

Battering Mothers for Their Abuser's Crimes

By DANAE ROBINSON*

Introduction

FAILURE TO PROTECT IS A CRIME OF OMISSION where a parent is charged because he or she failed to act when his or her child was being abused.¹ This charge is typically brought against the mother, even in cases where someone else abused the child.² When the mother is also battered, this charge is often used against her because it indicates that she was aware of the violence in the home.³

In this note, I will argue that failure-to-protect laws further punish mothers who are also victims of domestic violence because the legal system places a heavier burden on mothers to protect their children.⁴ While all battered mothers are disadvantaged in their attempt for justice, the legal system particularly harms mothers of color, and mothers of lower socio-economic classes by not employing the theories of intersectionality and anti-essentialism in failure-to-protect cases.

Part I explains the law and posits that the disparity in enforcement against women and men is due to the heightened expectation society places on mothers to be the primary protector. Part II gives context as to how race and class play a role in domestic violence cases. Part III applies the theory of intersectionality to domestic violence and critiques failure-to-protect laws under that theory. Part IV similarly applies the theory of anti-essentialism to domestic violence and offers an anti-essentialist critique of failure-to-protect laws. Part V suggests that incorporating anti-essentialism and intersectionality into the legal

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1. Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 276–77 (2001).

2. *Id.* at 274.

3. *Id.* at 280.

4. *Id.* at 275.

analysis for failure-to-protect cases will give battered mothers a viable defense instead of allowing the legal system to punish them for their abuser's crimes.

I. Failure-to-Protect Laws

A. Overview of Failure-to-Protect Laws

A parent may face criminal liability for failing to protect a child from abuse or neglect.⁵ While this law is termed in a gender-neutral manner, it is disproportionately enforced against mothers.⁶ Although the mother did not actually inflict any harm upon the child in these cases, she is charged because she did not protect the child from the abuser, often her spouse or partner.⁷ At first glance, failure-to-protect laws seem reasonable and necessary, however, they encompass a fatal flaw. The law often punishes mothers notwithstanding that they are abused and battered themselves.⁸ Some states have laws that contain a defense for women who are domestic violence victims, but this defense is often ignored in practice.⁹ Failing to protect a child is often treated as a strict liability crime.¹⁰

If convicted, the severity of sentencing depends on the individual state.¹¹ Some states give either probation or a lighter sentence between six months and one year.¹² On the opposite end of the spectrum, multiple states have a maximum sentence of life in prison.¹³ Because some of these statutes carry such a long prison sentence,¹⁴ it is imperative that the law take into consideration the factors that play into each mother's case.

Every victim is not the same. Every battered mother should not be punished simply because her victimization does not fit into the frame-

5. The "Failure to Protect" Working Grp., N.Y.C. Inter-agency Task Force Against Domestic Violence, *Charging Battered Mothers With "Failure to Protect": Still Blaming the Victim*, 27 *FORDHAM URB. L.J.* 849, 849 (2000).

6. Fugate, *supra* note 1, at 275.

7. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 *J. CRIM. L. & CRIMINOLOGY* 579, 619 (1998).

8. Fugate, *supra* note 1, at 280.

9. Jacobs, *supra* note 7, at 585.

10. The "Failure to Protect" Working Grp., *supra* note 5, at 854.

11. Alex Campbell, *Battered, Bereaved, and Behind Bars*, BUZZFEED (Oct. 2, 2014, 7:00 PM), https://www.buzzfeed.com/alexcampbell/how-the-law-turns-battered-women-into-criminals?utm_term=.tn2XeqGl7#.qt2nxVpkq [https://perma.cc/N6AB-DBTW].

12. *Id.*

13. *Id.*

14. *Id.*

work representing a stereotypical domestic violence victim.¹⁵ Many battered mothers face very long sentences, some even longer than the abuser, because society expects the mother to be perfect, to serve as the primary protector, and to sacrifice everything for her child.¹⁶



Maximum Sentences Under Failure-to-Protect Laws¹⁷

B. Double Standard Mothers Face

While the sentencing disparity between women and men can be explained by many factors, one underlying factor is the heightened expectation that society places on mothers to protect and nurture their children.¹⁸ When a child is harmed, the mother is more culpable

15. Leigh Goodmark, *Reframing Domestic Violence Law and Policy: An Anti-Essentialist Proposal*, 31 WASH. U. J.L. & POL'Y 39, 40–41, 45–46 (2009).

16. See *Fugate*, *supra* note 1, at 289–97; see also *Lindley v. State*, No. 08-08-00149-CR, 2010 WL 1076138 (Tex. App. Mar. 24, 2010); see also Sarah Kaplan, *A Battered Woman Will Stay in Prison for Failing to Protect Her Kids from Her Abuser. He Was Released 9 Years Ago.*, WASH. POST (Sept. 24, 2015), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/24/a-battered-woman-will-stay-in-prison-for-failing-to-protect-her-kids-from-her-abuser-he-was-released-9-years-ago/> [http://perma.cc/W2D4-6AAC].

17. Campbell, *supra* note 11.

18. *Fugate*, *supra* note 1, at 275.

because she failed to perform her role in the way that reflects a mother's love.¹⁹ According to society this love knows no bounds.²⁰ An imperfect mother is considered to be a bad mother who deserves to be punished—not only for her own shortcomings, but also for the failings of someone else.²¹

While every parent and caregiver should have a duty to protect his or her child, the increased scrutiny that mothers face often stems from gender stereotypes.²² A mother's love "is expected to overcome 'all physical, financial, emotional[,] and moral obstacles,' including, in the realm of failure-to-protect laws, any victimization at the hands of another."²³ Society imposes greater culpability on mothers because a woman is expected to make her maternal duties her utmost priority, whereas fathers are not judged for prioritizing other responsibilities before their children.²⁴ This double standard translates into how cases may play out.²⁵

The courts seem to expect mothers to sacrifice absolutely everything for their children, however, this level of sacrifice is often not expected of fathers.²⁶ When a woman cannot even protect herself from the abuser, the court should take a more objective and common-sense approach when determining whether a battered mother should be liable for failing to protect her child.²⁷ In instances where a mother is a victim of abuse, her inaction may be the greatest form of protection for herself and the child because a woman's risk of being killed by her abuser increases by seventy-five percent when she leaves her abuser.²⁸ Yet, this inaction will often lead to her conviction, whereas a father in the same position would have a greater chance of escaping liability.²⁹ As further evidence of this double standard, many battered

19. Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 HASTINGS WOMEN'S L.J. 67, 74 (1995).

20. *Id.*

21. *Id.* at 75.

