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How Failure to Protect Laws Punish the Vulnerable

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HOW FAILURE TO PROTECT LAWS PUNISH THE VULNERABLE

Amanda Mahoney[†]

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INTRODUCTION

“[K]ill me later. Just help me, please.”¹

Tondalao Hall was with her father one night, looking for a new place to live so she and her children could move away from her abusive boyfriend, Robert Braxton Jr. While Hall was out, Braxton broke the femur of Hall’s son.² After initially concealing the truth about what happened, Braxton eventually pled guilty to two counts of child abuse and was sentenced to two years in jail and eight years of probation.³ Hall, who also was physically and emotionally abused by Braxton, was convicted of four counts of child abuse for leaving the children with Braxton and sentenced to thirty years in prison under a “failure to protect” statute.⁴ Since sentencing, she has been denied clemency and

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1. Abstract at 619, *Pedraza v. Arkansas*, 2014 Ark. 298 (quoting Victoria Pedraza who was urging her husband to allow her to get help for her dying child) available at <https://www.documentcloud.org/documents/1284229-daniel-pedraza-brief-abstract-of-record.html#document/p625/a176597>.
 2. Ian Smith, *ACLU Wants Justice for Abused Mother Who Failed to Report Child Abuse She Says She Didn’t Know was Happening*, OKLAHOMA’S NEWS 4 (Oct. 24, 2017), <http://kfor.com/2017/10/24/acLU-wants-justice-for-abused-mother-who-failed-to-report-child-abuse-she-says-she-didnt-know-was-happening/>.
 3. *Id.*
 4. Dallas Franklin, *Oklahoma Judge Dismisses Review of Abused Woman Who Failed to Report Child Abuse by Boyfriend*, OKLAHOMA’S NEWS 4 (Dec. 12, 2017, 6:46 PM), <http://kfor.com/2017/12/12/oklahoma-judge-dismisses-review-of-abused-woman-who-failed-to-report-child-abuse-by-boyfriend/>; OKLA. STAT. tit. 21 § 843.5 (2017).

lost appeals to modify her sentence.⁵ Hall is eligible for parole in 2030; Braxton was released the day of sentencing.⁶

Failure to Protect (FTP) Laws have strayed far from their statutory intent when they are used to punish victims of domestic abuse. Under FTP laws, if a caregiver knows or suspects that a child is being abused and fails to report it, for any reason, the caregiver can be prosecuted the same as the abuser.⁷ Frequently, these laws are used to prosecute mothers who are also victims of the abuser, with evidence of their own abuse used against them in court.⁸ This application of FTP laws does not accomplish the goals of encouraging parents to remove their children from abusive environments and preventing child abuse. Moreover, when FTP laws are used to prosecute abused mothers, lawmakers and courts are compounding the problems they seek to resolve for abused children.

In many cases, FTP laws over-criminalize behaviors of mothers who fail to “seek help” in specific ways, while overlooking the steps that a mother has taken to protect her children. FTP laws have made the status of being an abuse victim into a crime because the history of a woman’s own abuse is used as evidence that she should have expected her abuser to also abuse the children.⁹ The divergence from the initial rationale behind FTP laws is highlighted here in an analysis of several typical cases. There are more efficient and socially satisfactory ways to reduce childhood abuse, help children who are abused, and create better home environments.

Part I of this note will review abuse in the United States. There has been rapid change in the attention paid to child abuse over the past half-century, with a large increase in awareness and governmental action. Statistics, however, show that child abuse is still as prevalent as ever in American households. FTP laws have grown out of multiple misapplications of placing blame for child abuse.

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5. *Updated FAQ: Tondalao Hall’s Hearing*, ACLU OKLA. (Dec. 8, 2017), <https://www.acluok.org/en/news/updated-faq-tondalao-halls-hearing>.
 6. Candace Liger, *Free Tondalao Hall*, CHANGE, <https://www.change.org/p/district-attorney-david-prater-free-tondalao-hall> (last visited Jan 15, 2018).
 7. Jeanne A. Fugate, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 273, 293 (2001).
 8. *Id.* at 280.
 9. *See* State Dep’t of Human Services v. Tate, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at *1 (Tenn. Ct. App. Mar. 31, 1995); Megan Lambert, *A Father Abuses His Children but Somehow Their Mother Goes to Prison For 30 Years*, ACLU (Jan. 31, 2018, 4:30 PM), <https://www.aclu.org/blog/criminal-law-reform/sentencing/father-abuses-his-children-somehow-their-mother-goes-prison-30>; *Campbell v. State*, 999 P.2d 649, 659 (Wyo. 2000).

Part II examines several FTP cases, including two recent cases that have garnered media attention for the strict punishment of an abuse victim. Although the laws are gender-neutral, women are disproportionately prosecuted and courts have a history of applying different standards and expectations to mothers and fathers. Additionally, a side-by-side comparison of two Florida cases from the same year, emphasizes the stark gender-based differences examined.

Part III will review the circumstances that most abused women face. Many studies have shown that they are socially isolated with few resources, emotionally and psychologically traumatized, and out of touch with many aspects of reality. In order to survive, these women employ coping mechanisms in their everyday life, which are aimed at protecting themselves and their children.

Part IV will evaluate the misuse and unfairness of FTP laws. FTP laws are comparable to “status” laws that do not address an overt act, but instead criminalize a person’s status instead of a behavior. I will also discuss similar laws that have been declared unconstitutional or are currently being challenged, and how their characteristics compare to FTP laws.

Part V contains recommendations for leniency and changes to FTP laws to ensure children grow up in the safest possible environment. Primarily, introducing options such as a battered woman syndrome defense and affirmative defenses within the statutes will help keep FTP laws in place, but provide some balance for abused women. Furthermore, recommendations are made for sentencing guidelines that encourage judges to account for a woman’s history of abuse and understand how her actions were shaped by her history of abuse.

I. HISTORICAL CONTEXT OF ABUSE IN THE UNITED STATES.

A. Tidal Wave of Change, Starting in the 1960’s

Before the 1960s, little attention was paid to preventing child abuse.¹⁰ Although there have always been some mechanisms in place to protect children,¹¹ the governmental role was minor until the mid-1900’s.¹² An article introducing “Battered Child Syndrome” brought the issue of child abuse to the public spotlight in 1962.¹³ This article detailed the importance of physicians detecting child abuse and the clinical indicators of abuse.¹⁴ The article focused national attention on the

10. John E.B. Meyers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 454-55 (2008-2009).

11. *Id.* at 449.

12. *Id.* at 452.

13. C. Henry Kempe et al., *The Battered-Child Syndrome*, 181 J. AM. MED. ASS’N 17, 17 (1962).

14. *Id.*

impact of abuse and the lack of research about children who are abused.¹⁵

The article not only captivated the public, but also caught the attention of Congress. This led to rapid and sweeping change by the legislature. Specifically, the Social Security Act Amendments of 1962 increased funding for child welfare services and required states to offer child welfare services statewide by July 1, 1975.¹⁶ Between 1963 and 1967, all fifty states enacted laws requiring physicians to report signs of abuse.¹⁷ President Nixon signed the Child Abuse Prevention and Treatment Act in 1974, which provided federal funding to states for the “prevention, identification, and treatment of child abuse and neglect” and research on child abuse.¹⁸

The Adoption Assistance and Child Welfare Act of 1980 focused on adoption and foster care, and stressed the importance of keeping children in their homes whenever possible.¹⁹ In the 1990s, however, this emphasis on keeping children with their parents as much as possible was criticized for allowing children to stay in unsafe environments.²⁰ In response, Congress passed the Adoption and Safe Families Act of 1997, which emphasized child safety as the primary goal, in addition to the desire to keep families together.²¹

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15. Meyers, *supra* note 10, at 455 (citing Elizabeth Elmer, *Identification of Abused Children*, 10 CHILD. 180 (1963)).
 16. See H.R. REP. NO. 87-2006, at 1, 3 (1962) (Conf. Rep.); Wilbur J. Cohen & Robert M. Ball, *Public Welfare Amendments of 1962 and Proposals for Health Insurance of the Aged*, SOC. SEC. BULL., Oct. 1962, at 15-16 (including services which “prevent[ed] or remed[ied] . . . neglect, abuse, exploitation or delinquency of children” and provided aid to neglected or high-risk children in “child welfare services”).
 17. Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States’ Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 VILL. L. REV. TOLLE LEGE 37, 37 (2013).
 18. Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106 (2016); *40 Years Ago: Child Abuse Prevention and Treatment Act Passed*, NAT’L LOW INCOME HOUS. COAL. (Oct. 14, 2014), <https://web.archive.org/web/20180303211321/http://nlihc.org/article/40-years-ago-child-abuse-prevention-and-treatment-act-passed>; Meyers, *supra* note 10, at 457.
 19. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500; Adoption Assistance and Child Welfare Act of 1980, H.R. 3434, 96th Cong. (1980).
 20. Meyers, *supra* note 10, at 460.
 21. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 101(a), 111 Stat. 2115 (1997); Cathleen S. Graham, *Implementation of the Adoption and Safe Families Act of 1997: The Indiana Experience*, 1 ADVANCES IN SOC. WORK 79, 79 (2000).

