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Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse

Linda J. Panko*

Introduction

Although child abuse has existed for centuries in the United States, an increase in the number of reported incidents in recent years has spurred legislative and judicial response, primarily in the form of "failure-to-protect" laws. Failure-to-protect laws impose liability upon parents, who have a duty to protect their child, when they fail to prevent abuse of the child at the hands of a known offender. Child abuse statutes generally appear in two forms: commission statutes, which are used to convict...
those who actually inflict abuse (active abusers), and omission statutes,\(^5\) which criminalize the passive conduct of those who expose a child to a risk of maltreatment or fail to protect or care for a child when they have an affirmative duty to do so (passive perpetrators).\(^6\) A court’s inquiry when applying an omission statute focuses on whether the passive perpetrator had notice of ongoing abuse and allowed the abuse to continue. A passive perpetrator’s liability for child abuse or homicide, if the abuse is the direct cause of the child’s death, is predicated upon a finding of several factors: (1) a legal duty to protect the child;\(^7\) (2) actual or constructive notice of the foreseeability of abuse; (3) the child’s exposure to abuse; and (4) failure to prevent such abuse. Parents can fulfill their legal duty to protect their children in the face of abuse by reporting the abuse to authorities, removing the child from the abusive situation, or ejecting the abuser from the child’s home. Statutes which criminalize passive conduct aim to protect children’s “best interests” by compelling parents to remove their children from abusive environments.

Several problematic themes can be identified in failure-to-protect case law: an overwhelming number of defendants are women; women defendants frequently are portrayed as “bad mothers;” and courts often fail to address underlying problems of abuse. Failure-to-protect laws have a disparate impact on women because men are more frequently active abusers\(^8\) and women often cannot protect themselves or their children from a male partner’s abuse. Women fail to protect their children for many reasons, including (1) fear of retaliation by the abuser; (2) economic disfigurement to any child . . . commits the offense of aggravated battery of a child.”)


6. See generally John Kleinig, Criminal Liability for Failures to Act, 49 LAW & CONTEMP. PROBS. 161, 169 (1986). Thirty-five states include liability for omissions in their child abuse statutes thereby recognizing the parental duty to care for and protect children. See also People v. Benway, 164 Cal. App. 3d 505, 511 (4th Dist. 1985) (“[W]e conclude all forms of felony child abuse whether ‘assaultive,’ ‘nonassaultive,’ ‘active,’ or ‘passive,’ constitute a ‘single course of conduct with a single purpose’ . . . Thus when death occurs, the act or omission to act merges into the homicide.”) (quoting People v. Burton, 6 Cal. 3d 375, 387 (1971)).

7. “The common law imposes affirmative duties upon persons standing in certain personal relationships to other persons—upon parents to aid their small children. . . . Thus a parent may be guilty of criminal homicide for failure to call a doctor for his sick child, a mother for failure to prevent the fatal beating of her baby by her lover, a husband for failure to aid his imperiled wife. . . . Action may be required to thwart the threatened perils of nature (e.g., to combat sickness, to ward off starvation or the elements); or it may be required to protect against threatened acts by third persons.” W. LAFAYE & A. SCOTT, CRIMINAL LAW § 3.3, 203-04 (2d ed. 1986). Note the gender-specific designation; e.g., “a mother for failure to prevent the fatal beating of her baby . . .”

8. Flynn McRoberts & John Gorman, Child Abuse Often Points to Boyfriend, CHI. TRIB., Mar. 11, 1993 (abuse by boyfriends is far more common than abuse by girlfriends, according to experts).
dependence on the male abuser; (3) emotional dependence on the male abuser, including the phenomenon of "learned helplessness;" and (4) family or legal pressures, such as fear that children will be taken from them, or issues relating to undocumented alien status. With these factors in mind, the inadequacy of the legal system's current approach to the protection of children becomes clear.

It is crucial to understand the causes of recent statutory developments and the legal background from which these developments emerge so as to facilitate the redress of the statutes' failures. Part I of this work examines how failure-to-protect statutes' disparate impact on women is the result of a legal backlash against the growing independence of women. Part II examines the traditional backdrop upon which failure-to-protect laws have been promulgated and interpreted and contrasts this backdrop with the modern trends ignored by these laws. Finally, Part III suggests how legislatures and the judiciary can better serve the best interests of abused children and mothers.

I. Mothers as Passive Perpetrators

A. The Expansion of Parens Patriae and Its Negative Impact on Mothers

The American legal system traditionally has accorded men great deference regarding the upbringing and discipline of children. This deference stems from the fact that for most of history, children, like women, were viewed as chattel with virtually no independent rights of their own. Over time, the privacy and autonomy accorded to men to run their families as they see fit has come to be delicately balanced against societal concerns regarding the welfare of children. Parental obligations have been summarized as follows:

It is the right and duty of parents, under the law of nature as well as the common law and the statutes of many states, to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance, and preservation, including medical attendance, if necessary. An omission to do this is a public wrong which the state, under its police powers, may prevent.

9. It is ironic that passivity, a character trait once generally considered desirable in females, can now form the basis of criminal liability.
10. See, e.g., Belloti v. Baird, 443 U.S. 622, 639 n.18 (1979) (parents have a constitutional right to be free from "undue, adverse interference by the State").
In *Parham v. J.R.*, the Chief Justice Burger articulated the long-held view of the U.S. Supreme Court, that "[o]ur jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over minor children." This traditional, hands-off approach has been encroached upon by the expanding doctrine of *parens patriae*.

Through the use of this doctrine, the state increasingly has intervened in the parent-child relationship. Assessing the recent expansion of *parens patriae*, as designed and implemented by the male-dominated legislature and judiciary, it is clear that the female-headed household is not accorded the same respect and deference as the traditional male-headed household. In light of the increasing commonality of female-headed households, this legal intrusion into family life may be viewed as a form of legal backlash against women who raise children without men. This backlash results from women's defiance of men's desire for dominance — dominance manifested and maintained, *inter alia*, by the traditional structure of male-headed households.