22. *Id.* at 77.

23. Fugate, *supra* note 1, at 290.

24. *Id.* at 298–300.

25. *Id.* at 290–92.

26. *Id.*

27. V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 230 (1996).

28. Adam Banner, *'Failure to Protect' Laws Punish Victims of Domestic Violence*, HUFFINGTON POST (Dec. 4, 2014, 10:12 AM), http://www.huffingtonpost.com/adam-banner/do-failure-to-protect-law_b_6237346.html [<http://perma.cc/W3FA-XU4W>]. See generally Panko, *supra* note 19, at 85.

29. Campbell, *supra* note 11.

mothers face similar³⁰ or even longer sentences than the men who abused or killed the child³¹ because courts believe that mothers should sacrifice their own safety to protect their children and “fulfill their ‘maternal instinct.’”³²

1. It is a Mother’s Duty to Protect and Nurture: Arlena Lindley

Arlena Lindley and her son, Titches, lived with Lindley’s boyfriend, Alonzo Turner III.³³ On the day of Titches’s death, Turner had grown angry because the toddler soiled his pants.³⁴ Turner beat the child with a belt and threw him against the wall.³⁵ He also stepped on Titches’s chest.³⁶ Lindley and her friend observed the abuse, but neither of them intervened because Turner threatened to kill Lindley if she interfered.³⁷ Lindley tried to take the child and leave, but Turner took the child away from her and slammed the door, leaving her outside.³⁸ She drove to a pay phone, which was not working, so she then drove to a friend’s house intending to call the authorities.³⁹ Instead, she called Turner and asked about Titches.⁴⁰

When Lindley returned to the apartment, Turner sent her out to run errands.⁴¹ By the time she returned, it was too late to save Titches’s life.⁴² Lindley testified that she thought Turner would calm down if she did exactly what he said, and he prevented her from calling the authorities.⁴³ Lindley told the police that she tried to stop the abuse, but Turner pushed her down on the floor.⁴⁴ Lindley further testified that Turner physically abused her and Titches, but she was unable to leave because he threatened to kill her family.⁴⁵ She previously tried to escape, but Turner threw her into his trunk and

30. Enos, *supra* note 27, at 260.

31. See Kaplan, *supra* note 16.

32. Fugate, *supra* note 1, at 291–92.

33. Lindley v. State, No. 08-08-00149-CR, 2010 WL 1076138, at *1 (Tex. App. Mar. 24, 2010).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at *2.

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at *3.

44. *Id.* at *2.

45. *Id.* at *3.

slammed it shut.⁴⁶ Titches's father, William Wade, had suspicions that his son was being abused; however, he was not charged at all.⁴⁷

Lindley was ultimately sentenced to forty-five years in prison.⁴⁸ During sentencing, the judge stated, "[y]ou failed to protect him from that horrible beast you were living with. You had a duty to protect your son, and you let him down. You didn't nurture him when he needed you the most."⁴⁹

This note is not arguing that Lindley should not have been convicted because she was a battered mother. It is not arguing that she should evade all liability. However, the severity of her sentence, as well as the judge's comment about failing to nurture her son when he needed her the most⁵⁰ is a reflection of the heightened duty placed on mothers to protect their children.⁵¹ A mother, by nature, is expected to be more nurturing and more dedicated to the child.⁵² Even when a man is abusing the child, the mother is blamed for allowing it to happen, for not leaving the abuser, for not being present during the abuse, or for entrusting someone else to care for her child with the same level of care that she is expected to give.⁵³

While all parents should be responsible for ensuring that they do not place their children in harm's way, the opinion of the court seems to be influenced by the assertion that Lindley was a *bad mother*.⁵⁴ The fact that Lindley did not love and protect her child in a way that meets society's expectations—even if that was all that she was capable of doing—led to a severe prison sentence that did not account for her struggles as a domestic violence victim.⁵⁵ Mothers are not allowed to fail any of the obligations and duties imposed by society's views on

46. Campbell, *supra* note 11.

47. *Id.*

48. Lindley, 2010 WL 1076138, at *1; see *Arlena Lindley Released!*, SURVIVED AND PUNISHED (Jan. 28, 2016), <http://www.survivedandpunished.org/updates/arlenna-lindley-released> (noting that Lindley was granted parole as of January 2016 after serving nine years in prison) [<https://perma.cc/CF8Y-NYW9>].

49. Campbell, *supra* note 11.

50. *Id.*

51. Fugate, *supra* note 1, at 275.

52. Rebecca Ann Schernitzki, *What Kind of Mother Are You? The Relationship Between Motherhood, Battered Woman Syndrome and Missouri Law*, 56 J. Mo. B. 50, 51 (2000).

53. *Id.*

54. See Campbell, *supra* note 11.

55. See *Lindley v. State*, No. 08-08-00149-CR, 2010 WL 1076138 (Tex. App. Mar. 24, 2010); see Campbell, *supra* note 11.

motherhood.⁵⁶ When they do, it is condemnable in society's eyes and deserving of strict liability punishment.⁵⁷

In the *Lindley* case, the natural father was not charged despite his suspicions of abuse.⁵⁸ Mothers are charged whether they witness the abuse, suspect the abuse, or just should have known about the abuse.⁵⁹ Yet, a father in the same situation does not face the same penalties under the law.⁶⁰ This reinforces the idea that mothers should be the primary protectors of their children while fathers have a lower responsibility to do the same.⁶¹ The laws are drafted in gender-neutral terms; however, “[g]ender asymmetry releases fathers from accountability while blaming mothers for creating harm to their children and sustaining harm to themselves.”⁶² It seems fathers are not required to share the same amount of responsibility for their children.⁶³ The double standard placed on mothers is unfair; both parents should be equally accountable for the safety and wellbeing of their children. Society's expectation of what a “good mother” is should not factor into the way she is adjudicated.⁶⁴

2. Sentencing Disparity: Tondalo Hall

Tondalo Hall was twenty years old with three children and an abusive boyfriend, Robert Braxton.⁶⁵ Braxton was the father of two of the children.⁶⁶ He consistently abused Hall, physically and verbally.⁶⁷ Whenever Hall tried to leave Braxton, he threatened to take the children and never allow her to see them again.⁶⁸ One day, Hall's son's leg began to swell so she took him to the hospital.⁶⁹ There she discovered that he had a fractured femur and twelve fractured ribs.⁷⁰ Her newborn daughter also had a fractured femur, fractured toe, and frac-

56. Panko, *supra* note 19, at 75.

57. See Enos, *supra* note 27, at 229–30; see Panko, *supra* note 19, at 74; see also The “Failure to Protect” Working Grp., *supra* note 5, at 854.