Even as the public and government were becoming more active in preventing and remedying child abuse, the laws were not consistently enforced. Stereotypical gender roles were still very prevalent,²² and care of children fell almost entirely to women. Society primarily looked at preventing child abuse as a responsibility of a mother, not a father.²³ When a male's actions were abusive towards a child, it was viewed as the mother's fault for leaving her child with the wrong person.²⁴

Although there were government-mandated child welfare programs in place by the 1980s, they did not function as intended. When Karen Dalton reported her husband to the police for abusing their children, the police refused to get "involved in a family matter."²⁵ A neighbor even testified that Karen had tried to leave, but her husband threatened to kill the children (once even held one of her children outside of a third-floor window) or to kidnap them if she did leave.²⁶ This did nothing to sway the court. Karen lost her parental rights, as the court disregarded her attempts to seek help. The Court stated there was no question about her "unfitness"²⁷ and that during the seven years of her marriage she should have found another opportunity to leave.²⁸

B. Child Abuse Today in America

Despite this rapid increase in governmental support since the 1960s, child abuse remains in American homes at high rates. A 2015 report showed that over 3.1 million referrals were made to Child Protective Services ("CPS") and almost sixty percent of those initial reports were "screened-in," meaning that they required some kind of investigation or intervention.²⁹ This report found that the average CPS investigation and response worker completed seventy-two cases per year (related to child abuse and neglect), with some individuals having caseloads as high as 205 per year.³⁰ Furthermore, the average referral included more than

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22. *Women's Roles vs. Social Norms*, N.Y. TIMES (Dec. 30, 1986), <https://www.nytimes.com/1986/12/30/style/women-s-roles-vs-social-norms.html>.
 23. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 593 (1998).
 24. *Id.* at 595.
 25. *In re Dalton*, 424 N.E.2d 1226, 1230 (Ill. App. Ct. 1981).
 26. *Id.*
 27. *Id.* at 1231.
 28. *Id.* at 1232.
 29. DEP'T OF HEALTH & HUM. SERVS. – CHILD. BUREAU, CHILD MALTREATMENT 2015 at 11 (2015) [hereinafter CHILD. BUREAU].
 30. *Id.* at 14.

one child.³¹ This study included results from 19,280 CPS professionals, totaling over 1.38 million cases, but does not include data from some states, including six out of the ten most populated states (California, Florida, New York, Pennsylvania, Ohio, and Georgia).³²

Between 2011 and 2015, the claim of abuse was substantiated or indicated in eighteen percent of cases reported to CPS, while 55.9% of cases were “unsubstantiated” (CPS was unable to rule out abuse, but was also unable to collect enough information to conclude abuse).³³ The likelihood of being abused is greatest in the first year of life, with the frequency decreasing each year.³⁴ The majority of children in this report suffered from neglect, while physical and sexual abuse were second and third, respectively.³⁵

In 2014, homicide was the third most common cause of death in children between one and four years of age and the fifth most common for children between five and fourteen years of age.³⁶ The Administration for Children and Families estimates that abuse and neglect were responsible for 1670 child deaths in 2015.³⁷ Parents were responsible for 77.7% of childhood homicide deaths.³⁸ Another study found that the United States’ system on tracking this information is so flawed, that the actual number of child deaths from abuse and neglect may be two times greater than reported.³⁹ These unpleasant realities of the prevalence of child abuse understandably drive legislation aimed at protecting children.

C. History of FTP Laws.

1. Statutory Goals of FTP

The goal of FTP laws is to encourage caretakers to report instances of childhood abuse and interpersonal violence, thereby reducing the

31. *Id.* at 10.

32. *Id.* at 14; *North Carolina Becomes Ninth State With 10 Million or More People, Census Bureau Reports*, U.S. CENSUS BUREAU (Dec. 22, 2015), <https://www.census.gov/newsroom/press-releases/2015/cb15-215.html>.

33. CHILD. BUREAU, *supra* note 29, at 18.

34. *Id.* at 20, 53-54.

35. *Id.* at 47.

36. Kenneth D. Kochanek et al., *Deaths: Final Data for 2014*, 65 NAT’L VITAL STAT. REP. 10, 10, 12 (2016).

37. CHILD. BUREAU, *supra* note 29, at 52-53.

38. *Id.* at 55.

39. *Child Abuse, Neglect Kills Hundreds in View of Authorities, AP Reports*, CBS NEWS, (Dec. 18, 2015, 12:23 PM), <https://www.cbsnews.com/news/child-abuse-neglect-kills-hundreds-in-view-of-authorities-ap-reports/>.

violence to which a child is exposed.⁴⁰ The states vary as to whether or not they have an FTP statute and how severe the sentences can be. As of 2015, forty-eight states, Washington D.C., and four U.S. territories have FTP laws; Maryland, Wyoming, and Puerto Rico do not.⁴¹ The statutes designate the crimes as either misdemeanors or felonies, with civil penalties, criminal penalties, or both.⁴² Current federal law under the Child Abuse Prevention and Treatment Act includes parents and caregivers who fail to act in their definition of “child abuse and neglect,”⁴³ but states may elect to impose stricter standards.

FTP supporters believe that by charging a caretaker who knows (or even suspects) a child is being abused with the same crimes as the abuser, the laws compel caretakers to report abuses at greater rates.⁴⁴ Some of these states even allow for the prosecution of a parent who “allows” a child to watch the parent suffer the abuse.⁴⁵ The hope is that this reporting will help stop the cycle of violence and reduce the lasting impacts of childhood abuse, such as antisocial behaviors, anxiety, PTSD, and violent behaviors later in life.⁴⁶ Although the intentions behind the laws are laudable, these laws in reality hurt mostly women; women who many believe should not be punished as severely as they are.

2. Compliance with FTP Laws

Purportedly, parents can comply with FTP laws and not be prosecuted if they report the abuse and get the child out of the abusive environment or make the abuser leave.⁴⁷ None of these options are as simple and straightforward as courts and the legislatures seem to think. As detailed in Part IV, mothers and children living in abusive

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40. Brenda M. Ewen, *Failure to Protect Laws: Protecting Children or Punishing Mothers?*, 3 J. FORENSIC NURSING 84, 84 (2007).
 41. U.S. DEPT’ OF HEALTH & HUM. SERVS. – CHILD. BUREAU, PENALTIES FOR FAILURE TO REPORT AND FALSE REPORTING OF ABUSE AND NEGLECT (2016), *available at* <https://www.childwelfare.gov/pubPDFs/report.pdf>.
 42. *Id.*
 43. Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5106 (2016).
 44. *See Jacobs, supra* note 23, at 611-12, 615.
 45. *E.g.*, *Nicholson v. Scoppetta*, 820 N.E. 2d 840, 844 (N.Y. 2004); *In re Lonell J.*, 673 N.Y.S. 2d 116, 118 (N.Y. App. Div. 1998) (holding that N.Y. Fam. Ct. Act § 1012 should be read to include domestic violence between parents as sufficient to establish neglect).
 46. *See Jacobs, supra* note 23, at 585; LENORE E. A. WALKER, *THE BATTERED WOMAN SYNDROME* 74 (2d ed. 2000); *see generally* Kempe, *supra* note 13; *Impact on Child Development*, U.S. DEP’T OF HEALTH & HUM. SERVS. – CHILD. BUREAU, <https://www.childwelfare.gov/topics/can/impact/development/> (last visited Nov. 4, 2017).
 47. *Jacobs, supra* note 23, at 615.

environments are not able to easily leave. There are a myriad of social, financial, and physical factors that prevent many abused mothers from taking action.

