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# Damned if You Do: The Rational Parent's Quandary Under Criminal Failure-to-Protect Statutes

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NOTE

# DAMNED IF YOU DO: THE RATIONAL PARENT'S QUANDARY UNDER CRIMINAL FAILURE-TO-PROTECT STATUTES

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ABSTRACT

Preventing child abuse is a persistent, ongoing battle in the United States. As the first line of defense for the most vulnerable members of society, parents and guardians are held to a high standard for protecting their children. Almost every state has enacted some form of statute imposing an affirmative duty upon parents to protect their own children from abuse, known as failure-to-protect statutes. While not inherently unjust, failure-to-protect statutes pose a unique set of problems in execution. In examining the application of failure-to-protect statutes, this article presents three case studies—each examining a different application of failure-to-protect.

The first case study illustrates the twin objectives of failure-to-protect statutes: the objective of holding accountable those who had the opportunity to protect their children, neglect to do so, and thereby indirectly harm their children, and the objective of preventing abuse in families and quickly ending abuse wherever it is discovered.

The second case study examines the problem of failure-to-protect statutes as applied to battered women. Under standard legal theories of duress and diminished capacity, the theory of battered woman syndrome has occasionally been proposed as a defense to failure-to-protect laws. However, the use of battered woman syndrome under the standard model is both scientifically misleading and legally ineffectual. In contrast, a model that views battered women as rational actors reacting to their circumstances,

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motivations, and incentives paves the road for the creation of an affirmative defense that protects abused parents while maintaining the integrity of the failure-to-protect system.

The third and final case study demonstrates the perverse incentive system created by the failure-to-protect framework. Parents of abused children are plagued by reasons not to report the abuse of their children, from the potential loss of custody to the havoc such a report can wreak upon a family. Those concerns are compounded by failure-to-protect laws, which almost never contain affirmative defenses for parents who *do*, ultimately, report the abuse. Thus, failure-to-protect laws disincentivize parents from reporting by threatening parents with prosecution if they do report. In this way, failure-to-protect laws have the opposite of their intended effect.

While legislatures have taken a variety of approaches to addressing these concerns, no state has crafted a statute that fully protects battered mothers or unwinds the perverse incentive system created by failure-to-protect laws. One state, Arkansas, provides the affirmative defense that a person cannot be prosecuted for failure-to-protect if that person takes reasonable steps to end the abuse, including notifying law enforcement. Another state, Ohio, provides protection if the parent did not have a readily available means of preventing the abuse and took timely and reasonable steps to summon aid. Although neither statute would be fully competent to stand on its own as a solution, a blend of Ohio's and Arkansas' affirmative defenses, as well as legislative effort to provide sanctuary and resources to battered mothers, is the ideal solution to the failure-to-protect paradox.

## I. INTRODUCTION

In 1992, Janice Loch stood on trial for aiding and abetting the rape of her eleven-year-old daughter.[1] According to the press, the defense attorney, and her own testimony, Janice Loch was a victim of horrible abuse.[2] Evidence of phone calls to the police and the intervention of neighbors demonstrated that Loch's boyfriend, Daniel Roethler, had been beating and systematically abusing her for two years.[3] Loch testified she had attempted to escape the

1. V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L. J. 229, 242 (1996) (citing Rebecca Sisco, *Villain or Victim?*, MINN. WOMEN'S PRESS, Mar. 24-Apr. 6, 1993, at 7). Some of the factual allegations leveled in Ms. Enos' article have been challenged, convincingly, by the assistant district attorney who prosecuted the case. Therefore, the facts that follow are only those essentially not in dispute.

2. *Id.*

3. *Id.*

situation, and when she failed, demanded Roethler stay away from her children.[4] Nevertheless, during the incident at issue, Roethler locked both Loch and her daughter in a bedroom and raped the child for an hour and forty-five minutes.[5] Loch testified that she feared Roethler would kill her daughter if Loch attempted to escape or seek help.[6] Sensing something was amiss, Loch's seven-year-old son[7] knocked on the door. Loch sent him away but "hop[ed] that he would notice something was wrong and call the police once he was out of [Roethler]'s earshot."[8] At trial, Loch argued she could not be culpable for failing to protect her daughter from abuse because, as a victim of abuse herself, she was incapable of saving her daughter.[9]

The rest of the evidence presented at trial, as well as circumstances following the trial, created a slightly more complicated picture than the one Loch painted. Janice Loch had, in fact, escaped from Daniel Roethler, before the rape occurred.[10] After Loch and her children fled from Minnesota to North Carolina, Roethler had no idea where they were.[11] There, Loch's daughter told her mother that Roethler had been sexual with her since Loch's very first date with him and that he had raped her.[12] The child presented her mother with bloody underwear as proof.[13] Loch did nothing to report the abuse or to seek medical help for her daughter but instead stashed the underwear in a drawer.[14] In spite of her daughter's confession, Loch moved her children back to Minnesota to reunite with Roethler shortly thereafter.[15]

Furthermore, evidence presented at trial demonstrated that Roethler took breaks during the course of the hour-and-forty-five minute ordeal—leaving the room to eat and sleep—but during that time, Loch did nothing to call for help.[16] In fact, Loch's son described her as sitting on the bed, smoking a cigarette nonchalantly when he went to the door. Additional evidence

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4. *Id.* at 243.
5. *Id.*
6. *Id.*
7. Kathryn L. Quaintance, *Response to V. Pualani Enos's "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children," Published in Volume 19 of the Harvard Women's Law Journal*, 21 HARV. WOMEN'S L. J. 309, 311 (1998).
8. Enos, *supra* note 1, at 243.
9. Quaintance, *supra* note 7, at 310.
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. Quaintance, *supra* note 7, at 310.
15. *Id.*
16. *Id.*

presented at trial suggested that Loch might have even had her hand in her own pants as she watched the rape of her daughter.[17]

A jury, consisting primarily of educated women, rejected Loch's battered woman argument and convicted her.[18] She was sentenced to eighty-six months in prison.[19]

Loch's story forms a compelling background against which the dilemma of failure-to-protect laws is vibrantly displayed. Failure-to-protect laws aim to achieve a very specific goal: stopping child abuse by requiring parents to protect their own children. However, failure-to-protect statutes are one-size-fits-all, while every case is complicated, nuanced, and laced with culpability and incentive concerns. With this dichotomy in mind, this article begins by discussing the application of failure-to-protect laws in three case studies and evaluates the strengths and weaknesses of failure-to-protect laws in each case. Additionally, this article evaluates the available defenses in each tableau, and analyzes the overall value of the defenses in protecting innocent victims and punishing abusers. Finally, this article proposes a system of affirmative defense statutes which work together to bring about justice in the complicated, nuanced stories of real families facing abuse.

## II. BACKGROUND: THE STATE OF FAILURE-TO-PROTECT LAWS

Failure-to-protect statutes are particularly unique in American jurisprudence, penalizing inaction rather than action. In general, there is no duty to protect those who are in danger.[20] Ancient common law did impose special duties on the basis of relationships, including the relationship of parents to their children.[21] Nevertheless, because children were "property" of their parents,[22] criminal prosecutions for child abuse of any kind were rare for the first century of American history—consisting only of the most egregious cases of neglect and direct assault.[23]

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17. *Id.*

18. *Id.* at 311.

19. Quaintance, *supra* note 7, at 311.

20. 40 Am. Jur. 2d *Homicide* § 82 (2018).

21. State v. Williquette, 385 N.W.2d 145, 152 (Wis. 1986) ("It is the right and duty of parents under the law of nature as well as the common law . . . 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[.]").

22. Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect Their Children*, 5 LAW AND INEQ. 359, 361 (1987).

23. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L. Q. 449, 449-50 (2008).

