitutional).

<sup>172</sup> 597 N.E.2d 273 (Ill. App. Ct. 1992).

<sup>173</sup> *Id.* at 275.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 294-95.

ther.<sup>176</sup> The court used twenty pages of a twenty-three page decision to recount the conflicting facts of the case. In its final pages, it upheld Novy's conviction of first degree murder and found that if she did not inflict the injuries, she knew Keith Novy inflicted the injuries.<sup>177</sup> The court found it significant that: (1) she remained with the father after the point when she should have been aware of the foreseeability of injury; (2) she failed to inform the authorities of the injuries; and (3) she actively concealed some of the injuries.<sup>178</sup> Novy's case is significant because under the theory of accountability, she became the first woman to be convicted of first degree murder where a failure to protect analysis formed part of the basis for her conviction. Despite the fact that Novy presented evidence that the child's abuse and neglect began at least nine months before she even met Keith Novy,<sup>179</sup> she was nonetheless convicted. Keith Novy was not prosecuted.<sup>180</sup>

Many states that have used traditional common law crimes as the basis for prosecution of non-abusing mothers have also adopted statutes which imposed criminal sanctions for people convicted of abusing children.<sup>181</sup> The criminal abuse statutes are

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<sup>176</sup> *Id.*

<sup>177</sup> *Id.* at 295-98.

<sup>178</sup> *Id.* at 296. Ironically, if Kimberly left the marriage, there would have been no additional guarantee of safety for the child, who would have remained with the father, but Kimberly would not have been liable.

<sup>179</sup> Kimberly Novy did not begin to live with Keith until March 18, 1989. *Id.* at 278. However, in 1987 doctors had already noted that both of Keith's children (as well as the father himself) had poor personal hygiene. While Keith was still with the children's birth mother, doctors noted the youngest child failed to thrive after an operation. In 1988, social services workers found that the child was withdrawn, had noticeable tremors, little language skills, and was missing school. *Id.* at 279.

<sup>180</sup> *Id.* The state presented evidence that the victim had excessive absenteeism, failed to thrive and was often dirty and smelled of urine during the year previous to Kimberly meeting Keith. *Id.* In addition, witnesses testified they saw Keith actively engage in emotional abuse of the child. *Id.* at 280-81. Kimberly stated she had both spanked the child with a belt and slapped him. *Id.* at 286. Keith on the other hand, had threatened to smash the child's head with a baseball bat and had banged two of the children's heads together so hard that it made an audible noise. *Id.* at 296. On Kimberly's behalf, her lawyer introduced evidence to establish that she had a dependent personality and that Keith's abuse of her, combined with her personality, made it impossible for her to prevent his abuse of the children. *Id.*

<sup>181</sup> See, e.g., ALA. CODE § 26-15-3 (1992) (a person is guilty of child abuse "who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years. . ."); GA. CODE ANN. § 16-5-70 (Supp. 1996) ("Any person commits the offense of cruelty to children in the first degree when such person maliciously causes a child under the age of 18 cruel or excessive physical or mental pain.").

divided into two categories: those that punish people who actually commit the abuse<sup>182</sup> and those that seek to punish people who exposed the child to risk of danger, or neglected to perform a duty of care or protection.<sup>183</sup> Purportedly, statutes seeking to criminalize passive conduct do so in order to protect children's "best interests" by compelling parents to remove their children from abusive environments. Some legislators and courts have focused on the following factors: (1) the parents' legal duty to protect the child; (2) the parents' actual or constructive notice of the foreseeability of abuse; (3) the child's exposure to the abuses and (4) the parents' failure to prevent such abuse.<sup>184</sup> Parents can avoid liability under these statutes by: (a) reporting the abuse; (b) removing the child from the abusive situation; or (c) ejecting the abuser from the child's home.<sup>185</sup>

Specific failure to protect legislation can relieve the state of the burden of proving *mens rea* once parental responsibility for the child has been established. The most frequently cited modern case establishing parental responsibility for a non-abusing parent is *State v. Walden*.<sup>186</sup> The case involved a charge that the mother aided and abetted her boyfriend's abuse of her children by passively standing by and doing nothing to help them. The Supreme Court of North Carolina upheld the trial court's jury instruction on the issue of parental responsibility which stated, "[a] parent has a duty to protect their [sic] children and cannot stand passively by and refuse to do so when it is reasonably within their [sic] power to protect their children."<sup>187</sup> The trial court also instructed the jury that it could find the mother guilty of aiding and abetting if it found that she was "present with rea-

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<sup>182</sup> Johnson, *supra* note 149, at 365. These statutes are referred to as "commission" statutes. *Id.*

<sup>183</sup> *Id.* See, e.g., ME. REV. STAT. ANN. tit. 17-A, § 554(1)(C) (West Supp. 1997) (imposing criminal sanction on a person who "recklessly endangers the health, safety or welfare of a child under 16 years of age by violating a duty of care or protection"); N.H. REV. STAT. ANN. § 639:3 (1996) (imposing criminal sanction on a person who purposely violates duty of care, protection or support). These are "omission" statutes. See Johnson, *supra* note 149, at 365.

<sup>184</sup> Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 HASTINGS WOMEN'S L.J. 67, 68 (1995).

<sup>185</sup> *Id.* The choices available to the non-abusing parent rest on the myths referred to by Enos, *supra* note 120, at 240.

<sup>186</sup> 293 S.E.2d 780 (N.C. 1982).

<sup>187</sup> See *id.* at 784.

sonable opportunity and duty to prevent the crime and fails to take reasonable steps to do so."<sup>188</sup> The Supreme Court established that to require a parent, as a matter of law, to take affirmative action to prevent harm to his or her child, or be held criminally liable, imposed a reasonable duty upon the parent.<sup>189</sup>

Interestingly enough, it is also the *Walden* case which recognizes the limitation of parental duty to protect. The court stated:

This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children. To require such, would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.<sup>190</sup>

The court indicated that there may be a range of options a parent may take, depending on the situation.<sup>191</sup> Ultimately, however, the court believed the reasonableness of the parent's behavior was a question for the jury after proper instructions from the trial court.<sup>192</sup>

While *Walden* laid the groundwork for liability through a failure to protect approach, it was *State v. Williquette*<sup>193</sup> which established criminal liability for non-abusing parents on the grounds that the parent failed to protect the child. In *Williquette*, the State of Wisconsin prosecuted Terri Williquette on two counts of child abuse.<sup>194</sup> Unlike the charges in *Walden*, the charges of abuse in *Williquette* were based on Williquette's alleged failure to take any action to prevent her husband from "sexually abusing, beating, and otherwise mistreating" her son

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<sup>188</sup> *Id.* (emphasis in original).

<sup>189</sup> *Id.* at 786.

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.* Aleen Walden was charged with assault with a deadly weapon, on the theory that she stood by when her boyfriend, George Hoskins, struck her child with a metal tip belt. *Id.* at 783. The other Walden children testified that Hoskins beat their youngest sibling. *Id.* Aleen Walden testified that the boy's natural father beat him and that she was struck several times by him when she tried to intervene. *Id.* Walden was convicted and sentenced to 5-10 years imprisonment. *Id.* at 782.

<sup>193</sup> 385 N.W.2d 145 (Wis. 1986).

<sup>194</sup> *Id.* at 147.

and daughter.<sup>195</sup> Williquette was charged under the Wisconsin child abuse statute which provided:

*Abuse of children.* Whoever tortures a child or subjects a child to cruel maltreatment, including, but not limited, to severe bruising . . . or any injury constituting great bodily harm under § 939.22(14) is guilty of a Class E felony. . . .<sup>196</sup>

Williquette moved to have the charges against her dismissed because the language of the statute did not specifically mention acts of omission, and because the state had not alleged that she directly committed the abuse.<sup>197</sup> The trial court concluded that the statute, as written, only applied to intentional acts of a defendant who directly abused the child.<sup>198</sup> The court of appeals reversed the trial court's order of dismissal.<sup>199</sup> It agreed that the statute was not intended to cover omissions. However, the appellate court held that Williquette could be tried as an aider and abettor to her husband's abusive actions (even though the state elected not to charge aiding and abetting).<sup>200</sup> The Wisconsin Supreme Court affirmed.<sup>201</sup> The court agreed that Williquette could be charged as an aider or abettor, but also ruled that omission conduct satisfied the statute.<sup>202</sup> Finding that the language of the statute was unambiguous, the court held that the language did not limit the application of the child abuse statute only to those actively participating in abusing children.<sup>203</sup>

Furthermore, the court moved beyond simply affirming Williquette's conviction. It established two additional parameters for failure to protect cases, namely (1) that an objective standard would be employed to determine what acts constitute child abuse,<sup>204</sup> and (2) that no *mens rea* need be demonstrated to es-

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<sup>195</sup> *Id.*

<sup>196</sup> *Id.* (quoting WIS. STAT. ANN. § 940.201). Section 940.201 was repealed and replaced by § 948.03 in 1989. See WIS. STAT. ANN. § 948.03 (West 1996).

<sup>197</sup> *Williquette*, 385 N.E.2d at 148.

<sup>198</sup> *Id.* at 149.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 155.

<sup>202</sup> *Id.* at 150-52.

<sup>203</sup> *Id.*

<sup>204</sup> "Thus child abuse consists of subjecting a child to conduct which is 'abhorrent to the sensitivities of the general public.'" *Id.* at 150. In the court's opinion, this standard gave the mother reasonable notice of her affirmative duty to protect her child from a foreseeable risk of cruel maltreatment.



tablish the crime.<sup>205</sup> The court cited two previous cases where it held that the charge of child abuse does not require a criminal intent in support.<sup>206</sup> Perhaps because the exposure to criminal liability was slight, in comparison to other felonies, the court was not troubled with establishing strict liability or even a negligence standard of liability.<sup>207</sup> After the *Williquette* decision, the Wisconsin legislature codified the court's ruling and formally included failure to act in its reformulated child abuse statute.<sup>208</sup>

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* (citing *State v. Danforth*, 385 N.W.2d 125 (Wis. 1986); *State v. Killory*, 243 N.W.2d 475 (Wis. 1976)). In *Killory*, "cruel maltreatment" was challenged on vagueness grounds. It was the first opportunity that the Supreme Court of Wisconsin had to interpret the statute. Killory was a college professor who tried to cure his niece of "psychopathy" by subjecting her to beatings and forced enemas. Based on a dictionary definition of "cruel," the court decided the word did not require malicious intent. *Killory*, 243 N.W.2d at 483. *Danforth*, also a case of active abuse, was decided on the same day as *Williquette*. In *Danforth*, the court held that specific intent was not a required element of child abuse. 385 N.W.2d at 129.

<sup>207</sup> When Killory was convicted, the penalty was a fine of \$500 or imprisonment, not to exceed one year. *Killory*, 243 N.W.2d at 479; see also Nancy A. Tanck, *Commendable or Condemnable?: Criminal Liability For Parents Who Fail To Protect Their Children From Abuse*, 1987 Wis. L. REV. 659, 663 n.23. Williquette's financial exposure was greater: she faced a fine of up to \$10,000, but the total jail exposure was not to exceed two years. *Id.* at 665 n.38. It was considered a Class E felony. *Id.* at 660 n.5. In criminal law theory strict liability crimes are not viewed favorably because they contradict notions of guilt based on individual liability determined through the evaluation of the *actus reus* combined with the defendant's *mens rea*. The tension between strict liability and criminal liability is demonstrated in the writings on felony murder. DRESSLER, *supra* note 125, at 119. Many states sought to restrict or limit the grounds upon which felony murder charges could be brought due to the inherent unfairness of convicting someone of a crime they did not intend to convict. See *infra* notes 292-93.

<sup>208</sup> The legislature adopted the following language:

*Failing to act to prevent bodily harm*

(a) A person responsible for the child's welfare is guilty of a Class C felony if that person has knowledge that another person intends to cause, is causing or has intentionally or recklessly caused great bodily harm to the child and is physically and emotionally capable of taking action which will prevent the bodily harm from occurring or being repeated, fails to take that action and the failure to act exposes the child to an unreasonable risk of great bodily harm by the other person or facilitates great bodily harm to the child that is caused by the other person.

WIS. STAT. ANN. § 948.03(4) (West 1997).

Whether Williquette was emotionally capable of providing assistance was not a factor in the court's decision of her case. Indeed, it was only thoroughly examined by the court in a case brought seven years later when a man challenged his conviction as an aider and abettor of his wife's abuse of his stepchildren. See *State v. Rundle*, 500 N.W.2d 916 (Wis. 1993). The State chose not to charge Rundle under § 948.03(4) (a) but rather as an aider or abettor. *Id.* at 917. His conviction was reversed because the

The reformulated statute elevated the severity of the felony ranking and required intentional or reckless conduct. The holding in *Williquette* served as the model of omissions analysis for other states when their own state statutes did not specifically speak on the issue of failure to protect.

While the failure to protect laws are written in gender neutral terms, their application and broad effect are gendered. Women are overwhelmingly prosecuted under these statutes because they are deemed to have primary caretaking responsibilities for the children and because they are within reach of the law.<sup>209</sup> Men may not be within reach, either because of flight or because no legal parental ties to the biological father have been established.<sup>210</sup> Most importantly, because men are increasingly more likely to be the actual perpetrators of the violence, women are left to prevent the violence.<sup>211</sup>

The imposition of an affirmative duty to protect a child from an abuser's violence creates a problem when the protecting parent fears retaliation from the abuser. Protecting the child in this situation can prove dangerous to the intervener and to the child.<sup>212</sup> Only three states—Iowa, Minnesota, and Oklahoma—have expressly created an affirmative defense for a parent who finds herself at risk of death or serious bodily injury if she acts to protect the child.<sup>213</sup> In order to exercise the de-

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State did not prove that he intended his actions or inaction to aid the abusing mother. *Id.* at 925.

<sup>209</sup> See Nancy S. Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, in 1A CURRENT PERSPECTIVE ON PSYCHOLOGICAL, LEGAL & ETHICAL ISSUES 195, 197 (Sandra A. Garcia & Robert Batey eds., 1990).

<sup>210</sup> *Id.* at 197-98. Heightened duty is based on the relationship of parent to child. Until recently, many state statutes did not view the biological father as a legal parent if he was not wed to the mother. Men who are not biologically related to the children of their girlfriends also may have no duty to intervene.

<sup>211</sup> See *supra* discussion in Part I.

<sup>212</sup> Johnson, *supra* note 149, at 367; see also Fantuzzo et al., *supra* note 127, at 120 (finding that a sizeable number of children in violent households are involved in multiple ways in the incident of abuse, including precipitating the dispute that led to the violence).