58. Campbell, *supra* note 11.

59. See Fugate, *supra* note 1, at 294–97; see also Jacobs, *supra* note 7, at 585.

60. See Fugate, *supra* note 1, at 294–97.

61. See *id.* at 290–91; see also Panko, *supra* note 19, at 77.

62. Schernitzki, *supra* note 52, at 50.

63. *Id.* at 51.

64. Panko, *supra* note 19, at 74–75.

65. Kaplan, *supra* note 16.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

ured ribs.⁷¹ Braxton received a ten-year sentence for child abuse, but he only served two years before he was released from prison.⁷² Hall received a thirty-year prison sentence for child abuse and failing to protect her children.⁷³ Although she did not actually abuse her children, she remained incarcerated while the actual abuser obtained his freedom.⁷⁴

This disparity in sentencing is largely attributable to the double standard applied to mothers and fathers. As a mother, Hall was expected to do everything imaginable to ensure that her children experienced no harm,⁷⁵ while Braxton's actual abuse was downplayed because society does not hold fathers to the same standard.⁷⁶ Hall tried to leave, but doing so could have potentially resulted in her children being taken by Braxton.⁷⁷ This would have endangered their welfare even more, and could have resulted in their deaths.⁷⁸ The court failed to take into account the fact that Hall did ask questions out of concern for her children, and she did try to leave.⁷⁹ Since the court imposed a standard of perfection on her, and she "allowed" her children to be abused, she thus failed as a mother.⁸⁰

Society's expectation that mothers be the primary protectors⁸¹ seems to manifest itself in the legal system where sentencing for a mother can be three times longer than sentencing of the man who committed the abuse.⁸² As a father, Braxton should face the same heightened scrutiny for failing to meet his obligation as a parent. The law is holding battered mothers accountable for someone else's crimes by reasoning that she was a "bad mother" for keeping her children in an abusive environment, while fathers are often not judged under the same standard.⁸³ While this double standard affects many battered mothers in this situation, it burdens women of color and indigent women to a greater extent.⁸⁴

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. Fugate, *supra* note 1, at 291–92.

76. *Id.* at 290–92.

77. Kaplan, *supra* note 16.

78. Panko, *supra* note 19, at 85–86.

79. Kaplan, *supra* note 16.

80. Schernitzki, *supra* note 52, at 51.

81. *Id.*

82. Kaplan, *supra* note 16.

83. Schernitzki, *supra* note 52, at 51.

84. Phyliss Craig-Taylor, *Lifting the Veil: Intersectionality of Ethics, Culture, and Gender Bias in Domestic Violence Cases*, 32 RUTGERS L. REC. 31, 46–49 (2008).

II. Race and Class

A. Race and Gender in Domestic Violence

Women of color often have different responses to domestic violence because of the strain that race and culture places on the various complexities of their experience.⁸⁵ Many women are torn between seeking help and adhering to their cultural values, which may require them to “keep face” and keep the family together.⁸⁶ Race can also play a factor in determining whether certain groups will seek legal aid because a history of bias and unresponsiveness has caused many people of color to distrust the legal system.⁸⁷ For example, a woman of color may not seek help because of the tension between racial minorities and law enforcement.⁸⁸ Because of this tension and bias, if a woman of color calls law enforcement, there is a significant chance that that encounter will exacerbate her situation.⁸⁹ It has been the experience of some minority women that police will not do anything at all.⁹⁰ By calling the police, she could anger her abuser even more and therefore place herself in danger of future violence.⁹¹

The legal system has often fallen short in regards to minorities.⁹² Many parties within the legal system believe that women of color are more amenable to violence and therefore culpable for the abuse.⁹³ Domestic violence can be normalized for certain victims by perpetuating these stereotypes.⁹⁴ It is difficult for victims of color to risk everything to call the authorities when it may only make the situation worse because of racial bias.⁹⁵ The stereotypical victim—a white, middle class woman—often does not face the same dilemma.⁹⁶ The abuse may be similar amongst white women and women of color, but the decision for women of color to seek help is often clouded by racial issues.⁹⁷ A minority woman may not be seen as a victim at all because

85. *Id.*

86. *Id.* at 52.

87. *Id.* at 49.

88. *Id.* at 50.

89. Geneva Brown, *Ain't I a Victim? The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 *CARDOZO J.L. & GENDER* 147, 147 (2012).

90. *Id.* at 177–180.

91. *Id.* at 167–68.

92. Craig-Taylor, *supra* note 84, at 49.

93. Brown, *supra* note 89, at 147.

94. *Id.* at 150–51.

95. Craig-Taylor, *supra* note 84, at 49, 52.

96. Goodmark, *supra* note 15, at 45.

97. Lisa M. Martinson, *An Analysis of Racism and Resources for African-American Female Victims of Domestic Violence in Wisconsin*, 16 *WIS. WOMEN'S L.J.* 259, 259 (2001).

of racial biases and stereotypes.⁹⁸ When a victim does not perfectly fit into the domestic violence victim paradigm, the stereotypes undercut her victimization.⁹⁹ The legal system needs to account for ways in which race can benefit some victims while it further harms others.

B. Poverty and Class in Domestic Violence

The law fails to consider the economic plight of domestic violence victims, especially minority victims.¹⁰⁰ Impoverished women are more likely to become victims of domestic violence.¹⁰¹ They are often financially dependent on their abusers.¹⁰² Without the support of family and friends, a victim may not feel she has the option to leave.¹⁰³ Indigent women often have impoverished family and friends who are unable to provide them with the support needed to leave the abuser.¹⁰⁴ It is not an easy decision for a mother to uproot her children when she is financially dependent on the abuser.¹⁰⁵ The assumption that a victim will know of the resources available to her, or that she should be financially adept to survive on her own, works to silence the voices of the women with less power in society and allows laws to be crafted around those with privilege.

III. Intersectionality

A. Overview of Intersectionality Approach

Traditional legal analysis assumes that a person can represent one aspect of her identity, without influences from the other characteristics that comprise her individuality.¹⁰⁶ The law may apply to women, but may fail to consider how factors such as race, class, sexual orientation, culture, and motherhood play into the analysis.¹⁰⁷ The law assumes that a person's identity can be fragmented in order to focus on one characteristic, such as gender.¹⁰⁸

98. Brown, *supra* note 89, at 147.

99. *Id.*

100. Craig-Taylor, *supra* note 84, at 52–53.

101. *Id.* at 53.