A fundamental shift in social perspective occurred in 1874, when the horrific abuse and neglect of 9-year-old Mary Ellen Wilson led a young missionary and the American Society for the Prevention of Cruelty to Animals to seek a writ of habeas corpus to deliver the child from her guardians.[24] Following Mary Ellen's rescue, a number of non-governmental child protection services began to emerge, which were quickly replaced with state child protection agencies.[25] By 1967, the protection of children fell unquestionably within the purview of the government.[26] The government's increasing interest in ensuring the well-being of children quickly bled into criminal law and culminated in the landmark Maryland case, *Palmer v. State*.[27] The *Palmer* court first recognized that parents have an affirmative duty to protect their children from abuse.[28]

That parents have a heightened duty to protect their children from the criminal acts of third parties was a groundbreaking concept, and from that concept sprung a new breed of statutes: statutes criminalizing child endangerment.[29] The Model Penal Code (MPC), published in 1962, set out a framework for child endangerment statutes: "A parent, guardian, or other person supervising the welfare of a child under 18 commits a misdemeanor if he knowingly endangers the child's welfare by violating a duty of care, protection or support."[30]

Because the framework set forth in the MPC lacked detail as to what the duties entailed, states began crafting careful delineations of what was required of parents. For example, in Minnesota, "[a] parent, legal guardian, or caretaker who knowingly permits the continuing physical or sexual abuse of a child is guilty of neglect of a child and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both."[31] Thus, the modern incarnation of failure-to-protect statutes was born.

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24. *Id.* at 451.

25. *See id.* at 453-54 (tracing the replacement of non-governmental child protection services with state-sponsored and controlled agencies).

26. *Id.*

27. Discussed *infra* Sec. III.

28. Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 278, n. 21 (2001) (observing that *Palmer* was the first failure-to-protect case).

29. *See, e.g.*, MINN. STAT. § 609.378.

30. MODEL PENAL CODE § 230.4.

31. MINN. STAT. ANN. § 609.378.

Today, twenty-nine states have enacted specific failure-to-protect laws.[32] Another nineteen states have enacted statutes with more general provisions[33] to effectuate essentially the same ends.[34] Among the twenty-nine states that have enacted specific failure-to-protect provisions, the language and requirements of the statutes vary wildly.

Only eight statutes directly criminalize simple omission (or failure to act).[35] For example, Florida criminalizes "[a] caregiver's failure to make a reasonable effort to protect a child from abuse, neglect, or exploitation by another person,"[36] and Arkansas criminalizes the "fail[ure] to take action to prevent the abuse of a minor."[37] Another small minority blend the act and

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32. ALASKA STAT. § 11.51.100; ARK. CODE ANN. § 5-27-221; CAL. PENAL CODE § 273A; DEL. CODE ANN. § 1102; FLA. STAT. § 827.03; HAWAII REV. STAT. § 709-903.5; IDAHO CODE ANN. § 18-1501; 720 ILL. COMP. STAT. 150/5.1; 720 ILL. COMP. STAT. 5/12C-5; IOWA CODE § 726.6; KY. REV. STAT. ANN. § 508.100; ME. REV. STAT. ANN. TIT. 17-A § 554; MASS. GEN. LAWS CH. 265, § 13J; MINN. STAT. § 609.378; MISS. CODE ANN. § 97-5-39; NEV. REV. STAT. § 200.508; N.M. STAT. ANN. § 30-6-1; N.C. GEN. STAT. § 14-318.4; N.D. CENT. CODE § 14-09-22 A; OHIO REV. CODE ANN. § 2903.15; OKLA. STAT. TIT. 21 § 843.5; OKLA. STAT. TIT. 21 § 701.7; OKLA. STAT. TIT. 21 § 852.1; S.C. CODE ANN. § 16-3-85; S.C. CODE ANN. § 16-3-95; S.C. CODE ANN. § 63-5-70; S.D. CODIFIED LAWS § 26-10- 30.; TENN. CODE ANN. §§ 39-15-401, 402, 39-13-102; TEXAS PENAL CODE ANN. § 22.04; UTAH CODE § 76-5-109; VA. CODE ANN. § 18.2-371.1 A; W. VA. CODE § 61-8D-2A; WIS. STAT. § 948.03.

33. ALA. CODE § 13A-13-6; COLO. REV. STAT. § 18-6-401; CONN. GEN. STAT. § 53-21; D.C. CODE § 22-1101; GA. CODE ANN. § 16-5-70; GA. CODE ANN. § 16-12-1; IND. CODE § 35-46-1-4; KAN. STAT. ANN. § 21-5601; LA. STAT. ANN. § 14:93; LA. STAT. ANN. 14:92; MD. CODE ANN., COM. LAW § 3- 602.1; MO. REV. STAT. § 568.045; MO. REV. STAT § 568.060; MONT. CODE ANN. § 45-5-622; NEB. REV. STAT. § 28-707; N.H. REV. STAT. ANN. § 639:3; N.Y. PENAL LAW § 260.10; OR. REV. STAT. § 163.200; 13 PA. CONS. STAT. § 4304; R.I. GEN. LAWS § 11-9-5; VT. STAT. ANN. 13 § 1304; WASH. REV. CODE § 9A.42.020; WASH. REV. CODE § 9A.42.030; WYO. STAT. § 6-4-403.

34. These statutes range in force and application from general child endangerment provisions that apply to the general public to more broadly establishing an affirmative duty on caretakers to refrain from violating a duty of care. *Compare,* KAN. STAT. ANN. § 21-5601 ("Endangering a child is knowingly and unreasonably causing or permitting a child under the age of 18 years to be placed in a situation in which the child's life, body or health may be endangered.") *with* MONT. CODE ANN. § 45-5-622 ("A parent, guardian, or other person supervising the welfare of a child less than 18 years old commits the offense of endangering the welfare of children if the parent, guardian, or other person knowingly endangers the child's welfare by violating a duty of care, protection, or support.").

35. ARK. CODE ANN. § 5-27-221; DEL. CODE § 1102; FLA. STAT. § 827.03; ME. REV. STAT. ANN. TIT. 17-A § 554; TENN. CODE ANN. § 39-15-402; S.C. CODE ANN. § 63-5-70; TEXAS PENAL CODE ANN. § 22.04; VA. CODE ANN. § 18.2-371.1(A).

36. FLA. STAT. § 827.03.

37. ARK. CODE ANN. § 5-27-221.

omission requirements[38] by criminalizing both "willfully caus[ing] or permit[ting] the . . . child to be injured,"[39] and "willfully caus[ing] or permit[ting] the . . . child to be placed in such situation that its person or health is endangered."[40] Thus, in these states, the parent may be liable both for directly allowing the child to be injured, and for failing to investigate the situation in which the child is being placed. Finally, a substantial majority of states require direct action on the part of the parent to attach culpability, from "leav[ing] the child with another person knowing the other person has previously physically mistreated . . . any child,"[41] to "knowingly permit[ting] the continuing physical or sexual abuse of a child . . . ."[42]

However, the statutes that require an act all stem from the basic concept that parents *allow* injury to the child. According to Black's Law Dictionary, to *allow* merely means "[t]o put no obstacle in the way of"[43] some event—to fail to prevent the event from occurring. Thus, at its core, even prohibiting *allowance* is not the prohibition of an action, but rather the prohibition of a failure to act—the prohibition of an omission.

Just as states vary in the action requirement of failure-to-protect statutes, the requisite mental state varies substantially from state to state. A minority of states criminalize *reckless* failure-to-protect, while the majority require that the parent *knowingly* allow the abuse of the child. Only one state, New Hampshire, raises the culpability to *purposely* violating a duty of care before imposing liability for child endangerment.[44]

The following three case studies analyze in detail the application of failure-to-protect laws, their failings and problems, and their accompanying defenses.

## III. A CASE OF CLEAR CULPABILITY: *PALMER V. STATE*

Barbara Ann Palmer was a vibrant, "wild" young woman from Oxford, Pennsylvania.[45] Following her freshman year of high school, she became

38. CAL. PENAL CODE § 273a; IDAHO CODE ANN. §18-1501; 720 ILL. COMP. STAT. 5/12C-5; KY. REV. STAT. ANN. § 508.100; NEV. REV. STAT. § 200.508; N.M. STAT. § 30-6-1.

39. IDAHO CODE ANN. §18-1501.

40. *Id.*

41. ALASKA STAT. § 11.51.100.

42. MINN. STAT. § 609.378.

43. *Allow*, BLACK'S LAW DICTIONARY (10th ed. 2014).