<sup>213</sup> See Johnson, *supra* note 149, at 367 (citing IOWA CODE ANN. § 726.6.1(e) (West 1986); MINN. STAT. § 609.378 (1984); OKLA. STAT. ANN. tit. 21, § 852.1A (West 1997)). The Minnesota Criminal Code defines endangerment of a child as follows:

Subdivision 1. (b) Endangerment. A parent, legal guardian, or caretaker who endangers the child's person or health by:

(1) intentionally or recklessly causing or permitting a child to be placed in a situation likely to substantially harm the child's physical, mental, or emotional

fense, the defendant must have reasonably believed that to interfere would result in additional injuries to the child or to the defendant. The reality of the child's injury or death makes it difficult to view the mother's situation from her perspective at the time of the incident. Sympathies for the child's suffering can obscure the fact-finder's ability to properly evaluate the mother's choices.

Finally, it is difficult to locate many of the women who face the quandary of being both battered and non-abusing mothers in the criminal justice system. Because of the threat of life imprisonment, without the possibility of parole, or even the possibility of having death imposed, many mothers plead to second degree murder or involuntary manslaughter. Often we only become aware of them if they are referred to in the appeals of their spouses or significant others.<sup>214</sup>

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health or cause the child's death; . . . is guilty of child endangerment and may be sentenced to imprisonment for not more one year or to payment of a fine of not more than \$3,000, or both. If the endangerment results in substantial harm to the child's physical, mental, or emotional health, the person may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than \$10,000, or both.

(2) Defenses. It is a defense to a prosecution under subdivision 1, paragraph (a), clause (2), or paragraph (b), that at the time of the neglect or endangerment there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect or endangerment would result in substantial bodily harm to the defendant or the child in retaliation.

MINN. STAT. ANN. § 609.378 (West 1997). Minnesota does also recognize endangerment as an underlying felony in felony murder charges where the child dies. *Id.* § 609.185.

The Iowa law reads:

A person who is the parent, guardian, or person having custody or control over a child . . . commits child endangerment when the person does any of the following: . . . (e) knowingly permits the continuing physical or sexual abuse of a child or minor. However, it is an affirmative defense to this subsection if the person has a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person or the child or minor.

IOWA CODE ANN. § 726.6.1 (West 1997).

Finally, the Oklahoma statute provides:

A person who is the parent, guardian, or person having custody or control over a child . . . commits endangerment when the person knowingly permits physical or sexual abuse of a child. However, it is an affirmative defense to this paragraph if the person had a reasonable apprehension that any action to stop the abuse would result in substantial bodily harm to the person or the child.

OKLA. STAT. ANN. tit. 21, § 852.1.A (West 1997).

<sup>214</sup> See, e.g., *Jackson v. State*, 343 S.E.2d 122 (Ga. Ct. App. 1986) (defendant challenged the sufficiency of testimony which came partially from his wife who was also charged and pled guilty as an accomplice); see also *Schneider, Resistance*, *supra* note

### III. THE THEORY OF OMISSIONS LIABILITY

*[T]he law places on a parent a legal duty to protect her child. . . . She can't put up blinders and say, . . . "I don't see anything, I don't hear anything" . . .*<sup>215</sup>

*I asked John if I could go call 911. He said no, its [sic] too late.*<sup>216</sup>

Pauline Zile was initially charged with three counts of aggravated child abuse and one count of first degree felony murder.<sup>217</sup> The underlying felony for the murder charge was aggravated child abuse.<sup>218</sup> The State alleged that Pauline Zile's conduct in failing to protect her child rose to the same level of

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91, at 516-17 (difficulty in finding women who have been subjected to battering because court records are poorly developed by counsel or alternatively, no record exists because the women were improperly advised regarding plea options). There are several women incarcerated in the Florida Correctional Institute in Lowell, Florida whose children were killed by boyfriends. They are young, late teens or early twenties, and pled to second degree murder to avoid exposure to the death penalty. Telephone Interview with Midge Watson, Founder of the Women Helping Women Program, Tallahassee, Fla. (Mar. 1997). "Women Helping Women" is a volunteer program that teaches female inmates to recognize the signposts of domestic violence and helps develop strategies to end violence.

<sup>215</sup> Closing statement of State Attorney Duggan in the trial, TR, *supra* note 9, at 2630.

<sup>216</sup> Florida Dep't of Corrections Presentence Report 12 (No. 94-11068) (typed Apr. 28, 1995) [hereinafter Presentence Report] (on file with author) (citing Zile statement to police).

<sup>217</sup> The indictment for one of the aggravated child abuse counts alleged that Pauline kept Christina out of school after her disappearance. The court dismissed the count since Christina was already dead so it was impossible to abuse her at that time. However, it is questionable whether this count could be valid even if the child were alive given the definition of aggravated abuse. The other two counts of aggravated child abuse related to two separate occasions when Pauline was observed to striking Christina. Only one of those occasions referred to action taken on the actual date of Christina's death.

<sup>218</sup> The Florida statute provides as follows:

"Aggravated child abuse" occurs when a person: (a) Commits aggravated battery on a child; (b) Willfully tortures, maliciously punishes, or willfully and unlawfully cages a child; or (c) Knowingly or willfully abuses a child and in so doing causes great bodily harm, permanent disability, or permanent disfigurement to the child.

FLA. STAT. ANN. § 827.03(2) (West 1998). "Torture" is then defined as "every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused." *Id.* § 827.01(3) (emphasis added).

culpability as the conduct of John Zile who affirmatively caused Christina to die.<sup>219</sup>

#### A. WHY PUNISH OMISSIONS?

Though somewhat unusual in our system of jurisprudence, there is a growing trend towards the establishment of crimes that are committed through omission, or the failure to act when action is expected.<sup>220</sup> Traditionally, the law looks to affirmative acts when assessing criminal liability. The common law drew a distinction between affirmative acts and omissions. "Criminal-

<sup>219</sup> Florida's definition of first degree murder includes: "(1)(a) The unlawful killing of a human being . . . (2) When committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any: . . . (h) Aggravated child abuse." *Id.* § 782.04. Murder in the first degree constitutes a capital felony, punishable by death or life imprisonment without possibility of parole. *Id.* Murder in the second degree includes:

(2) The unlawful killing of a human being, when perpetrated by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual . . . " *Id.* Second degree murder is "punishable by imprisonment for a term of years not exceeding life . . .

(3) When a person is killed in the perpetration of, or in the attempt to perpetrate . . .

(h) Aggravated child abuse, by a person other than the person engaged in the perpetration or in the attempt to perpetrate such felony, the person perpetrating or attempting to perpetrate such felony is guilty of murder in the second degree . . .

(4) The unlawful killing of a human being, when perpetrated without design to effect death, by a person engaged in the perpetration of, or in the attempt to perpetrate, any felony other than: . . .

(h) Aggravated child abuse . . . is murder in the third degree."

*Id.* See also *Nicholson v. State*, 600 So. 2d 1101 (Fla. 1992); *Nicholson v. State*, 579 So. 2d 816 (Fla. Dist. Ct. App. 1991) (disapproving holdings of Florida State Courts of Appeals that the legislature, in § 827.03, only intended to punish specific acts of commission).

<sup>220</sup> Lionel H. Frankel, *Criminal Omissions: A Legal Microcosm*, 11 WAYNE L. REV. 367, 384 (1965) (growth of vast body of conduct-regulating statutes). Omissions liability is a derivative form of liability in that the actions of the party who fails to intervene is insufficient in and of itself to constitute a violation of the norm under which he is being punished. Liability requires an independent process for which the party will be held accountable. See GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 583 (1978). Fletcher identifies four elements that are presupposed in derivative liability: "(1) a harm that is to be attributed to the actor, (2) an independent human or natural process that is the primary cause of the harm, (3) the actor's ability to prevent the harm and his failure to do so, (4) a duty to intervene and prevent the harm." *Id.* at 588. Additionally, Fletcher identifies two problems with omissions analysis: weak causal relationship between the harm caused by the independent act and the failure to intervene, and the conceptual difficulty of applying notions of "intent" to failures to act. *Id.* at 582-83. For the battered mother, the independent process is the action of the active abuser.

ity" was described as "the voluntary behavior, under relevant surrounding circumstances, to which the law attributes actual or threatened harm."<sup>221</sup> Thus, "[t]he reason for requiring an act, is that an act implies a choice' and the criminal law operates by influencing choice."<sup>222</sup> Normally law is envisioned as proscribing the infliction of particular harm.<sup>223</sup> However, it is also well accepted in our system of criminal justice that criminality may also attach where the actor has a legal duty to act and the capacity to act but fails to do so.<sup>224</sup> Legal scholars believe the exception to the act requirement is permitted because the actor's failure to perform a legal duty of which he is capable satisfies the purpose of the of the act requirement,<sup>225</sup> that is, that the omission "reflects a purposeful focusing of choice upon the circumstances surrounding [the actor's] behavior and the likely consequences [of such behavior]."<sup>226</sup> In a common law analysis, in order "[f]or criminal liability to be based upon a failure to act, it must first be found that there is a duty to act—a legal duty and not simply a moral duty."<sup>227</sup> The categories of legal duty have been variously described as ranging from four to seven.<sup>228</sup> The develop-

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<sup>221</sup> *Id.* at 386.

<sup>222</sup> *Id.* at 387 (quoting OLIVER WENDELL HOLMES, *THE COMMON LAW* 54-55 (1881)).

<sup>223</sup> Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 548 (1988).

<sup>224</sup> See PAUL H. ROBINSON, *CRIMINAL LAW* 191 (1997).

<sup>225</sup> *Id.* at 191-92; see also Paul H. Robinson, *Criminal Liability For Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y.L. SCH. L. REV. 101, 106 (1984).

<sup>226</sup> Frankel, *supra* note 220, at 387; see also FLETCHER, *supra* note 220. Fletcher states it as a sophisticated version of looking at isolated events apart from their effects on other persons or their interests which he calls "atomistic." *Id.* at 590-91. This atomistic view "reduces to the observation that some norms prohibit conduct and others require conduct." *Id.* at 591. Thus, "[o]missions are the violations of norms that require conduct." *Id.*

<sup>227</sup> LAFAVE & SCOTT, *supra* note 38, at 203.

<sup>228</sup> Frankel, *supra* note 220, at 369-70, cites to the duties established in *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962): (1) where a statute imposes a duty of care; (2) where one stands in a status relationship to another; (3) where one has assumed a contractual duty to care for another; and (4) where one has previously assumed the care of another and so secluded the helpless person as to prevent others from rendering aid. In contrast, Hughes identifies five areas in which a legal duty can be established: (1) by operation of law; (2) by virtue of status relationship; (3) by virtue of the exercise of a privilege; (4) by virtue of the decision to participate in a public sphere; and (5) by virtue of contractual or gratuitous voluntary undertakings. Graham Hughes, *Criminal Omissions*, 67 YALE L. J. 590, 599-600 (1958). Additionally, see Robinson, *supra* note 225, at 101; LAFAVE & SCOTT, *supra* note 38, at 203-07, noting seven categories: (1) duty based upon relationship; (2) duty based upon statute;

ment of the concept of "legal duty" was to establish limits beyond which it was deemed morally inappropriate or perhaps too risky to impose liability for failure to act.<sup>229</sup> Traditionally, authorities "agreed that the law neither could or should punish all . . . omissions."<sup>230</sup> For example, there is no general duty to rescue.<sup>231</sup> This refusal to adopt a general duty to rescue sets Anglo-American law apart from European law on the issue of rescue.<sup>232</sup>

At common law, a person was held to have an affirmative duty to assist another who stood within a certain legal relationship. Therefore, it was the duty of parents to aid their children,<sup>233</sup> husbands to aid their wives,<sup>234</sup> masters to aid their servants,<sup>235</sup> and ship captains to aid their passengers and crew.<sup>236</sup>

(3) duty based upon contract; (4) duty based upon voluntary assumption of care; (5) duty based upon creation of peril; (6) duty of landowner; and (7) duty to control the conduct of others/general duty to rescue.

<sup>229</sup> The tension between the desire to recognize the moral imperative to help those in need of rescue weighed against the danger of casting the net of liability too expansively was pointed out in early discussion among English jurists when attempting to formulate a Code of Law for India. See Frankel, *supra* note 220, at 382-84. Fletcher cautions that legal duty as used in this sense should be distinguished from liability for breach of a specific statutory act such as failure to file a tax return. The cases of specific statutory duties to act generate direct liability where the offense is complete at the moment of the breach. FLETCHER, *supra* note 220, at 585-86. "Derivative liability, in contrast, is based on some independent process of events over which the defendant has minimal control, and therefore liability is not subject to determination until these events run their course." *Id.* at 586. While it would be appropriate for the legislature to create direct liability by specifying the situations in which there was a duty to act, "[i]t would still be incumbent on the courts to work out these duties in specific cases." *Id.* Legislative attempts to create omissions liability for parents who fail to protect may blur the distinction between derivative and direct liability, causing confusion as the courts attempt to interpret whether the mother's failure to act alone completes the violation. See *infra* Part IV. Fletcher also indicates that negligent manslaughters are also sometimes framed as omissions, but that they, like specific statutory duties, require a different analysis and do not satisfy the criteria for derivative liability. FLETCHER, *supra* note 220, at 586-88.

<sup>230</sup> Leavens, *supra* note 223, at 553.

<sup>231</sup> There are exceptions to the general rule. Both Minnesota and Vermont have statutes imposing a duty to rescue all persons, not just those with special duties. See MINN. STAT. § 604A.01 (West 1998); VT. STAT. tit. 12, § 519 (1997).

<sup>232</sup> For analysis of French, Italian and German law on the duty to rescue the helpless, see Frankel, *supra* note 220, at 371. See also Hughes, *supra* note 228, at 632-34, for a discussion of how Yugoslav, French, German, Italian, and Soviet law treat the issue of duty to rescue.

<sup>233</sup> See *Jones v. United States*, 308 F.2d 307 (D.C. Cir. 1962).

<sup>234</sup> See *Westrup v. Commonwealth*, 93 S.W. 646 (Ky. Ct. App. 1906).

<sup>235</sup> See *Queen v. Brown*, [1893] 1 Terr. L.R. 475; *Rex v. Smith*, 172 Eng. Rep. 203, 205 (K.B. 1826).