In addition to leaving, these women are also expected to report the abuse to authorities. Seeking help may be unrealistic for some of the same reasons. As discussed in Part IV, these women often do not have anywhere else to go, they distrust others, and they have no support system or financial resources. The abused women know that they will face repercussions when the abuser finds out that they have reported the abuse. Undereducated, poor, and minority women may be the most likely to face abuse.⁴⁸ This group has the greatest need for government-sponsored services,⁴⁹ while at the same time, these women may have a history of distrust of police, social workers, and any other assistance-providing organization,⁵⁰ stemming from systemic persecution and neglect.⁵¹ In some cases, the distrust may even be due to the victim's previous fruitless attempts to seek help for the abuse.⁵²

Most FTP laws only examine whether or not a parent was able to stop their child from being abused and reported the abuse to law enforcement.⁵³ These FTP laws ignore the capabilities of the mother, the realities of the social situation, and the mother's own status as an

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48. CTR. FOR DISEASE CONTROL, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (2017), at 198, available at <https://www.cdc.gov/violenceprevention/pdf/NISVS-StateReportBook.pdf>; Lecia Imbery, *The Intersection of Poverty and Domestic Violence*, COAL. ON HUM. NEEDS (Oct. 16, 2014), <https://www.chn.org/2014/10/16/intersection-poverty-domestic-violence/#.WgD71GhSw2w>; SUNITA KISHOR & KIERSTEN JOHNSON, WOMEN AT THE NEXUS OF POVERTY AND VIOLENCE: HOW UNIQUE IS THEIR DISADVANTAGE? 147 (2005), available at <https://dhsprogram.com/pubs/pdf/od32/8.pdf>.
 49. WALKER, *supra* note 46, at 16.
 50. WOMEN OF COLOR NETWORK, DOMESTIC VIOLENCE 2 (June 2006), available at https://www.doj.state.or.us/wp-content/uploads/2017/08/women_of_color_network_facts_domestic_violence_2006.pdf.
 51. Jeffrey Jones, *In U.S., Confidence in Police Lowest in 22 Years*, GALLUP (June 19, 2015), <https://news.gallup.com/POLL/183704/CONFIDENCE-POLICE-LOWEST-YEARS.ASPX>.
 52. Beverly Engel, *Why Don't Victims of Sexual Harassment Come Forward Sooner?*, PSYCHOL. TODAY (Nov. 16, 2017), <https://www.psychologytoday.com/us/blog/the-compassion-chronicles/201711/why-dont-victims-sexual-harassment-come-forward-sooner>.
 53. *E.g.* ARIZ. REV. STAT. § 13-3623 (LexisNexis 2017); ARK. CODE ANN. § 5-27-221 (2017); N.D. CENT. CODE § 14-09-22 (2017).

abuse victim.⁵⁴ When women in these abusive situations are prosecuted for another person's actions (that they may not even know about), their prosecution is furthering the cycle of distrust of "the system" and alienating the people who need the most help.

II. CASES HIGHLIGHT THE HARSH APPLICATION OF FTP AND UNREALISTIC EXPECTATIONS OF A WOMAN

A. Representative FTP Cases

1. Titches Lindley

Arlena Lindley lived with her son Titches and her boyfriend, Alonzo Turner. One cold morning, Titches was seen by Lindley's friend sitting outside without shoes.⁵⁵ Turner became angry with the boy after Titches soiled himself. Turner whipped Titches with a belt, threw him against the wall, pushed his face into oatmeal on the floor, stuck his head in the toilet, and stepped on his chest.⁵⁶ Lindley tried to leave with Titches, but Turner would not let her take him⁵⁷ and Turner locked Lindley out of the house.⁵⁸ While she was away from the home, she declined the opportunity to call the police, instead she called Turner, not wanting to anger him any further.⁵⁹ Lindley then returned home, told Titches to take a nap, then went to several stores, at the request of Turner.⁶⁰ When she returned, Titches was struggling to breathe. An ambulance was called and Titches later died due to his injuries.⁶¹ Threatened with ninety-nine years of imprisonment,⁶² Lindley pled guilty to injury to a child and was sentenced to forty-five years imprisonment.⁶³

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54. See, e.g. ARIZ. REV. STAT. § 13-3623 (LexisNexis 2017); ARK. CODE ANN. § 5-27-221 (2017); N.D. CENT. CODE § 14-09-22 (2017). At least three states offer affirmative defenses if intervening would result in substantial harm to the child or the person: IOWA CODE § 726.6(1)(e) (2018); MINN. STAT. § 609.378(2) (2017); OKLA. STAT. tit. 21, § 852.1 (2017).
55. *Lindley v. State*, App. No. 08-08-00149-CR, 2010 Tex. App. LEXIS 2044, at *2 (Tex. Ct. App. 8th Dist. Mar. 24, 2010).
56. *Id.* at *2-3.
57. *Id.* at *3.
58. Jacqueline Mabatah, *Blaming the Victim? The Intersections of Race, Domestic Violence, and Child Neglect Laws*, 8 GEO. J. L. & MOD. CRITICAL RACE PERSP. 355 (2016).
59. *Lindley*, LEXIS 2044, at *4.
60. *Id.* at *4-5.
61. *Id.* at *5-7.
62. Sentencing Transcript at 3, *Texas v. Lindley*, 2010 Tex. App. LEXIS 2044 (Tex. Ct. App. 8th Dist. Mar. 24, 2010) (No. F06-89089-X).
63. *Lindley*, LEXIS 2044, at *9.

Lindley's testimony highlighted many common themes seen in homes with abuse. She acknowledged that she did not call the police when she left because she was scared of what Turner would do and thought it would be safer to calm him down by listening to him.⁶⁴ She had the same reasoning for running errands after returning the first time.⁶⁵ Turner had convinced her that if she sought medical care for Titches, CPS would take Titches away from her.⁶⁶ That morning, Turner threatened to kill her if she touched Titches or tried to leave with him.⁶⁷ She even tried to get Turner to focus his aggression at her and leave Titches alone.⁶⁸ Because of the ongoing abuse in the house, Lindley was trying to set up a plan to leave Turner, but the process was taking time.⁶⁹ Lindley was even packing up Titches' clothes when her friend came over that morning.⁷⁰ She could not have predicted that Turner was going to beat Titches so aggressively that he would die, and when she did see the extent of his injuries, she called 911 to try to save his life.⁷¹

2. Aubriana Coke

Aubriana Coke (Brie) was two years old when her mother called 911 to report that she was not breathing.⁷² After Brie was pronounced dead, multiple bruises caught the attention of the hospital staff.⁷³ Her mother, Victoria, and stepfather, Daniel, reported that she had fallen from a dock the day before and Brie started acting strange later that day.⁷⁴ They reported being hesitant to seek medical attention because of a previous DHS investigation.⁷⁵ As the investigation around Brie's death went on, warning signs alerted authorities that the parents' story was false. There was a mysterious green cord that Victoria and Daniel gave conflicting stories about. The medical examiner said that Brie's

64. *Id.* at *8.

65. *Id.*

66. *Id.*

67. *Id.* at *3; Sentencing Transcript at 78, 162, *Texas v. Lindley*, 2010 Tex. App. LEXIS 2044 (Tex. Ct. App. 8th Dist. Mar. 24, 2010) (No. F06-89089-X).

68. *Lindley*, LEXIS 2044.

69. *Id.* at 49.

70. *Id.* at 72.

71. *Id.* at 52-53.

72. ARKANSAS STATE POLICE CASE FORM (2012), *available at* <https://www.documentcloud.org/documents/1283064-victoria-pedraza-arkansas-state-police.html#document/p3/a176583>.

73. *Id.*

74. *Id.*

75. *Id.*

bruises were not caused by a fall from a dock and he called her death a homicide. In addition, there were concerns about the use of unusual punishment methods.⁷⁶ Shortly after being arrested, Victoria admitted the dock story was false, that Daniel had punched Brie in the stomach, and that he had routinely abused both her and Brie.⁷⁷

Because of her plea deal to testify against Daniel, the charge of capital murder against Victoria was dropped.⁷⁸ She was only charged with permitting child abuse, for which Victoria received the maximum sentence of twenty years imprisonment.⁷⁹ Additionally, as a requirement of Arkansas law, Victoria will have to register as a sex offender when she is released.⁸⁰ The prosecutor, Deen, acknowledged that Victoria was controlled by and feared Daniel. Deen recognized that she was only able to tell the truth once she was arrested, away from his control and brutality, but he asserted that fear did not remove her duty as a mother. Deen also stated that he would not have put Victoria on trial had she taken a more aggressive approach to defending Brie: “[s]he should’ve cut his throat while he slept.”⁸¹

B. Stark Gender Differences

1. Historical View of Woman

Until the 1980s, mental health professionals and physicians widely believed that abused women had specific, negative characteristics that explained why they were abused.⁸² Purportedly, the women were aggressive masochists who enjoyed being hurt or punished and were sexually inadequate for their husbands.⁸³ Additionally, the evidence of abuse that was noticed by a professional was frequently characterized as a symptom of a mental illness.⁸⁴ For example, a woman who has been psychologically abused will frequently exhibit signs of paranoia and distrust because she has been manipulated to believe that everyone but her abusive partner is trying to hurt her.⁸⁵ That misinterpretation of

76. *Id.*

77. *Id.*

78. Alex Campbell, *Battered, Bereaved, and Behind Bars*, BUZZFEED (Oct. 2, 2014), https://www.buzzfeed.com/alexcampbell/how-the-law-turns-battered-women-into-criminals?utm_term=.fhrOVjolph#.cbYyqbYBV.