44. N.H. REV. STAT. ANN. § 639:3.

45. Palmer v. State, 164 A.2d 469, 469 (M.D. 1960).

pregnant and dropped out of school.[46] In 1957, she gave birth to a little girl named Theresa—called Terry—and married the father of her daughter.[47]

The next year, she met Edward McCue, a 21-year-old married man from Louisiana.[48] Leaving Terry in Pennsylvania with her parents, Palmer moved to Louisiana to live with McCue.[49] The two quickly returned to Pennsylvania, however, and McCue's attitude toward Terry—then about 18 months old—was established almost immediately.[50] Palmer's father recalled one particular episode early on in the relationship:[51] when the toddler refused to eat her dinner, McCue "came over [to the table] and whacked her" hard enough to leave a mark on her face.[52] Disgusted with his behavior, Palmer's father kicked McCue out of the house. Palmer witnessed the incident, but nevertheless moved into an apartment with McCue shortly thereafter.[53]

In the new apartment, McCue's treatment of Terry worsened.[54] Within four days, even the neighbors were aware that the child was being severely, brutally beaten by McCue.[55]

On one occasion, a downstairs neighbor heard McCue dragging little Terry "up and down the hall and beating and beating her."[56] Eventually, the neighbor heard Palmer exclaim, "My God, Eddie, you have opened up her soft spot!"[57] The next morning, the beating and screaming resumed,[58] so the neighbor went upstairs and demanded to see McCue.[59] Palmer came to the door and begged the neighbor not to call the police on "Eddie."[60] She claimed the neighbor must have imagined the beatings, explained that Eddie would get in trouble if he was arrested, and declared her love for McCue.[61]

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46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Palmer*, 164 A.2d at 469.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Palmer*, 164 A.2d at 469.

56. *Id.*

57. *Id.* at 470 (On that occasion, the neighbor did call the police, who informed them that "he could not take any 'real' steps until Monday.").

58. *Id.*

59. *Id.*

60. *Id.*

61. *Palmer*, 164 A.2d at 470.

For months, Palmer continued to live with her daughter's abuser.[62] Meanwhile, McCue continued to torture 18-month-old Terry—beating her mercilessly with a belt for hours on end, throwing her down the stairs, and even biting her buttocks.[63] Finally, with a fierce blow to the child's abdomen, McCue "literally ripped the infant's liver nearly in two."[64] Realizing the child was severely injured, Palmer left Terry with McCue and went to seek medical help. [65]She informed a doctor "[w]ithout apparent anxiety" that the child was dying.[66] By the time the doctor arrived at the house, Terry was dead.[67]

In the aftermath, Palmer did not weep for Terry. Instead, she repeatedly insisted—both to the doctor and to the police—that Eddie "could not have done it," asked "if [he] would be all right" and "what would happen to [him]."[68] Even when Palmer herself was arrested and charged with Terry's murder, she continued to protect her child's killer, testifying at trial that he only disciplined the child, and "did not spank Terry hard enough to hurt."[69] The trial judge, sitting without a jury, found her guilty of involuntary manslaughter.[70]

### *A. The Policy Underpinnings of Failure to Protect*

Palmer's story illustrates, in vibrant color, the policy implications undergirding failure-to-protect laws—that is, the fundamental purposes that lawmakers attempt to achieve by enacting these statutes.[71] *State v. Palmer* demonstrates *why* failure-to-protect laws are in place.

#### 1. A Policy of Clear Culpability

The first policy undergirding failure-to-protect statutes is culpability. Moral culpability is the crux of failure-to-protect statutes and cases, because society, courts, and legislatures firmly believe that willingly allowing children to be abused is morally wrong.

In a general sense, culpability answers the fundamental question of criminal law: when "is [it] fair to go from the factual premise, D caused or

62. *Id.*
63. *Id.* at 470-71.
64. *Id.* at 471.
65. *Id.*
66. *Id.*
67. *Id.*
68. *Palmer*, 164 A.2d at 471-72.
69. *Id.* at 472.
70. *Id.* at 469.
71. *See Public Policy*, BLACK'S LAW DICTIONARY (10th ed. 2014).

assisted in causing X (a social harm) to occur, to the normative judgment, D should be punished for having caused or assisted in causing X to occur"?[72] The answer—simple to state but carrying complicated implications—is moral culpability. "We are justified in punishing because and only because offenders deserve it. Moral culpability ('desert') is . . . both a sufficient as well as a necessary condition of liability to punitive sanctions."[73] Culpability, or moral blameworthiness, is a reference point for assessing the existence or the level of the defendant's guilt, and culpability is the standard for understanding the appropriate punishment of the offender.[74] In other words, if D *should not*, morally, allow X (social harm) to occur, and D knowingly allows X to occur, then D is culpable. The extent to which D is punishable depends on the extent of culpability.

Therefore, if parents morally *should not* knowingly allow their children to be abused, culpability arises when they do. In the oft-cited Wisconsin failure-to-protect case, *State v. Williquette*,[75] the court relied heavily on moral reasoning to conclude that a parent who fails to protect a child is culpable for the child's mistreatment. Quoting *American Jurisprudence,* the court pointed out:

> 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. [76]

In other words, the duty to protect is implicit in the role of a parent—it is inherent in natural law, moral law, common law, and statutory law.[77] The court continued: "The child has the right to call upon the parent for the discharge of this duty, and public policy for the good of society will not permit . . . the parent to divest himself irrevocably of his obligations in this

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72. Phyllis L. Crocker, *Concepts of Culpability and Deathworthiness: Differentiating Between Guilt and Punishment in Death Penalty Cases*, 66 FORDHAM L. REV. 21, 35 n. 63 (1997).

73. Michael S. Moore, *The Moral Worth of Retribution, in Responsibility, Character, and the Emotions*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 179, 181-82 (Ferdinand Schoeman ed., 1987) (footnote omitted).

74. Crocker, *supra* note 70 at 35 n. 63 (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 78, 3 (2d ed. 1995)).

75. 385 N.W.2d 145, 152 (1986).

76. *Id.* at 152.

77. *Id.*

regard or to abandon them at his . . . pleasure[.]"[78] Thus, not only is the parent bound by law to protect the child, but the child has an implicit, affirmative right to the parent's care.[79] Parents *should* protect children, and the failure to do so is morally culpable, deserving of punishment.

Moral culpability is also the crux of *Palmer*. The *Palmer* court first presented, in five pages of graphic, exacting detail, the story of what happened to Terry Palmer.[80] In contrast, the court's four-paragraph legal rationale was cursory and shaky.[81] The court examined Palmer's ability to prevent the death of her child, and dwelt extensively on the fact that Palmer chose to defend her child's abuser rather than her child.[82] The court reasoned, in effect, that because the evidence demonstrated that Palmer *could and should have* removed the child from danger, the evidence was sufficient to support her conviction for her daughter's murder. And because the defendant *could and should have* removed the child from danger, she was the proximate cause of Terry's death.[83] The court's heavy emphasis on the facts of the case, and its opinion that she easily *could and should have* acted, points to policy: Palmer *should not have* remained with McCue when she was aware that he was abusing her child in such extreme, horrible ways. Her failure made her guilty of murder.

Furthermore, the court was so convinced of Palmer's culpability that it stretched the doctrine of criminal proximate cause beyond its traditional limits. Palmer argued that McCue's criminal battery of the child was an intervening, superseding cause of Terry's death—thus cutting off liability.[84] The court observed that "[i]t is not essential to the existence of a causal relationship that the ultimate harm which has resulted was foreseen or intended by the actor," but rather, "[i]t is sufficient that the ultimate harm is one which a reasonable man would foresee as being reasonably related to the acts of the defendant."[85] Palmer could have acted to prevent the reasonably foreseeable murder of her daughter. Because she failed to do so "under the circumstances previously described," she was a proximate cause of her daughter's death.[86]

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78. *Id.*
79. *Id.*
80. *Palmer*, 164 A.2d at 469-73.
81. *See supra* Part I.A.2.
82. *Palmer*, 164 A.2d at 473-74.
83. *Id.* at 474.
84. *Id.*
85. *Id.*
86. *Id.*

In support of its conclusion, the court cited a string of civil law pertaining to intervening, superseding causes in negligence, including the restatement of torts.[87] What the court failed to acknowledge was that the intervening, superseding cause in this case was not simple negligence—it was murder. Criminal acts are nearly always intervening, superseding causes, with very limited exceptions—and the exception for parental duty had not yet been recognized.[88] But the court's conclusion that Palmer was responsible for Terry's murder requires an exception for parental duty. Thus, the court's conclusion was founded on circular reasoning. The court's tortured reasoning reflects the deep moral understanding that Palmer *should have* protected Terry from McCue—and that she had a legal duty to do so as a result. The *should have* of the court's analysis reflects the policy of culpability inherent in its newly-created failure-to-protect law.