Increasing legal intrusion is evidenced by the recent evolution of failure-to-protect laws and parental-responsibility laws. For instance, failure-to-protect laws have been expanded to hold mothers civilly liable for failing to protect their children from their husband's sexual abuse. In 1993, two daughters who had been sexually abused by their father won a $3.4 million award against both parents. The court ordered their mother to contribute half the amount because she was also found negligent in allowing the abuse to occur. Counsel for the mother's insurance company remarked that "Two years ago, any of this would have been unusual. . . . I'm seeing more and more cases across the country of mothers' being brought in for negligent supervision."
Parental responsibility laws punish parents who fail to control their children's misconduct, operating with the implicit assumption that parents can actually control the behavior of their children. Parental liability statutes originally were intended to make parents responsible for their children's juvenile delinquency, vandalism, and malicious mischief. More recently, however, these laws have become the bases of liability not only for property damage but also for damages resulting from personal injury. It is easy for a parent to be held liable under these statutes. A case in point is that of the single mother who was the first parent arrested under a California anti-gang law which subjects parents to criminal liability for failing "to exercise reasonable care, supervision, protection, and control over their minor child." Initially the police questioned the woman about her fifteen-year-old son's role in a gang rape. Then, upon discovering gang memorabilia in her home, they proceeded to arrest her. The prosecutor claimed that this evidence demonstrated that she "failed as a parent because it showed she knew about her son's gang affiliation, condoned it and may have even participated in his gang." The woman stated that she had tried to discipline her son and had even enrolled him in an alternative-education program that provided classes for high school students expelled for criminal activity or bad conduct. She observed:

16. See, e.g., Joseph P. Shapiro, *When Parents Pay for Their Kids' Sins*, U.S. NEWS & WORLD REP., July 24, 1989, at 26 (listing the following state parental-responsibility laws: Wisconsin and Hawaii: imposing child-support payments when their children have babies; Arkansas: imposing fines on parents when children skip school; Florida: imprisoning if child injures another with a gun left accessible by a parent; Ohio: imposing fines or jail sentences for parents who encourage drug use or whose children are truant; 29 states and the District of Columbia: evicting families from public housing if child uses or sells drugs. See generally Humm, supra note 3.

17. See, e.g., *State v. Hamilton*, 501 A.2d 778, 779 (Del. 1985) (stating that Delaware "statutes and the caselaw imposing liability presume the obvious, that in our culture, the parent of a child, with whom that child resides, has control over the child"), aff'd, 515 A.2d 397 (Del. 1986); Illinois Parental Responsibility Law, "The legislative purpose of this Act is twofold: (1) to compensate innocent victims of juvenile misconduct that is willful or malicious; and, (2) to place upon parents the obligation to control a minor child so as to prevent intentional harm to others"). Ill. Ann. Stat. ch. 740 para. 115/1 (Smith-Hurd 1992). At common law, parents are not liable for the torts of their children, unless the children were acting as agents of the parents or the common law was changed by statute. 67A C.J.S., *Parent & Child*, § 123 (1978).


22. Thompson, supra note 20, at 1.
How could the police know about all the things I have done to try to help my son . . . . [a]ll they see is a bunch of pictures of a party and some writing on the wall. They don’t see everything my family has gone through. . . . [I] considered quitting my job to keep closer watch on my kids, but we could have never made it on welfare . . . . If they put me in jail, then what’s going to happen to my kids? Is that going to solve the problem?23

If convicted, the woman could have been sentenced to a year in prison with a maximum fine of $2,500. The charges were dropped, however, when police discovered that she had attended a parenting course and received a certificate for successful completion, and that she had tried to discipline her son and steer him away from joining a gang. While she may have been an ineffective parent, she had done all that she could under the circumstances.

Referring to the sudden popularity of parental-responsibility laws, one commentator noted that

[t]his trend raises the question of why the state now has decided to involve itself in a domain that has for so long been considered the exclusive province of the family. . . . [T]hese laws arise from frustration with two related problems: (1) the state’s inability to contain juvenile lawlessness, and (2) the welfare of children who are victims of violence and abuse.24

Although correct in his assessment of the initial concerns spurring legislative change, this commentator’s explanations only scratch the surface of these complex issues without examining the crucial correlative, societal factors. While the inherent appeal of justifications such as those articulated by the commentator make the unacceptable results of the application of parental responsibility laws seem more tolerable, one must be cautious in accepting such a simple premise at face value.

Single mothers who raise children without the sanction of male-defined institutions, such as marriage and the nuclear family, threaten these traditional patriarchal strongholds. When a man cohabits with a woman and her children, he is no longer the “property owner.” His status is more akin to that of a passing guest or interloper. The man’s ability to control what was traditionally his property — women and children — is thus frustrated. Women who raise children without men not only reject and refuse to conform with male institutions, they also threaten men by demonstrating their ability to raise children without a father figure.

23. Id.
24. Humm, supra note 3, at 1130.
Fear has been used as a potent weapon in the backlash against autonomous women. In the 1980s, popular news was replete with stories and studies which struck at themes traditionally thought of as significant for women: children and male partners. In her recent book *Backlash: The Undeclared War Against American Women*, Susan Faludi notes, among the copious manifestations of backlash against working mothers, the horror stories promoted by the news media. She describes two feature articles published in *Newsweek* within a two-week period.\(^{25}\) The first article described child abuse in child care centers as “epidemic.” Two weeks later, a second issue carried the cover story, *What Price Day Care?*, complete with a picture of a frightened child sucking his thumb and a contrasting eight-page article entitled, *At Home by Choice*, featuring a former bond seller who traded her career for motherhood and wifedom. Faludi also notes articles in the *New York Times Magazine*, *Savvy*, and *Newsweek* which proclaim that an increasing number of women choose to stay at home rather than pursue careers, though the articles conspicuously lack federal labor statistics to support such assertions.

In contrast to the obvious route taken by “pro-family values” conservatives, the media deluged audiences with studies, stories, statistics, and polls on “the man shortage” and women’s “biological clocks.” The media made sure that women knew more than they ever wanted to know about their slim chances of marriage after age thirty and the many dangers of giving birth after age forty. Feminism was depicted not as a beacon of self-determination, but rather as self-gratification at the expense of children, husbands, family, values and morals, and, as such, a primary reason for the rise in crime, abuse, and angst. Most importantly, the press was

the first to set forth and solve for a mainstream audience the paradox in women’s lives, the paradox that would become so central to the backlash: women have achieved so much yet feel so dissatisfied; it must be feminism’s achievements, not society’s resistance to these partial achievements, that is causing women all this pain.\(^{26}\)

The media had become forthright in placing the “blame on Mame.”

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25. *Susana Faludi, Backlash: The Undeclared War Against American Women* 42 (1991). See also *Husbands No, Babies Yes*, *Newsweek*, July 26, 1993, at 53 (reporting the dramatic increase of single mothers choosing motherhood, accompanied by a statistical chart with a *Where’s Poppa? Not Here* heading and juxtaposed with an article on a sex-abuse trial involving a day-care center); *Daughters of Murphy Brown*, *Newsweek*, Aug. 2, 1993, at 58 (discussing the same U.S. Census Bureau report as the article one week earlier, this time as part of an issue on teen violence).