It is correct for the law to view the mother of a battered, abused or murdered child as having an established legal duty to aid her child. Indeed, the recognition of the parent's legal duty remains as one of the earliest consistently recognized special relationships.<sup>237</sup>

Legal scholars who have written about omissions liability, however, seem to accept without question that it is correct to hold a mother liable in all situations where she fails to protect the child from abuse or fails to rescue the child when abuse occurs.<sup>238</sup> Even though the doctrine provides that a parent is not required to risk death or serious bodily injury, no serious attention has been given to the development of principles limiting parental liability.<sup>239</sup> Setting the issue of limitations aside for the moment, the question of whether a duty to act exists does not conclusively resolve the issue of criminal liability for failure to act. A more sophisticated analysis is required. However, before moving to analyze causal connections it is necessary to note that the state may elect to charge a mother with complicity in the

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<sup>236</sup> 11 Will. 3, ch.7 (1698-99 Eng.), cited in Hughes, *supra* note 228, at 594 n.18. Hughes observed that in the early analysis of omissions liability, it appeared that the common law granted a higher place to the interests of seamen than those of children, and that early theorists never suggested liability for homicide through the neglect of children. He traces the expanded parental liability for protection of children to the mid 1850s as reflected in *Regina v. Bulb*, 4 Cox Cr. Cas. 455 (Oxford Cir. 1851). *Id.* at 621. See also Frankel, *supra* note 220, at 381 (describing the increased prosecutions of pauperized parents for failing to care for their children).

<sup>237</sup> See, e.g., *Regina v. Downes*, 1 Q.B.D. 25, 29-30 (1875). However, parental duty was not the earliest special relationship developed. As of 1715, the major failures for which a person could be prosecuted had to do with failures to assist the lord of the manor. Little was mentioned about parental duty until the early 1800s. See Hughes, *supra* note 228, at 590-97 (discussing the history of criminal omissions). Frankel agrees that early law had neither the time nor the resources to consider issues of criminal liability on the basis of failure to act, but was much more concerned with actual violent acts which threatened the lord's stability. Frankel, *supra* note 220, at 371-76.

<sup>238</sup> For example, in analyzing *Palmer v. State*, 164 A.2d 467 (Md. 1960) (manslaughter conviction of mother upheld when "paramour" killed child), Frankel states that the court's conclusion seems "uncontestably sound." Frankel, *supra* note 220, at 398. He claims that we are "shocked" by the failure of the mother in this case to show a greater concern for the welfare of her infant daughter. *Id.* at 399 n.104. The mother in *Palmer* is not guilty of manslaughter because she breached her statutory duty to care for the child, but because she was deviant and delinquently failed to rescue the child from her lover's brutality. The terms "deviant" and "delinquent" are just ways of expressing shocking breaches of community expectation. *Id.*

<sup>239</sup> See *supra* Part II discussion of development of "failure to protect" theory.



death of her child.<sup>240</sup> Accountability and aiding and abetting are theories of complicity. Complicity, like omission, is a derivative form of liability.<sup>241</sup> It is thus a particularly attractive way to establish liability against mothers. It requires the existence of an independent process with which the aider or abettor interacts.<sup>242</sup> Typically, a person can be said to be an accomplice to someone actively engaged in committing a crime if she "(a) gave assistance or encouragement or failed to perform a legal duty to prevent [the act] (b) with the intent thereby to promote or facilitate commission of the crime."<sup>243</sup>

If a duty is established, as with any other type of criminal offense, we must be able to establish a nexus between the failure of the actor to meet her duty and the actual injury suffered. In other words, for our purposes, is there a nexus between the mother's failure to act and the death of the child? The legal duty analysis for establishing liability by omission has been critiqued for its failure to create a satisfactory nexus "between the duty requirement and the causal nature of the criminal prohibition . . . ."<sup>244</sup> The problem then is to distinguish between those omissions that "cause" harm and those that do not.<sup>245</sup>

#### B. CAUSATION'S ROLE IN THE OMISSIONS ANALYSIS

Many scholars have explored questions of causation in criminal law. Rarely does the analysis involve gendered considerations, except in the context of rape and domestic violence. A nongendered theoretical analysis can produce significant dan-

<sup>240</sup> See *People v. Stanciel*, 606 N.E.2d 1201 (Ill. 1992) (mother convicted of first degree murder on the basis of accountability when her boyfriend killed her child; accountability is Illinois' version of aiding and abetting).

<sup>241</sup> FLETCHER, *supra* note 220, § 8.5, at 634-35.

<sup>242</sup> *Id.*

<sup>243</sup> LAFAYE & SCOTT, *supra* note 38, § 6.7, at 576. See also Joshua Dressler, *Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to Old Problems*, 37 HASTINGS L.J. 91 (1985); Sanford H. Kadish, *Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323 (1985); Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609 (1984).

<sup>244</sup> Leavens, *supra* note 223, at 562.

<sup>245</sup> *Id.* Indeed, Frankel argues that the nexus is "all too clear;" establishing a causal relationship is at most a preliminary problem. Frankel, *supra* note 220, at 388 (citing Herbert Wechsler & Jerome Michaels, *A Rationale of the Law of Homicide*, 37 COLUM. L. REV. 701, 723-24 (1937)). Attribution is really a matter of deciding how to fix blame when faced with a sometimes vast number of causes. *Id.* (citing H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 22 (1959)). Causal connections are also a factor in aiding and abetting cases.

gers to a battered mother faced with charges of failure to protect. Causation in Anglo-American law is traditionally broken into a two prong analysis.<sup>246</sup> First it must be determined that the actor's behavior is the "but-for" cause of the result. We ask whether the actor's conduct is the antecedent without which the event would not have occurred. In order to proceed with an attempt to impose criminal liability upon the actor, there must be a determination that the "but-for" threshold has been met.<sup>247</sup> This threshold is also known as the "legal cause."<sup>248</sup> In the second prong of the causation analysis, it must be asked whether the actor's failure to act was also the proximate cause of the child's death.<sup>249</sup> Here the law differentiates between or among the many possible "but-for" causes, identifying some as the di-

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<sup>246</sup> See LAFAYE & SCOTT, *supra* note 38, § 3.12, at 277.

<sup>247</sup> This is the *sine qua non* test, also known as "actual cause," "factual cause" or "cause-in-fact." DRESSLER, *supra* note 125, § 14.02[A]. "The *sine qua non* test serves a limited but very important purpose. It functions in a negative manner to exclude certain forces, including human ones, from responsibility for resultant harm." *Id.*

<sup>248</sup> Consider the quintessential causation hypothetical: A, B, and C are able-bodied adults standing beside a pool in which a young child is drowning. A, a stranger, pushed the child into the pool. Each could easily save the child but none does and the child drowns. A is clearly liable for homicide because A pushed the child in. Are the others liable for the death of the child as well? They can only be liable if their failure to rescue the child also caused the child's death. One could hardly dispute the fact that had the observers, B and C, pulled the child out of the water, she would not have drowned. It is possible to say therefore that B and C's failure to act was the antecedent cause but-for which the child would not have drowned. See Leavens, *supra* note 223, at 563. However, criminal liability would not normally be imposed upon B and C: the hypothetical assumes B and C had no improper *mens rea*. Excusing B and C from liability is consistent with the Anglo-American policy of liability limitation. There is no logical reason, however, why B and C could not be held liable on some level. In those jurisdictions which impose a duty to rescue, both B and C could probably be charged with a misdemeanor.

<sup>249</sup> Dressler notes that courts in discussing proximate cause use conclusory terms such as "direct cause," "remote cause," and "superseding intervening cause." DRESSLER, *supra* note 125, § 14.03[A], at 163. Dressler suggests that a court or a jury does not in fact "discover" the proximate cause of harm; rather, the jury "selects" it. *Id.* "The decision to attach causal responsibility for social harm to one rather than to another actual cause is one made by common sense and moral intuitions." *Id.* Under the Model Penal Code, the American Law Institute attempted to eliminate some of the confusion surrounding the definition of proximate cause. *Id.* at § 14.04[B] (citing MODEL PENAL CODE § 2.03 commentary at 256 (1985)). The MPC accepts the common law *sine qua non* rule. *Id.* § 14.04[A]. "The remaining issue . . . is whether [a defendant] caused the prohibited result with the level of culpability—purpose, knowledge, recklessness or negligence—that is required in the definition of the offense." *Id.* at § 14.04[B] (discussing MODEL PENAL CODE § 2.03 commentary at 260 (1985)).

rect or proximate cause of the result.<sup>250</sup> In criminal law, just as in torts, the proximate cause determination is "not altogether or even chiefly a question of mechanical connection or scientific law but a mixed question turning largely on the policy of imputing or denying liability."<sup>251</sup> "Since the attribution process is a matter of fixing blame, it is concerned primarily with violated mandates and prescriptions and the public expectations arising from those mandates and prescriptions."<sup>252</sup> Thus, "[t]he more serious the violation, the greater will be the tribunal's willingness to attribute blame even though the causal relationship is far removed and unclear."<sup>253</sup>

One approach to examining the proximate cause determination is to attempt to determine which act, of a possible universe of acts, can be used to analogize to a physical cause and effect. In other words, can we identify the act that changes the status quo?<sup>254</sup> To a large degree, the concept of status quo revolves very much around the conception of what is normal so that "status quo" can be determined. Presumably our everyday

<sup>250</sup> Leavens, *supra* note 223, at 564. Frankel echoes the discussion on the causation issue. Frankel, *supra* note 220, at 388-89. He posits that the law is "concerned primarily with violated mandates and proscriptions and the public expectations arising from those mandates and proscriptions." *Id.* (footnote omitted). He asserts that blame fixing is only secondarily interested in conduct, "and conduct which does not violate public expectations is neutral and irrelevant even though it was in fact a cause of the harm." *Id.* at 389.

<sup>251</sup> Hughes attributes this notion to Jerome Hall. Hughes, *supra* note 228, at 627 (discussing JEROME HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 256-66 (1947)). It would follow then that if C were the child's parent, C might be assessed liability because the public expectation that the parent would act to prevent the drowning would be greater for C, the parent, than for B, a stranger. This assumes that B has no contractual or other duty to rescue the child, e.g., that B is not a lifeguard.

<sup>252</sup> Frankel, *supra* note 220, at 388-89.

<sup>253</sup> *Id.* at 389. However, Frankel points out that:

violation of a public expectation alone, without factual causation, will [not] warrant attribution of harm to the violation. However, when the violated mandate to act is foreseeably related to the prevention of the very harm involved, the tribunal may be expected to conclude that the violation was a cause, and the blameworthy cause, of the harm. Similarly, a harm may be attributed to an omission when the omission was in breach of an expectation that the ommitter would act to prevent the harm.

*Id.* (citations omitted).

<sup>254</sup> In the drowning hypothetical, A's push of the child into the pool has changed the status quo and placed the previously safe child into a life threatening situation. Common sense tells us that of all the events which occurred, including the child's wandering into the pool area, it is A's push that is the impetus for the changed conditions. Leavens, *supra* note 223, at 568.

understanding of the status quo will encompass "more than the physical state of affairs at a given time."<sup>255</sup> Status quo "is taken to include expected patterns of conduct, including actions designed to avert certain unwanted results."<sup>256</sup> Once it is realized that the particular undesired state of affairs can be avoided by taking certain precautions, those precautions are incorporated into what is seen as "normal or at rest state of affairs."<sup>257</sup> As Professor Leavens explains:

A failure to engage in the preventive conduct in these cases can thus be seen as an intervention that disturbs the status quo. When such failure to act is a necessary condition (a "but for" cause) of a particular harm, then that failure fairly can be said to cause that harm.<sup>258</sup>

The multiple interpretations of the best way to analyze causation have been ascribed to the tension between the law's distinction between affirmative acts and omissions. Some scholars have alleged this distinction to be false.<sup>259</sup> They suggest that the omission should not be seen as an affirmative act because too little of the omission actor's conduct has been analyzed.<sup>260</sup> Alternatively, it is proposed that the analysis of who can be held liable would be made easier if the causal analysis were extended beyond the few moments before the incident which leads to death or serious injury and focused instead on a broader "course of conduct."<sup>261</sup> For example, in *Palmer v. State*<sup>262</sup> the court went beyond looking at the mother's behavior on the date of the death of her child at the hands of her paramour. The court considered the mother's actions over an extended period of time, and found them to be totally wanting.<sup>263</sup> In cases where battered mothers are accused of failing to protect, the court seems to have no difficulty looking at a broader course of conduct. However, the court's broader view seems to run only to the mother's behavior and not that of the batterer to determine

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<sup>255</sup> *Id.* at 573.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* (footnote omitted). Leavens calls this "an undifferentiated causal responsibility" and asserts that it is no better than the but-for analysis of causation, leaving us with a universe of potentially liable actors much greater than the universe of individuals we are willing to punish. *Id.* at 574.

<sup>259</sup> *See id.* at 583.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.* at 589.

<sup>262</sup> 164 A.2d 467 (Md. 1960).

<sup>263</sup> *Id.* at 473.

how the abuser's behavior affected or influenced the mother's ability to act.<sup>264</sup>

Whether society uses its common sense approach<sup>265</sup> or its moral measurement of public expectation,<sup>266</sup> there are different levels of expectation as to who will undertake preventive conduct as a matter of routine.<sup>267</sup> In this context,

[a] duty sufficient to support criminal sanctions must be founded on both an empirically valid expectation that persons in similar circumstances will act to prevent a harm—the probability aspect of normality—and also a deeply ingrained common understanding that society relies on that individual to prevent the harm—the normative aspect of normality.<sup>268</sup>

It is said, therefore, that parents have a duty to prevent harm to their children because empirically, almost all parents act this way, and normatively, our society will consider it reprehensible if they do not.<sup>269</sup> It is this combination of deviance—departing from a pattern of regular performance, and reprehensibility—being blameworthy—that makes us conclude that failure to act caused the harm.<sup>270</sup> The burden is on the fact-finder at trial to determine whether the conduct in question is normal or the status quo and whether it is abnormal or intrusive.<sup>271</sup>

A non-gendered analysis of causation poses a clear danger for battered mothers. Society expects the battered mother to

<sup>264</sup> See Enos, *supra* note 120, at 229.

<sup>265</sup> See FLETCHER, *supra* note 220, § 8.2.1, at 593 (citing HART & HONORE, *supra* note 245), referring to H.L.A. Hart and A. Honore, who looked for the critical difference between, for example, "killing" someone and "allowing them to die."

<sup>266</sup> Leavens, *supra* note 223, at 575 n.96. Leavens argues that Frankel, in contrast, supported the notion of "an externally recognized legal duty as a basis for criminal liability." *Id.*

<sup>267</sup> Leavens attempts to distinguish this causal definition from "external legal doctrines" and public policy arguments. *Id.* at 575. His definition looks instead to "how society defines the status quo for that situation at that point in time, a determination based both on probabilistic and normative factors." *Id.* However, it seems intuitively wrong to suggest that by legally selecting certain relationships over others upon which the law imposes a duty, probabilities and normative values were not taken into consideration at the time the duty was established. See Frankel, *supra* note 220, at 378-81, for discussion on the developing importance of the parental obligation.