2. A Policy of Incentivization

The second policy undergirding failure-to-protect is implicit in *Palmer* and has been made explicit by the statutes that erupted across the country following *Palmer*. The heightened duty of parents to protect their children from the criminal acts of third parties was a novel concept, from which sprung a new breed of statutes—statutes criminalizing child endangerment.[89]

Buried deep under the language of failure-to-protect statutes lies the policy of incentivization. While culpability, as a policy, is backward-looking, incentivization is a forward-looking, goal-based policy. In the case of child protection laws, the goal of the statutory scheme is the protection of children. For example, the State of Minnesota expressed the goal of the state's failure-to-protect law in these terms:

> The legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse . . . . Intervention and prevention efforts must address immediate concerns for child safety and the ongoing risk of abuse or neglect and should engage the protective capacities of families.[90]

Within the Minnesota statutory scheme, and within the schemes of any state with child abuse laws, the goal of protection is paramount.[91] While punishing evildoers is a worthy end, the primary function of the statutes within these

87. *Id.*

88. 65 C.J.S. *Negligence* § 232. *See also* Fugate, *supra* note 28.

89. *See, e.g.*, MINN. STAT. § 609.378.

90. MINN. STAT. ANN. § 626.556 (West 2018).

91. *Id.*

schemes is not primarily to punish the wrongdoer but rather to prevent harm and quickly mitigate harm that does occur.[92] Failure-to-protect statutes were enacted to encourage behavior in keeping with the end goal of protecting children—to "engage the protective capacities of families" such that the concerns for "children whose health or welfare may be jeopardized" are immediately addressed.[93]

Incentivization, while not a widely recognized goal of criminal justice, is implicit in the entirety of criminal law, "[f]or it is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility."[94] By defining the minimum requirements and holding out a penalty for failing to meet those minimum requirements, criminal law acts as a system for encouraging socially positive behaviors.[95] For parents of small children, those socially positive behaviors include protecting their children, or if protection proves impossible, reporting the abuse of their children to entities that can.[96] Thus, as simplistic as it may sound, the policy of failure-to-protect laws is to encourage parents to prevent or report abuse of their children through threat of criminal prosecution.[97]

Applying this general framework to the *Palmer* case, the forward-looking element of Palmer's conviction becomes apparent. Palmer *could and should have* prevented the harm to her child.[98] Her conviction, while heavily tainted with retribution, also reflects the desire to incentivize others moving forward. In that way, *Palmer* became both a cautionary tale and a new law.[99] Parents seeking to avoid imprisonment should protect their children.

In conclusion, the undergirding policies of failure-to-protect laws are strong. However, as the following cases demonstrate, some substantial flaws in application prevent these statutes from achieving the policies they are designed to meet.

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92. *See id.*

93. *Id.*

94. Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 410 (1958).

95. *See id.*

96. MINN. STAT. ANN. § 626.556 (West 2017).

97. *See id.*

98. *Palmer*, 164 A.2d at 473.

99. *See* Fugate, *supra* note 28 and accompanying text.

## IV. THE CASE OF THE BATTERED MOTHER: *CAMPBELL V. STATE*

Casey Campbell was a young, working mother of three.[100] A child of abuse herself, Campbell had been beaten by her brother from the time she was seven years old, and by her stepfather beginning in her teens.[101] When she was sixteen, her long-time boyfriend Floid Boyer began abusing her as well.[102] Over the next several years, Boyer's abuse of Campbell worsened, culminating in violent assaults with knives and even guns on various occasions.[103]

In 1992, Campbell's eight-month-old daughter, Hillary,[104] was removed from Campbell and Boyer's care as a result of Boyer's abuse of the child.[105] The child was returned to her mother—who was then living with Boyer—in late 1994.[106]

On June 27, 1995, Campbell returned home from work to find Hillary covered in second- and third-degree burns.[107] Boyer, who had been alone with the child all day, claimed Hillary had been burned when he tripped and spilled hot coffee on her earlier in the day.[108] Campbell, fearing Boyer's wrath, examined the child's burns, and decided not to take the child to the hospital.[109] In hopes of keeping Boyer's anger at bay, Campbell instead left Hillary with a babysitter and went to play darts at a local bar with Boyer.[110]

When Campbell and Boyer returned home, Campbell quietly wrapped the child in a blanket, placed her in a stroller, and walked the few blocks to the nearest hospital.[111] The attending physician, believing the burns could not have been inflicted by hot liquid, called the police.[112] After investigating, the police arrested both Boyer and Campbell on charges of child abuse and

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100. Campbell v. State, 999 P.2d 649, 654 (Wyo. 2000). Although some of the facts of the case were not specifically found by the jury, what follows is Campbell's account of what happened.

101. *Id.* at 655.

102. *Id.*

103. *Id.*

104. In the original case, the child is not identified except as HC. For ease of readability, the child has been assigned a pseudonym.

105. *Campbell*, 999 P.2d at 654.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 654-55.

110. *Campbell*, 999 P.2d at 654-55.

111. *Id.* at 654.

112. *Id*

endangerment—despite the fact that Campbell herself never laid a finger on her daughter.[113]

### *A. Challenging the Culpability of Victim–Parents and Battered Women*

If it is true that moral culpability undergirds failure-to-protect laws, where is the blameworthiness when the mother[114] herself is the victim of her children's abuser? From legal scholars[115] to journalists and lay reporters,[116] many voices have spoken out against failure-to-protect laws, because the laws punish abuse victims alongside perpetrators.[117] A 1989 study from Boston Hospital of Pediatrics estimated that 60% of mothers of abused children are themselves victims of abuse.[118] Is a parent still culpable for mistreating his or her children when, like Casey Campbell, the parent is both abused and also psychologically incapable of leaving his or her abuser?

#### 1. Battered Woman Syndrome: Duress and Diminished Capacity

Many scholars have turned to battered woman syndrome ("BWS") as an engine for appropriately assigning culpability in failure-to-protect cases. Battered woman syndrome is not a defense or excuse unto itself,[119] but rather a buoy for one of three other defenses: self-defense, duress, or diminished capacity.[120] Likewise, BWS is not a singular medical diagnosis, but rather "[a] constellation of medical and psychological symptoms of a woman who has

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113. *Id.*

114. While it is entirely possible, and potentially even common, that battered fathers experience the same phenomena as battered mothers, most of the following research centers specifically on mothers. Thus, this section uses the term "mothers" to describe parents generally.

115. *See, e.g.*, Evan Stark, *A Failure to Protect: Unravelling "The Battered Mother's Dilemma,"* 27 W. ST. U. L. REV. 29, 37-38 (2000).

116. *See, e.g.*, Adam Banner, *'Failure to Protect' Laws Punish Victims of Domestic Violence*, HUFFINGTON POST (Dec. 4, 2014, 10:12 AM), https://www.huffingtonpost.com/adam-banner/do-failure-to-protect-law_b_6237346.html.

117. *See, e.g.*, Alex Campbell, *He Beat Her and Murdered Her Son—and She Got 45 Years in Jail*, BUZZFEED NEWS (Oct. 2, 2014, 10:00 PM), https://www.buzzfeed.com/alexcampbell/how-the-law-turns-battered-women-into-criminals.

118. Linda McKibben et al., *Victimization of Mothers of Abused Children: A Controlled Study*, 84 PEDIATRICS 531, 534 (1989).

119. REBECCA ANN SCHERNITZKI, *WHAT KIND OF MOTHER ARE YOU? THE RELATIONSHIP BETWEEN MOTHERHOOD, BATTERED WOMAN SYNDROME AND MISSOURI LAW*, 56 J. MO. BUS. 50, 54 (2000).