B. GOOD MOTHERS VERSUS BAD MOTHERS

At the root of the belief that mothers who fail to protect their children are morally reprehensible, and thus criminally punishable, lies a condemnation not so much of their failure to perform acts of a physical nature but rather of their failure to perform acts of love — the way mothers should love their children.27 A mother’s love for her child is the most-revered form of love, which knows no bounds; i.e., it overcomes all physical, financial, emotional, and moral obstacles. Where such obstacles actually do limit a woman’s ability to protect her child, they are not recognized as “obstacles” and are thus not considered relevant or legitimate factors in adjudicating guilt for failure-to-protect. For instance, a Maryland court, outraged by a fifteen-year-old mother’s negligence, affirmed her involuntary manslaughter conviction.28 The court held that her boyfriend’s propensity for violence was such that it would put an ordinary, prudent person on notice of endangerment to the child and that she “easily could, and should, have removed Terry [her daughter] from this danger.”29 Her failure to do so was sufficient to support a finding that her gross and criminal negligence was a contributing cause of the child’s death. The court’s curt dismissal of the fifteen-year-old mother’s possible economic and emotional dependence on her boyfriend, and her fear of retaliation by him, is probative of the little weight given to such factors.

The court’s focus on the mother’s capability to “properly” raise children in the absence of a male charge exposes the way in which the male-legal system30 holds women to a male-defined standard of “good mother” conduct. While men have also been convicted for failing to protect their children from abuse inflicted by mothers, these cases, like cases of male rape, are the exception, not the norm.31 Failure-to-protect laws have a disparate impact on women32 because women held liable under such laws are unfairly judged from a standpoint of male bias

29. Id. at 474 (emphasis added).
30. FALUDI, supra note 25, at 8 (reporting that less than 8% of all federal and state judges and less than 6% of all law partners are women.)
32. See Evan Stark and Anne E. Flicraft, Women and Children at Risk: A Feminist Perspective on Child Abuse, 18 INT’L J. HEALTH SERVICES 97, 98-100 (1988) (reporting that men are more likely than women to batter their children, particularly men who batter their wives); DAVID G. GIL, VIOLENCE AGAINST CHILDREN 116 (1970) (study finding fathers or father substitutes were perpetrators in nearly two-thirds of child abuse incidents. Although, in absolute numbers, slightly more children were abused by mothers than fathers, 29.5% of children were living in homes without father figures.)
predicated upon an effort to coerce women to conform to patriarchal concepts of "motherhood."

A central component, if not the keystone, of the nuclear family, is the ideal of motherhood, which embodies an unrealistic and oppressive standard. As Chesler points out, "[m]others are expected to perform a series of visible and non-visible tasks, all of which are never-ending. Mothers are not allowed to fail any of these obligations. The ideal of motherhood is sacred; it exposes all mothers as imperfect." The "good mother" is expected to sacrifice herself for the greater good of her family by nurturing, caring, and taking responsibility for children and home. Within the nuclear family, it is still considered natural that mothers have a special bond with their children while fathers remain distant. "Mothers' love is unconditional and nurturing; fathers' love is earned." Traditionally, a mother's raison d'être was to be nurturer, caretaker, and homemaker. These personal, uncompensated and disempowering sacrifices are simply expected of mothers.

When a mother acts contrary to this ideal of motherhood, courts often portray her as a "bad mother" and thus deserving of punishment. In State v. Palmer, the court juxtaposed the mother's heartless response to her baby's death with her concern for her paramour, making her sound all the more deserving of punishment for being a bad mother:

The doctor arrived within minutes and found the infant dead. Appellant made no show of emotion but repeated eight or ten times that McCue [the abuser] could not have done it, and asked if McCue would be all right and what would happen to McCue. . . . She was not crying nor very upset. He asked her why she had allowed the beating to go on. She said that there was nothing she could do about it. . . . When reunited after separate questioning, they went into a "love scene."

33. PHYLLIS CHESLER, MOTHERS ON TRIAL 50 (1986).
35. References to the relationship between human beings and their natural surroundings as "mother earth" and "mother nature" are indicative of the nurturing and caretaking traits attributed to women.
36. Mothers continue to be the primary caretakers of children and as such their ability to become financially or professionally independent or equal to men is significantly impeded. Becker, supra note 34, at 157 (citing VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 4 (1988)); see also Richard A. Posner, Economic Analysis of Sex Discrimination Laws, 56 U. CHI. L. REV. 1311 (1989) (average woman will devote more time to child rearing than the average man, resulting in lower lifetime earnings).
37. 164 A.2d 467 (Md. 1960).
The first tear Sgt. Lowe saw appellant shed was after her mother had arrived. . . . 38

In State v. Stanciel and State v. Peters39 (consolidated on appeal), the Illinois Supreme Court held that mothers may be convicted, under the Illinois accountability statute, of aiding and abetting the murder of their children resulting from their partners' abuse.40 Both women received the same sentences (sixty and thirty years, respectively) as their boyfriends, who actually committed the murders, for their failure to prevent the harm. While Barbara Peters was not present when the fatal beating of her son occurred, the fact that she permitted the abuser to have exclusive care of her son constituted aid. Peters was far from the court's image of an ideal mother. The court's opinion portrays her as a "bad mother,"42 noting that on the evening of the fatal occurrence, Peters had gone out drinking with a friend and failed to look in on her son that evening.43 Ms. Peters' living situation, which involved working two jobs, 5 p.m. to midnight on weekdays and bartending on weekends to support her son and boyfriend, was not taken into consideration by the court. Instead, it focused on her reaction to hearing that her son had been murdered: "Peters just shrugged her shoulders and gave [the detective] a look as if it did not matter. Peters told Baldwin [the detective] she had not really wanted the boy. When Baldwin asked her whether she did not really care what happened to Bobby, [her son] Peters responded, 'I guess not.'"44 The court did, however, go on to note that "Peters did tell Baldwin she loved Bobby and that she would never allow someone to abuse the boy or to deliberately

38. Id. at 471-72.
40. See also State of North Carolina v. Walden, 293 S.E.2d 780 (N.C. 1982), rev'd 280 S.E.2d 505 (N.C. App. 1981) (upholding mother's sentence for aiding and abetting child abuse for failing to take reasonable steps to prevent the harm).
41. Ill. Ann. Stat. ch. 720, para. 5/5-2 (Smith-Hurd 1992), formerly Ill. Rev. Stat. 1987, ch. 38, § 5-2 (Smith-Hurd 1989). The relevant section of the current statute states: "When accountability exists. A person is legally accountable for the conduct of another when . . . (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense."
42. See Peters, 586 N.E.2d 469, 472 (Ill. 1991), aff'd 606 N.E.2d 1201 (1992) (appellate court quoting the babysitter's comment that "the defendant did not love Bobby 'the way a mother should love a child'").
43. Peters, 606 N.E.2d at 1208.
44. Id.
hurt him." Peters seemingly was sentenced to thirty years not only for failure-to-protect but also for failure to be a "good mother."