<sup>268</sup> Leavens, *supra* note 223, at 575.

<sup>269</sup> See *id.*

<sup>270</sup> *Id.*

<sup>271</sup> Leavens acknowledges that the common sense approach to causation creates difficulties in terms of determining what actually is the "common sense." *Id.* at 570. This decision is properly left to the jury to make. It allows the fact-finder wide latitude to decide after looking at all of the facts in each particular case what conduct is normal. *Id.* at 569 n.74.

prevent the harm and considers her reprehensible when she does not.<sup>272</sup> But how does the probabilistic analysis fit in with the normative expectation? When the statement is made that empirically almost all parents act in this way, what data are we relying upon to reach this conclusion? What is the universe of parenting the legal scholars and fact-finders have considered? Is this, for example, the universe of parents whose offspring are produced as a result of marital rape? Is it the universe of parents where the batterer threatens the life of the woman if she intervenes in the disciplining of the child? Is it the universe of households where the mother herself has been beaten or tortured or whose liberty is restricted in ways our "normative" family cannot imagine? Is this empirical mother the 12-50% of mothers who live in violent relationships?<sup>273</sup> Is it the mother who left with her children on prior occasions, only to be hunted down by the abuser when the courts and police offered no protection? No, traditionally, it has been the universe of the parent whose curtains of privacy the court has continuously refused to pierce. It is the universe of the "good" mother. When the mother who does not fit the "empirical" category fails to act, it can be easily seen as a "but-for" cause of the child's injuries or death (one of many possible causes). But, stereotypical views about mothers leave her without a way to demonstrate that she is not the proximate cause of the child's injuries or death.

When we consider the acts of battered mothers, are our common sense judgments about normality and the status quo with regard to the rescue of her children appropriate?<sup>274</sup> We may be able to see that a batterer has the potential to engage in violence against members of the household, including children. We may also believe that it would be a sensible precaution for the battered woman to leave the home, hopefully with the chil-

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<sup>272</sup> See, e.g., *supra* note 238 and accompanying text (discussing *Palmer v. State*, 164 A.2d 467 (Md. 1960)).

<sup>273</sup> Mahoney, *supra* note 83, at 10 (citing MURRAY A. STRAUS ET AL., *BEHIND CLOSED DOORS: VIOLENCE IN THE AMERICAN FAMILY* 36 (1980); LENORE WALKER, *THE BATTERED WOMAN* 19 (1979)).

<sup>274</sup> See *infra* Part IV. I suggest that they are neither appropriate nor realistic and consequently the use of such judgments creates obstacles for the mother when jurors assess the proximate cause between her conduct and the death of a child. See also Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 508 (1997) (examining the term "moral conventionalism" and indicating that what is ordinarily assumed to be right and wrong, good and bad, has disadvantaged women in the criminal process).

dren.<sup>275</sup> If we incorporate this precaution into our standard conceptualization of the status quo, we will make no allowance for a woman's actual reality in comparison to our "normative" notions of her reality when we encounter the woman who is emotionally or physically unable to leave or has no place to go.

The law's readiness to rely on the community's common sense understanding of how people are expected to act is and has been problematic for women who are dealing with issues of violence within the home. While the law no longer endorses a husband's right to beat his wife, judges still express sympathy towards men who beat or kill their wives and girlfriends.<sup>276</sup> As recently as 1981, the law had no regular mechanism to employ in the fact-finding process to help understand the context of violence in the battered women's life.<sup>277</sup> In Florida, it was not until 1993 that the court established women were entitled to present expert evidence of battering.<sup>278</sup>

### C. *MENS REA* AND CRIMES OF OMISSION

Once the mother's act or non-act is established, her *mens rea* must be evaluated. *Mens rea*, like the *actus reus*, is an indispensable element and must be established before criminal liability can be assessed in any crime.<sup>279</sup> However, its precise meaning

<sup>275</sup> Mahoney, *supra* note 83, at 5.

<sup>276</sup> Compare Lynn H. Schafran, *There's No Accounting For Judges*, 58 ALB. L. REV. 1063, 1063-67 (1995) (reporting comments of various judges when excusing male violence towards women), with *Smith v. Meyers*, 74 N.W. 277, 278 (Neb. 1898) (stating the old rule that the husband has the right to "chastise the wife [and] has the right to control the wife with the lash"). Although jurisdictions recognized the need for the law to reflect society's growing enlightenment and departed from the "stick no wider than the thumb rule," courts still sanctioned the husband's right to "punish" the wife for "moderate correction." See, e.g., *State v. Rhodes*, 61 N.C. 453 (1868).

<sup>277</sup> See Maguigan, *supra* note 125, at 427-28. A decade ago, most states had no existing body of law, apart from the rules of evidence pertaining to a decedent's past violence, which assisted the appellate courts in evaluating early claims of error in the exclusion of battered woman syndrome evidence. *Id.*

<sup>278</sup> See *State v. Hickson*, 630 So. 2d 172 (Fla. 1993). Prior to *Hickson*, *Hawthorne v. State*, 408 So. 2d 801 (Fla. Dist. Ct. App. 1982) was the controlling case. In *Hawthorne*, the court ruled that the party offering the expert testimony was required to satisfy the trial judge that the state of the art or scientific knowledge about battering was sufficiently developed to permit a reasonable opinion to be given by an expert. *Id.* at 805-06. Subsequent cases followed *Hawthorne* leaving it up to the individual trial judge to determine whether the subject of BWS has gained general acceptance in the relevant scientific community. See *Rogers v. State*, 616 So. 2d 1098, 1098-99 (Fla. Dist. Ct. App. 1993).

<sup>279</sup> DRESSLER, *supra* note 125, at 95. In strict liability crimes, however, no *mens rea* need be established. The *actus reus* is sufficient to establish liability. *Id.* at 117-19.

has never been clearly understood.<sup>280</sup> It has been variously defined as a guilty state of mind, a "guilty or wrongful purpose," or a "criminal intent."<sup>281</sup> In this sense, an actor is guilty of a crime if she commits the *actus reus* of the offense with a morally blameworthy state of mind.<sup>282</sup> *Mens rea* also refers to the specific mental state required in the definition of the offense. Every criminal act, either explicitly or implicitly, contemplates a particular state of mind required for culpability under the relevant statute. Under this elemental approach, a defendant is not guilty of an offense, even if she has a culpable frame of mind, if she lacks the mental state specified in the definition of the crime.<sup>283</sup>

Under common law, crimes include not only those where the results are the conscious object of the actor (intentional acts), but also those where the actor knows the results are virtually certain to occur as a result of her conduct (those things of which the actor has knowledge).<sup>284</sup> In crimes of commission, *mens rea* can be generalized as an intention to bring about the prohibited consequences or, at least, recklessness with regard to the consequences.<sup>285</sup>

"The concept of *mens rea*, and its sub-concepts, intention and recklessness, were constructed as generalizations of the instances of liability for offenses of commission."<sup>286</sup> It has been argued that the concepts cannot be fluently applied to offenses of omission.<sup>287</sup> The difficulty produced in a crime of omission is that there is *no* conduct by which to measure the actor's state of mind. Without first determining whether the actor knew of her duty to act, attempting to determine her *mens rea* would be senseless. Establishing appropriate *mens rea* in a crime of omission, however, goes beyond merely establishing knowledge or ignorance of the duty to act.<sup>288</sup> It must further be established that the actor knew of the circumstances which triggered the

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<sup>280</sup> *Id.* at 95-96 nn.2-3.

<sup>281</sup> BLACK'S LAW DICTIONARY 985 (4th ed. 1968).

<sup>282</sup> DRESSLER, *supra* note 125, at 95.

<sup>283</sup> *Id.* at 96.

<sup>284</sup> *Id.* at 105-06.

<sup>285</sup> See Hughes, *supra* note 228, at 600.

<sup>286</sup> *Id.* at 605-06.

<sup>287</sup> *Id.* at 606.

<sup>288</sup> See LAFAYE & SCOTT, *supra* note 38, at 210.



duty.<sup>289</sup> In the case of omissions, I suggest that a third inquiry could be added: Did the actor intend her behavior to constitute a response to the circumstances which triggered the duty?

It would be difficult for a parent to argue that she should not be held liable for failure to protect on the grounds that she was unaware of her duty to protect her child. As a society we believe that parents are in the best position to know when a child is in need. This is no less true if the parent is a battered mother. Parental obligations to provide for and protect their children is a concept solidly entrenched in the common law.<sup>290</sup> Moreover, it seems morally appropriate to expect a parent to fulfill her duty of care towards her child.<sup>291</sup>

On a practical level however, the logical extension of the moral persuasion is not at all clear. What does it mean, exactly, that the mother should know of her duty to protect, particularly if by "duty to protect" what is really meant is an obligation to preserve the child's life at all costs?

Indeed, some state statutes have held that mothers are strictly accountable for knowledge of the duty to protect.<sup>292</sup>

<sup>289</sup> See Hughes, *supra* note 228, at 601-02. Hughes raises the hypothetical of a pharmacist who sells a restricted drug without registering the sale. The question is whether his act of selling the drug violates a statute requiring all restricted drug sales to be registered. The pharmacist's guilt may either turn on whether he knew he had a duty to report the sale or whether he knew that this particular drug was restricted, thereby triggering his duty to register the sale.

<sup>290</sup> See *supra* Part II.

<sup>291</sup> Cf. A.D. Woolzley, *A Duty to Rescue: Some Thoughts For Criminal Liability*, 69 VA. L. REV. 1273 (1973) (examining the moral certainty of imposing the duty to rescue upon persons who have close relationships to the endangered individual).

<sup>292</sup> See N.M. STAT. ANN. § 30-6-1(c) (Michie 1997), as an example of a state which uses a strict liability standard even though statutory provisions established a specific level of *mens rea*. The statute in question provides:

Abuse of a child consists of a person knowingly, intentionally or negligently, and without justifiable cause, causing or permitting a child to be:

- (1) placed in a situation that may endanger the child's life or health; or
- (2) tortured, cruelly confined or cruelly punished . . .

*Id.*

In *State v. Lucero*, the Supreme Court of New Mexico affirmed the conviction of Dorothy Lucero for the death of her child at the hands of her live-in boyfriend. 647 P.2d 406 (N.M. 1982). The mother attempted to present evidence that she was also subject to the boyfriend's violence. *Id.* at 407. Expert testimony was offered to support a duress defense. The court ruled that the defense of duress is used to help evaluate a defendant's state of mind. *Id.* at 408. However, despite the plain language of the statute, Lucero's state of mind was held to be irrelevant, as the court interpreted § 30-6-1(c) to be one of strict liability. *Id.* at 408-09. On its face, the statute

Holding a defendant liable for murder on a strict liability basis is a rare undertaking in criminal law.<sup>293</sup> Such a departure violates the normal requirement that guilt be individually determined by evaluating the conscious desires of the defendant. Severe punishment for offenses such as murder would normally be unjust when it has not been determined that the defendant intended to bring about the consequences of her acts.<sup>294</sup>

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does not appear to require strict liability. However, the court cited cases as early as 1975 recognizing the statute as one of strict liability, stating that the public interest in child abuse is so compelling that it overrides individual interests and common law requirements that a mental element be established. *Id.* at 408.

Section 30-6-1(c) was challenged in *State v. Santillanes*, 849 P.2d 358 (N.M. 1993). Vincent Santillanes was charged under subdivision (2) for causing injury to his nephew. He slashed the boy's throat from ear to ear with a knife. *Id.* at 359. Santillanes challenged the use of a negligence standard in lieu of a criminal one. *Id.* at 360. The Supreme Court of New Mexico agreed that it was improper for a criminal statute to define conduct according to a civil negligence standard. *Id.* at 365. Santillanes' conviction was upheld, but the court prohibited any further use of a civil negligence standard. *Id.* at 368. The State in *Lucero* was not required to demonstrate any *mens rea*. Yet in the case of Santillanes, an active abuser, a *mens rea* was required, even if only that of criminal negligence.

<sup>293</sup> See Hughes, *supra* note 228, at 629 n.129. It is obviously not without precedent: felony-murder, for example, is a strict liability offense in a sense. However, even in this category there continues to be scholarly debate over the appropriateness of murder charges based on strict liability. See, e.g., *People v. Burroughs*, 678 P.2d 894 (Cal. 1994) (Bird, C.J., concurring) (strongly urging the court to abandon second degree felony murder doctrine). Hawaii and Kentucky have completely abolished the felony murder rule by statute. See HAW. REV. STAT. § 707-701 (1976); KY. REV. STAT. § 507.020 (Michie 1975); see also *People v. Aaron*, 299 N.W.2d 304, 321 (Mich. 1980) (rejecting application of the felony murder principle through statutory interpretation). Other states have restricted its use to first-degree felonies which were enumerated in common law. See, e.g., *Commonwealth v. Exler*, 89 A. 968 (Pa. 1914) (death brought on by shock during commission of statutory rape is not murder, since statutory rape, though a felony, is not a common law felony).

<sup>294</sup> Strict liability can be used against battered mothers when the state uses aiding and abetting statutes, alleging that the mother's failure to act constituted aid to the abuser. See *People v. Peters*, 606 N.E.2d 1201 (Ill. 1992). When charging aiding and abetting, the state must show that the mother intended her behavior to encourage and facilitate the abusing parent. It should not be sufficient to show merely that she was present and aware of the abuse. The state must establish the causal connection between the mother's knowledge and the death of the child. In the case of a battered mother, it appears that the inference is too readily drawn that a mother's failure to act is circumstantial evidence of her intent to encourage or facilitate the abuser's behavior as well as proof of the causal connection.

In *Peters*, the Illinois Supreme Court held that the law required proof that the mother shared the intent of the principal and a common criminal design. *Id.* at 1235. Because Peters continued to leave the child in the abuser's presence, the court found she sanctioned the abuse and therefore shared a common design. *Id.* at 1232 (emphasis added). By relying on assumptions about what good mothers should do, courts uphold liability simply because the child died rather than because the state established that the mother intended the result or encouraged the abuser. This is strict

Once it is established that the mother knew of her duty, the second question in the *mens rea* trilogy can be asked: Did she know that the circumstances leading up to the child's death triggered the duty to act? This is a more complex question. How does the court evaluate whether the mother should have known that the event which led to the death of the child triggers the duty to act such that a failure to act warrants murder liability? The easiest case would be where the mother intentionally refused to aid her child. When a mother has the means and ability to help the child and does not because it is her intention to permit the child's death, it makes sense to find her liable for murder because she makes a conscious choice to violate the mandate requiring her to act. This is the classic case contemplated by the theory of omissions liability.