120. *See generally* Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211 (2002). Since self-defense is not generally at issue in failure-to-protect cases, an analysis of it is unnecessary here.

suffered physical, sexual, or emotional abuse at the hands of a spouse or partner and who, as a result, cannot take action to escape the abuse."[121]

The BWS model, articulated by psychologist Lenore Walker, describes the cycle of abuse and the ensuing "learned helplessness" of a woman in a violent relationship.[122] According to Walker, the cycle of abuse is a progression through a generic pattern: a period of "tension buildup" in the relationship is followed by an "explosive episode" of physical abuse and then by a "honeymoon" phase—wherein the abuser apologizes, promises to change, and treats his partner with kindness and affection—thereby convincing the partner to stay in the relationship.[123] In Walker's model, this cycle continues until the victim "learns" that she is trapped in the relationship and cannot escape—resulting in "learned helplessness."[124] As a result, Walker postulates, the battered woman believes leaving the relationship is impossible and often refuses help even when it is offered.[125]

A battered woman defense to a failure-to-protect charge may be brought in two ways: duress or diminished capacity.[126] To prevail on a duress claim, the defendant must show: (1) that the defendant was under a well-grounded apprehension of an imminent threat; (2) that the defendant had not placed herself in a situation in which it was probable that she would be forced to choose the criminal conduct; (3) that the defendant had no reasonable alternative nor a chance to refuse to do the criminal act and still avoid the threatened harm; and (4) that there existed a causal relationship between the criminal action taken and the avoidance of the threatened harm.[127]

The BWS model steps in to explain that the cycle of abuse causes women in abusive relationships to have a "well-grounded" fear of "immediate" harm if they do not cooperate with the abuser's treatment of their children, even if the abuser is not literally threatening immediate harm in that moment.[128] Furthermore, the cycle of abuse causes the victim to believe she is incapable

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121. *Battered-Woman Syndrome*, BLACK'S LAW DICTIONARY (10th ed. 2014).

122. LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 91 (3d ed. 2009).

123. Stark, *supra* note 115, at 46.

124. *Id.*

125. *Id.*

126. By far, the most common use of BWS as a defense is in the context of self-defense. Because self-defense is not an applicable defense to failure-to-protect charges, we need not address it here. For a strong analysis of BWS in self-defense cases, however, see David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67, 89 (1997).

127. United States v. Willis, 38 F.3d 170, 175 (5th Cir. 1994).

128. *See* Burke, *supra* note 120, at 253-54.

of escaping, even if an otherwise reasonable mode of escape exists.[129] Thus, BWS serves as an engine for meeting each of the elements in a duress claim.

Diminished capacity—sometimes called diminished or partial responsibility, partial insanity, or the *Wells-Gorshen* rule[130]—by contrast, is not an affirmative defense. Instead, "the evidence of defendant's history of being battered" is "not offered as a defense to excuse her crimes but rather as evidence to negate the *mens rea* element of the crime."[131] In other words, as a result of her battering, the mother is incapable of forming the intent necessary to sustain the verdict.[132] In contrast to an insanity defense, which "excuses, mitigates, or lessens a defendant's moral culpability due to his psychological impairment,"[133] diminished capacity renders the prosecution incapable of proving the *mens rea* of the crime and acts as an absolute defense.[134]

Applying these defenses to the *Campbell* case would have handily resolved any injustice. By all accounts, Boyer horribly abused Campbell—which set in motion Walker's cycle of abuse under BWS theory.[135] After years of such treatment, Walker would claim that Campbell fell into a state of learned helplessness and the belief that she could not leave. The duress defense would say that her constant state of helplessness and her anticipation of the abuse that might follow if she reported Boyer to the authorities constituted a well-grounded apprehension of an imminent threat. As a result of her battering, there was no reasonable escape, and she could not be held responsible for placing herself in the situation, because she had no ability to escape after the abuse began.[136] However, these defenses were not open to Campbell. For various reasons, discussed below, these applications of BWS in the courtroom have been widely rejected.

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129. *Id.*

130. State v. Wilcox, 436 N.E.2d 523, 524 n.3 (Ohio 1982).

131. State v. Mott, 931 P.2d 1046, 1050 (Ariz. 1997).

132. *See id.*

133. *Id.*

134. Muench v. Israel, 715 F.2d 1124, 1143 (7th Cir. 1983) (observing that "courts have used the labels diminished responsibility, diminished capacity, and other nomenclature merely as a shorthand for the proposition that expert evidence of mental abnormalities is admissible on the question of whether the defendant in fact possessed a particular mental state which is an element of the charged offense.").

135. *See* Burke, *supra* note 120, at 253-54.

136. *Id.*

2. Criticism of Battered Woman Syndrome Research

Despite the pervasiveness of Walker's analysis, a substantial amount of research in the last few decades has led many to question the accuracy of the BWS framework, starting with Walker's research itself. Empirically, the methodology of Walker's research has been widely criticized.[137] For example, all of the subjects Walker studied were battered women—she maintained no control group of non-abused women against which to measure the battered women's reactions.[138] Of the battered women Walker studied, none were accused of cooperating with their abusers in the commission of a crime—in fact, few were criminals at all, rendering her research unhelpful in analyzing the behavior of accused criminals.[139]

Walker's methodological weakness continued into the study itself. "In many studies the hypotheses of the experimenters are not difficult to discern, and subjects may simply supply the researchers with what they want to hear."[140] This phenomenon, called hypothesis guessing, is an immense danger in social sciences because it leads to flawed research—thus, social scientists carefully disguise their own hypotheses in an effort to maintain the integrity of the study.[141]

Walker's research, however, made no effort to prevent hypothesis guessing.[142] On the contrary, the study's mode of questioning both suggested the answer the researcher sought and also cornered the subjects into a specific set of answers.[143] As Walker herself explained:

> After the description of each incident [of abuse], basing [the interviewer's] judgment on both the open-ended description and a series of closed-ended questions concerning the batterer's behavior before the event ("Would you call it . . . irritable, provocative, aggressive, hostile, threatening"—each on a 1–5 scale) and after the event ("nice, loving, contrite"), the interviewer recorded whether or not there was "evidence of tension building and/or loving contrition."[144]

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137. *Id.* at 236.

138. *Id.* at 237.

139. *Id.*

140. David L. Faigman, *The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent*, 72 VA. L. REV. 619, 637 (1986).

141. *Id.*

142. *Id.*

143. *Id.*

144. Walker, *supra* note 120, at 95.

Given this set of questions, the subjects of the study could reasonably anticipate the answers the researcher sought and could not reasonably answer in any way contrary to what the researcher anticipated.[145]

Finally, and perhaps most damningly, Walker's reporting methodology following the study on the cycles of abuse failed to place the cycles within the same relationship. If, indeed, the data reflected a distinct cycle that occurred within every abusive relationship, culminating in learned helplessness, it would follow that all three stages—tension building, leading to the acute battering incident, followed by loving contrition—would coincide in a single relationship.[146] But when reporting, Walker stated, separately, "[i]n 65% of all cases . . . there was evidence of a tension-building phase prior to the battering" and "[i]n 58% of all cases there was evidence of loving contrition afterward."[147] She offered no data as to the overlap between these two classes of subjects, leading one commentator to observe, "If sixty-five percent of all subjects experienced tension building before an acute battering incident and fifty-eight percent of all subjects experienced loving contrition after an acute battering incident, then it is likely that only about thirty-eight percent of the women actually experienced the entire cycle."[148] Thirty-eight percent of subjects, especially in a highly biased study, can hardly be sufficient to constitute an entire syndrome affecting all battered women.[149]

3. Legal Inadequacy of Battered Woman Syndrome as a Defense

Laying aside the scientific difficulties of BWS, a more substantial hurdle exists in applying the syndrome to defenses for failure-to-protect cases—namely, that duress has been widely rejected in BWS cases and diminished capacity has been widely rejected as a defense to any case.

a. Inadequacy of duress in failure-to-protect cases

Courts have been particularly unwilling to apply BWS to duress claims.[150] Whether or not a person is under duress is an inherently objective analysis: duress is only a defense if, under the circumstances "the threat of the use of unlawful force is such that a person of reasonable firmness . . . would have been unable to resist."[151] In contrast,

145. *See* Faigman, *supra* note 140, at 637.

146. *Id.* at 639.

147. Walker, *supra* note 120, at 95.

148. Faigman, *supra* note 140, at 639-40 (emphasis omitted).

149. *Id.*

150. *Willis*, 38 F.3d at 175-76.

151. *Id.* at 175.