102. Panko, *supra* note 19, at 68–69.

103. *Id.*

104. Brown, *supra* note 89, at 169.

105. *Id.*

106. Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle the Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 17 (1995).

107. *Id.*

108. *Id.*

The intersectionality theory opposes this assumption and argues that a woman's experiences are not so easily compartmentalized.¹⁰⁹ Kimberlé Crenshaw argues that the magnitude of a woman's experience cannot be fully understood by looking at the dimensions of her identity independently.¹¹⁰ A woman's experiences are shaped by the intersection of the various strands of her identity.¹¹¹

B. Intersectionality Applied to Domestic Violence

The intersectionality theory is especially important to the legal analysis surrounding domestic violence victims. The stereotypical domestic violence victim is "white, straight, middle-class, meek, weak, passive, and dependent."¹¹² Every victim does not fit into the paradigm often used in domestic violence cases.¹¹³ To be effective, the legal system must welcome insight into the various characteristics and experiences of each victim and recognize the connection between those dimensions of her identity, and her response to the violence.¹¹⁴ Crenshaw argues that the intersection of race and class shapes a woman's experience concerning violence.¹¹⁵

Systems of race, class domination, and gender intersect for battered minority women, such that intervention strategies that do not take these forces into account will be of little use because the obstacles that these women face are distinct.¹¹⁶ To help a battered woman effectively, and understand her response to the violence, her race and class, amongst other characteristics, must be considered.¹¹⁷ The law should consider how the facets of a woman's identity limit her options for intervention and protection.¹¹⁸ The law must recognize that many women are particularly vulnerable because of the way the strands of their identity can exacerbate an already difficult situation.¹¹⁹

109. *Id.*

110. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1244 (1991).

111. *Id.* at 1242–43.

112. Goodmark, *supra* note 15, at 45.

113. *Id.* at 40–41, 45–46.

114. Craig-Taylor, *supra* note 84, at 51.

115. Crenshaw, *supra* note 110, at 1242.

116. *Id.* at 1246.

117. *Id.*

118. *See id.*

119. Crenshaw, *supra* note 110, at 1249.

C. Intersectionality and Failure-to-Protect Laws

With failure-to-protect laws, the courts need to consider the layers of each victim's identity and the struggles she faces when determining whether or not to convict her for failing to protect her child. The law sees her as a mother, but fails to account for the ways that other dimensions of her life and identity impact her inaction.¹²⁰ She should not be written off as a "bad mother" without determining the extent of her vulnerability,¹²¹ which is influenced by her ability, or inability, to control the situation,¹²² and her complete experience as a battered woman.¹²³ Factors such as a woman's race and culture influence the way she perceives the abuse and ultimately whether she will seek help.¹²⁴

While society expects a mother to protect her child, it is important to understand her perception of the situation as a battered woman.¹²⁵ Many criticize the actions or inactions of battered women, saying, "I would have done [something besides allow the abuse]," but that belief is often from people speaking "from their own non-battered experience, beliefs, emotions, education, and socio-economic situation."¹²⁶ All of the dimensions of a mother's identity play a role in how she responds to the violence and the measures she takes to protect her child.¹²⁷

Many women face several forms of oppression and all of them play a role in her response to violence.¹²⁸ Race, class, and gender oppression often burden women of color.¹²⁹ When a mother is charged with failing to protect her child, the various sources of oppression in her life should be considered to determine if she truly believed she had no alternatives to staying with her abuser.¹³⁰ When a victim leans

120. Enos, *supra* note 27, at 230.

121. Schernitzki, *supra* note 52, at 51.

122. *See* Panko, *supra* note 19, at 90–92.

123. Schernitzki, *supra* note 52, at 54.

124. Remla Parthasarathy, *Identifying and Depicting Culture in Intimate Partner Violence Cases*, 22 *BUFF. J. GENDER L. & SOC. POL'Y* 71, 84 (2014).

125. *See id.* at 83–84.

126. Panko, *supra* note 19, at 85.

127. *See* Parthasarathy, *supra* note 124, at 84.

128. Crenshaw, *supra* note 110, at 1245–46.

129. *Id.*

130. Panko, *supra* note 19, at 88; *see* Goodmark, *supra* note 15, at 54; *see also* Schernitzki, *supra* note 52, at 53, 56.

on the legal system for support, she should not be prosecuted based on stereotypes, assumptions, and privileged beliefs.¹³¹

While domestic violence affects people from all walks of life, ignoring the additional challenges and burdens that some mothers face is, in essence, stripping them of the due process they deserve.¹³² Failure-to-protect laws are crafted in a manner that assumes all mothers are able to remove their children from abusive situations without hesitation.¹³³ The law assumes that she has the resources to leave her abuser and maintain a stable environment for her child thereafter,¹³⁴ while failing to consider how heavily her identity and circumstances weigh in her decision to stay with her abuser.¹³⁵ The intersection of identity and domestic violence is far too complex to simply punish a battered mother for failing to protect her child when she herself is the subject of constant abuse.¹³⁶

There are countless reasons why a battered mother makes the decision to stay in an abusive relationship that also endangers her child.¹³⁷ In some cultures and religions, domestic violence is a private family matter and a woman can be ostracized for publicizing the abuse and breaking up the family.¹³⁸ Her fear of being shamed by her loved ones may overwhelm her decision to leave with her children.¹³⁹ Aside from the fear of being shunned, some abusers use their religion to justify the abuse.¹⁴⁰ Mothers may stay with their abusers because they do not want to disobey their religious teachings.¹⁴¹ These pressures should be considered before punishing a mother for failing to leave her and her child's abuser.

In considering race, women of color are often dissuaded to seek help due to consistent patterns of discrimination¹⁴² and a lack of trust in law enforcement and the legal system.¹⁴³ In addition to the issues

131. See Fugate, *supra* note 1, at 285, 288–90, 306; see also Enos, *supra* note 27, at 247–48.

132. See Panko, *supra* note 19, at 88.

133. See *id.* at 68–69.

134. See Enos, *supra* note 27, at 246; see also The “Failure to Protect” Working Grp., *supra* note 5, at 858–59; e.g. Schernitzki, *supra* note 52, at 53.

135. Parthasarathy, *supra* note 124, at 83.

136. Schernitzki, *supra* note 52, at 54–55.

137. *Id.* at 53, 55.

138. Goodmark, *supra* note 15, at 54; see also NANCY K.D. LEMON, DOMESTIC VIOLENCE LAW 137 (Nancy K.D. Lemon ed., American Casebook Series 4th ed. 2013).

139. LEMON, *supra* note 138, at 128, 137.

140. *Id.* at 164–65.