Like Peters, Violetta Burgos, the mother accused in *Stanciel*, did not conform with the image of an all-loving and all-caring mother. Burgos had lost custody of her child when her boyfriend broke the child's leg, but regained custody on the condition that she refrain from contact with the boyfriend. However, she not only continued the relationship, but also allowed her boyfriend to discipline her son. The appellate court found that while Burgos may have been guilty of neglect, the evidence did not show that she had ever permitted her boyfriend to beat the child. The court held that "[h]er mere presence during the beating is insufficient to find that she aided the commission of murder." The Illinois Supreme Court, however, reversed, finding that her conduct was sufficient to support a finding of common criminal design. As a result of Burgos's and Peters's failure to protect their children, they were convicted not simply for child neglect, but rather for aiding and abetting murder.

II. Recognizing the Obstacles to a Mother's Control of Her Family

A. PARENTAL STANDARDS FOR MOTHERS DIFFER FROM THOSE FOR FATHERS

Society's standards of parenting for fathers are vastly different from those it holds for mothers. Accordingly, women are adjudged by the harsh standard established for "good mothers," while men who fail-to-protect their children benefit from a much lower standard. While mothers are expected to devote themselves to their children, fathers who do so are considered rather extraordinary, going above and beyond the call of duty. For example, one working mother described her husband's experience while raising the children:

You won't believe the offers of help John had when he kept the children last year while I finished school. People at the church and in the neighborhood brought cooked food, or invited him and the children to supper two or three times a month. He had offers all

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45. *Id.* This ambivalence is not uncommon among mothers who feel the stress and frustration of working and raising a child alone, along with resentment toward the child and guilt for not meeting the expectations of the ideal mother. See Becker, *supra* note 34, at 145 (quoting MARILYN FRENCH, HER MOTHER'S DAUGHTER 617 (1987) ("[W]omen caught, trapped, bewildered by motherhood, impaled forever on their ambivalence—love and resentment in almost equal proportions")).


47. *Id.*
the time to babysit or do laundry or help clean house. They all
thought it was so wonderful that he was doing this thing — as if
the children were his as much as mine. Don’t get me wrong. I
thought it was wonderful, too, but not any more than if I did it. I
never had any offers like he got. I guess I’m doing what I’m
supposed to do. 48

Although this example is based on a married couple, the situation is
illustrative of how fathers are treated more favorably than mothers for
carrying out their parental duties.

Judicial application of these different parental standards is exemplified
by two Wisconsin cases, State. v. Williquette 49 and State v. Rundle. 50 In
Williquette, the Wisconsin Supreme Court held that the mother’s leaving
her two children in the care of their father and failing to stop his abuse was
sufficient overt conduct to convict the mother of child abuse, as if she had
directly abused the children herself. While the Court of Appeals held that
she could be liable for aiding and abetting the crime of child abuse, 51 the
Wisconsin Supreme Court held that she could also be directly liable for the
crime, under Section 940.201 of the Wisconsin child abuse statute
outlawing behavior that “subjects a child to cruel mistreatment.” 52

Although the statute did not expressly cover those who knowingly place
children in situations where abuse is likely, 53 the court broadly construed
“subjects” to cover acts beyond those of a direct abuser. “Subjects” was
interpreted to mean not only abusive behavior, but also exposure of the
child to foreseeable risks of abuse by a person who has a duty to care for

48. WOMEN AS SINGLE PARENTS: CONFRONTING INSTITUTIONAL BARRIERS IN THE
COURTS, THE WORKPLACE, AND THE HOUSING MARKET 85 (Elizabeth A. Mulroy, ed.,
1988).
49. 385 N.W.2d 145 (Wis. 1986); superseded by statute, State v. Rundle, 500 N.W.2d
916 (Wis. 1993).
50. 500 N.W.2d 916 (Wis. 1993).
51. Williquette, 370 N.W.2d 282 (Wis. Ct. App. 1985) (state did not raise the issue of
aiding and abetting).
52. 385 N.W.2d at 147; Wis. Stat Ann. § 940.201 (1985), repealed by § 948.03(2)(3)
(1987). The relevant section of the statute states: “Whoever tortures a child or subjects a
child to cruel maltreatment, including but not limited, to severe bruising, lacerations,
fractured bones, burns, internal injuries or any injury constituting great bodily harm under
sec. 939.22(14) is guilty of a Class E felony. In this section, ‘child’ means a person under
16 years of age.”
53. See Williquette, 385 N.W.2d at 158 n.2 (Heffernan, C.J., dissenting). Colorado,
Florida, and Nevada are examples of states with express provisions covering persons who
knowingly endanger children by placing them in situations where abuse is likely to occur.
For example, “A person commits child abuse if he causes an injury to a child’s health or
permits a child to be unreasonably placed in a situation which poses a threat of injury to
the child’s life or health.” Colo. Rev. Stat. § 18-6-401(1) (1986). See also Williquette, 385
N.W.2d at 148-149 (holding that § 940.201 only applies to those who intentionally and
directly abuse a child and thus granted the defendant’s motion to dismiss).
the child. Williquette's leaving the children with their father while she worked\textsuperscript{54} was held to constitute one of the direct causes of abuse (overt conduct), not simply an omission. Although she did not directly abuse her children, Williquette was bound over for a felony trial with a potential two-year prison sentence. Chief Justice Heffernan, dissenting, characterized the majority's holding as an "emotional catharsis" rather than an interpretation of the law.\textsuperscript{55} Furthermore, Heffernan rejected the majority's position that the legislature intended the statute to reach acts of omission and objected to what he saw as the equation of two unlike acts.\textsuperscript{56}

Williquette's potentially severe sentence is particularly disconcerting in light of \textit{State v. Danforth},\textsuperscript{57} decided the same day. The \textit{Danforth} defendant, the mother's live-in boyfriend, was the direct perpetrator of child abuse when he fatally perforated the child's intestine. His defense, that he was assisting the boy's vomiting and had not intended to hurt him, was rejected by the Wisconsin Supreme Court, which held that specific intent to harm the child was not an element of the child abuse statute. This male defendant, who was the direct abuser and cause of the child's death, was convicted of a Class E felony, which carries a fine not to exceed $10,000 or a prison sentence not to exceed two years, or both — roughly the same penalty which the mother in \textit{Williquette} faced.\textsuperscript{58} Was the wrong committed by Williquette (failure-to-protect from a known abuser) comparable to the wrong committed by Danforth (actual physical abuse inflicted upon a child leading to death)? Attaching the same punishment for these "two unlike acts" is outrageously disproportionate. Williquette, like Peters, not only was punished for her failure to stop her husband's abuse, but also for being a "bad mother."