79. *Id.*

80. ARK. CODE ANN. § 12-12-903(s) (2017) (“‘Sex offense’ includes . . . [p]ermitting abuse of a minor”).

81. Campbell, *supra* note 78 (quoting Thomas Deen).

82. WALKER, *supra* note 46, at 101.

83. Snell et al., *The Wifebeater’s Wife*, 11 ARCHIVES OF GEN. PSYCHIATRY 107, 111-112 (1964).

84. WALKER, *supra* note 46, at 103.

85. *Id.*

symptoms by professionals often led to an incorrect diagnosis of a psychiatric illness, which in turn reaffirmed the belief that something was inherently wrong with abused women.

Although FTP laws are written in gender-neutral language, they are disproportionately enforced against women.⁸⁶ This is because our society tends to place a much higher burden for raising children on the mother than on the father.⁸⁷ It was always the mother's role in our society to raise the children and provide a nurturing environment.⁸⁸ The father was typically seen as the ruler of the house and the authority figure, not to be questioned. Although the modern view of fathers is less of a strict disciplinarian⁸⁹, the roles in abusive households are often still conforming to this stereotype: the male is the breadwinner, in control of the house, and the woman is subservient, in need of guidance and support.⁹⁰

Even when there is evidence of a loving, non-abusive relationship between the child and mother, judges still tend to impose harsh punishments on a mother who failed to protect.⁹¹ It has been declared that a mother who loves her children should have an even greater instinct to protect them from harm.⁹² Historically, even when a mother does try to intervene and fails, it is typically seen as inaction by the

86. Jacobs, *supra* note 23, at 619.

87. WALKER, *supra* note 46, at 78; Jacobs, *supra* note 23, at 619.

88. See Jacobs, *supra* note 23, at 587.

89. *The Changing Role of the Modern Day Father*, AM. PSYCHOL. ASS'N, <http://www.apa.org/pi/families/resources/changing-father.aspx> (last visited Jan. 20, 2018).

90. See, e.g., ZVI EISIKOVITS & ELI BUCHBINDER, LOCKED IN A VIOLENT EMBRACE: UNDERSTANDING AND INTERVENING IN DOMESTIC VIOLENCE 44-45 (2000); WALKER, *supra* note 46, at 78.

91. See e.g. Johnson v. State, 508 So.2d 443, 444-445 (Fla. Dist. Ct. App., 1987) (Zehmer, J., dissenting) (mother plead no contest to manslaughter after her boyfriend beat her daughter to death. The state presented evidence that he also abused the mother, had a history of trauma, and a low intelligence. The state also shared that the mother seemed to have a loving relationship with her daughter and there was no evidence that she abused the child in any way. The state recommended three to seven years imprisonment for the mother and the judge gave her the maximum sentence of 15 years for failing to protect her daughter).

92. *Id.*

police and courts.⁹³ Frequently, these cases involve mothers with limited resources; namely, mothers who work and need to leave their children in the care of their partners.⁹⁴

2. Wanda's Story

After Wanda Lee Tate's husband pled guilty to all counts of severe child abuse, both parents lost parental rights. During her trial for failing to protect her children, evidence that Wanda also suffered her husband's abuse and that she was in constant fear of him was presented and undisputed.⁹⁵ Later, when Wanda was seeking to have her parental rights reinstated, the Court stated, "with reference to [Wanda], the Court finds that even animals protect their young."⁹⁶ The Court then declared that she needed to take responsibility for her own actions and that "the natural maternal instinct that any mother should have . . . should have overcome her fear if she is to be a fit mother" and refused to return her parental rights.⁹⁷

3. Case Comparison

Two cases from 1995 in Florida highlight the sharp contrast in gender-based expectations. In the first case, Walter Zile was convicted of the first-degree murder of his stepdaughter.⁹⁸ He had beaten her, stored her body in a closet for days, and then buried her.⁹⁹ The child's mother, Pauline Zile, was present at the time of the beating.¹⁰⁰ Although it was well-known that Walter was abusing Pauline too, Pauline's

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93. *State v. Walden*, 306 N.C. 466 (1982) (mother was convicted of assault with a deadly weapon without ever wielding a "weapon" of her own. The children's father entered their apartment, began hitting them with a belt. When she tried to intervene, she was repeatedly struck in the face. The court still claimed she failed in her "inherent" duty to take affirmative action to protect them); *See also* EISIKOVITS & BUCHBINDER, *supra* note 90, at 118-119 (police verbally berated a woman who reported abuse, indicating that a call for help was a waste of time and that her action fell on deaf ears); *see, e.g.*, Sentencing Transcript at 80, *Texas v. Lindley*, 2010 Tex. App. LEXIS 2044 (Tex. Ct. App. 8th Dist. Mar. 24, 2010) (No. F06-89089-X).
94. *Barrientos v. Johnson*, No. EDCV 15-2187-R (KS), 2016 U.S. Dist. LEXIS 72852, at *3, *12 (C.D. Cal. Apr. 22, 2016); *State v. Morrison*, 437 N.W.2d 422, 424 (Minn. Ct. App. 1989).
95. *See State Dep't of Human Servs. v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at *1 (Tenn. Ct. App. Mar. 31, 1995).
96. *Id.* at 2.
97. *Id.* at 3.
98. *Zile v. State*, 779 So.2d 535, 536 (Fla. Dist. Ct. App. 2000).
99. *Zile v. State*, 710 So.2d 729, 731 (Fla. App. 1998).
100. *Id.* at 731-732.

counsel failed to introduce any of that evidence at her trial.¹⁰¹ Pauline was also convicted of first-degree murder and sentenced to life imprisonment.¹⁰² Prosecutors had even sought the death penalty for Pauline because she failed to protect her daughter.¹⁰³

The same year, Jessica Schwarz was convicted of abusing her ten-year-old stepson, leading to his death.¹⁰⁴ He was found nude in the pool, with bruises all over his body at 6:00 am.¹⁰⁵ There was evidence that the abuse had been ongoing and obvious.¹⁰⁶ Jessica had even discussed her dislike of the child with others; seventeen witnesses testified that she physically and mentally abused the child.¹⁰⁷ Even though CPS had been involved with the family because of multiple reports of abuse,¹⁰⁸ David Schwarz (the child's father), claimed he had not noticed any evidence of abuse.¹⁰⁹ Jessica was sentenced to life in prison; David was not charged with any crime related to his son's death.¹¹⁰

Although there are some differences between these two cases, there is no legal explanation as to why one parent was found culpable and the other was not charged with any crime. Pauline Zile saw her child being abused. David Schwarz claimed to have no knowledge of his son's abuse, in spite of his son's behavioral problems, hospitalizations, and CPS investigations.¹¹¹ Given how FTP laws have been applied to mothers, this claim of ignorance should not have released David Schwarz from all responsibility. Mothers have been prosecuted under

101. Jacobs, *supra* note 23, at 583.

102. Zile, 710 So.2d at 731-732; Jacobs, *supra* note 23, at 583; Stephanie Smith, *Pauline Zile Escapes Death*, SUN SENTINEL (June 8, 1995), http://articles.sun-sentinel.com/1995-06-08/news/9506070619_1_pauline-zile-life-sentence-child-s-death.

103. Jacobs, *supra* note 23, at 583; *Woman Gets Life Term in Murder of Daughter*, BALT. SUN (June 8, 1995), http://articles.baltimoresun.com/1995-06-08/news/1995159184_1_zile-rapp-christina.

104. Schwarz v. State, 695 So.2d 452, 453 (Fla. App. 1997).

105. *Id.*

106. *Id.* at 454.

107. *Id.*

108. *Brief Life of A.j. Schwarz Filled With Violence, Custody Problems*, SUN SENTINEL (Sept. 4, 1994), http://articles.sun-sentinel.com/1994-09-04/news/9409030431_1_david-schwarz-half-sister-stepmother.

109. Mike Folks, *A.j. Case Haunts Father*, SUN SENTINEL (July 17, 1995), http://articles.sun-sentinel.com/1995-07-17/news/9507160205_1_david-schwarz-truck-driver-abuse.

110. Jacobs, *supra* note 23, at 584.

111. *Brief Life of A.j. Schwarz Filled With Violence, Custody Problems*, *supra* note 108.

FTP laws without having seen the abuse.¹¹² Judges have told the mothers that they should have realized that the abuse was happening; the bruises were visible and the warning signs were present.¹¹³ Here, the court system viewed the woman as responsible for the child, but the father as blameless and a second victim.