In the case of the battered mother, however, we have a defendant who may not know that the actions of the abuser should trigger her duty to act. The duration of the abuse over an extended period of time in and of itself may be sufficient to satisfy the court that the abuse was severe enough to alert the mother that her duty had been triggered.<sup>295</sup> Still, there is little in the way of specific discussion on the point. In cases where the abuser's violence has never been directed towards the children, or the abuse has not been long term, or where the abuser's acts did not appear life threatening, it is difficult to identify what specifically should have alerted the mother to her duty to act.<sup>296</sup>

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liability cloaked in the language of complicity. The *Peters* court ignored, for example, evidence that the mother attempted to shift some child care responsibilities from the abuser to a baby sitter. *Id.*

<sup>295</sup> See *People v. Bernard*, 500 N.E.2d 1074, 1079 (Ill. App. Ct. 1986).

<sup>296</sup> Violent men who have not previously directed their anger towards anyone in the household except the mother can suddenly subject the children to violence as a way to punish the mother. See Roberts, *supra* note 52, at 115; see also Dutton, *supra* note 125, at 1206-08 (stating that violence in the home does not always follow the cycle of violence established by Lenore Walker; battering takes many different forms and surprise attacks upon the children are within the realm of possibilities).

A parent's right to engage in corporal punishment is also at issue. A spanking does not always qualify as abuse. Yet, when the child dies, in hindsight it can be interpreted to be aggravated child abuse. For example, in the *Zile* case, Christina died after she had been slapped by John Ziles. She cried and he covered her mouth to quiet her. Her cause of death was asphyxia. Appellant's Initial Brief at 103, *Zile* (No. 95-2252). See also *Differing Images Emerge in Zile Closing Arguments*, FLA. SUN-SENTINEL, May 15, 1996, at 1B (reporting prosecutor's closing remarks during John Zile's trial that Christina asphyxiated on her own vomit). If Pauline observed the slap and John covering Christina's mouth, should that have alerted her that death was imminent?

In none of the scenarios would it be obvious to the mother that she needed to act in some way to protect her child.

The third inquiry asks whether the mother intended her actions to be a response to the events which triggered the duty to protect. I believe this inquiry should be added because many battered mothers have in fact acted, but the courts consistently characterize their behavior as non-action. Describing the mother's behavior as non-action is inaccurate. Her awareness of the risk combined with the death of the child does not require reaching the conclusion that she ignored the risk. In many instances the mothers have observed or suspected that their children were being abused by others, and they affirmatively responded to the triggers of their duty to protect. In fact, it may be that more of the mothers take affirmative steps than traditionally believed.<sup>297</sup> Responses may vary from trying to restructure the child's day to ensure less time is spent in the abuser's presence,<sup>298</sup> to creating exaggerated stories to alert others to the possibility of problems within the home,<sup>299</sup> to actually leaving the home. In some cases she may try to intervene physically or verbally.<sup>300</sup> It is difficult to recognize the women who act affirmatively in the case law, as the courts regularly fail or refuse to recognize the actions of these women as affirmatively responding to the child's needs. To say that these women acquiesce in the harm imposed upon their children or that they have encouraged it ignores all the evidence favorable to the women. We no longer think battered women intend to be battered or encourage their mates to abuse them. It is no more the intention of battered mothers that their children be killed than it is the intention of battered women to be beaten.

Even if we were to analyze the battered mother's behavior from the perspective of extreme recklessness, murder liability

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<sup>297</sup> See, e.g., Miccio, *supra* note 163, at 1102.

<sup>298</sup> See, e.g., *Commonwealth v. Cardwell*, 515 A.2d 311 (Pa. Super. Ct. 1986).

<sup>299</sup> In *United States v. Webb*, a wife was held captive by her husband after he beat their child to death. 747 F.2d 278, 281 (5th Cir. 1984). After he left for work, she staged a break-in and told the husband she had been raped so that he would take her to the emergency room. *Id.* At the hospital she told the emergency room physician that her child had been killed. *Id.* The husband fled. She was prosecuted.

<sup>300</sup> One of the Ziles' neighbors testified that she overheard Pauline say to John Zile, "That's enough, John." See Appellant's Initial Brief at 12, *Zile* (No. 95-2252). Depending on what Pauline observed, it is conceivable that she satisfied her duty with the statement.

remains problematic.<sup>301</sup> In order for murder liability to be based on recklessness, the conduct must be wanton or of a level of depraved indifference.<sup>302</sup> The reckless actor knew of a grave risk of death or serious bodily injury and chose to ignore it. The battered mother has not ignored the risk to her child, but acts within the limits of her ability in the face of the risk.

In the final analysis, it appears as though courts have short-changed battered mothers when analyzing the *mens rea* component of behavior alleged to be a murderous omission. Insufficient distinctions are made between mothers who knew of risks and those who either did not know or attempted to respond to known risks. The death of the child clouds our ability to focus on whether the mother violated the mandate to act or whether she failed to save the child—a desirable end, but not one required by the law.

#### D. IMPOSSIBILITY OF PERFORMANCE IN OMISSIONS CASES

The inquiry into whether a battered mother is capable of performing the intervening act allows us to return to the question of limitations on the duty to act. When the prosecution alleges that the mother failed to take any steps to protect the child, the question must be asked whether the mother was capable of acting. Just as one may not be criminally liable on account of bodily movement which is involuntary, so one cannot be criminally liable for failing to do an act which she is physically incapable of performing.<sup>303</sup> As has been discussed previ-

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<sup>301</sup> Murder liability under an omissions theory can also be based on the view that the mother's failure to act constituted extreme recklessness. Under common law, conduct must be malicious or of a level of depraved indifference to establish liability. LAFAYE & SCOTT, *supra* note 38, at 606. The reckless actor knows of a grave risk of death or serious bodily injury and chooses to ignore it. If we assume that a battered mother knows of the risk to her child, her awareness of the risk combined with the death of the child does not require reaching the conclusion that she ignored the risk. In the scenario mentioned above, the mother took affirmative steps to minimize the risks. It is wrong therefore to conclude that she ignored the risks. My thanks to Christopher Slobogin for helping me flesh out this point.

<sup>302</sup> The common law standard is restated in Model Penal Code § 210.2, which provides that "criminal homicide constitutes murder when committed . . . recklessly under circumstances manifesting extreme indifference to the value of human life." MODEL PENAL CODE § 210.2 (1985). The reckless actor is punished because she presents as grave a danger to society as the intentional actor. She is an actor who knew of a substantial risk of death or serious bodily injury and chose to ignore it.

<sup>303</sup> See *United States v. Spingola*, 464 F.2d 909 (7th Cir. 1972); LAFAYE & SCOTT, *supra* note 38, at 208; see also PAUL ROBINSON, CRIMINAL LAW DEFENSES (1984 & Supp.).

ously, a parent has a duty to feed her child and provide basic necessities. The parent may be excused from liability for failure to provide food and sustenance to the child if the parent, because of severe poverty, is unable to do so.<sup>304</sup> The example is simple because poverty makes the parent physically incapable of providing food. In other instances however, the exact meaning of "capable of performance" is open to interpretation. It could mean that the act is physically impossible or it could have a broader meaning that includes mental incapability. Some failure to act legislation specifies that the act be one which the actor is physically capable of performing.<sup>305</sup> Other jurisdictions have deleted the word "physically," apparently barring omissions liability on the basis of any incapacity.<sup>306</sup> In considering omissions liability against mothers who have been battered, the distinction between mental incapability and physical impossibility is extremely important.

### 1. Mental Incapacity

The availability of an incapability defense as opposed to an impossibility defense would theoretically be of assistance to battered mothers. Assume defense counsel could establish successfully that the mother was battered in the home. If the threshold levels of proof were met, the mother might then be able to introduce evidence concerning not only the nature of domestic violence but also the myriad of ways in which her behavior might be affected by the violence.<sup>307</sup> Such evidence could in-

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<sup>304</sup> *Stehr v. State*, 139 N.W. 676 (Neb.), *aff'd on reh'g*, 142 N.W. 670 (Neb. 1913). The parent will still be liable if assistance is available from welfare or charity and the parent fails to seek or obtain that assistance.

<sup>305</sup> See, e.g., *People v. Hager*, 476 N.Y.S.2d 442, 447 (N.Y. Co. Ct. 1984) (noting the minimum requirement for criminal liability for failure to perform an act is physical capability); *State v. Olson*, 356 N.W.2d 110, 112 (N.D. 1984) (stating conviction is precluded for a strict liability crime of hit-and-run where defendant lacked the mental or physical ability to perform the required act). The Model Penal Code in § 201(1) provides for criminal liability for the "omission to perform an act of which [a person] is physically capable." MODEL PENAL CODE § 201(1) (1985). Professor Robinson has criticized the Model Penal Code language because it can lead to ambiguity as to whether the actor who is physically capable but mentally unable is excused. See ROBINSON, *supra* note 224, at 200.

<sup>306</sup> Only five states have done so: Alaska, Michigan, Ohio, Oregon and Utah. See ROBINSON, *supra* note 224, at 200 n.8.

<sup>307</sup> This could include testimony concerning many different behaviors that occur as a result of battering, included but not limited to "learned helplessness." See Dutton, *supra* note 125, at 10-13.

clude expert testimony which would aid the fact-finder in evaluating the mother's state of mind to determine whether she had the capability of protecting a child in the same violent household. The test of incapability has the advantage of being subjective—it is focused on the actor herself—as opposed to a scientific analysis of whether the act is literally possible of being performed.<sup>308</sup>

The battered mother should legitimately be able to raise her own exposure to violence within the home to help explain why she did not or could not act to save the child. At the extreme end, if there is evidence that the mother was mentally incapable of protecting her child, she might present an insanity defense. However, attempting to use insanity as a defense presents theoretical and ideological obstacles. In the first instance, the mother's behavior may not fit the threshold definition of insanity. Under the most commonly recognized definition of insanity, the actor must be laboring under such a defect of reason or a disease of the mind that she (1) did not know the nature and quality of the act she was doing, or (2) did not know what she was doing was wrong.<sup>309</sup> In the context of the mother who is battered, she does know, in many instances, what she is doing, and therefore she would not be able to meet the first prong of the test. In addition, even where the mother has been terrorized and reasonably chose not to act, jurors may still believe that it was wrong for her to fail to prevent the death of her child.<sup>310</sup> From an ideological perspective, arguing that the battered mother is insane denies the reality of her existence. Such an argument undermines any attempt to have the focus on responsibility for violence within the home placed on the abuser as opposed to the abused.

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<sup>308</sup> See ROBINSON, *supra* note 224, at 200 (suggesting that this standard may be too liberal). Professor Robinson states that if society demands a minimum level of self-restraint against internal and external pressures to commit an offense, society can also properly demand a minimum level of effort or sacrifice in performing a legally required act. *Id.* His view is that the actor's personal incapacity ought to be recognized as a defense only where it satisfies either a requirement analogous to the voluntariness requirement for commission offenses or a requirement analogous to those of a general excuse such as insanity or duress. *Id.*

<sup>309</sup> See DRESSLER, *supra* note 125, at 299.

<sup>310</sup> See *infra* note 353 and accompanying text (narrative of Carolyn).

Alternatively, one legal scholar has suggested the possibility of a diminished capacity defense for mothers.<sup>311</sup> The term diminished capacity has more than one meaning in the law.<sup>312</sup> For battered mothers, the intended meaning is the defense of "partial responsibility." Under a partial responsibility defense, murder may be reduced to manslaughter if it is committed as the result of "extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."<sup>313</sup> Currently, diminished capacity defenses of this type are not recognized in most jurisdictions. Applying the concept of diminished capacity to battered mothers would permit the mothers to be held to their duty to protect the children, while at the same time permitting them to be excused from liability for murder.<sup>314</sup> Women who meet the criteria for diminished capacity should be permitted to introduce evidence on this issue. However, battered mothers should not be limited to this defense. Such an effort would continue the attempts to enforce the stereotypical view of lawbreaking women as being either mad or bad,<sup>315</sup> and restrict women's options for defenses that are readily available to men.<sup>316</sup>

Attempts to use other traditional excuse defenses such as duress or coercion have not been successful for the battered mother.<sup>317</sup> The excuse of duress is based upon the existence of a

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<sup>311</sup> See Becker, *supra* note 88, at 21-22.

<sup>312</sup> Diminished capacity is a legal term of art used to describe two categories of circumstances in which a defendant's abnormal mental condition, short of insanity, will exonerate him or, more often, result in his conviction of a crime or degree of crime less serious than the original charge. See DRESSLER, *supra* note 125, at 319. There is a *mens rea* form of diminished capacity that negates the *mens rea* element of the case-in-chief. This is not a true defense. *Id.* The other version of diminished capacity is the partial responsibility. *Id.*

<sup>313</sup> *Id.* at 325.

<sup>314</sup> Becker admits that a battered mother may not deserve a diminished capacity type of defense. See Becker, *supra* note 88, at 21. While she calls for even-handed application of discretionary standards when mothers are defendants, she acknowledges that the law today does not reflect even-handedness. *Id.* at 22.

<sup>315</sup> See *supra* Part II.

<sup>316</sup> Schneider, *Resistance*, *supra* note 91, at 495-96 (commenting on efforts to restrict self defense options for women who kill violent partners).

<sup>317</sup> See Erickson, *supra* note 209, at 203 (citing *United States v. Webb*, 747 F.2d 278 (5th Cir. 1984), where a battered mother unsuccessfully attempted to use the defense of coercion). Erickson views this as a possible consequence of the law either being interpreted too narrowly or too rigidly, thereby failing to encompass the type of coercion experienced by battered women. See *id.* See generally Robert P. Mosteller, *Syndromes and Politics in Criminal Trials and Evidence Law*, 46 DUKE L.J. 461 (1996).



threat made against the life of the defendant or the life of a loved one. The threat must be one of immediate or imminent death or serious bodily injury.<sup>318</sup> In the case of battered mothers, the very existence of the threat may be an issue. While the woman may understand, based on the abuser's past performance, that interference may cause injury to herself or further injury to the child, the batterer may not have expressly stated a threat on the specific day of the death or injury.<sup>319</sup> A previous threat or a threat of future harm is normally insufficient to excuse the mother's behavior on the specific day of the child's death. However, in the context of a violent home, the threat of future violence may legitimately create a very real and reliable barometer of impending violence, particularly if the woman continues to engage in the behavior, e.g., resisting the violence against herself or her children, which escalates the severity of a violent attack.