In \textit{State v. Rundle},\textsuperscript{59} a case involving a father as the defendant, the Wisconsin Supreme Court revisited the interpretation of "subjects"\textsuperscript{60} in the context of the revised child abuse statute. Rundle had been convicted for aiding and abetting the intentional and reckless physical abuse inflicted by his wife upon his three-and-a-half-year old daughter. Despite the fact that he was aware of the danger, had an opportunity to act, and failed to protect the child, his conviction was reversed. Rundle's conduct was more
egregious than Williquette's in that he was present during the continuing abuse, underwent parental training when his child was removed from his home twice for abuse, and repeatedly lied to medical personnel regarding the baby's injuries (arguably affirmative, overt conduct). The child had been admitted to a hospital on several occasions for bruises, scratches, cuts and ultimately for "shaken baby syndrome." There was also, however, evidence that the father had a loving relationship with the child and was her primary caretaker.\footnote{Rundle, 500 N.W.2d at 919.}

The Wisconsin Supreme Court held that the state failed to prove that the defendant undertook the affirmative action against the victim required for him to be convicted of aiding and abetting physical child abuse. The state could not avoid the "failing-to-act" provision by charging the defendant with intentional and reckless child abuse as an aider and abettor without proving "conduct, either verbal or overt, that as a matter of objective fact aids another person in the execution of a crime."\footnote{Id. at 924.} The court distinguished Williquette, in which the mother's similar failure to prevent abuse was sufficient to uphold her conviction for child abuse under Section 940.201\footnote{Wis. Stat. Ann. § 940.201 (1985), repealed by § 948.03(2)(3) (1987).} and for aiding and abetting, by examining the revised, post-Williquette child abuse statute. The revised statute clarified the ambiguous "subjects to" statutory language at issue in Williquette by adding the clause "failure to act exposes the child to an unreasonable risk of great bodily harm. . . ."\footnote{Wis. Stat. Ann. § 948.03(4)(a) (West Supp. 1990).} Unlike other state statutes on child abuse, the revised Wisconsin statute expressly subjects parents to criminal prosecution for failing to protect their children from abuse in addition to the general provisions for intentional and reckless physical child abuse. A plurality of the Wisconsin Supreme Court agreed with the appellate court's statement that the defendant may have been guilty under the "failing-to-act" provision, but that the evidence was insufficient to establish his guilt as an aider and abettor.

The dissent's analysis is similar to that of the Illinois Supreme Court in Peters and Stanciel in asserting that the defendant's omission - intentionally failing to stop the abuse - did rise to the level of an affirmative, overt act.\footnote{The plurality attempted to distinguish Rundle from the Illinois decision, by stating that the Wisconsin legislature specifically criminalized failure-to-act in its child abuse statute, in contradistinction to the Illinois court's interpretation of its aiding and abetting statutes. Rundle, 500 N.W.2d at 925-26.} The dissent charges that the plurality did not distinguish Rundel's conduct from Williquette's, which constituted "overt conduct" sufficient to constitute aiding and abetting. The court depicted
Rundle as a caring father, who comforted his daughter and saw to it that she did not hurt herself,\(^66\) while Williquette was portrayed as a non-responsive, non-caring mother. Although Rundle's conduct was more egregious and more "overt" than Williquette's, his conviction was reversed and hers affirmed.

Even a loving, caring mother is susceptible to being found the "cause" of child abuse. The Maryland Court of Appeals held that failure to seek timely medical treatment for a severely beaten child rose to the level of cruel and inhumane conduct, which is sufficient to be the "cause" of injury. In \textit{State v. Fabritz},\(^67\) the state court found that the mother's watching and caring for her daughter, who appeared sick, for approximately eight hours before seeking necessary surgical treatment which would have saved her, "caused" her death. The court's harsh treatment of the mother is indicative of the male-standard of motherhood. In its opinion following her \textit{habeas corpus} petition,\(^68\) the Fourth Circuit stated:

\[\text{The evidence is utterly bare of proof of a consciousness of criminality during her bedside vigil. This may have been an error of judgment, however dreadfully dear, but there was no awareness of wrongdoing on her part. . . . Fabritz's error amounted to a failure to procure medical attention in less than eight hours after her arrival at home.}\(^69\)

Ultimately, the Fourth Circuit held that her conviction was void for denial of due process under the Fourteenth Amendment.

\textbf{B. THE STRUGGLES OF SINGLE PARENTING}

Failure-to-protect laws are based upon the white, middle-aged, middle-class man's notion of the traditional "American family": "[s]tudies of judicial attitudes toward women's roles reveal a strong preference among some judges for the traditional family of breadwinner father/homemaker."\(^70\) The traditional concept of the "American family" is a nuclear family comprised of wage-earner father, housewife mother, and obedient children, as exemplified by the "typical" 1950s family, which

\(^{66}\) Id. at 919 (quoting a social worker's evaluation of Rundle as a parent: "it was almost always Kurt that [the child] sought out to do any parental task. If she was hurt, she would go to Kurt for comfort. If she needed something, she would ask Kurt. . . . If she was spilling something, if she attempted to leave the room, it was Kurt that got up and tended to her or made sure that she was not doing something dangerous").


\(^{69}\) Id. at 700 (citation omitted).

\(^{70}\) \textit{FALUDI}, \textit{supra} note 25, at 42 (women are often denied equal justice, treatment, and opportunity due to stereotyped myths, beliefs, and biases).
produced record rates of marriage and birth. Contemporary society sentimentalizes the "American family," idealized in the old television series "Leave it to Beaver" and "Father Knows Best," which portray life as much more simple and satisfying, presumably because men and women knew their places. In 1992, only 24% of married couples, down from 43% in 1976, fit the traditional family mold in which only the husband worked outside of the home. As defined by Axinn and Levin, "the family is the basic organizing device of modern society and all social policy decisions impinge on family well-being. In this sense, then, social policy and family policy are essentially one."  

Failure-to-protect laws should not be based upon traditional notions of motherhood and family when the realities of the modern world sharply differ. The widely-publicized decline in family values is actually a decline in the number of traditional, male-headed families. The American notion of "family" has evolved since the 1950s and laws must adjust to this changing concept. Today's family is profoundly different from the "traditional" family portrayed in Norman Rockwell paintings. The traditional, nuclear family has given way to single-parent families, nonmarital heterosexual and homosexual cohabitation, step-families, and foster and adoptive families. Of all the changes in the traditional family, the greatest change is the move from the patriarchal to the matriarchal, single-parent household. The National Center for Health Statistics reported that in 1990 the number of births to unmarried mothers hit an all-time high of 1,165,384 in the United States, and in 1992, 28% of babies were born to unwed mothers, compared to 12% twenty years earlier. Therefore, our legal system must consider the plethora of interrelated problems that may circumscribe a single mother's ability to protect her children: single parenting, work, poverty, and abuse.