III. REALITIES IN FAMILIES OF ABUSE

When women are abused, evidence of their abuse is often used against them in their trial for FTP.¹¹⁴ This is done in spite of all of the evidence that women in abusive relationships have a difficult time leaving their abuser for many legitimate reasons, including the abuser's psychological control over them.¹¹⁵ Despite all of the known barriers to leaving the abuser, courts demand that an abused woman perform the impossible, at the very first hint of abuse, and leave with her child.

The American Medical Association has recognized that coercive behaviors are a major factor in domestic violence and abuse cases.¹¹⁶ Specifically, "isolation, deprivation, and intimidation" are used by the abuser to control and manipulate the victim.¹¹⁷ At the same time, the woman may be socially isolating herself in order to hide the abuse and her shame.¹¹⁸ Not only will she seclude herself from family and friends, but an abused woman is likely to miss work because she wants to hide the physical signs of abuse or may even be asked to leave due to visible marks.¹¹⁹ This seclusion is important when discussing the obstacles an abused mother faces, because it compounds each of them, making them even more difficult to surmount. Although the importance of the abuser's coercive control is rarely recognized by policy makers and the legal system, helping women break from the abuser's mental control can account for at least half of the services abuse victims seek.¹²⁰ Frequently, the woman has lost the ability to trust family and friends

112. *Campbell v. State*, 999 P.2d 649 (Wyo. Sup. Ct. 2000); *Davis v. Commonwealth*, 1998 Ky. LEXIS 44 (Sup. Ct. 1998).

113. *Campbell*, 999 P.2d; *Davis*, 1998 Ky. LEXIS.

114. *Mabatah*, *supra* note 58, at 357; *Jacobs*, *supra* note 23, at 619; *Barrientos v. Johnson*, No. EDCV 15-2187-R (KS), 2016 U.S. Dist. LEXIS 72852, at *32; *Fugate*, *supra* note 7, at 292.

115. *See Fugate*, *supra* note 7, at 293.

116. *American Medical Association Diagnostic and Treatment Guidelines on Domestic Violence*, 1 ARCHIVES OF FAM. MED. 38, 39 (1992).

117. *Id.*

118. *WALKER*, *supra* note 46, at 35.

119. *Stephanie Riger et al., The Radiating Impact of Intimate Partner Violence*, 17 J. INTERPERSONAL VIOLENCE 184, 194 (2002).

120. *EVAN STARK, COERCIVE CONTROL: THE ENTRAPMENT OF WOMEN IN PERSONAL LIFE* 35 (2007).

and can no longer successfully navigate any relationships or accurately perceive the motives of others.¹²¹

A. *Why Women Do Not Leave Right Away*

1. No Place to Go

Most of the time, the women do not have a safe place to go at which their abuser cannot reach them.¹²² It takes a long time for an abused woman to find a safe place to live, especially when she has children to bring with her.¹²³ The family and friends an abused woman has kept ties with may be reluctant to invite the abused family into their own home, fearing for their own safety.¹²⁴ Although shelters may provide a temporary living space, it is difficult for most abused woman to transition to single-family living due to financial barriers.¹²⁵

In a large study of women, battered women were almost twice as likely as non-battered women to report that they did not have access to a car.¹²⁶ The same study found that abused women were half as likely to see friends frequently and changed residences almost three times as much as non-abused women.¹²⁷ For many victims of abuse, the abuse continues even when they are not living with the abuser.¹²⁸ In fact, separating from an abuser can greatly increase the severity of abuse because the abuser is angered and likely to retaliate.¹²⁹

2. Accessing Services

Even after a mother has taken steps to physically leave, there are hindrances to success. Women who do seek out help from law

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121. WALKER, *supra* note 46, at 35 (reporting that battered women need support for survival, have trouble understanding neutrality or objectivity in others, and how this can impact the ability of the women to interact with and trust a therapist).
122. Erica Burman & Khatidja Chantler, *Domestic Violence and Minoritisation: Legal Policy Barriers Facing Minoritized Women Leaving Violent Relationships*, 28 INT'L J. L. & PSYCHIATRY 59 (2005).
123. Andrea J. Martin et al., *The Process of Leaving an Abusive Relationship: The Role of Risk Assessments and Decision-Certainty*, 15 J. FAM. VIOLENCE 109, 118 (2000); See Burman & Chantler, *supra* note 122; Eliana Dockterman, *Why Women Stay: The Paradox of Abusive Relationships*, TIME (Sept. 9, 2014), <http://time.com/3309687/why-women-stay-in-abusive-relationships/>.
124. Riger et al., *supra* note 119, at 186.
125. Martin et al., *supra* note 123, at 110.
126. WALKER, *supra* note 46, at 36.
127. *Id.* at 35.
128. STARK, *supra* note 120, at 111.
129. *Id.* at 115 (reporting that almost half of the men on death row for domestic homicide murdered their partner after she left).

enforcement or social services are often confronted with questions that make them uncomfortable and wary.¹³⁰ An abused woman who has finally been able to seek help typically finds it difficult to repeatedly recount the abuse; she is ready to move on.¹³¹ Furthermore, she may be confronted with questions about why she did not leave sooner, creating a feeling that she is to blame for the abuse.¹³² The guilt is only worsened when she must account for her children's abuse too. When this is compounded by the woman's distrust and suspicion of others because of her abuse experiences, utilizing available services is daunting.

3. Finances

Abused women rarely have access to financial resources that would allow them to leave. Even when they are not living in poverty, their abusive partner limits their access to money.¹³³ Women who reported being abused were over three times as likely as non-abused women to report that they had no access to cash.¹³⁴ Women who suffered the greatest amount of emotional abuse were less likely to have any autonomy than a woman who suffered from only physical violence.¹³⁵ This means that women who experience the most psychological trauma and have the most distorted thought processes are the least likely to have a job, let alone independent finances.

4. Threats of Future Violence

An abuser will typically make threats about what he would do if the woman left: harm her, harm himself, and harm her family members (including children).¹³⁶ The women have likely already seen their abusers follow through on threats of violence when they have done something the abusers did not like.¹³⁷ In addition to overt threats of violence, abusers frequently threaten to report the mother to CPS.¹³⁸ This can be especially effective when the children are actually suffering from physical abuse, as they will have evidence of abuse for CPS to

130. EISIKOVITS & BUCHBINDER, *supra* note 90, at 112.

131. *Id.*

132. *Id.*

133. *E.g.* WOMEN OF COLOR NETWORK, *supra* note 50.

134. WALKER, *supra* note 46, at 35-36.

135. STARK, *supra* note 120, at 13.

136. *Texas v. Lindley*, 2010 Tex. App. LEXIS 2044 (Tex. Ct. App. 8th Dist. Mar. 24, 2010), at *3; *United States v. Webb*, 747 F.2d 278, 281 (Nov. 13, 1984).

137. *In re Dalton*, 424 N.E.2d 1226, 1230 (Ill. Ct. App. July 31, 1981).

138. *Domestic Violence & Abuse*, U.C. DAVIS, <https://www.ucdmc.ucdavis.edu/hr/hrdepts/asap/Documents/DomesticViolence.pdf> (last visited Nov. 5, 2017).

find. Also, if CPS has already been involved with the family, the mother will have a heightened sense of fear and awareness of what can happen.¹³⁹ These threats are not empty; women are at the greatest risk of severe violence after they leave their abuser.¹⁴⁰ Even threats of the abuser committing suicide are effective to prevent women from leaving because of her emotional ties and dependence on him.¹⁴¹ With these realities, an abused mother may reasonably think that staying will placate the abuser and that it is the safest option for everyone.

This reality is demonstrated by statistics on states that have mandatory arrest laws for domestic violence.¹⁴² Mandatory arrest laws require an officer to arrest someone for domestic violence without a warrant, if there is probable cause to believe the assault took place.¹⁴³ States claim that reports of domestic abuse are down, but, these laws may actually just decrease reporting of abuse while increasing rates of domestic homicide.¹⁴⁴ A woman may be more hesitant to report abuse because she believes that she will be arrested too or she believes that the abuser will retaliate once released.¹⁴⁵ Using FBI homicide reports, one study found that the rates of domestic partner homicide increased almost sixty percent in states with mandatory arrest laws.¹⁴⁶ This

139. EISIKOVITS & BUCHBINDER, *supra* note 90, at 120.

140. Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence From Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 89 (2009); Frances L. Coleman, *Stalking Behavior and the Cycle of Domestic Violence*, 12 J. INTERPERSONAL VIOLENCE 420, 430 (1997); Ruth E. Fleury et al., *When Ending the Relationship Does Not End the Violence*, 6 VIOLENCE AGAINST WOMEN 1363, 1364-66 (2000).