141. *Id.* at 167.

142. Craig-Taylor, *supra* note 84, at 49.

143. *Id.* at 49–50.

that stem from the legal system, there are societal and community burdens to consider, such as pressure to keep the family together,¹⁴⁴ and the fear of being stigmatized by the community for placing another man of color in the hands of a perceived biased criminal justice system.¹⁴⁵ Because some may assert that a mother should just dismiss these concerns for the sake of her child's safety, it becomes imperative that the legal analysis for failure-to-protect examines the mother's perception of the abuse, as well as her alternatives to end the violence.¹⁴⁶ These concerns may seem slight to some, but they may be so great to her that leaving her and the child's abuser does not seem like a viable option.

In addition to issues clouded by race or culture, many battered women are unable to leave the abuser because of a legitimate concern that they cannot financially provide for their children.¹⁴⁷ This is often a major roadblock that hinders many battered mothers from leaving the abuser because it is difficult for women to relocate without financial security.¹⁴⁸ Perception is important because a resource-deprived mother may feel that it is better to remain in the home with the abuser and try to minimize the abuse instead of potentially forcing her children to be homeless.¹⁴⁹ Many mothers, such as the young mother discussed below,¹⁵⁰ lack the resources and financial support to provide a safe environment for their children away from the abuser.¹⁵¹

D. Low Income Oppression: Heidi Marie Benjamin

Heidi Benjamin was twenty years old when her boyfriend, Scott Bolden, beat her toddler to death.¹⁵² When Benjamin discovered the abuse, she tried to feed her daughter and put her in a cold bath.¹⁵³ However, she waited two to three hours before seeking help for the

144. See LEMON, *supra* note 138, at 129.

145. Brown, *supra* note 89, at 148; see also LEMON, *supra* note 138, at 129.

146. Parthasarathy, *supra* note 124, at 83–84.

147. The “Failure to Protect” Working Grp., *supra* note 5, at 859.

148. Brown, *supra* note 89, at 169.

149. The “Failure to Protect” Working Grp., *supra* note 5, at 859.

150. Adam R. Banner, *Failure to Protect: Oklahoma Woman Sentenced After Toddler's Child Abuse Death*, ADAM R. BANNER, OKLA. CRIM. DEF. ATT'Y AT L. (Jan. 2, 2015), <http://www.oklahomalegalgroup.com/news/failure-to-protect-oklahoma-woman-sentenced-after-toddlers-child-abuse-death> [<http://perma.cc/9TCU-GGUR>].

151. Brown, *supra* note 89, at 169.

152. Banner, *supra* note 150.

153. Amanda Bland, *Mother Sentenced to 14 Years in Prison on Abuse Charges Filed After 19-month-old's Death*, TULSA WORLD (Dec. 31, 2014), http://www.tulsaworld.com/news/crime-watch/mother-sentenced-to-years-in-prison-on-abuse-charges-filed/article_fbd6379d-05db-55ca-a260-c75b03d66cb2.html [<http://perma.cc/BRV4-C5CW>].

toddler.¹⁵⁴ Benjamin was thereafter charged with neglect and permitting child abuse by injury.¹⁵⁵ Her attorney argued that she did not have access to a phone, a vehicle, or keys to the residence in order to help her daughter.¹⁵⁶ Furthermore, her attorney noted that Benjamin had an IQ that was below average.¹⁵⁷ Benjamin was sentenced to fourteen years in prison for both neglect and permitting child abuse by injury.¹⁵⁸ The court based its holding on the fact that Benjamin moved to be with a man whose violent history she should have known, without putting resources in place to get away if she needed to leave him.¹⁵⁹ In Benjamin's case, she was a young mother who was abused, had a below average IQ, and lacked access to resources to give her daughter a better life.¹⁶⁰

The legal system failed Benjamin when it severed the parts of her identity and reduced her to a mother who *should have known better*.¹⁶¹ It is difficult to conceptualize imposing a "should have known" standard on a young woman whose IQ is below average.¹⁶² The court further minimizes Benjamin's victimization by discounting the fact that she is of a lower socio-economic status.¹⁶³ Despite the actual hardships imposed by poverty, society mistakenly assumes that a woman who stays because she lacks resources to leave is accepting the violence.¹⁶⁴ Benjamin depended financially on her abuser and lacked the resources to leave.¹⁶⁵ Her failure to protect her child may be more fairly attributed to her lack of resources rather than the quality of her parenting.¹⁶⁶

Assuming that a battered mother will know of the resources available to victims, or that she should have money in place in order to leave her abuser is an unfounded assumption. As compared to a low-income woman, the stereotypical victim—a white, middle class woman¹⁶⁷—is likely to have better financial resources at her disposal,¹⁶⁸

154. *Id.*

155. Banner, *supra* note 150.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See id.*

162. *See id.*

163. *Id.*

164. The "Failure to Protect" Working Grp., *supra* note 5, at 858.

165. *See* Banner, *supra* note 150.

166. *See id.*

167. Goodmark, *supra* note 15, at 45.

168. *See* Brown, *supra* note 89, at 168.

or is at least better able to secure resources.¹⁶⁹ Justifying prison sentences based on the belief that a mother stayed by choice is continuously molding the law to protect one type of victim while further punishing every other victim who falls outside of this paradigm.

IV. Anti-Essentialism

A. Overview of Anti-Essentialism Approach

Essentialism is the idea that things have a fundamental set of characteristics that make them what they are.¹⁷⁰ In the feminist context, essentialism assumes that a woman's experience based on her gender can be described independently of all of her other characteristics, such as race and class.¹⁷¹ Essentialism tries to describe the essence of a woman, while assuming that all women share the same innate characteristics.¹⁷²

The anti-essentialism approach refutes the idea that the layers of a woman's identity, as well as her experiences, can be severed and viewed independently.¹⁷³ Describing one experience on behalf of all women cannot accurately reflect the voices of all women.¹⁷⁴ While there may be a common thread of oppression amongst all women, that oppression is experienced differently based on the other characteristics that comprise each woman's identity.¹⁷⁵ It is difficult to describe one common experience without silencing the voices of women who face unique challenges.¹⁷⁶

B. Anti-Essentialism Applied to Domestic Violence

In the domestic violence context, the anti-essentialism approach argues that “[d]omestic violence does not transform every woman who experiences it into a stereotypical victim, nor should this victim stereotype shape domestic violence law and policy.”¹⁷⁷ Anti-essentialism requires us to look deeper into the lives of women who are victims of domestic violence instead of simply reducing each of them to a

169. See Goodmark, *supra* note 15, at 45.

170. Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 WM. & MARY J. WOMEN & L. 273, 274 (1999).

171. Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

172. Wong, *supra* note 170, at 274–75.

173. Grillo, *supra* note 106, at 19.

174. Harris, *supra* note 171, at 585.

175. See *id.* at 588.

176. See Grillo, *supra* note 106, at 30.

177. Goodmark, *supra* note 15, at 41.

domestic violence victim.¹⁷⁸ Every victim has a different story, and the components of her identity cannot be reduced to one common experience.¹⁷⁹ A comprehensive analysis of a battered woman's experience will help ensure that her victimization is not undermined simply because she is not the same as another victim.¹⁸⁰

Actors within the legal system, such as lawyers, judges, law enforcement officers, and social workers are taught to look for specific phases, characteristics, and behaviors that are indicative of domestic violence.¹⁸¹ If a specific cycle is not present then it is assumed that no domestic violence is occurring.¹⁸² By allowing victim stereotypes to shape domestic violence laws, women who do not fit the stereotype must first prove that they are victims.¹⁸³ Victims who are not "white, straight, middle class, meek, weak, passive, and dependent" have to first prove that they are victims because their identity deviates from the stereotypical victim or their situation does not perfectly fit into the cycle law officials associate with domestic violence.¹⁸⁴

Many victims face skepticism, but some are further disadvantaged by their race, culture, class, or sexual orientation.¹⁸⁵ To undermine a woman's victimization and credibility makes justice difficult to be served properly.¹⁸⁶ When a woman is facing criminal liability related to domestic abuse, she is unfairly burdened by laws requiring she prove that she is a victim, and further, a stereotypical victim.¹⁸⁷

C. Anti-Essentialism and Failure-to-Protect Laws

Liability for failure-to-protect generally requires that "(1) the defendant had a legal duty to protect the child, (2) the defendant had actual or constructive notice of [the abuse or at least] the foreseeability of abuse, (3) the child was . . . abused, and (4) the defendant failed to prevent the abuse."¹⁸⁸ Some states offer an affirmative defense that is available when the defendant failed to protect the child due to a

178. *Id.*

179. *Id.* at 40–41.

180. Brown, *supra* note 89, at 165–66.

181. Goodmark, *supra* note 15, at 42.

182. *Id.* at 42.

183. *See id.* at 45.

184. *Id.*

185. *Id.* at 47.

186. *Id.* at 45, 47.

187. *See id.*

188. Fugate, *supra* note 1, at 279.

fear of harm to herself or the child; however, most states enforce failure-to-protect laws in a manner similar to strict liability.¹⁸⁹

When a victim does not fit the mold of the stereotypical victim, the law often works against her.¹⁹⁰ Failure-to-protect laws that do not carve out a defense for domestic violence victims operate based on the assumption that all victims have the same goals—to leave their abusers and hold them accountable.¹⁹¹ When a battered mother fails to adhere to the expected course of action, she is generally punished for failing to protect her child despite her own victimization.¹⁹²

Courts often fail to understand that every woman has a unique situation and a distinct abuser, some of whom are not deterred by the threat of legal action.¹⁹³ A woman who falls outside of the expected narrative may be overlooked as a victim.¹⁹⁴ This valid expectation that the legal system will fail her often causes victims to endure the violence.¹⁹⁵ Because the justice system has historically been unreliable for people of color, it is difficult for mothers of color to seek help.¹⁹⁶ Even when a battered mother does rely on the system in an attempt to stop the abuse towards her and her children, she is often greeted with bias and unresponsiveness.¹⁹⁷ Due to prevalent stereotypes, many people believe that women of color, particularly African American women, are more amenable to violence.¹⁹⁸ As a result, a battered mother may be punished for failing to protect her child by a system that would not help her had she tried to stop the abuse through legal means.¹⁹⁹

Anticipating that the legal system will not account for her experience as a battered mother may invoke a very real fear that her children will be taken away from her.²⁰⁰ Battered mothers who reach out to Child Protective Services (“CPS”) for assistance often do not receive the help they need or the solution that they seek.²⁰¹ If CPS even responds, it will often remove the child from both parents rather than

189. *Id.* at 278–79; *see also* The “Failure to Protect” Working Grp., *supra* note 5, at 854.

190. Brown, *supra* note 89, at 165–66.

191. Goodmark, *supra* note 15, at 46.

192. Fugate, *supra* note 1, at 280.

193. Goodmark, *supra* note 15, at 55.

194. *See* Brown, *supra* note 89, at 166.

195. Goodmark, *supra* note 15, at 55.

196. *See* Craig-Taylor, *supra* note 84, at 49.

197. *Id.* at 49–50.

198. Brown, *supra* note 89, at 147.

199. *See id.*

200. Panko, *supra* note 19, at 68–69.

201. *See* Enos, *supra* note 27, at 250–51.

just the abuser.²⁰² In effect, a battered mother is treated as a perpetrator instead of a victim. If she does not leave her and the child's abuser, as the stereotypical victim is expected to do, her victimization can then be discounted. It is unfair to treat a battered mother as a perpetrator when the abuse was out of her control.

Reporting abuse to the police draws attention to the fact that there is abuse occurring in the home, while such notification is the point of reporting the abuse, it can lead to the children being removed from the home.²⁰³ CPS is more likely to remove children from a home when there are reports of domestic violence.²⁰⁴ Many mothers remain silent about the abuse because they do not want to be separated from their children.²⁰⁵ Notifying the authorities can work against a domestic violence victim because it provides the court with evidence that the mother had notice of the abuse. The complexities of her identity and her life as a victim are dismissed

Under an anti-essentialist paradigm, the legal system should assist a battered woman who is seeking help instead of punishing her by taking away her children. Despite the fact that the mother is being abused herself, she is not considered a victim because the abuse against her should have "alerted her to the batterer's tendency to violence."²⁰⁶ As a result, the court expects her to shield her children from this abuse.²⁰⁷ The legal system needs to give weight to the mother's victimization and her individual struggles in order to understand her inaction and the fears that consumed her decision to leave the abuser.

A mother may be held accountable for her child's wellbeing, however if she faults in that duty because of domestic violence, her hardships resulting from the battering are relevant. Handing out harsh punishments based on the assumption that a mother could safely remove her children from the abusive situation is ignoring the plight of battered women who may be resource-deprived²⁰⁸ or deterred from leaving based on cultural or religious beliefs.²⁰⁹ The lack

202. *Id.* at 250.

203. *Id.* at 250–51.

204. *Id.*

205. *Id.*

206. Fugate, *supra* note 1, at 280.

207. *Id.* at 279–80.