Duress is also predicated upon the defendant being a person of reasonable firmness. Here the battered mother confronts the troublesome issue of whether someone who "allows" themselves and their children to be battered can be found to be reasonable.<sup>320</sup> The human bias against the experiences of battered women makes it difficult to convince laypeople, as well as judges and prosecutors, that the mother, for example, was not a

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Mosteller argues that special consideration ought to be made for battered women because of societal recognition of their plight and the disparate impact law can have on them. While I agree with Mosteller's conclusion that evidence of the woman's state of mind as a result of exposure to battery should be admitted, I disagree that this treatment should be considered as extending "special consideration" to women. Rather, it should be understood as *correcting* hundreds of years of legal history where both the written law and the judges who interpreted it denied application of existing principles of criminal law to women who killed spouses or intimates.

<sup>318</sup> See LAFAVE & SCOTT, *supra* note 38, at 436. Threatened future harm will not suffice, nor will non-serious bodily harm or property damage. *Id.* It is an affirmative defense that an actor engaged in conduct charged to constitute a crime because she was coerced to do so by the use of, or threat to use, unlawful force against her person or the person of another, which a person of reasonable firmness would have been unable to resist. See DRESSLER, *supra* note 125, at 270-71.

<sup>319</sup> See Erickson, *supra* note 209, at 202. The question then becomes what can the mother rely on in the absence of an express and immediate threat? Does the statement, "If you interfere, I will kill you" constitute a threat? Depending on whether the court is looking at this one isolated incident or the whole spectrum of violence, the statement may not be viewed as a "threat," or at least not an immediate threat.

<sup>320</sup> The defense is unavailable if the actor succumbed to pressure that would not move a person of reasonable firmness. See LAFAVE & SCOTT, *supra* note 38, at 432. Similarly, if the actor places herself recklessly or negligently in a situation where she will be subjected to duress, the defense will be unavailable to her. *Id.* at 433.

weak woman easily pressured by her intimate partner or that she did not recklessly place herself in a situation where she would be subjected to coercion or duress.<sup>321</sup>

## 2. *Physical Impossibility*

Reliance on a "physically capable" provision presents a much more difficult case for a mother who has been battered if "physically capable" is defined in the objective sense. That is, can a human perform the act in question? What does it mean that someone is physically capable of performing an act? Assume that an object falls on a child (an independent process) in the presence of the child's mother. Assume further that the object weighs 300 pounds. The mother can lift only 150 pounds. If she does not try to lift the object, can we say that she has failed to protect the child? Such a result would seem unjust since we know she was not physically capable of doing so, even though there is someone alive in the universe who could do so.<sup>322</sup> There is no logical reason why physical impossibility could not be expanded to accommodate a more subjective standard.<sup>323</sup> This is an area where feminist legal theorists may be able to continue to press for consideration of women within the normative universe.

At a different level, we may also ask whether it is possible that a history of abuse led the mother to believe that it is improbable that any intervention by her would protect the child. Therefore she would conclude that it is impossible to protect the child. Evidence demonstrating the real and substantial fear that the batterer generates for the mother should be admissible. The common expectation may be that all she has to do in order to satisfy her duty is pick up the phone and call the police.<sup>324</sup>

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<sup>321</sup> Battered women who kill an intimate partner and try to avail themselves of the traditional justification defense, self defense, encounter parallel difficulties. They must overcome the assumptions that they were weak women or that they could have just left the violent home. See Mahoney, *supra* note 83, at 61-63.

<sup>322</sup> We shall assume for these purposes that there is no one else to whom she can turn for assistance and that she did not cause the object to fall on the child.

<sup>323</sup> See Erickson, *supra* note 209, at 205. Erickson states that it is unclear what a woman would need to establish in order to raise a physical impossibility defense successfully. Would she have to show the batterer was armed and she was not? That he was 6'2" and drunk and she is 5'4"? These questions are difficult in part because no serious scholarly attention has been devoted to them by the criminal law theorists.

<sup>324</sup> This is similar to the expectation that a battered woman can just leave to escape further abuse. See Mahoney, *supra* note 83, at 64.

Courts scour the evidence looking for any conceivable opportunities when the mother "could have gotten help" as opposed to focusing on the many instances where the futility of seeking help was demonstrated. Yet the battered mother's options are rarely as simple as "picking up the phone."<sup>325</sup> Her fear can affect her ability to feel safe enough to "pick up the phone."

*People v. Bernard*<sup>326</sup> provides an interesting look at this issue. Bernard's two children had been sexually abused by her boyfriend. She was charged and convicted of aggravated battery.<sup>327</sup> The *Bernard* court noted in its opinion that the boyfriend was 6'3," weighed 225 pounds, and was a bouncer at a bar.<sup>328</sup> The court emphasized the size of the defendant to show that he was capable of inflicting great harm on the children and that because of his size the mother should have known of the risk of injury to the children.<sup>329</sup> The opinion contains no similar physical description of the mother. Perhaps the mother's size might help explain why she did not intervene or why actions she did take were not effective intervention. A witness testified that on one occasion the mother asked the abuser if the child could be taken to the doctor, but he refused to allow it.<sup>330</sup> As we have seen elsewhere, the *Bernard* court conflated the mother's duty to act with an unspoken requirement that she save the child from death. Thus, small attempts undertaken by the mother were seen as ineffective and therefore equivalent to non-action. This is yet another instance where gendered implications of a criminal defense have not been explored or developed.

### 3. Risk of Injury to the Mother

Related to the issue of possibility is the question of the amount of inconvenience, expense and risk that the rescuer must undergo in order to fulfill her duty to act. A parent must doubtlessly expose herself to a higher risk to save her child than does a person who has no relationship to the child.<sup>331</sup> At the

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<sup>325</sup> The mother may be imprisoned within the home, or denied access to telephone and neighbors. See narratives *infra* Part IV.

<sup>326</sup> 500 N.E.2d 1074 (1986).

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 1076.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.* at 1075.

<sup>331</sup> LAFAYE & SCOTT, *supra* note 38, at 209.

same time there has been a clear recognition in the law that a parent is not required to risk his or her own life or be subjected to serious bodily injury.<sup>332</sup> However, what factual situations may circumscribe the responsibility? Requiring that the mother act to protect her child is quite different from requiring that the mother act to save her child.<sup>333</sup> Judicial opinions offer little guidance for distinguishing between the two, and no analysis can be found on this point in the states where failure to protect statutes have been enacted. In the vacuum created by the lack of guidance, women who are in battering relationships are finding that no steps they take are found to be "reasonably possible" under the circumstances. This is consistent with the difficulties women and mothers face when they attempt to have the stories of the violence they experience heard in judicial forums. The efforts of these women to protect themselves and their children are often heroic, but receive little credence when evaluated by the courts and compared with the violence of the batterer towards the child.<sup>334</sup>

#### IV. BATTERING AND DETERMINATIONS OF REASONABLENESS

*I pray that everyone who ever knew and will know me will forgive me for not being a strong person.*<sup>335</sup>

Mothers who are battered confront the same thorny issue as battered women who kill: can their behavior be seen as reason-

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<sup>332</sup> See *State v. Walden*, 293 S.E.2d 780 (N.C. 1982) (despite upholding the conviction of a woman whose boyfriend killed her child, the court rejected the notion that parents have the duty to place their own lives at risk).

<sup>333</sup> See *FLETCHER*, *supra* note 220, at 626 (discussing the grammatical complications of trying to use action words of commission in the failure to act context). To prohibit someone from killing is very different from commanding them to preserve a life. *Id.* at 583. See also *Hughes*, *supra* note 228, at 599.

<sup>334</sup> See *Enos*, *supra* note 120, at 242-43. *Enos* gives the example of a Minnesota case of aiding and abetting a rape. Despite the fact that the mother sought help from Minnesota Police and the Child Protective Services and attempted to obtain a civil order of protection against the abuser, she was convicted of aiding and abetting her daughter's rape by the abuser. But see *State v. Mott*, 901 P.2d 1221 (Ariz. Ct. App. 1995) (holding that trial court improperly excluded testimony regarding BWS and its impact on the mother's ability to make decisions to protect her child); *Barrett v. State*, 675 N.E.2d 1112 (Ind. Ct. App. 1996) (reversing trial court ruling that BWS evidence only was admissible for self defense but was not relevant when the victim, the child, was a third party).

<sup>335</sup> *Folks*, *supra* note 2, at 1B (quoting Pauline's letter).

able?<sup>336</sup> The issue of reasonableness of the battered mother's behavior is one for the jury. The fact-finder's wide latitude in these cases highlights the need and importance of fashioning an appropriate defense which will accurately portray the mother's circumstances for the jury.<sup>337</sup> However, what the jury hears is shaped by the trial judge through procedural<sup>338</sup> and evidentiary rulings,<sup>339</sup> as well as by his instructions to the jury.<sup>340</sup> The trial court is guided, as are jurors, by the cultural and stereotypical view of mother as the selfless protector of the child.<sup>341</sup> Adher-

<sup>336</sup> See Schneider, *Resistance*, *supra* note 91, at 499-501 (noting all the conflicting views of whether women's behavior should be viewed as reasonable).

<sup>337</sup> Schneider states that for battered women who kill the issue of reasonableness has a critical impact on the choice of defense. *Id.* at 501. To the extent defense counsel, due to stereotypical imagery of battered women cannot conceive of the woman's actions as reasonable, it is unlikely that counsel will suggest a defense which requires developing and presenting evidence of reasonableness. *Id.*

<sup>338</sup> See Maguigan, *supra* note 125, at 439. Maguigan enumerates four procedural inquiries made by the court which can have an impact on a battered woman's ability to have the jury consider self defense: (1) how much evidence must the woman present in order to be entitled to the instruction; (2) what is the source of her evidence; (3) what is the scope of the evidence; and (4) whether the evidence is of sufficient quality. *Id.* She states that judges vested with the power to make full credibility decisions can become obstacles to the woman's ability to have the jury receive the self-defense instruction. *Id.*

<sup>339</sup> *Id.* at 421-31, 451-58 (discussion of impact of evidentiary rulings, particularly as to the batterer's propensity for violence and the use of expert witnesses). See Parrish, *supra* note 125; see also Mosteller, *supra* note 317, at 470-71 & n.33.

<sup>340</sup> See *State v. Rundle*, 500 N.W.2d 916 (Wis. 1993). Rundle objected to one of the instructions given on the grounds that it allowed jurors to find guilt without weighing his individual intent. The instruction as read by the court provided: "If you are satisfied beyond a reasonable doubt from the evidence in this case that *either* defendant, as a party to the crime, intentionally caused bodily harm to [the child] . . . you should find the defendant guilty." *Id.* at 989 n5 (emphasis added). The court did not reach the issue as it reversed on other grounds.

During Pauline's charging conference, the state requested an instruction that because Pauline was the natural mother of Christina she had a heightened duty. See TR, *supra* note 9, at 2534-37. The court denied the instruction, yet in its closing, the state referred repeatedly to the fact that Pauline was Christina's natural mother and should have protected her like any natural mother would have. See *id.* at 2624, 2629-30. Trial counsel failed to object during the closing and the court took no action *sua sponte*. In effect, the state got the instruction it wanted.

It is hard to evaluate what effect the comments had on the jurors. However, once deliberations began the jurors asked only four questions. Two of the questions related to instructions on the murder charge including one where they inquired if "standing by and doing nothing" could be considered causing bodily harm. See Appellant's Initial Brief at 21, *Zile* (No. 95-2252); Stephanie Smith, *Zile Jury Struggles to Clarify Issues, Jury Queries Judge About Accomplice Theory*, FLA. SUN-SENTINEL, Apr. 11, 1995, at 1B.

<sup>341</sup> See generally Roberts, *supra* note 52; Schneider, *Resistance*, *supra* note 91. See also Schafran, *supra* note 276 (detailing the reactions of some male judges to domestic vio-

ence to stereotypical views can impede the court's ability to evaluate probative evidence on the issue of reasonableness.<sup>342</sup>

The inequitable results that develop are demonstrated in *Johnson v. Florida*.<sup>343</sup> In *Johnson*, the mother's boyfriend killed her child. The mother entered a plea of *nolo contendere* to the offense of manslaughter.<sup>344</sup> Yet there was ample evidence that the mother was unable to prevent the abuse, and that she herself had a loving and protective relationship with the child.<sup>345</sup> At sentencing, the state's attorney took the position that Johnson was not similarly situated to the boyfriend and that there was no evidence in the record to indicate that the mother helped perpetuate the abuse or desired the death of the child.<sup>346</sup> Yet, the sentencing judge not only ignored the state's advocacy, but departed from recommended guidelines and sentenced the mother to the maximum time permitted by law.<sup>347</sup> In *Johnson*, where both the known facts and the support of the state were

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lence which skews justice and endangers women). Such sympathies were certainly used by the prosecutor in the *Zile* case. The jurors were urged to speculate on what it was like for Christina the day she died. See Appellant's Initial Brief at 139, *Zile* (No. 95-2252). The state commented that Christina did not have the opportunity to have a judge and a lawyer protecting her as Pauline did. *Id.* at 138.

<sup>342</sup> Similar problems occurred (and to some extent still occur) at the trial level when abused women seek to introduce prior beatings as evidence that their behavior at the time of the killing of an abusive spouse was reasonable. For many years, courts excluded testimony that demonstrated years of ongoing abuse contributed to a sense of imminent death or serious bodily injury. This prevented juries from evaluating the testimony which might have established the reasonableness of the women's actions. See Maguigan, *supra* note 125, at 415; see also *State v. Norman*, 378 S.E.2d 8 (N.C. 1989). Because a court cannot envision a situation where a woman can be in imminent fear of death or serious bodily injury when the spouse is asleep, it excludes, as a matter of law, introduction of history of abuse on the issue of reasonableness. See also Henderson, *supra* note 274, at 480-81 (indicating the difficulty societal attitudes towards sexual violence in allowing children's voices to be heard in sexual abuse cases).

<sup>343</sup> 508 So. 2d 443 (Fla. Dist. Ct. App. 1987).

<sup>344</sup> *Nolo contendere* is a plea which may be entered, with leave of the court, to a criminal complaint or indictment by which the defendant does not admit or deny the charges, though a fine or sentence may be imposed pursuant to it. A plea of *nolo contendere* may not be used against the defendant in a civil action based upon the same acts.

<sup>345</sup> *Id.* at 444 (Zehmer, J., dissenting).

<sup>346</sup> *Id.* (Zehmer, J., dissenting).

<sup>347</sup> The recommended sentencing range was from three to seven years. *Id.* at 445 (Zehmer, J., dissenting). The trial judge sentenced the mother to 15 years in prison. In making its ruling the court stated that the mother either administered the fatal beating or allowed it to be administered, despite the fact that no evidence suggested she had done so. The court further stated that the mother had abandoned or abdicated the care, nurturance and protection of her child—again, despite the evidence in the record to the contrary. *Id.* at 446 (Zehmer, J., dissenting).

behind the mother, she was still penalized by the trial court because she did not "save" her child.