141. U.C. DAVIS, *supra* note 138.

142. Mandatory arrest laws were enacted after a 2-year study showed that arresting the offender decreased their likelihood to re-offend within six months. However, the author of the study later declared “The evidence shows that, while arrest deters repeat domestic violence in the short run, arrests with brief custody increase the frequency of domestic violence in the long run among offenders in general.” Lawrence Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 139, 167 (1992) (finding that any initial deterrent impact is gone within 30 days and escalation of violence occurs within one year).

143. Iyengar, *supra* note 140, at 86.

144. *Mandatory Arrest Laws May Hurt Domestic Violence Victims*, U. AKRON (Mar. 26, 2015), <http://www.uakron.edu/im/news/mandatory-arrest-laws-may-hurt-domestic-violence-victims>; Iyengar, *supra* note 140, at 85.

145. *Mandatory Arrest Laws May Hurt Domestic Violence Victims, supra* note 144; *What is the Impact of Mandatory Arrest Laws on Intimate Partner Violence Victims and Offenders?*, U. KY CENT. FOR RES. ON VIOLENCE AGAINST WOMEN (Dec. 2011), https://opsvaw.as.uky.edu/sites/default/files/05_Mandatory_Arrest.pdf.

146. Iyengar, *supra* note 140, at 85, 97.

increase is likely due to two reasons; victims report less often because they do not want their partners to be arrested, and victims fear that if the abuser is arrested, he will respond with even more extreme violence.¹⁴⁷

B. Coping Mechanisms That Allow Women to Feel In-Control of the Abuse

1. Denial

Denial is recognized as a psychological mechanism used to detach from a painful reality and is frequently employed by parents whose children are being abused.¹⁴⁸ Denying the abuse psychologically shields the mother from the emotional stress and guilt from letting down her child.¹⁴⁹ It also spares her the anger and sense of betrayal she would feel towards her partner, especially for sexual abuse.¹⁵⁰ If a mother has a history of being abused herself, this will compound her remorse and guilt because she knows the pain her child has experienced.¹⁵¹

A study of sexually abused children in Scotland found that almost every parent had psychopathological symptoms after finding out about their child's sexual abuse.¹⁵² Learning of sexual abuse of a young child may be more traumatic for a non-abusing parent than the abuse is for the child.¹⁵³ Denial is a recognized psychological tactic, but it prevents the mother from being able to help her children in abusive environments. Although this is employed as a coping mechanism for the mother, it also becomes a barrier to leaving the abuser.

A mother may also be in denial about how much she is able to impact the abuser's behaviors. Abused women reported that they felt they had greater control over what happened in their lives than did non-abused women.¹⁵⁴ This is likely a result of trying to create an appeasing environment for the abuser under the belief that the abuser

147. *Id.* at 88.

148. Christine Adams, *Mothers Who Fail to Protect their Children from Sexual Abuse: Addressing the Problem of Denial*, 12 YALE L. & POL'Y REV. 519, 521 (1994).

149. *Id.*

150. *Id.*

151. *Id.* at 521-522.

152. Fiona Forbes et al., *Early Intervention Service for Non-Abusing Parents of Victims of Child Sexual Abuse*, 183 BRIT. J. PSYCHIATRY 66, 70 (2003).

153. Poonam Tavkar, *Psychological and Support Characteristics of Parents of Child Sexual Abuse Victims: Relationship with Child Functioning and Treatment*, THESES DISSERTATIONS, AND STUDENT RES.: DEP'T OF PSYCHOL., 161-162 (2010).

154. WALKER, *supra* note 46, at 107.

can be prevented from becoming violent.¹⁵⁵ Over ninety percent of abused women reported that they perform at least one daily behavior aimed at keeping the abuser happy.¹⁵⁶ These women believe that by structuring the environment to please the abuser, they can control the abuser's violent episodes and avoid the violence.¹⁵⁷

2. Trying to Shield the Children

Because many women with children in abusive situations do not feel they have a reasonable way to leave their abuser, mothers are likely to try to bear the brunt of the abuse themselves. Mothers report trying to get the abusers to focus on them, yell at them, or even hit them, instead of the child.¹⁵⁸ This tactic has likely worked in the past, so a mother expects this to work in the future. Just as in Lindley's case, she had no way of knowing that this tactic may not work when the abuser delivers the next beating.¹⁵⁹ If an abused mother's circumstances severely limit her options for dealing with the abuser or leaving, using herself as a distraction appears to her as one of the most effective ways of protecting her children.

IV. EVALUATING THE STATUTES

A. Constitutionality of a "Status" Crime

1. Status Versus Conduct

The U.S. Supreme Court has refused to uphold certain criminal statutes if the purported crime does not involve the performance of an overt act. The Court held that it is unconstitutional for a state to criminalize the status of being addicted to narcotics if the accused did not use or possess any narcotics in the state.¹⁶⁰ The court equated this to punishing someone for contracting a disease or having a mental illness.¹⁶¹ It is "cruel and unusual punishment," in violation of the Eighth Amendment, to declare someone guilty for their status when they have displayed no criminal behavior.¹⁶² The state cannot punish someone for displaying symptoms of their addiction without the defendant actually using drugs in the state.

155. *Id.*

156. *Id.*

157. *See* EISIKOVITS & BUCHBINDER, *supra* note 90, at 43.

158. Sentencing Transcript at 198, *Texas v. Lindley*, 2010 Tex. App. LEXIS 2044 (Tex. Ct. App. 8th Dist. Mar. 24, 2010) (No. F06-89089-X).

159. *See id.*

160. *Robinson v. California*, 370 U.S. 660, 667 (1962).

161. *Id.* at 666.

162. *Id.* at 667.

FTP laws are criminalizing the status of being a victim of abuse for many women. Even if the mother has been the only one suffering abuse and the child witnesses the abuse, or the abuser is “caught” after the first time he abuses the child, the mother is held accountable just the same. Prosecutors argue that she should have known that because she was being abused, the abuser was likely to do the same to the child. The symptoms of abuse make a woman unable to leave and protect her children the way the law would like. An abused woman’s symptoms become the conduct criminalized by FTP laws without any evidence that she abused her children.

2. Removing Children Due to Mother’s Victimization

Aware that simply witnessing violence can negatively impact a child, several states were charging abused mothers with neglect for their “participation” in domestic violence.¹⁶³ Even though the child wasn’t abused, if a child witnessed domestic violence, they were removed from their mother’s care and placed in foster care.¹⁶⁴ One mother, Shawline Nicholson, ended a relationship with her boyfriend and he then assaulted her, for the first time.¹⁶⁵ She called 911 and was taken to the hospital.¹⁶⁶ While admitted, she was informed that CPS had taken her children because she was not able to protect them given that her boyfriend had beaten her.¹⁶⁷ Charges of neglect were filed against Nicholson, and even after her children were returned, she was listed by the state as a neglectful parent.¹⁶⁸ Nicholson joined with other mothers prosecuted in similar circumstances and filed a class action law suit against the city and CPS. Upon review, the Federal Court declared this practice unconstitutional¹⁶⁹ and several other states have concluded the same.¹⁷⁰

163. *Nicholson v. Williams*, 203 F. Supp. 2d 153, 215-16 (E.D. N.Y., 2002); STARK, *supra* note 52, at 43; *but see* Justine A. Dunlop, *Judging Nicholson: An Assessment of Nicholson v. Scoppetta*, 82 DENV. U. L. REV. 671, 672 (2005).

164. STARK, *supra* note 120, at 43.

165. *Nicholson v. Williams (Defending Parental Rights of Mothers Who are Domestic Violence Victims)*, N.Y. CIV. LIBERTIES UNION, <https://www.nyclu.org/en/cases/nicholson-v-williams-defending-parental-rights-mothers-who-are-domestic-violence-victims> (last visited Jan 20, 2018) (hereinafter *Defending Parental Rights*).

166. *Id.*

167. *Id.*

168. *Id.*

169. *In re Nicholson*, 181 F.Supp.2d 182, 185 (E.D.N.Y., 2001); *Defending Parental Rights*, *supra* note 165; STARK, *supra* note 120, at 43.

170. *E.g. In re Sehy*, App. Nos. 306370, 306371, 2012 Mich. App. LEXIS 1577 at *22 (Aug. 14, 2012); *N.J. Div. of Youth & Family Services v. S.S.*, 372 N.J. Super. 13, 15-16 (2004).