> [e]vidence that the defendant is suffering from the battered woman's syndrome is inherently subjective . . . . Such evidence is not addressed to whether a person of reasonable firmness would have succumbed to the level of coercion present in a given set of circumstances. Quite the contrary, such evidence is usually consulted to explain why this particular defendant succumbed when a reasonable person without a background of being battered might not have.[152]

Thus, as a technical matter, courts are unwilling to entertain a duress defense with respect to BWS where the argument would require the jury to subjectively judge the mental state of the defendant.[153] To do otherwise would impermissibly extend the defense, which "[i]n addition to being contrary to settled duress law, . . . would be unwise. Accordingly, while evidence that a defendant is suffering from the battered woman's syndrome provokes our sympathy, it is not relevant . . . to whether the defendant acted under duress."[154] While courts remain unwilling to expand duress jurisprudence to a subjective analysis, the duress defense will always fail under a BWS framework.

b. Inadequacy of diminished capacity or diminished responsibility defense

As discussed above, the diminished capacity defense is a general term for all kinds of failure-to-prove defenses that hinge on the psychological non-existence of *mens rea*.[155] Although accepted, in some form, in about half of U.S. jurisdictions,[156] diminished capacity varies wildly in application and understanding across the nation.[157] Many jurisdictions accept it only as a defense to crimes involving specific intent or first-degree murder[158]—both of

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152. *Id.*

153. Courts have been somewhat more willing to accept evidence of BWS in cases where the defendant is, objectively, under a present threat. For example, in a Tenth Circuit case, a young woman, Dunn, was battered by her boyfriend, who threatened her with a gun, warning that he would kill her if she tried to escape his vehicle on a long road trip. Following the boyfriend's multiple-murder and crime spree, and Dunn's subsequent trial for aiding and abetting the murder, the court held that evidence of BWS was admissible to show Dunn's mental state at the time of the crimes. Dunn v. Roberts, 963 F.2d 308 (10th Cir. 1992).

154. *Willis*, 38 F.3d at 176-77.

155. Muench v. Israel, 715 F.2d 1124, 1143 (7th Cir. 1983).

156. Henry F. Fradella, *From Insanity to Beyond Diminished Capacity: Mental Illness and Criminal Excuse in the Post*-Clark *Era*, 18 U. FLA. J.L. & PUB. POL'Y 7, 47 (2007).

157. Clark v. Arizona, 548 U.S. 735, 749–51 (2006).

158. Fradella, *supra* note 156, at 48.

which would exclude failure-to-protect cases.[159] Thus, in many jurisdictions, such evidence is inadmissible as a whole.

Among the rising trends, however, is the formulation approved by the United States Supreme Court in *Clark v. Arizona*, [160] which rejects the admission of "opinion testimony going to mental defect or disease, and its effect on the cognitive or moral capacities on which sanity depends."[161] In effect, Arizona "confine[s] to the insanity defense any consideration of characteristic behavior associated with mental disease."[162] Battered woman syndrome is predicated on the idea that there is characteristic behavior associated with psychological patterns of abuse victims.[163] Thus, in order to bring in evidence of BWS as a defense in cases that follow Arizona's formulation, the defendant would be forced to plead insanity.[164]

Being forced to plead insanity presents battered women with another hurdle: general skepticism with the insanity defense by jurors. As one researcher discovered after a two-year survey on the subject, "[a]ccording to the news media, the allegedly 'popular' insanity defense . . . is a reward to mentally disabled defendants for 'staying sick,' a 'travesty,' a 'loophole,' a 'refuge,' a 'technicality,' one of the 'absurdities of state law,' perhaps a 'monstrous fraud.'"[165] In fact, surveys have shown that the public believes

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159. As discussed in Part II, *supra*, failure-to-protect penalizes culpable omissions. Only one state, New Hampshire, requires that the parent intentionally fail to protect the child before attaching culpability. N.H. REV. STAT. ANN. § 639:3. The remaining states fall into general-intent categories by attaching culpability to a general *mens rea*, absent an intent to cause harm.

160. Clark v. Arizona, 548 U.S. 735, 760 (2006).

161. *Id.*

162. *Id.* at 762.

163. *See supra* Part IV.A.1.

164. A number of states have also enacted affirmative defenses hinging on the non-abused parent's reasonable fear of reprisals. This is a problematic defense for two reasons: first, it is accompanied with the same jury skepticism discussed in the following paragraph; second, these defenses fail to address the perverse incentive problem discussed *infra*, Part V.

165. Michael L. Perlin, *"The Borderline Which Separated You from Me": The Insanity Defense, the Authoritarian Spirit, the Fear of Faking, and the Culture of Punishment*, 82 IOWA L. REV. 1375, 1403 (1997) (quoting Jihad Al-Khazen, *The Beirut Syndrome*, MONEYCLIPS, Dec. 12, 1994; Jim Gogek & Ed Gogek, *Why the Public Hates the Insanity Defense*, L.A. DAILY J., Jan. 5, 1995; Rod Williams, *The Logic Is Very Clear*, HOUS. CHRON., Feb. 10, 1995, at 31; Rod Overton, *Talk of Legal Insanity Law Resurfaces; To Close Loophole in Legal System*, GREENSBORO (N.C.) NEWS & REC., Aug. 13, 1994, at A1; Karen Fernau, *Tough Law Makes Pleading Insanity Harder to Prove; Killers Face Roadblock in Quest for Freedom*, PHX. GAZETTE, May 16, 1994, at A1; Thomas Sowell, *Insanity Defense Subverts Justice*, ST. LOUIS POST-DISPATCH, Feb. 16, 1994, at 7B; Editorial, *Sanity on Insanity*, BOS. GLOBE, Apr. 1, 1994, at 18; and John Angelotta, *Insanity Not a Scientific Term*, CLEVELAND PLAIN DEALER, Apr. 14, 1994, at 11B.

insanity is raised as a defense in as many as fifty percent of cases, despite the fact it is only raised in less than one percent of cases.[166] Perhaps because the public is so skeptical of insanity as a defense, it is successful less than one in four times that it is raised.[167] Faced with such odds, the battered woman stands little chance of mounting a successful insanity defense, even if such an option is open to her.

### *B. An Alternative to the Battered Woman Syndrome: The Rational Actor*

In recent years, another theory has emerged for understanding women in abusive relationships. Professor Alafair Burke, in her article *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, posits a theory predicated on behavioral economics' concept of a "rational actor."[168] By starting with the presupposition that victims of domestic violence are not "homogeneous, irrational, and cognitively impaired,"[169] but rather are "rational actors choosing among options that are limited by . . . factual circumstances,"[170] understanding the behavior, and thus unravelling the culpability dilemma, of battered women in failure-to-protect cases becomes much simpler.

Burke starts by attacking the core premise of BWS—that battered women do not leave their batterers.[171] On the contrary, according to one study, more than thirty-three percent of battered wives divorced their husbands over the course of a two-year period, while the general population during that time is between two and five percent.[172] To the extent that battered women do stay with their abusers, Burke observes: "sociological evidence demonstrates that there is no single explanation for the continuation of battering relationships,"[173] and that reasons for remaining are as diverse as the women themselves. Competing priorities include a myriad of considerations, such as the potential danger of attempting to leave or previous failed attempts to leave.[174] Some women try repeatedly to leave abusive relationships, only to be

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166. Stephen G. Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. PA. L. REV. 1709, 1723 (2005).

167. *Id.*

168. Burke, *supra* note 120, at 266.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.* at 268.

174. Burke, *supra* note 120, at 268.

tracked down by their abusers and returned to a more dangerous situation than the one they left.[175]

Compounding the problem of failed attempts to leave is the reality that society often fails to protect battered women, even when evidence of the abuse is clear and present.[176] Burke tells the story of Sarah Buel, a survivor of domestic abuse:

> She was at a crowded laundromat with her son when she looked up and saw her husband in the door. She began screaming, telling the people around her to call the police. Her husband responded, "No, this is my wife. We've just had a little fight." No one moved, so Buel pointed to the bruises still blackening her face and said, "This is the person who beat me up. . . . [p]lease, call the police." Her husband responded repeatedly, "No, this is my wife," and still no one moved.[177]

Unfortunately, Buel's experience is not unusual. Reports of women being beaten—in public, in houses with open doors and windows, in apartments with thin walls—abound.[178] Furthermore, women who use defensive force against their abusers run the risk of being arrested themselves, and as a result are reticent to call the police.[179]

Unsurprisingly, many battered women also cite economic hurdles as the primary reason they fail to leave their abusers.[180] If a woman is economically dependent, not employed, and has no housing opportunities, she is substantially less likely to leave her abuser.[181] As abusive relationships often carry feelings of isolation and shame, battered women often have few avenues of support from family and friends.[182] Additionally, although safehouses for battered women do exist, there are still not enough beds to support the number of women who flee abusive relationships.[183]

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175. *Id.*

176. *Id.* at 269.