208. The "Failure to Protect" Working Grp., *supra* note 5, at 858.

209. See generally LEMON, *supra* note 138, at 115–73 (explaining the unique conflicts that can arise between acting in accordance with one's cultural and religious beliefs, and leaving one's abuser).

of this kind of analysis ignores genuine issues that arise for many mothers who are deterred from relying on the justice system because of race or other identity factors.²¹⁰ It ignores their fears of being separated from their children²¹¹ and the difficulties of obtaining safe and affordable child care.²¹²

D. When a Victim Falls Outside of the Paradigm: Cecilia Vasquez

Fifteen-month-old Uriah was killed by his father, Freddie Ordoñez.²¹³ Uriah's mother, Cecilia Vasquez, who was working at the time, typically worked while Ordoñez cared for their two children.²¹⁴ One day Ordoñez became frustrated with Uriah and threw him into the bathtub.²¹⁵ Uriah developed bruising, repeatedly vomited, and ultimately had a seizure the next day.²¹⁶ As Uriah's condition worsened over the coming days, Vasquez attempted to call emergency personnel to get help for their son, but Ordoñez would not allow her to make the call.²¹⁷ A couple of days after being thrown into the bathtub, Uriah succumbed to his injuries.²¹⁸ Without Vasquez's knowledge, Ordoñez took Uriah's body into the desert and burned his remains.²¹⁹ Vasquez was sentenced to eighteen years in prison for child abuse.²²⁰ Ordoñez was sentenced to twenty-two years in prison for child abuse resulting in death.²²¹

Vasquez testified that Ordoñez abused her on a regular basis.²²² At trial, the defense presented undisputed evidence that Vasquez needed treatment for a battered-spouse syndrome diagnosis.²²³ De-

210. Craig-Taylor, *supra* note 84, at 49–50.

211. Panko, *supra* note 19, at 69.

212. Lindsey Anderson, *Better Child-Care Options Can Help Combat Fatal Child Abuse*, N.M. IN DEPTH (Dec. 14, 2014), <http://nmindepth.com/2014/12/14/better-child-care-options-can-help-combat-fatal-child-abuse/> [<http://perma.cc/4343-ZBN4>].

213. *State v. Vasquez*, 2010-NMCA-041, ¶ 2–3, 148 N.M. 202, 232 P.3d 438; *e.g.*, Anderson, *supra* note 212.

214. Vasquez, 2010-NMCA-041, ¶ 3.

215. *Id.*

216. *Id.* ¶ 4.

217. *Id.*

218. *Id.* ¶ 5.

219. Anderson, *supra* note 212.

220. Vasquez, 2010-NMCA-041, ¶ 8.

221. Anderson, *supra* note 212.

222. Vasquez, 2010-NMCA-041, ¶ 6.

223. *Id.* ¶ 40; *see* Kelly Grace Monacella, *Supporting a Defense of Duress: The Admissibility of Battered Woman Syndrome*, 70 TEMP. L. REV. 699, 699–700 (1997) (“‘Battered woman syndrome’ occurs as the aftereffect of repeated, severe abuse and, according to scientific observers, is marked by common characteristics and behaviors. Many women who suffer from battered woman syndrome are forced by their batterers either actually or indirectly to com-

spite this evidence, the trial court refused to even consider mitigating her sentence.²²⁴ On appeal, the court said that the trial court did not abuse its discretion in deciding not to mitigate the sentence.²²⁵

This is a clear example of a battered mother not being considered a victim. Vasquez does not represent the stereotypical domestic violence victim, so the court discounted her victimization.²²⁶ As a Hispanic, lower status woman,²²⁷ Vasquez's experience is not represented by the paradigm courts use to determine who is a victim.²²⁸ When the court determined that a jury could find that Vasquez's choice to leave Uriah with Ordoñez "created a substantial and foreseeable risk of death or great bodily injury to Uriah," it did not appear to consider the fact that Vasquez had to leave her children in their father's care because she had to work.²²⁹ It did not consider that she might not have had any other affordable and viable child care alternatives.²³⁰ Vasquez's income from Subway²³¹ may have not been enough to pay for all of their bills, as well as proper childcare. While society asserts it is a mother's responsibility to protect her children, in cases such as these, there is a conflict with her desire to provide for her children. A battered mother's complete situation cannot be overlooked when understanding why she left her children in the care of an abuser.²³²

Vasquez's experience cannot simply be reduced to being a victim of domestic violence. As a woman of color and a woman with a lower socioeconomic status, Vasquez faced several forms of oppression that influenced her failure to protect her child.²³³ However, she is not even acknowledged as a victim because the dominant voice speaking on behalf of domestic violence victims is a white, middle or upper class woman.²³⁴ Had anti-essentialism principles been applied here, the battered spouse syndrome evidence would have been considered as mitigating evidence for the length of Vasquez's prison sentence.

mit crimes." Battered women often remain with their abusers and do as they are told to thwart the infliction of more violence. The victims of abuse typically live in a constant state of fear because of the abuse, which then affects their response to the violence over time.).

224. See Vasquez, 2010-NMCA-041, ¶ 6.

225. *Id.* ¶ 41.

226. See Goodmark, *supra* note 15, at 45–46.

227. See generally Anderson, *supra* note 212.

228. See Goodmark, *supra* note 15, at 45.

229. Vasquez, 2010-NMCA-041, ¶ 21; see generally Anderson, *supra* note 212.

230. Anderson, *supra* note 212.

231. See *id.*

232. See generally Anderson, *supra* note 212.

233. See generally Crenshaw, *supra* note 110, at 1245–46.

234. Harris, *supra* note 171, at 588.

V. Moving Forward with Intersectionality and Anti-Essentialism

A. Totality of the Circumstances

Going forward, the theories of intersectionality and anti-essentialism need to be implemented into the legal analysis framework surrounding failure-to-protect laws. This analysis should be employed when the mother being charged is also a victim of domestic violence. The courts must first use anti-essentialism to recognize that each battered mother is still a victim regardless of how well her story relates to that of the model domestic violence victim.²³⁵ Then, the theory of intersectionality should be applied to ensure that the court's analysis consists of an all-encompassing analysis of a victim's identity and circumstances.²³⁶ To do so, the courts should apply a standard that is similar to the totality of the circumstances test.²³⁷ This standard takes all of the factors surrounding a situation into account instead of placing unfair and potentially unrealistic expectations on the victims.