Federal Courts have long recognized that the Fourteenth Amendment protects the “fundamental right of parents” to have “care, custody, and control of their children.”¹⁷¹ Furthermore, it has been declared unconstitutional for the State to remove children from their parent(s) without showing unfitness.¹⁷² In *Nicholson*, the Court recognized that even temporarily removing a child from their parent can impact the child’s emotional well-being, and it is the child’s constitutional right to stay with an abused, yet competent, parent.¹⁷³ With FTP prosecutions, children are removed from their mother’s care in a similar manner, with the same disregard for the children’s emotional and psychological well-being. Many mothers prosecuted under FTP are not unfit, they just did not have the resources to physically separate from the abuser.

B. FTP Laws’ Poor Deterrent Effect

There is evidence that simply enacting stricter punishments for criminal actions does not increase compliance with the laws or create greater deterrence.¹⁷⁴ In order for a criminal law to actually have the effect of deterring criminal behavior, it must have several components present. First, the targeted group needs to have knowledge of the law; specifically, what it criminalizes and who it punishes.¹⁷⁵ Second, the law needs to actually impact an individual’s behavior.¹⁷⁶ Altered states of mind that may impact a person’s decision-making and reasoning abilities need to be accounted for when determining if behavior will likely be impacted.¹⁷⁷ This is compounded by the fact that people tend to spend time with those like themselves, which can continue to cloud their judgment and alter what is considered normal.¹⁷⁸ Finally, the recognized punishment for the crime needs to outweigh the gain from

171. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

172. *Quilloin v. Walcott*, 98 S.Ct. 549, 555 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[if] a State were to attempt to force the breakup of a natural family, over the objections of the parents and children, without some showing of unfitness and for the sole reason that to do so was thought to be in the child’s best interest’.”) (quoting *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 863 (1977)).

173. *In re Nicholson*, 181 F.Supp.2d 182, 185 (E.D.N.Y., 2001).

174. *See, e.g.*, PAUL H. ROBINSON, *DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW: WHO SHOULD BE PUNISHED HOW MUCH?* 58 (2008).

175. *Id.* at 24.

176. *Id.* at 28.

177. *Id.* at 28-29.

178. *Id.* at 30; TOM R. TYLER, *WHY PEOPLE OBEY THE LAW* 24 (1990).

the commission of the crime.¹⁷⁹ This cost-benefit analysis includes the likelihood, severity, and timeliness of the punishment.¹⁸⁰

1. FTP Laws Analyzed for Deterrence Effect

FTP laws likely do not have a strong deterrent effect. Defendants' knowledge of FTP laws has not been studied. That is to say, it is unknown whether or not these women are aware of FTP laws before they are prosecuted. These women most likely do not know of the nuances of their legal duty to protect their children in abusive environments. Since no data is available, however, for the purposes of this article, we will assume that defendants were aware of FTP laws.

It has been well documented that women exposed to abuse tend to have an atypical and flawed pattern of reasoning due to emotional and psychological abuse, as discussed in Section IV.¹⁸¹ This altered mindset explains why women stay in abusive environments, produce excuses, and rely on coping mechanisms to deal with the abuse instead of leaving or reporting it.¹⁸² Furthermore, women with a history of abuse are more likely to be in abusive relationships.¹⁸³ A woman's previous experiences often shape what she considers normal behaviors and how to respond in times of tension.

The cost benefit analysis for abused women is likely the greatest factor. An abused woman will be aware of the risk of even more severe abuse if she tries to leave or seek help.¹⁸⁴ She has probably seen little punishment given to abusers and finds the criminal justice system to be ineffective.¹⁸⁵ Furthermore, if she was aware of FTP laws, she may be worried about seeking help if the child abuse has been ongoing and she fears both retaliation from the abuser and criminal liability. An abused woman who believes she can handle the abusive episode will see the benefit of not reporting and avoiding the perceived costs. All these factors combined show that FTP laws do not encourage most women to report domestic child abuse or leave; in other words, they do not deter this crime of omission.

179. ROBINSON, *supra* note 174, at 32.

180. *Id.*; TYLER, *supra* note 178, at 21-2.

181. LENORE E. A. WALKER, BATTERED WOMAN SYNDROME 76 (4th ed. 2017) (hereinafter BATTERED WOMAN SYNDROME); Frederick L. Coolidge & Laura W. Anderson, *Personality Profiles of Women in Multiple Abusive Relationships*, 17 J. FAM. VIOLENCE 117, 126-127 (2002).

182. BATTERED WOMAN SYNDROME, *supra* note 181; Jacobs, *supra* note 23, at 605.

183. Sara F. Stein et al., *The Social and Individual Characteristics of Women Associated with Engagement with Multiple Intimate Violent Partners*, J. OF INTERPERSONAL VIOLENCE 1, 17 (Nov. 2016).

184. *See* Fugate, *supra* note 7, at 293.

185. *Id.*

2. Increasing Strictness Does Not Increase Compliance

When Louisiana made rape of a child under twelve years of age a capital punishment, the U.S. Supreme Court eventually struck the punishment down as unconstitutional.¹⁸⁶ Not only was the punishment declared not proportional to the crime, it did not serve the social goal of preventing rape of children.¹⁸⁷ Research also indicated that when there was a preexisting social or familial relationship between the rapist and the child, there was a particular hesitancy to report the abuse because of the extreme punishment.¹⁸⁸ All of the legal proceedings for a death penalty case also forced the child victim to repeatedly re-live and re-tell the abuse story.¹⁸⁹

Although the death penalty has not been used in an FTP prosecution, life sentences can be given under FTP laws,¹⁹⁰ and the same arguments can be made here. In the circumstances where the mother was not part of the abuse or was not able to protect the child, a life sentence (or even a sentence equal to or greater than the abuser's) is disproportionate to the crime she is guilty of. If mothers are afraid of being prosecuted for the abuse or having their children taken away due to FTP laws, there is no incentive to seek help from a governmental body or social program.

Additionally, if a child is old enough to know that their mother may be held accountable for the child's abuse at the hands of another, the child will be less likely to seek help in order to protect the mother.¹⁹¹ Forcing children, who are already victims of abuse, to live through (and

186. *Kennedy v. Louisiana*, 554 U.S. 407, 469 (2008).

187. *Id.* at 445-446.

188. *Id.* at 445.

189. *Id.* at 442-443.

190. OKLA. STAT. tit. 21, § 843.5 (D), (J) (2017).

191. Alex Campbell, *How "Failure to Protect" Laws Cost a 12-Year-Old Rape Victim His Mother*, BUZZFEED (Oct. 7, 2014, 7:26 PM), https://www.buzzfeed.com/alexcampbell/mothers-imprisonment-leads-rape-victim-to-wish-he-had-never?utm_term=.jyBAyZoyN#.puNjb2JbX (telling the story of a boy, Collin, who reported being raped by his stepfather. The stepfather also regularly abused the mother, even holding a gun to her head. This was used against her at her own trial. The stepfather pled guilty to various sex crimes and was sent to prison for 15 years for raping Collin. Collin's mother was sentenced to 20 years for allowing the rape to happen. Collin has expressed regret for coming forward about his stepfather and, in turn, getting his mother sent to prison. Collin stated, "I would have rather gone through the abuse for the rest of my life" than have his mother imprisoned.); WALKER, *supra* note 46, at 82 (finding that abused children have a strong dependence on their parents and will refuse to work with law enforcement or social services to protect either parent).

possibly participate in) the conviction of a non-abusive parent will be traumatic for a child of any age.

C. Arguments for the Removal of the “Resistance Requirement” in Rape

Until the 1980s, almost all rape statutes required that the victim fight back.¹⁹² The victim was expected to “resist to the utmost” or at least as much as legislatures thought a woman should resist in the circumstance.¹⁹³ In the 1970s, activists argued that fighting back should not be a requirement because it will most likely lead to increased injury for the victim.¹⁹⁴ Furthermore, the law should focus on the behavior of the attacker, not requiring the victim to act in a certain way.¹⁹⁵ As a result, many states have removed the “resistance requirement” from their rape statutes.¹⁹⁶ This reflects an understanding that these situations elicit a large spectrum of victim behaviors, all as a response to characteristics of that individual attack.

Similar arguments can be made against prosecuting abused women under FTP laws. These women have been abused before, and most likely have seen their children be abused. When a mother has learned that she is unable to stop the abuse, it is unreasonable to insert a “resistance requirement” compelling her to carry out a narrow set of actions (stopping the violence, removing the child, and calling the police) that she knows will almost always make the situation worse by further angering the abuser, increasing the level of violence, and lengthening the attack.

Initially, FTP prosecutions appear different from rape prosecutions because there is a third party involved (the child). The FTP defendants advocated for here, however, are comparable. Even though the mother has a duty to protect her child, when she is also a victim of the abuse, the expectations need to be different. We recognize that rape victims should not be required to fight back if their attacker has a gun because it will only increase the probability that the victim will be shot. Likewise, abuse victims should not be required to act in a way that they know will increase the severity of the abuse for themselves or their child.