In *State v. Walden*, as well, there was conflicting testimony as to whether the children were beaten by the mother's current boyfriend or the children's father.<sup>348</sup> There was testimony that on an occasion when the mother intervened she was struck and her face was beaten and bruised.<sup>349</sup> Yet, in the court's opinion that fact was not connected to the fact that the children were beaten in her presence. As represented, the mother was made to appear as if she took no reasonable steps to prevent the abuse.<sup>350</sup>

In a review of the cases of women charged with failure to protect, no women were excused from liability.<sup>351</sup> None of these cases explain what behavior by the mothers might constitute "every step reasonably possible." Can society envision and accept a situation in which the mother does not offer her own life to save that of her child? Case law indicates it is difficult for the court to reach that conclusion.<sup>352</sup> Legal scholars must begin to describe and explain the reactions of the mothers as being reasoned actions. Though that may go against the grain of the

<sup>348</sup> *State v. Walden*, 293 S.E.2d 780 (N.C. 1982). The children testified that the boyfriend beat them. *Id.* at 783. In contrast, Walden's father testified that the children's father beat them. *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> Evaluation of steps taken by mothers in these situations follows a pattern of trivialization by the courts—a pattern also seen in cases when women were battered. See, e.g., *People v. Bernard*, 500 N.E.2d 1074 (Ill. App. Ct. 1986), where testimony indicated that the mother asked the abuser's permission to seek medical attention and borrowed money from neighbors to get to the hospital. Her actions were not viewed as active steps taken on behalf of the children. This pattern was also pointed out by Natalie Loder Clark in *Crime Begins At Home: Let's Stop Punishing Victims and Perpetrating Violence*, 28 WM. & MARY L. REV. 263, 289 (1987). Clark provides examples of lawyers' characterizing violent episodes in the home as trivial events, so that the women's responses will seem unreasonable and disproportionate. *Id.* Clark also points out that when the victim does not leave the home the court views her action as the equivalent of consenting to the violence. *Id.* at 288. Similarly, a mother's inability to extricate her children from the hands of an abuser is interpreted as her consent to ongoing abuse. See Enos, *supra* note 120, at 240-57.

<sup>351</sup> See, e.g., *United States v. Webb*, 747 F.2d 278 (5th Cir. 1984); *Boone v. State*, 668 S.W.2d 17 (Ark. 1984); *Johnson v. State*, 508 So. 2d 443 (Fl. Dist. Ct. App. 1987); *People v. Staniel*, 606 N.E.2d 1201 (Ill. 1992); *People v. Novy*, 597 N.E.2d 273 (Ill. App. Ct. 1992); *People v. Bernard*, 500 N.E.2d 1074 (Ill. App. Ct. 1986).

<sup>352</sup> Indeed, a similar observation is made by Schneider in reference to battered women. See Schneider, *Resistance*, *supra* note 91, at 504-05 (noting that both judges and legal scholars manifest discomfort with the notion that battered women who kill can claim their actions are "objectively" reasonable).

"child savers," the approach is consistent with a sound criminal law theory. Consider the following narrative:

I'm here because my husband wanted to kill me, and since he couldn't, he killed my baby instead. He knows that I'd rather be dead than have my child dead, so this worked out better for him. I have lost all of my children now, and it will be a slow death for as long as I live knowing that he took the one thing I've ever had as my own. It started one afternoon when I was sleeping in a very deep sleep because he kept me up for two days in a row. I hadn't been out of his sight for almost three years. Can you imagine that? He locked me in when he went out, and mostly we stayed home. The beatings were a regular part of our life, so when he called me, I was trained to jump up and run to him. This day he told me that our son had fallen and hit his head on the edge of the table. I took one look at him and knew that he hit him with something, and that my son was in serious trouble. He died waiting in the same emergency room that I had been in two nights before after my husband tried to kill me. He wouldn't even let me hold my son as he died. I don't remember what happened after that except that I was screaming that my husband killed my son and that the hospital let him die. My husband was arrested there, and four days later at my son's funeral, I was arrested and brought to Riker's Island. He told the detectives that I hit my son on the head with a hammer that the police found in the trash-can in our kitchen. They said both our fingerprints were on it. Maybe they were, but I did not kill my son! Now he has taken everything from me. I've spent my life running from one hit to another. I've been beaten up since I've been here too . . . . Everyone hates a woman who sleeps while her child is being killed. The only reason I don't hate myself is because I don't even exist anymore after twelve years of being abused.<sup>353</sup>

Or, consider another version of violence:

My husband started abusing my son when I wouldn't have sex. When he started hurting my son, I started trying to fight back and protect my son, but that only made things worse. He beat both of us worse than ever. He told me he would call my welfare worker and say I was the one hurting my son if I told the police. He sounded really convincing, and I believed him. He did things like burn my son with hot water in the bathtub while I was tied up on the bed. I lied to the neighbors sometimes, but I think they knew. . . . My welfare was cut off because I missed my face-to-face [meeting] because I was so badly beaten. . . . One day we were all hungry, and my son was crying. He beat him so badly I was really scared. He tied him up and made me have sex while my son was under the bed. When it was over, I rushed to get my son, but he wasn't breathing. He screamed, "Look what you did, you killed him." That's all I remember. I was crying and screaming for what seemed like a day. . . . When I threat-

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<sup>353</sup> See RICHIE, *supra* note 63, at 108 (the narrative of "Carolyn" who was arrested for first degree murder in the death of her child); see also Roberts, *supra* note 52, at 121-25 (vulnerability of other family members to be used as hostages by the abuser).



ened to tell the truth he went to my grandmother's house and beat her almost to death as a way to keep me quiet . . . .<sup>354</sup>

The plight of these women and their children is almost too painful to read. Yet, the narratives illustrate several points: (1) violence towards the child may be unexpected and reflect an escalation in violence previously directed only at the mother—this raises a question of whether the mother knew or should have known that her child was at risk; (2) the mothers are not necessarily passive observers of their children's death—in some cases they may be physically unable to help; and (3) above all else, given the abuser's propensity to violence, the mother's behavior was reasonable. By reasonable, I mean that the mother, based on the information available to her at the time, can form a reasonable belief that further intervention would create the risk of death or serious bodily injury to herself or increase the risk of harm to her child. If her determination is correct, then she should not be held liable for the death of the child. Her action or inaction should be seen as justifiable.<sup>355</sup> A reading of the narratives of both women requires neither an argument for diminished capacity nor one of coercion or duress, but can and should fit squarely within the accepted standards of reasonable behavior in a jurisdiction that uses a subjective or hybrid standard of reasonableness.<sup>356</sup> In a state with a purely objective standard of reasonableness, battered mothers, like other bat-

<sup>354</sup> RICHIE, *supra* note 63, at 106-07 (the narrative of Sebina, who was arrested for second degree murder for failure to protect).

<sup>355</sup> There is considerable debate as to whether acts committed by a battered woman can be justifiable. Schneider, *Resistance*, *supra* note 91, and Maguigan, *supra* note 125, argue, for example, that in some instances when a battered woman kills her spouse, her actions are justifiable under standard self-defense claims. George Fletcher argues that the acts are only excusable. George P. Fletcher, *Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 553 (1996). See also Claire Finkelstein, *Self-Defense as a Rational Excuse*, 57 U. PITT. L. REV. 621 (1996). However Fletcher's and Finkelstein's views are challenged as misunderstanding the problem. See, e.g., Benjamin C. Zipursky, *Self-Defense, Domination, and the Social Contract*, 57 U. PITT. L. REV. 579 (1996); David Gauthier, *Self-Defense and the Requirement of Imminence: Comments on George Fletcher's Domination in the Theory of Justification and Excuse*, 57 U. PITT. L. REV. 615 (1996).

<sup>356</sup> This fits in with Leavens' notion of causality occurring on a continuum rather than being judged from a single isolated event. Leavens, *supra* note 223, at 584. If our picture of time, for example, is the moment that Carolyn realizes her child is hurt, her risk does not appear that great. If our window, however, stretches back farther to the years of being under constant surveillance, we can argue that Carolyn's choice was reasonable.

tered women, may find it difficult to raise issues of abuse in their own defense.<sup>357</sup>

Courts have characterized the behavior of battered mothers as being unreasonable because allegedly the mothers "did nothing" when their children were killed. However, there are at least three ways—besides actually doing nothing—in which a mother can be viewed as "doing nothing." In the first narrative the mother "did nothing" because she was not present during the abuse and had no prior notice of it. The second narrative is that of a mother who "did nothing" because she knew of the abuse but appeared unable to do anything about it. The third potential category of mothers who "do nothing" are those who have attempted to do something to protect their children but were unsuccessful. The courts remain unable to distinguish between a mother who truthfully does nothing because she does not care and the three types of mothers identified here. Rarely is there an effort to distinguish among them.<sup>358</sup> On those occasions where a court does recognize that the mother made an effort, it frequently trivializes the measures undertaken by the mother.<sup>359</sup> Therefore, for the mother there can be no set of facts upon which she can successfully argue that further action placed her at risk of death or serious bodily injury.

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<sup>357</sup> See Maguigan, *supra* note 125, at 424-25 (showing that most states use either a subjective standard or a standard incorporating both subjective and objective components). In those states using a purely objective standard, particularly those combining objectivity with a requirement of immediate danger, battered women seem to have a more difficult time getting evidence introduced. *Id.* at 413 n.116.

<sup>358</sup> See Enos, *supra* note 120, at 240-54 (describing the approaches of various courts); see also *People v. Bernard*, 500 N.E.2d 1074 (Ill. App. Ct. 1986) (providing an example of the way the courts have commonly obscured the difference between the two). The *Bernard* court concluded the mother did not ask for help from a neighbor who was present or from a motel maid who interacted with mother. *Id.* at 1078. Yet, the testimony cited by the court contradicted this assertion. The neighbor who witnessed some of the acts of violence, without notifying the police himself, testified that the mother was struck in the face and thrown against a wall on one occasion when she intervened. *Id.* at 1075. And though the maid said the mother never told her of the abuse, she also testified that the mother asked for a ride to her place of employment and stated that the mother hoped to be able to get from there to the hospital so that her child could receive treatment. *Id.* at 1076. This is not the same as doing nothing. The court's analysis correlates to the myths and assumptions outlined by Enos, *supra* note 120, at 240-57 (indicating courts endorse myth that friends and relatives are willing to give the mother assistance).

<sup>359</sup> Enos, *supra* note 120, at 258-60 (discussing judicial assumptions that the mothers' fears are unjustified, unbelievable and exaggerated and that the abuser does not pose grave danger to the mothers).

The strength of the cultural belief that mothers should go to whatever lengths are required to save a child, including death, are echoed in the words of the corrections officer who prepared Pauline Zile's pre-sentence report. The corrections officer stated, "[i]n my opinion it is atrocious for a mother not to risk her life—everything, to save her child."<sup>360</sup> When we require the mother in an abusive relationship to rescue the child at any cost, we deprive her of the right to make a reasonableness assessment, a right given to any other defendant faced with potentially life threatening choices.<sup>361</sup>

Any effort to portray the battered mother's inability to save the life of her child as reasonable will meet stiff resistance from the public. The resistance was and continues to be demonstrated in the public's unwillingness to view as reasonable the defensive behavior of women trapped in violent relationships.<sup>362</sup> Studies of juror attitudes toward battered women underscore the difficulty that jurors have in applying a general standard of reasonableness to women.<sup>363</sup> This resistance led some feminist

<sup>360</sup> Presentence Report, *supra* note 216, at 12. The officer also stated that the only mitigating factor she found on Pauline's behalf was that she had no prior criminal involvement. It was the officer's opinion that the crime was "heinous, atrocious and cruel" because the victim was her daughter. *Id.* at 11. The officer recommended that Pauline be put to death. The ongoing abuse and Pauline's references of being abused herself were trivialized in the officer's report and, despite some clear common indicators of abuse such as the controlling nature of John's behavior, the officer interpreted Pauline's knowledge of the abuse as consent to it. *See id.* at 11-12. *See generally* Clark, *supra* note 350, at 288-89.

<sup>361</sup> That would place a mother above and beyond what black letter law calls for in omission cases. *See supra* Part III. Even in civil law jurisdictions, where bystanders have an affirmative obligation to rescue, no country requires the rescuer, even if related, to risk death or serious injury. Yet, this is exactly what we expect and require from mothers.

<sup>362</sup> But see Mosteller, *supra* note 317, at 480 n.60, who cautions that even if battered women's conduct was seen as common or frequent, its commonality would not require a finding that the conduct was legally reasonable. The law incorporates elements of morality into the legal standard such that common conduct may still violate moral principles. *Id.* It appears that the unspoken moral value for the battered mother is that she should forfeit her own life for her child's. The question then, is whether the law should support that value? I do not believe it should.

<sup>363</sup> *See* Alana Bowman, *A Matter of Justice: Overcoming Juror Bias in Prosecutions of Battered Women Through Expert Witness Testimony of the Common Experiences of Battered Women*, 2 S. CAL. REV. L. & WOMEN'S STUD. 219 (1992); Edith Green et al., *Jurors' Knowledge of Battered Women*, 4 J. FAM. VIOLENCE 105 (1989); Charles P. Ewing & Moss Aubrey, *Battered Woman and Public Opinion: Some Realities About the Myths*, 2 J. FAM. VIOLENCE 257 (1987). "Studies show that when no expert testimony on battered women's syndrome is presented," male jurors are less likely than female jurors to believe the battered female. Lorrie L. Luellig, *Why J.E.B. v. T.B. will Fail to Advance Equality: A Call for Dis-*

scholars to argue that a separate standard of reasonableness based on women's experiences should be created.<sup>364</sup> Though some courts entertained the argument, most jurisdictions have rejected a separate standard.<sup>365</sup> The tension between the arguments for a single standard of reasonableness and a separate standard continue because the law has not yet accepted the normality of violence within women's lives. By arguing for a single reasonableness standard that includes the experiences of mothers living within violent homes, we can continue to pressure the law to account for the experiences of women in the legal mainstream. This position avoids the argument that battered women seek deferential consideration under the law.<sup>366</sup>

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*crimination in Jury Selection*, 10 WIS. WOMEN'S L.J. 403, 426 (1995). Expert testimony is often needed to clarify and explain the psychological and societal aspects of a battering relationship because they are not within the understanding of the average juror. See Lisa A. Linsky, *Use of Domestic Violence History Evidence in the Criminal Prosecution: A Common Sense Approach*, 16 PACE L. REV. 73, 83 (1995).