177. *Id.*

178. *Id.*

179. *Id.* at 270.

180. Michael J. Strube & Linda S. Barbour, *Factors Related to the Decision to Leave an Abusive Relationship*, 46 J. MARRIAGE & FAM. 837, 842 (1984).

181. Burke, *supra* note 120, at 271.

182. *Id.* at 271–72.

183. *See* Merle H. Weiner, *From Dollars to Sense: A Critique of Government Funding for the Battered Women's Shelter Movement*, 9 L. & INEQ. 185, 273 n.541 (1991); Joan Zorza, *Recognizing and Protecting the Privacy and Confidentiality Needs of Battered Women*, 29 FAM. L.Q. 273, 276 (1995).

Finally, emotional connections with their abusers cause some women to stay. Love itself is a strong incentive for a woman to stay in a relationship,[184] and many women remain in a relationship believing their loved one will change.[185] As Burke remarked: "Battered women may value the possibility of that change more than they do their own safety, and while many might decide differently, that decision alone does not evidence a cognitive incapacity."[186]

All of these considerations together reflect why, even in response to the abuse of their children, battered women may be unlikely to leave abusive relationships. How Burke's theory of the battered woman as a rational actor should inform the law's reaction to battered women in failure-to-protect cases will be discussed further in section VI.

## V. THE CASE OF PERVERSE INCENTIVES: *PEOPLE V. PETERS*

Barbara Peters was working as a waitress at a bowling alley in early 1987, where she met Karen Wagner.[187] Wagner and Peters quickly became friends, and Wagner agreed to babysit Peters's one-year-old son, Bobby.

For three months, Wagner cared for Bobby without noticing anything amiss.[188] However, once Peters started dating Kenneth Jacobsen, Wagner started noticing peculiarities about little Bobby—starting with a severe diaper rash.[189] Several weeks later, the babysitter noticed bruising on the child's buttocks.[190] When she questioned the child's mother, Peters said she had thought it was the result of a fall at Wagner's house—after all, Bobby was just learning to walk and stumbled regularly.[191] Later, Jacobsen dropped Bobby off at Wagner's house with small bruises on his cheeks, chin, and forehead.[192] He told the babysitter that Bobby had fallen off the ladder of a slide.[193] When Peters picked up the child later, Peters asked Wagner about Bobby's bruises and Wagner relayed Jacobsen's story.[194] Peters did not respond to the story.[195]

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184. Burke, *supra* note 120, at 273.

185. *Id.*

186. *Id.*

187. People v. Peters, 586 N.E.2d 469, 471 (Ill. App. Ct. 1991), *aff'd sub nom.* People v. Stanciel, 606 N.E.2d 1201 (Ill. 1992).

188. *Peters*, 586 N.E.2d at 471.

189. *Id.*

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.*

194. *Peters*, 586 N.E.2d at 471.

195. *Id.*

About six months after Wagner started watching Bobby, Jacobsen and Peters moved in together and Jacobsen began watching Bobby during the week and leaving the toddler with Wagner on weekends.[196] Over time, a pattern formed: Bobby would come to Wagner's house with a new injury—welts on his back, a split lip, severe burns on his legs, back, and neck—each time worse than the last.[197] And each time, Jacobsen had a less probable explanation—"Bobby had fallen on the sidewalk; " "Bobby had fallen down an elevator shaft;" "the burn was caused from Bobby's clothes rubbing on the back of his leg."[198] When Jacobsen would come to pick up the child, Bobby would cling to Wagner and start crying.[199] Eventually, Wagner reported the family to child protective services.[200]

After child protective services investigated, Peters refused to talk to Wagner for several weeks.[201] However, when Wagner ran into Peters and Bobby at the bowling alley about a month later, Wagner offered to take the child home and Peters accepted.[202] While Wagner had the child alone, she checked his body, noticed no fresh injuries, and observed that the burn was healing.[203] The last time Wagner saw Bobby was again at the bowling alley.[204] Wagner asked Peters for permission to see Bobby for Christmas, and Peters refused, stating that "Jacobsen did not want either [Peters] or Bobby to have anything to do with Wagner."[205]

Eight days later, on December 16, 1987, Peters left Bobby with Jacobsen for the evening.[206] When she returned three hours later, Bobby was in bed and she did not look in on him.[207] The next morning, Jacobsen told Peters they needed to take Bobby to the hospital because he had turned blue.[208] At the emergency room, the hospital registrar overheard Peters say to Jacobsen:

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196. *Id.*
197. *Id.*
198. *Id.*
199. *Id.* at 472.
200. *Peters*, 586 N.E.2d at 471-72.
201. *Id.* at 472.
202. *Id.*
203. *Id.*
204. *Id.*
205. *Id.*
206. *Peters*, 586 N.E.2d at 473.
207. *Id.*
208. *Id.*

"I told you not to get so angry, I told you not to get so angry, I told [you] this would happen."[209]

The child died later that day from a subdural hematoma resulting from blunt head trauma[210]—probably sustained from being smashed against a tabletop, countertop, or wall.[211] At the time of his death, almost every inch of his body was covered in bruises,[212] many of which were at least a week old.[213]

When asked how she thought the child died, Peters replied that "she thought Jacobsen was responsible for his death."[214]

### *A. Perverting Incentives to Report Abuse*

The story of Barbara Peters illustrates the final glaring flaw with failure-to-protect laws: they fail to effectively incentivize parents to report or prevent abuse by perverting the incentive to report abuse. Since most of the world can be analyzed through an economic lens,[215] a careful analysis of the behavioral economics of failure-to-protect laws illuminates the effectiveness of the law in protecting children.

Presumably, Peters became aware at some point that Jacobsen was abusing Bobby. Consider Peters has three rational considerations: the expected gains from concealing the abuse, the expected legal sanctions against concealing the abuse, and the expected cost of reporting the abuse.[216] If the expected

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209. *Id.* at 474.

210. *Id.* at 472.

211. *Id.* at 474.

212. *Peters*, 586 N.E.2d at 474. (Reciting medical testimony regarding "massive bruising around the face as well as swelling to the forehead. The photographs showed bruising all along the left side of Bobby's eye and cheekbone, at the temple, and extensive bruising along the jawline. Other photographs illustrated bruises along the front of Bobby's forehead, along Bobby's right and left eyebrows, and along the bridge of his nose. Photographs of the front side of Bobby's body showed bruising in the chest area. Photos of Bobby's left arm showed extensive bruising all along the fingers of the left hand, as well as bruising to the wrist, and up into the left arm and elbow. Photos of Bobby's right arm revealed bruises along all of the fingers of the right hand extending up to the top of the hand, as well as bruises along the top of the right arm.").

213. *Id.* at 476.

214. *Id.* at 474.

215. *See* STEVEN D. LEVITT & STEVEN J. DUBNER, FREAKONOMICS 13 (2005) ("[E]conomics represents how [the world] actually *does* work.")

216. *See* W. KIP VISCUSI, MARKET INCENTIVES FOR CRIMINAL BEHAVIOR 301 (1986), *available at* http://www.nber.org/chapters/c6289.pdf. Viscusi's framework was designed for a financial risk-benefit analysis of crime. However, the same general principals apply regardless of whether the benefits and losses in question are in terms of money or in terms of other concerns, such as prison time or loss of relationships.

gains of concealing the abuse, minus the legal sanctions, are greater than the cost of reporting the abuse, the mother will report the abuse.

Peters stood to gain substantially by concealing the abuse—evading prosecution entirely. After all, if she never reveals the abuse and she is never discovered, she cannot be prosecuted for failure to protect. If she reveals the abuse, she may be prosecuted for allowing Jacobsen into her home.