Unmarried mothers generally are younger, poorer, and less educated than those mothers who are married at the time of the birth of their

children and "face a constant wearying struggle to maintain a family."\textsuperscript{76} With the diminution of social stigma attached to unwed motherhood, however, an increasing number of educated, professional, or managerial women are also having children out of wedlock.\textsuperscript{77} The complexity of a single mother’s situation does not lend itself to reductive analysis or facile solutions:

The plight of single-parent families has become so serious and so complex that basic changes are needed in social and economic conditions — changes brought about by a combination of social programs, tax policies, and economic policies. For example, these families need “housing, day care, job training, medical, service, and nutritional programs, safe neighborhoods, access to predictable job markets, and an adequate income that derives from some combination of children’s allowances, wages, tax rebates, and support payments.” In order to meet single parent families’ needs, social reform must look beyond traditional concerns of public welfare to economic inequalities and to the institutional arrangements that reinforce these inequities.\textsuperscript{78}

A second major trend changing the traditional family is the working mother. Mothers who work by choice or by economic necessity do not forsake the traditional role of homemaker but rather add to their responsibilities. More than 50% of all mothers with preschool children worked outside the home in 1991, compared to only 20% in 1960.\textsuperscript{79} Most of these working women are confined to sex-segregated, low-paying job categories,\textsuperscript{80} thus locking them into a cycle of poverty. While single mothers of children under age six bring in an average annual income under $7,000, annual childcare costs can range from $2,000 to $6,500.\textsuperscript{81} Of the one-quarter of mothers in the labor force who are single with children under eighteen, nearly 40% do not earn enough to raise their families above

\textsuperscript{77} Id. \textit{See also} Carleton R. Bryant, \textit{Rise in One-Parent Families Has Some Predicting Worst}, WASH. TIMES, Apr. 23, 1992, at A1 (census bureau reports that mothers headed 8.7 million single-parent families compared to 1.4 million headed by fathers). The “some predicting worst” headline is indicative of the prevailing view that single mothers cause innumerable societal problems.
\textsuperscript{78} Mulroy, \textit{supra} note 48, at 105 (quoting \textsc{Bruce Jansson}, \textit{The Reluctant Welfare State} 254 (1987)).
\textsuperscript{79} Families To Keep Changing, But Slower, CHI. TRIB., Aug. 25, 1992, at 5.
\textsuperscript{80} \textit{See generally} FALUDI, \textit{supra} note 25, at 364 (in 1988, women with college diplomas were still only earning 59 cents to their male counterparts’ dollar).
\textsuperscript{81} Mulroy, \textit{supra} note 48, at 277 (citing \textsc{House Comm. on Ways and Means}, 99TH CONG., 1ST SESS., \textsc{Children in Poverty} 372 (Comm. Print 1985)).
poverty level. Other single mothers rely on public assistance or child support. These disturbing trends have caused some commentators to recognize the "feminization of poverty." 

Legislatures and courts cannot ignore the fact that poverty or fear of poverty significantly circumscribes a mother's options in ways not relevant to men. Women and children not only comprise the largest portion of poor people and residents of homeless shelters but also are becoming the fastest-growing poverty section in the United States. Nearly half of female-headed families with children live in poverty versus only 15% of two-parent families. Family breakup is a major source of poverty, throwing most custodial parents and their minor children into severe economic hardship. Within four months of separation, household incomes of custodial mothers plummet 37%; only half of the 58% of women with children under twenty-one awarded child-support payments actually received the full amount. Middle and upper-income women are not immune from the rapid descent into poverty after divorce: one in seven such women needs public assistance.

In domestic violence cases, women and children's financial dependence on men is frequently a question of survival. The deleterious economic consequences of divorcing an abusive husband/father cannot be dismissed in a cavalier manner.

82. Mulroy, supra note 48, at 99.
84. William A. Galston, Putting Children First, AMER. EDUCATOR 44 (Summer 1992); Mulroy, supra note 48, at 277; see also U.S. Dept. of Commerce, Bureau of the Census, Family Disruption and Economic Hardship: The Short Run Picture for Children, 1991 CURRENT POPULATION REPORTS no. 23 (report by Suzanne Bianchi and Edith McArthur) (finding that fewer than half of absent fathers pay child support, making it almost twice as likely that children of divorce parents will live in poverty than children in intact families).
85. Galston, supra note 84, at 44-46.
C. THE DYNAMICS OF VIOLENCE IN THE FAMILY

Domestic violence is another obstacle for many mothers which is too often discounted by those who, in hindsight, harshly judge mothers who do not protect their children from abuse within the home. Child abuse is viewed by some as a moral issue, to the exclusion of the economic, emotional, legal, and physical issues involved. The complex issue of domestic violence is seen in facile terms seemingly so obvious and compelling that to believe otherwise is unthinkable. The complexity of child abuse generally is compounded by the coexistence of spousal abuse. In a series of articles chronicling the killing of children in Chicago, one article asked these rhetorical questions:

Why didn’t she get help? Why didn’t she kick him out? Why didn’t she leave? If she did leave, why would she ever agree to see him again? Those on the outside see these as logical questions, the steps painfully obvious: ‘If only she’d done this.’ ‘If only she’d done that.’

The commonly held attitude of “I would have done...” fails to take into account, inter alia, that the “I” referred to is a vastly different “I” than the one in the actual battering situation. That is, those who say “I would have...” typically speak from their own non-battered experience, beliefs, emotions, education, and socio-economic situation, rather than from a battered woman’s point of view. Furthermore, inquiries blaming women are misplaced. More appropriate inquiries are: why did he batter?; could she have left him?; and how could we have helped her to leave him? Leaving the abuser often does not stop the violence. Consider that three-fourths of women killed in domestic violence were separated or divorced from their mate. The leading cause of injury to women in this country is abuse by their male partner; a 1958 study found that 41% of all female-murder victims were killed by an intimate, such as a husband. Other studies indicate that, typically, abuse actually escalates when a

90. Kiernan, supra note 89, at A1 (citing several studies based on U.S. Dept. of Justice statistics).
92. See Natalie Loder Clark, Crime Begins at Home: Let’s Stop Punishing Victims and Perpetuating Violence, 28 WM. AND MARY L. REV. 263, 285 (citing M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE 213 (1958)).
woman attempts to sever her relationship with the abuser. Lenore Walker, a leading psychologist on battered women, calls this a "[n]o-win situation. . . . You're in danger when you're with him and you're in danger when you're not. That's what leads to a lot of behavior by abused women that those of us on the outside can't understand." Between 1983 and 1987, domestic violence shelters had more than a 100% increase in the number of women seeking refuge. Almost half of all homeless women, in the eighties, were victims of domestic violence.