<sup>364</sup> Some scholars have proposed a "reasonable battered woman" standard, see Kit Kinports, *Defending Battered Women's Self-Defense Claims*, 67 OR. L. REV. 393, 450-54 (1988), as well as a "reasonable woman" standard as advocated by Phyllis L. Crocker, *The Meaning of Equality for Battered Women Who Kill Men in Self-Defense*, 8 HARV. WOMEN'S L.J. 121, 152 (1985). Other feminist legal scholars have argued against the adoption of a separate standard of reasonableness for women and critique the scholars who propose them for suggesting new stereotypes of women while at the same time narrowing the type of woman who might be able to take advantage of such a standard. See, e.g., Maguigan, *supra* note 125, at 442-48 (stating there is no need for a separate standard; all that is needed is for the trial judges to actually use the law that applies).

<sup>365</sup> Kansas, Wisconsin and Missouri have constructed "reasonable battered woman" or "reasonably prudent battered woman" standards. See Maguigan, *supra* note 125, at 411 n.111. Pennsylvania is an example of a state that experimented with alternative standards of reasonableness but ultimately rejected the idea that there was a need for one. *Id.*

<sup>366</sup> Mosteller argues that the acceptance of BWS rests on shaky scientific ground. Mosteller, *supra* note 317, at 487-90. He notes the imbalance that existed in the law regarding the experiences of battered women and believes that political forces created evidentiary rule changes which have restructured the law of self-defense. While he believes the changes may be necessary because of our society's political denial of violence against women, he states that the introduction of testimony regarding the syndrome places the woman in a more favorable position. *Id.* But see Maguigan, *supra* note 125, at 451-58 (stating that statistics indicate, in states where changes had been made, the admission of BWS evidence did not guarantee acquittal, nor should it).

## V. A COHESIVE APPROACH TO CHANGE

*[Y]ou don't have to be "soft on crime" or sympathetic . . . to find many questions about the case troublingly [sic] unresolved. For example: Is first degree murder too excessive a verdict for a woman who prosecutors never claimed struck her daughter at all?*<sup>367</sup>

*I hope this will help other mothers come forward if their children are being beaten or punished to a bad extent.*<sup>368</sup>

A complex web of inadequately developed theoretical doctrine, judicial misinterpretation and a political process biased against the assertion of women's legal rights impedes the ability of battered mothers to defend themselves against murder charges which are based on failure to protect statutes. The approach to eliminating those impediments must also be complex. Problem solving must occur across all three areas—changes in one area only will be futile.

## A. RE-THINKING THE THEORETICAL DOCTRINE

As I have discussed, there are several areas of theoretical criminal law doctrine that need to be re-examined with an eye towards evaluating whether the underlying principles exclude women's experiences from normative consideration. The reasonable person standard is one such area where the scholarly work is already in progress. The difficulty of coming to terms with an appropriate standard of reasonableness has much to do with our acceptance of vague notions of moral consensus. Everyone agrees that it guides the development of theoretical principles, but no one has yet to offer a satisfactory explanation of how the experiences of women, particularly those in violent homes, are incorporated into the moral consensus. We need to give more careful attention to whether society can or should continue to treat violence in the home as behavior that is rare and unusual. There is no easy answer apparent. Statistics tell us that violence is present in a significant percentage of our families. Yet, what moral and political repercussions do we as a society experience when we accept violence as normative behavior?

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<sup>367</sup> Editorial, *Zile Deserves Tough Punishment, Yet Troubling Questions Linger*, FLA. SUN-SENTINEL, June 9, 1995, at 20A (presenting a series of troubling questions about the willingness to find Pauline Zile guilty of first degree murder).

<sup>368</sup> Folks, *supra* note 2, at 1B (conclusion of Pauline's list of regrets).

We must continue to challenge the notion of moral consensus to ensure that the diverse experiences of all women, not just those women who fit the stereotype of the good woman/mother, are included.<sup>369</sup>

In the area of omissions theory specifically, we need to re-visit what we mean by "failure to protect." There needs to be clarification as to whether the doctrine requires that the mother engage in some conduct aimed at protecting the child or whether we actually mean that the mother has a duty to save the child. The two concepts are significantly different but are being used interchangeably by courts and legislatures. The conflation of the two terms puts the mother in a tenuous legal position and permits the courts to look at the death of the child as conclusive proof of the mother's failure to protect. In clarifying our understanding of omissions, we need to ask whether our exploration of the *mens rea* element is complete. Would adding a third inquiry which explored what effect the mother believed her actions would have be helpful to our understanding of whether she actually responded to her duty to act? Finally, with regard to omissions, legal theorists must engage in a more thorough analysis of the definition of physical impossibility. We can use the paradigm of the battered mother as a vehicle to explore whether we can or should conceive physical impossibility as a more flexible term rather the rigid one employed now. A more flexible concept of physical impossibility can contribute to opening the possibilities of defense for these mothers.

We need to continue to critique the limitations in the theory of duress and coercion to determine whether the elements of the defense, or our normative interpretations, result in a gendered denial of availability of the defense, particularly for women living in violent homes. Our understanding of the effects of violence and threats of violence upon the mental state of a battered woman should be used to help evaluate whether a battered mother's fear of injury to herself or fear of heightened injury to her child can legitimately fit within the rubric of duress. Further, an integrated approach to the discussion of rea-

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<sup>369</sup> Feminist theorists must be careful to learn from the discussion of which standards should be used to evaluate the behavior of battered women who kill their significant others. A reasonableness standard that is narrowly revised to include only a stereotypic view of good mothers, or an essentialized battered mother, is little improvement over the status quo.

sonableness may help us to understand that a battered mother has not intentionally or recklessly placed herself and her children in a violent home where she would be subjected to duress.

#### B. JUDICIAL MISINTERPRETATION OF LAW

Judges need to be better educated on the connection between violence against the mother, violence against her child, and her ability both to see opportunities to protect and to make choices to protect. Judges must begin to differentiate among the many types of battered mothers who appear before them. To date, judicial recognition of the difference between a mother who actually does nothing and a mother who is either unaware of her child's danger or one engages in coping strategies is sorely lacking. Judges must be sensitized to the fact that cultural bias may compel them to view these different mothers as one in the same.

We must continue to press judges to apply established rules of evidence to battered mothers in a principled way. Rules governing the admissibility of expert testimony should be as applicable to battered mothers as they are to battered women who kill their spouses. Too few trial courts have recognized the disparity created when a mother is denied the right to present expert testimony as to her mental state at the time her child is killed. Similarly, evidentiary rules governing testimony of the abuser's history of violence need to be applied uniformly, even if that violence is directed only at the mother. Courts cannot continue to refuse to recognize that a battered mother cannot shrug off her own abuse simply because the batterer also abuses her child. The evidence of the batterer's history of abuse is relevant to her mental state at the time the child is killed.

#### C. POLITICAL ACTION: MONITORING THE DISCRETION EXERCISED BY THE STATE IN CHARGING

In the 1970s, grass roots feminist groups stepped forward to name the violence that women were experiencing, calling it "date rape" and "woman battering." Their efforts profoundly affected our thinking about criminal law principles and raised society's awareness about violence against women. Unfortunately, battered mothers do not engender sympathetic responses from the feminist community or from the public. Nonetheless, political action is an appropriate tool to use to

help secure these women's right to present a defense. At the most basic level, the political process can be used to determine the magnitude of the problem. We must find ways to make these women visible within the criminal justice system. Their present invisibility keeps us from tackling the difficult questions concerning the morality of a battered mother's behavior.<sup>370</sup>

We need to do better monitoring of state prosecutors to encourage them to exercise appropriate discretion in cases. At present there is no body of case law where fathers or step-fathers have been charged with failure to protect children actively abused by mothers.<sup>371</sup> Cases against fathers are few and far apart, indicating that prosecutorial discretion is exercised more frequently on behalf of fathers than it is on mothers.<sup>372</sup> And where children have been abused by mothers or step-mothers, no public outcry for prosecution of fathers has occurred.<sup>373</sup> As we be-

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<sup>370</sup> The Violence Against Women Act authorizes the federal government to conduct studies to determine the prevalence of domestic violence in our country. See 42 U.S.C. § 13961. Through the VAWA, studies can be funded to evaluate the magnitude of the problem. As of the spring of 1996, the Battered Women's Clemency Project in Florida identified 37 women whose first, second or third degree murder charges involved a victim who was a child. Not all of these women are battered mothers, but the Project hoped to investigate how many of them were battered. Unfortunately, inadequate staffing due to lack of funds prevented the project from being completed.

<sup>371</sup> See *supra* note 68.

<sup>372</sup> For example, no cases of first degree felony murder based on a failure to protect theory have ever been filed in Florida against a father or boyfriend. *Leet v. State*, 595 So. 2d 959 (Fla. Dist. Ct. App. 1991), is the only case located where a boyfriend was charged and convicted. However, he was only charged with third degree felony murder. The court remarked that the state, either accidentally or intentionally, had chosen not to charge him with first degree murder as a principal. *Id.* at 961-62. *Leet's* case is less compelling than those of battered mothers, since he had knowledge of both the child's injuries and the mother's background of abuse. Nor was he subjected to violence at the mother's hand. Conversely, the lesbian lover of a mother who actively killed her child was charged in Florida of first degree felony murder. See *Cardona v. State*, 641 So. 2d 361, 362 (Fla. 1994) (lover pled to second degree felony murder to avoid exposure to death penalty); see also *State v. Rundle*, 500 N.W.2d 916 (Wis. 1993) (where the state chose to prosecute father as an aider and abettor despite the codification of the failure to protect legislation).

<sup>373</sup> In another case tried in the same county at the same time as Pauline Zile's trial, the state charged Jessica Schwarz with the murder of her stepson. See *supra* notes 26-32 and accompanying text. No charges were filed against the father. The apparent inequity in the two cases prompted one reader to question whether a double standard existed in the prosecution of the two cases. See *Double Standard in Murder Charges?*, PALM BEACH POST, Apr. 22, 1995, at 19A. Also, compare the intensity of the outrage against Susan Smith, *supra* note 14, with the reaction to a father in Florida who drowned his two boys by driving them into the Everglades swamp. *Death in the Everglades*, MIAMI HERALD, June 28, 1997, at 1A (after a dispute with his ex-girlfriend, a fa-



come more aware of the real picture of violence within the home, it is clear that women are more likely to be prosecuted even where men are the ones actually harming the children. They will be prosecuted when they are the active abusers and they will be prosecuted as the "passive" abusers. Fathers, step-fathers, boyfriends and other male intimates, on the other hand, will be prosecuted only if they are caught actively abusing. The failure of state prosecutors to exercise their discretion to prosecute male intimates, few of whom are abused, demonstrates that discretion is not being exercised on any principled basis. If evenhanded prosecutions based on the duty of a parent to a child were occurring, there would be a greater number of cases of men being charged with failure to protect. The absence of cases against fathers, step-fathers and boyfriends indicates that prosecutors do not consider men to have the same legal obligation toward children that women have. "Mother only" failure to protect policies, regardless of whether they are official policies or only socially driven policies, help substantiate arguments that criminal law theories have a gender bias incorporated within the way the law is developed and applied.<sup>374</sup> Feminist groups should organize around the issue of selective prosecutions of battered mothers.<sup>375</sup>

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ther drove car with his two sons into the lake and drowned them). The story made first page news only in Miami. A Westlaw search produced less than twenty news articles on the event. Search of WESTLAW, NPPLUS and NPMJ databases (Sept. 1997).

<sup>374</sup> See Nancy S. Erickson & Nadine Taub, *Sex Bias in the Teaching of Criminal Law*, 42 RUTGERS L. REV. 309 (1990).

<sup>375</sup> Although some jurisdictions have suggested that selective prosecution claims based on gender are available and could be successful, *see, e.g.*, *Futernick v. Sumpter Township*, 78 F.3d 1051, 1057 (6th Cir. 1996), others have pointed out the difficulty of such a claim. The prohibition against selective prosecution may be meaningless in practice because courts require proof of discriminatory intent and effect, a burden almost impossible to satisfy. *See, e.g.*, Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997). This may be a frightening prospect for lawyers, particularly when they have been assigned to represent an indigent woman. A challenge of this nature would require research into local prosecutorial practices which might be politically uncomfortable for the lawyer. The complexity of such a challenge highlights the need for lawyers to fully familiarize themselves with the multifaceted ways violence against mothers can influence and shape the mother's defense case. *See Schneider, Resistance, supra* note 91, at 515-17.

## VI. CONCLUSION

*I've tried and worked so hard for my life and my children and now it's ruined.*<sup>576</sup>

We may never know if Pauline Zile was actually a battered mother. There are hints that she fits within the category of women and mothers who are trapped in violent households. Unless she is granted a new trial we may never know the reality of the world within the Zile intimate space. In this regard, Pauline Zile shares the predicament faced by many women before battered women's syndrome was allowed to be presented in their defense. Unlike them, however, Pauline enjoys no public supporters, no group lobbying on behalf of her and other similarly situated women, and no celebrities raising funds in her name. Nor will we hear the expanded tale of her life in any clemency proceeding. The legal future looks bleak for Pauline Zile.

We do know, however, that violence within the home is no longer a secret, and it hasn't been for some time. The plight of women and children trapped in violent homes must not continue to be a low priority item for our society. If the law is truly to offer protection to battered women and their children, it must do so in a way that acknowledges the complexity of the problem. The law cannot pretend to offer a battered woman its shelter, only to put her in a house with no roof and no doors. We cannot acknowledge the dangers to her and then refuse to acknowledge that those very same dangers make it difficult for her children to be safe within their own home. Given society's perception of mothers, not fathers, as all-sacrificing beings, it is difficult to reach the conclusion that there are some circumstances where the law should say it is justifiable or excusable when the mother is unable to protect her child. Yet that is exactly what should happen in the cases of some battered mothers. No one, least of all the battered mothers, would want to say that any child should die at the hands of an abuser within their home. To the extent that the law can properly protect children, it should. However, it does not follow that no mother should be excused when her child dies as a result of violence within the home. This is not to say that all women whose children have been harmed or killed within the home should be excused for

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<sup>576</sup> Folks, *supra* note 2, at 1B (comments of Pauline Zile).

the death of their children at the hands of others. The behavior of mothers runs the full spectrum, from active abuser to actually doing nothing because they may not care (this is true of fathers and boyfriends as well, although the law still does not place priority on their protection of their children). That spectrum includes mothers who are battered and who may not be able to do anything or who will never be able to do enough to save the child. The law has always placed limits on parental duty. It is time for courts and society as a whole to extend the full protection of the law to the battered mothers as well—even if that means acknowledging that the mother can't always protect her children and that she shouldn't always be required to die in deference to her children.