By incorporating anti-essentialism principles, the legal framework will be more inclusive of all victims, not just those who perfectly fit into the standard modeled after one type of victim. Every woman who is battered is a victim, regardless of her race, culture, or class.²³⁸ While no victim's plight is superior to another, it is important to recognize that women can face different issues surrounding violence.²³⁹ A woman of color may face predicaments that stem from her race or culture—predicaments that a white woman may not face.²⁴⁰ A middle or upper class woman may have access to resources that an indigent woman does not, and those resources can play a substantial role in a battered mother's response to the abuse.²⁴¹ If the court punishes a mother for failing to protect her child regardless of her circumstances, it is seeking justice for one at the expense of another. Once a battered mother is viewed as a victim, the court can then take a more accurate look at her culpability regarding the child abuse.

235. See Goodmark, *supra* note 15, at 45–46.

236. Craig-Taylor, *supra* note 84, at 46–54.

237. THELAW.COM DICTIONARY, <http://dictionary.thelaw.com/totality-of-the-circumstances/> (last visited Sept. 23, 2017) (defining that the test is being used “[w]hen all the factors surrounding an event are taken into account, usually to determine whether there has been a violation of a person’s constitutional rights.”) [<http://perma.cc/LQJ6-C8EL>].

238. Goodmark, *supra* note 15, at 41.

239. See Craig-Taylor, *supra* note 84, at 52.

240. See *id.* at 43.

241. See *id.* at 53–54.

In addition to applying anti-essentialism principles to domestic violence victims, they also need to be applied to the concept of motherhood. Enos argues that “[a]bused mothers should not be judged against a theoretical, idealistic concept of ‘mother.’ Rather, a mother’s actions or decisions should be judged by a reasonable person standard that takes into account her particular situation, circumstances, and capabilities.”²⁴² It is difficult to grasp how a mother can be punished so harshly for a situation over which she has no control.²⁴³ Society has constructed this archetype representing the perfect mother but fails to understand that each mother is different and faces unique hardships.²⁴⁴ This standard must be set aside when there are failure-to-protect cases involving battered mothers. A woman may not fit the ideal of a perfect mother or typical domestic violence victim, however, her individual circumstances should be considered regardless.

By applying the intersectionality theory, the court will need to look at the battered mother’s identity in its entirety to determine the impact it has on her response to violence.²⁴⁵ The current failure-to-protect analysis is heavily influenced by gender roles.²⁴⁶ The law assumes that a mother can act, as a mother should, without being influenced and affected by the other dimensions of her identity.²⁴⁷ The strands that make up a woman’s identity cannot be separated.²⁴⁸ The oppression that stems from the various layers of her individuality can neither be isolated nor ignored by using a legal analysis framework that does not account for the plight of battered women of color, as well as indigent women.²⁴⁹

B. Mens Rea

There should also be a specific *mens rea* requirement for failure-to-protect cases that involve a battered mother.²⁵⁰ There is a differ-

242. Enos, *supra* note 27, at 230.

243. *Id.*

244. *Id.*

245. See Craig-Taylor, *supra* note 84, at 49–53.

246. See Fugate, *supra* note 1, at 274–76.

247. Enos, *supra* note 27, at 230.

248. Ange-Marie Hancock, *When is Fear for One’s Life Race-Gendered? An Intersectional Analysis of the Bureau of Immigration Appeals’s In Re A-R-C-G Decision*, 83 *FORDHAM L. REV.* 2977, 2982–83 (2015).

249. See Craig-Taylor, *supra* note 84, at 49–53.

250. LEGAL INFORMATION INSTITUTE, https://www.law.cornell.edu/wex/mens_rea (last visited Sept. 23, 2017) (mens rea describes the mental state that a person must have in order for a crime to be intentional) [<http://perma.cc/NTQ6-45BL>].

ence in the culpability of a mother who simply allows the abuse to continue versus a mother who does not know of any alternatives to stop the abuse. The courts cannot automatically presume that the victim fails as a mother because of her inaction.²⁵¹ Many victims face a significantly greater risk of being killed after leaving their abuser.²⁵² When a mother fails to protect her child by leaving the abusive environment, it may be an attempt to simply keep them both alive.²⁵³ When it is a woman's belief that she only has two options—stay with the abuser and attempt to stop the abuse or to be killed²⁵⁴—it is unjustifiable for a mother to serve a long prison sentence for the actions of her abuser.

By analyzing all the factors that influenced her omission (failing to protect her child), it is more likely that the court will be able to determine the mother's intent. Some may argue that her intent does not matter because either way she failed to keep her child out of harm's way. This argument is applicable when the mother is not a victim of the abuse herself. Domestic violence plays a significant role in the physical, mental, and emotional wellbeing of the victim.²⁵⁵ All the dimensions of a woman's life and identity influence her response to traumatic situations like domestic violence.²⁵⁶ This should be accounted for when charging a battered mother for failing to protect her child.

Conclusion

It is always tragic for a child to have to suffer or even die at the hands of an abuser. Domestic violence is an extremely complex issue that requires a deeper analysis than what is applied in the current framework for failure-to-protect cases. The amount of culpability, as well as the severity of the prison sentence, should be determined after taking a comprehensive look at a mother's plight, her sources of oppression, and her knowledge of any alternatives to staying with her abuser. Knowledge of the abuse and the ability to stop the abuse are two very different concepts²⁵⁷ that the court should consider and distinguish.

251. See Panko, *supra* note 19, at 75.

252. Banner, *supra* note 28.

253. The "Failure to Protect" Working Grp., *supra* note 5, at 858–59.

254. See *id.*

255. NATIONAL COALITION AGAINST DOMESTIC VIOLENCE, <https://ncadv.org/learn-more> (last visited Sept. 23, 2017) [<http://perma.cc/RS4A-26L6>].

256. Craig-Taylor, *supra* note 84, at 47.

257. Enos, *supra* note 27, at 240–48.

It is a parent's duty to protect his or her child, but there is a heightened expectation placed on mothers to be the primary protector.²⁵⁸ Because of this heightened expectation,²⁵⁹ battered mothers are punished without any regard to their actual ability and efforts to control the situation and protect the child.²⁶⁰ As a result, battered mothers are further punished because of their abuser's actions. It is difficult to determine the correct balance between serving justice for the child and setting a fair sentence for a battered mother because of mitigating circumstances. The plight of battered mothers should be considered in its entirety because there is no "typical" victim and all of the characteristics that encompass a mother's identity should not have to be severed in order for the courts to serve justice properly.

258. Schernitzki, *supra* note 52, at 51.

259. Fugate, *supra* note 1, at 274; *see also* Schernitzki, *supra* note 52, at 51.

260. Enos, *supra* note 27, at 230.