A close nexus exists between battered women and abused children. A recent study indicates that child abuse is found in over 50% of battering cases. In many cases where a mother is convicted for child abuse inflicted by her boyfriend or husband, the mother herself is a victim of physical and emotional abuse at the hand of the same offender. The difficulty in analyzing many failure-to-protect cases is the absence, in court opinions, of any discussion or even notation of whether the mother was also a victim of abuse. Only a few state statutes expressly provide affirmative defenses for battered women, such as allowing the woman to explain her inertia if she feared that any action to stop the abuse would result in physical harm to herself or exacerbate the danger to the child. Unfortunately for the defendant in the following case, such a defense is not recognized in New Mexico.

In *State v. Lucero*, the New Mexico Supreme Court held that mistake of fact and duress were irrelevant to a charge of child abuse because a defendant's mental state is not an element of the crime of child abuse. The mother, living on public assistance, had two children and was pregnant with her third child at the trial. While admitting to knowing about the abuse of her son, she testified that she only yelled at her boyfriend to stop and did not seek help because her boyfriend threatened

94. *Id.* at A16.
95. FALUDI, *supra* note 25, at 8.
96. *Id.* at 25.
97. See Schneider, *supra* note 27, at 551 (citing Nancy S. Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, 1A CURRENT PERSP. IN PSYCHOL. LEGAL AND ETHICAL ISSUES 197, 200 (1991)).
98. See *id.* (study finding over 50% of battered women cases also involved child abuse).
102. *Id.* at 409.
to inflict even greater harm on both her and her son. She also testified that her boyfriend beat her and once broke her jaw. At trial, a psychologist testified that the mother was under duress when she failed to seek assistance for her child, due to her fear of her boyfriend's threat of violence. The Lucero Court rejected the duress defense and held that the child abuse statute was a strict liability statute.

The fact that the mother herself is a victim of battering sometimes can work against her in custody battles. In State v. Williams, an appellate court upholding the conviction of a pregnant and severely battered mother stated that evidence of abuse could properly have led the trial court to find that the defendant mother should have foreseen the danger her husband posed to others, including her child. Some judges find it so difficult to comprehend a battered woman's sense of helplessness and inertia that they award custody to the batterer. In Blake v. Blake, a New York appellate court reversed the trial court's award of custody to an abusive father based on its finding that the shelter to which the mother had fled with her two children was unsuitable for the children. The trial judge's decision was based on the belief that a more suitable home could be provided by the battering husband, despite the fact that he had abused his wife for several years, often in the presence of the children. In granting custody to the father, the trial judge ignored statistics showing that men who batter their wives often abuse their children.

The opinions in failure-to-protect cases are notable for their absence of any discussion of the woman's options in preventing the abuse, despite the fact that it is her very failure to act upon these options for which she is being penalized. Often the woman's experience is reduced to a generalized, typified model rather than being analyzed in light of the complex factors which might work to confine the woman to her particular situation.

103. Id. at 407 (definition states that child abuse occurs when a "person knowingly, intentionally or negligently, and without justifiable cause . . . permit[s] 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.").
104. Id.
105. Id.
106. Id. at 408-09.
107. See Schneider supra note 27, at 550 ("The law views battered mothers as primarily responsible for harms to which their children are exposed. Yet, in custody battles, battered women may lose custody of their children because they are portrayed as victims.").
110. See id.; see also Bertram v. Kilian, 394 N.W.2d 773 (Wis. 1986) (overruling trial court's holding that evidence of a father's abuse of his wife was irrelevant in a custody dispute).
II. Best Interests of Children and Mothers

Is it, in the long term, in the best interest of the child to take the non-abusive parent away from him or her? Do punitive measures against a non-abusive parent help protect children from abuse? Are we serious about our commitment to keeping a family together when we place the child in foster care because her mother failed to protect her from an abuser? The purpose of failure-to-protect laws is to prevent child abuse by motivating the non-abusive parent to act to protect his or her child from abuse by threatening him or her with criminal or civil liability. Failure-to-protect laws fail, however, for two reasons. First, these laws are based on the unwarranted assumption of control and ignore the daily oppression and struggle in the lives of many women. Mothers who fail to act do so for complicated logistical or emotional reasons and not because they fail to recognize the danger or desire the danger to continue. Many mothers fail to act because of the limited, viable, long-term alternatives available. Rather than recognizing the limitations circumscribing a woman’s conduct, the legislature and courts have opted for an easy-to-calculate approach to prosecution. This approach ignores the complicated realities confronted by the women subject to these decisions in favor of direct action that purports to solve the problem, regardless of the fact that the underlying problem remains.

The second fatal flaw of failure-to-protect laws is their failure to serve their purported purpose of looking out for the best interest of the child. These laws deal with a fait accompli; they do nothing to help prevent the abuse. Failure-to-protect laws are not directed toward the actual abuser and do not motivate mothers to protect their child to any greater extent than the absence of the threat of imprisonment. Many mothers who are aware of the abuse of their children already have considered ways to provide a safer environment for their children, making the threat of liability superfluous. Thus, failure-to-protect laws punish children by taking their mothers away from them and often requiring them to testify against their mothers before they are placed in foster care. One commentator weighed the benefits and detriments of punishing a parent for her failure to protect:

The detriments of making the defendant’s conduct criminal, however, outweigh the benefits. [Several] detriments appear in the family setting. First, the mother’s obligation to remove her children from the father’s control will at the very least disrupt any remaining shreds of family harmony and, very likely, will precipitate the dissolution of the family unit. More importantly, a felony conviction against both parents may punish the children and destabilize their environment by taking both parents away from
them. While the children are doubtless safer without the abusive father, it is less clear that they are better off in foster care than in a single-parent home with their mother.\footnote{111}

The Illinois Coalition Against Domestic Violence called these punitive measures directed against non-abusive mothers “inappropriate, unjust and counterproductive.”\footnote{112} The Coalition believes that the proper focus should be on prosecuting the perpetrator of the violence, given well-documented evidence that many mothers of abused children are themselves victims of abuse at the hands of the same male.

A. ALTERNATIVE REMEDIES TO PUNISHMENT

A better-reasoned approach to non-abusive mothers with mates who abuse their children consists of two prongs. The first prong is comprised of preventive measures that would offer realistic options to non-abusive mothers by establishing adequate, long-term protective and supportive services to enable women to escape their violent homes and take their children with them to a safe environment. Any strengthening of the family would be better derived from a policy of support, assistance, education, training, and treatment rather than the destructive policy of punishment. The latter policy results in irreparable harm to the mother-child relationship held so sacred by our society. It would be absurd to argue that a prison environment will make any parent a better parent.