What are the costs of complying with the law? For one, a non-abusive mother stands to lose custody of her children, either to her partner or to the state. Early on in the abuse cycle, if Peters had reported the abuse, Jacobsen could have painted her as the abuser. Such occurrences are not uncommon; as one researcher observed: "[V]iolent men will likely seek new means of control when old ones fail. Batterers use the legal system as a new arena of combat when they seek to keep their wives from leaving."[217] In one study, 59% of men who were granted full custody of their children abused their partners and 36% had kidnapped their children.[218] Even direct abuse of the children doesn't necessarily impair custody hearings. Another study cited a case in which "the judge made his decision after walking past the shelter to which the mother and children had fled," because, in the judge's opinion, the shelter was an inappropriate living arrangement and the father provided the better home.[219] In fact, the situation looks worse for the mother who has chosen to stay with a man who is abusive to either or both her and her children—she is deemed pathologically weak and incapable of caring for her own children.[220]

Another prominently-factored consideration in the non-abusive parent's analysis is the principle of uncertainty.[221] The primary uncertainty is whether the abuse will be exposed at all. Intrinsic in the mother's analysis is not only a risk-assessment—the calculus of the value of what she stands to lose if the abuse is discovered—but also an ambiguity assessment of whether the abuse will be discovered at all if she does nothing.[222] Although between 4% and 16% of children are physically abused in high-income countries, roughly 90% of abuse cases will never be "substantiated."[223] Therefore, while the mother

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217. Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 44 (1991).

218. *Id.* at 45.

219. *Id.*

220. *Id.* at 4, n. 14.

221. *See* Nuno Garoupa, *Behavioral Economic Analysis of Crime: A Critical Review*, 15 EUR. J. OF L. AND ECON. 5, 9 (2003).

222. *Id.* at 9-10.

223. Ruth Gilbert et al., *Burden and Consequences of Child Maltreatment in High-Income Countries*, 373 THE LANCET 68, 68 (2008).

stands to lose a significant amount if her failure to report is discovered, the overall risk of being discovered is very low if she does nothing. Furthermore, she can work to reduce that risk further by working to conceal the abuse.[224] As a result, the expected legal sanctions in the equation are reduced almost to zero, and the gains of concealing the abuse skyrocket.

Uncertainty also plays a role if the mother does choose to report—the uncertainty of prosecution regardless of the fact that she ultimately reported. With a single, notable exception, failure-to-protect statutes do not contain exceptions for mothers who report the abuse themselves,[225] and many do not contain a requirement that the parent *know* about the abuse to be prosecuted for failure-to-protect.[226] Thus, in many states, it is entirely possible for the mother to discover her child has been abused without her knowledge, report the abuse to the police and take steps to protect her child, and then still be prosecuted for failing to protect the child. As a result, then, the mother who chooses to report may potentially be signing her own guilty verdict. Therefore, the cost of reporting the abuse is very, very high.

Of course, there is a formidable incentive—an emotional or innate incentive—to protect one's children.[227] However, in an effort to avoid both the sting of the failure-to-protect law, to avoid the potential wrath of the abuser, and to protect the children, parents may take the situation into their own hands rather than report the situation to authorities, which may endanger both the life of the child and the life of the non-abusive parent.

### *B. Statutory Attempts to Unravel the Perverse Incentive Dilemma*

Only two states have attempted to solve the perverse incentive problem with statutory affirmative defenses: Arkansas and Ohio.[228] The Arkansas affirmative defense reads:

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224. Notably, the mother could also reduce her risk of being caught by attempting to put a stop to the abuse herself. However, considering the BWS statistics noted above, the mother may put herself in grave danger if she does.

225. *See supra* notes 32 and 33.

226. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-3623 (2009). ("[A]person who...having the care or custody of a child or vulnerable adult . . . causes or permits the person or health of the child or vulnerable adult to be injured or who causes or permits a child or vulnerable adult to be placed in a situation where the person or health of the child or vulnerable adult is endangered is guilty of an offense.")

227. *See generally* Eyal Abraham et al., *Father's Brain Is Sensitive To Childcare Experiences*, 111 PROC. OF THE NAT'L. ACAD. OF SCI. OF THE U.S. 9792 (suggesting both mothers and fathers have a biological predisposition to protect and nurture their own children).

228. ARK. CODE ANN. § 5-27-221 (West 2018); OHIO REV. CODE ANN. § 2903.15 (West 2018).

> It is a defense to a prosecution for the offense of permitting abuse of a minor if the parent, guardian, or person legally charged with the care or custody of the minor takes immediate steps to end the abuse of the minor, including prompt notification of a medical or law enforcement authority, upon first knowing or having good reason to know that abuse has occurred.[229]

By granting absolute immunity from prosecution to parents who attempt to end the abuse of their children by reporting to medical or law enforcement personnel, Arkansas attacks the perverse-incentive problem head on.[230] As a result of the protection from prosecution, the cost of reporting drops for those parents. However, the statute does nothing to defend parents like Peters, who are aware of a third person who knows of the abuse, because the third person can testify that the parent did not report when they "first knew" of the abuse.

Furthermore, the statute fails to address the custody issue or any of the concerns surrounding a battered mother's lack of culpability. In other words, battered mothers find no shelter under this particular statute. Finally, the statute does not address any of the custody concerns that may incentivize mothers not to report.

The culpability of battered mothers issue is answered in Ohio's affirmative defense: "It is an affirmative defense to a charge under this section that the defendant did not have readily available a means to prevent the harm to the child or the death of the child and that the defendant took timely and reasonable steps to summon aid."[231] In other words, if the non-abusive parent could not have prevented the abuse, the parent cannot be held liable for the abuse that ensues. Thus, states that accept a rational actor theory of battered women can determine, based on the *res gestae* of each individual circumstance, whether the mother had a "readily available means of ending the abuse." However, unlike Arkansas' defense, Ohio's defense does not include language to combat the perverse incentivization caused by failure-to-protect statutes.

## VI. A PROPOSED SOLUTION: BLENDING AFFIRMATIVE DEFENSES

While both Arkansas and Ohio present strong affirmative defenses to their failure-to-protect statutes, neither approach fully encompasses both of the

229. ARK. CODE ANN. § 5-27-221 (West 2018).

230. *Id.*

231. OHIO REV. CODE ANN. § 2903.15 (West 2018).

policy objectives of failure-to-protect laws: culpability and incentivization.[232] A blend of the language of the two statutes, however, quiets concerns about the prosecution of battered mothers who fear for their own safety and the safety of their children, as well as concerns about incentivizing non-abusive parents not to report abuse. An ideal affirmative defense, therefore, might read:

> (a) It is a defense to a prosecution for the offense of permitting abuse of a minor if the parent, guardian, or person legally charged with the care or custody of the minor voluntarily takes immediate steps to end the abuse of the minor, including prompt notification of a medical or law enforcement authority.
> (b) It is also an affirmative defense for the offense of permitting abuse of a minor if the parent, guardian, or person legally charged with the care or custody of the minor if, under the circumstances, the parent, guardian, or person legally charged with the care or custody of the minor:
> (1) had no reasonable means of ending the abuse or notifying medical or law enforcement authorities; or
> (2) could not reasonably have taken steps to end the abuse or notify authorities without severe bodily harm to self or to the minor.

Additionally, in the interest of incentivizing battered mothers, in particular, to report the abuse of their children, states should enact legislation that provides financial and legal resources specifically for mothers who report the abuse of their children—thus removing the disincentive of homelessness and custody battles from mothers who would otherwise leave abusive partners. By enacting these measures, legislatures would take much-needed steps toward protecting children from preventable abuse.

## VII. CONCLUSION

Good intentions don't always make good legislation. Failure-to-protect legislation is an example of particularly good intentions: the intention to protect children from preventable abuse and to stop abuse as soon as possible after it starts. As *Loch* and *Palmer* demonstrated, there is certainly a need for such legislation. But even well-intentioned laws can be perverted by circumstance—whether the circumstance results in the punishment of a

232. *Supra* Sect. II.

victim of abuse or in the perverted incentives that cause a mother to conceal, rather than report, abuse. In such cases, a strong affirmative defense, like the one presented in section VI, would move failure-to-protect laws from well-intentioned laws to well-executed justice.