The State of Missouri, commendably, is concentrating its efforts on the prevention of child abuse. As the Missouri Director of Social Services stated, “[o]bviously there are a million and one stories. Mom leaves the baby with the boyfriend. Mom leaves the baby alone while she goes to work. It all points to the need for better parenting education, better child care education and the need to provide safe environments.”\footnote{113} Where the mother’s malfeasance stems from her inability to prevent harm to, and protect and care for, her children, the appropriate remedy is one that emphasizes and works on those defaults that allowed the harm. Although these types of programs are costly, they would help to avoid costs of prosecuting and imprisoning a mother and placing a child in foster care.

One commentator advocates pre-trial diversion for first-time, non-abusive offenders.\footnote{114} Pre-trial diversion involves imposing specific obligations on offenders and requiring successful completion of treatment programs. Such pre-trial diversion would consist of therapy and lessons in

\footnote{111} Tanck, \textit{supra} note 56, at 684-85.  
\footnote{114} Johnson, \textit{supra} note 2, at 388-390.
parental and survival skills for the children as well as the offender. If the parent failed to successfully complete the program or allowed her children to fall prey to further abuse, then she could be criminally punished. Pre-trial diversion does not, however, adequately assist the offender who needs emotional, financial and actual support, assistance, education, training and treatment in order to break away from the abuser for a sustained period of time.

B. REWORKING FAILURE-TO-PROTECT LAWS

The second prong of my approach is directed at failure-to-protect laws. These laws should require consideration of various factors affecting a woman's ability to "control" the situation to be regulated, including (1) whether the mother herself was a victim of abuse; (2) the extent to which she was emotionally incapable of protecting her children or suffers from "learned helplessness;" (3) whether she was paralyzed by fear of legal action; (4) whether she was physically or financially capable of escaping the abuser; (5) whether she had attempted to sever her relationship with the abuser; and (6) if so, whether severe consequences followed; and (7) whether long-term support and assistance was available, but refused. In addition, because the existing laws are premised on the finding that the woman knew or should have known of the danger posed by the actual abuser to her child, they should require that the actual abuser be prosecuted as a predicate to finding a mother liable. As Schneider claims, "[f]ar too few child abusers are actually prosecuted and convicted by the courts while too many battered women face child neglect charges." It borders on the absurd to hold the mother liable for failing to act upon knowledge that the abuser posed a danger when the court system itself finds that the evidence against him is insufficient. It is too much to expect a mother to uproot her family or eject the man she loves (the alleged abuser) and face potential violence, homelessness, or loss of custody, when the legal system itself does not find the evidence against the alleged abuser sufficient to punish him. While no one factor is dispositive of a case, it would not be overly difficult for the justice system to incorporate these factors in the

115. Illinois has a similar program regarding aggravated battery of a child. "When a person engaged in the actual care of the victim child . . . pleads guilty to, or is found guilty of the offense of aggravated battery of a child, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place such person upon probation upon such reasonable terms and conditions as it may require. At least one such term of probation shall be that the person report to and cooperate with the Department of Children and Family Services at such times and in such programs as the Department . . . may require." Ill. Ann. Stat. ch. 720, para. 5/12-4.3 (Smith-Hurd 1992).

116. Schneider, supra note 27, at 552 (quoting COALITION OF BATTERED WOMEN'S ADVOCATES, POSITION PAPER ON CHILD WELFARE 467 (Nov. 1988)).
same manner that mitigating factors or affirmative defenses are used in the law.

The third factor which I have proposed, paralysis due to fear of legal action, would include various fear tactics which are used by male abusers to control their female partners. One common fear tactic is to threaten the woman with the loss of custody of her child.\textsuperscript{117} Unless a mother can prove that abuse had a direct impact on the child, courts usually regard domestic violence as irrelevant.\textsuperscript{118} In January 1993, Illinois amended its Domestic Violence Act to require that an abused woman be allowed to take her children with her or designate where they should go if she is separated from them.

A second fear tactic is to threaten the woman with deportation, if she is an illegal alien.\textsuperscript{119} A woman’s illegal status makes her exceptionally vulnerable to abuse by husbands, as recognized by the amendments to the 1986 Immigration Act,\textsuperscript{120} which allows abused women to waive the Act’s two-year waiting provision. The hostility of some courts and the lack of funding to effectively assist poverty-stricken mothers leave little question as to why these mothers do not turn to authorities for help.

\textbf{Conclusion}

Many mothers who fail to protect their children are trapped between the polarities of powerful men in the legal and political systems and abusive men in their personal relationships. Many of the women convicted in failure-to-protect cases deal with their abusers on a personal, daily level. Powerful men also influence and govern women’s behavior on a daily basis by defining, interpreting, and enforcing male-created laws. When confronted with the pervasive and ever-increasing problem of domestic violence, even powerful men feel powerless and frustrated. While the methods employed by lawmakers and abusers may differ in form, both groups of men attempt to control a woman’s behavior at some level with


\textsuperscript{118} Cahn, \textit{supra} note 117, at 1093 n. 276.

\textsuperscript{119} Prosecutors declined to prosecute Lorena Lopez, an illegal immigrant mother, for failure to protect her son from her boyfriend’s abuse because she herself was a victim of abuse and her failure to seek assistance was a result of her illegal status and inability to speak English. Lopez moved to a safe house, fearing retaliation from her paramour’s friends, and hid from her own family, who blamed her for allowing her boyfriend to harm her son. \textit{See} McRoberts, \textit{supra} note 8, at 16; \textit{see also} Michelle J. Anderson, \textit{A License to Abuse: The Impact of Conditional Status on Female Immigrants}, 102 YALE L. J. 1401 (1993); Schneider, \textit{supra} note 27, at 535.

little understanding of or care for the woman herself. Furthermore, both groups of men fail to see that both violence against women, and children and imprisonment of women who fail to protect, are not solutions to problems.

Failure-to-protect laws are founded upon pervasive gender-based ideas. As discussed above, these ideas include assumptions that good mothers are all-providing, all-sacrificing, and all-knowing (can accurately assess and predict a mate's violence); that abused women can leave their abusers; and that by imposing a threat of imprisonment, women will act to protect their children when they otherwise would not. The complexity of single motherhood and abusive partners does not lend itself to quick and facile solutions.

These mothers need shelters, safe houses, counselling, training, support groups, legal services, and employment assistance that will allow them to transcend their seemingly hopeless situations and set them on a path of long-term self-sufficiency and thus self-determination.121 We must stop assuming that mothers, in all circumstances, are capable of breaking away from their abusive male partners for any sustained period of time. To base failure-to-protect jurisprudence on this fallacy commits injustice to the mothers and defeats the best interest of the children.

121. See Clark, supra note 92, at 264 (citing Oppenlander, The Evolution of Law and Wife Abuse, 3 L. & POL'Y Q. 382, 385 (1981) (“The law today fails to afford assaulted spouses full protection and adequate remedies.”)).