192. Peter Landsman, *Does Removing the Force Element Matter?: An Empirical Comparison of Rape Statistics in Massachusetts and Colorado*, 21 WM. & MARY J. WOMEN & L. 767, 768 (2015).

193. Julie Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 L. & SOC’Y REV. 117, 118 (1991).

194. *Id.*; David P. Bryden, *Redefining Rape*, 3 BUFFALO CRIM. L. R. 317, 356 (2000).

195. Horney & Spohn, *supra* note 193, at 118.

196. Landsman, *supra* note 192, at 768.

Some advocates have called for courts to examine the amount and type of force used in a rape and the response of the victim.¹⁹⁷ Sometimes the attacker may exert psychological, manipulative, or coercive control without physically threatening the victim.¹⁹⁸ Even though overt physical force is not present, the victim does not feel safe to call for help or strongly resist. The same principles can be translated to a mother being too afraid to call for help during a violent episode by the abuser, even if she is not currently the one being abused. Each situation needs to be examined individually in light of the history of abuse, resources available, and steps the mother did take to protect her children. This need for individual consideration supports the need for expert witnesses and leniency in sentencing guidelines for abuse victims, as discussed in Part VI.

V. BETTER WAYS TO EFFECTUATE CHANGE FOR MOTHERS AND CHILDREN LIVING IN AN ABUSIVE ENVIRONMENT

Both legal changes and community-based actions need to be taken in order to protect abused mothers from harsh FTP prosecution and end the systemic abuse children face. Affirmative defenses like battered woman syndrome and ones that are built into FTP laws are an important step towards acknowledging that abused mothers should not be prosecuted strictly for being in a position of helplessness. Additionally, judges should be encouraged to scrutinize the full picture in FTP sentencing, examining the woman's history of abuse and her actual relationship and interactions with the child, away from the abuser. States can leave FTP laws in place and still punish the negligent caregivers that the laws were originally intended to punish without exacerbating the devastating realities of abused children who have abused mothers.

A. Battered Woman Syndrome Defense

1. Current Use for Homicide or Manslaughter Cases

Shortly after the national attention abuse received in the 1960s, the idea of "battered woman syndrome" was introduced.¹⁹⁹ A "battered woman" was defined as "a woman . . . who is or has been in an intimate relationship with a man who repeatedly subjects or subjected her to forceful physical and/or psychological abuse."²⁰⁰ Following the development of the psychological theory, a self-defense claim for

197. Bryden, *supra* note 194, at 359.

198. *Id.*

199. WALKER, *supra* note 46, at 3.

200. *Id.* at 260.

battered woman slowly became accepted by states.²⁰¹ This defense strategy allows a woman to introduce evidence of the abusive relationship and expert testimony on the psychological impact of the abuse and how that impacted her decisions.²⁰² The jury may then use that knowledge to consider the mitigating effects that her condition as a battered woman had on her actions.²⁰³

Battered woman syndrome (BWS) as an affirmative defense is most often used when an abused woman murders (or attempts to murder) her abuser in, what she claims is, self-defense during a time where she is not being physically abused.²⁰⁴ Without the knowledge of her status as a battered woman, however, it appears that the woman attacked the “victim” at a time where she was not in imminent danger (which is required to claim self-defense).²⁰⁵ The expert testimony allows the jury to understand why the woman did not leave the abuser,²⁰⁶ that she knows she is in danger at all times,²⁰⁷ and why she felt violence was her only option²⁰⁸ due to the psychological trauma and symptoms discussed here in Part V.

In order to establish her status as a battered woman, she must first present evidence that she has gone through the cycle of abuse at least

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201. Lenore E.A. Walker, *Battered Woman Syndrome and Self-Defense*, 6 NOTRE DAME J. L., ETHICS & PUB. POL’Y 321, 322 (2012 (hereinafter Walker, *Self-Defense*)); See e.g. Peter Jensen, *Schaefer, Moved by Tales of Abuse, Commutes Sentences of 8 Women*, BALT. SUN, (Feb. 20, 1991), http://articles.baltimoresun.com/1991-02-20/news/1991051077_1_spousal-abuse-battered-women-schaefer (reporting on the clemency to the 8 women and the governor’s push for evidence of battered woman syndrome to be allowed at trial); Morgan Abbott, *Admissibility of Battered-Spouse Syndrome Evidence in Alaska*, 32 ALASKA L. REV. 153, 155 (2015) (some women convicted of murder or assault prior to the acceptance of the battered woman syndrome defense have been pardoned); Isabel Wilkerson, *Clemency Granted to 25 Women Convicted for Assault or Murder*, N.Y. TIMES (Dec. 22, 1990), <https://www.nytimes.com/1990/12/22/us/clemency-granted-to-25-women-convicted-for-assault-or-murder.html> (“granted clemency . . . to 25 women who had been convicted of killing or assaulting husbands or companions who the women said had physically abused them.”); Tamar Lewin, *More States Study Clemency for Women Who Killed Abusers*, N.Y. TIMES, Feb. 21, 1991, at A19.
202. *State v. Koss*, 551 N.E.2d 970, 974 (Ohio 1990); *Sheehan v. Powers*, 2017 U.S. Dist. LEXIS 173480, at *21-22 (D. N.Y. Oct. 18, 2017).
203. *Koss*, 551 N.E.2d at 978.
204. Walker, *Self-Defense*, *supra* note 201, at 321.
205. *Id.* at 324-25; Abbott, *supra* note 201, at 157.
206. *Koss*, 551 N.E.2d at 974.
207. Walker, *Self-Defense*, *supra* note 201, at 325; Abbott, *supra* note 201, at 159-160.
208. Walker, *Self-Defense*, *supra* note 201, at 325-326.

twice and she remained in the relationship.²⁰⁹ Furthermore, expert testimony can only be included to the extent it will aid the jury in understanding the abused woman's actions and her view of reality.²¹⁰ Then the testimony must pass a three-part admissibility test: the information is outside the knowledge of the ordinary layperson; the "expert" is qualified to provide the court with the information; and the information stems from a reputable background rooted in an accepted science.²¹¹ Additionally, "the probative value of the testimony must outweigh [the] prejudicial impact" against the man she attacked.²¹² It is important to note that the court's acceptance of a woman's status as battered does not guarantee acquittal or even leniency; it is just to aid in the analysis of the facts surrounding the attack.²¹³ Use of this defense also allows for the evidence of abuse to be considered during sentencing, whether or not the jury accepted the defense.²¹⁴

2. Applying Battered Woman Syndrome Defense to FTP Cases

Unless states amend the current writing of FTP laws, BWS defense should be carried over to FTP cases. This would allow prosecution of the caregivers whose actions were intended to be criminalized by FTP laws while providing a defense when the woman is also a victim of abuse. As the research and science behind the psychological symptoms of abuse grow, courts need to adapt their approach. Expert testimony describing a woman's history of abuse from the same abuser, how her thought patterns were manipulated to have distrust of everyone and incorrectly perceive reality, and how she employed various coping mechanisms to lessen the abuse will help a court understand whether she acted in a reasonable way, given the circumstances. This will allow for the court to account for the steps a woman did take to protect her children, given the resources she has available, and looking at the whole situation, not just the moments during that instance of abuse.

The same requirements for the use of BWS defense in homicide cases can be used for FTP cases. The woman will be expected to provide evidence of her own abuse and expert testimony to convey the intricate

209. *Koss*, 551 N.E.2d at 974.

210. *See Ibn-Tamas v. U.S.*, 407 A.2d 626, 632 (D.C. App. 1979).

211. *Id.*

212. *Id.* at 647.

213. *Abbott*, *supra* note 201, at 156.

214. *See People v. Johnson*, 205 A.D.2d 344, 344 (Sup. Ct. N.Y. 1994); *United States v. Whitetail*, 956 F.2d 857, 863-864 (1992) (holding that 18 USC § 5K2.10 allows the Court can consider the evidence and reduce a sentence to less than the sentencing guidelines if "the victim's wrongful conduct contributed significantly to provoking the offense behavior," regardless of if the jury accepted the battered woman syndrome defense) (citing 18 USC § 5K2.10 (2017)); *Abbott*, *supra* note 201, at 160.

psychological impact the abuse had on her behaviors. The same test for admissibility and probative value can also be directly applied. Just as the court is able to use the evidence and testimony to reduce sentences for homicides, judges in FTP cases should be able to sufficiently and freely consider a woman's history of abuse when sentencing. Court must move towards accepting the precedent to allow the use of this defense for FTP prosecutions. Evidence of a woman's abuse is often already exploited by the prosecution in FTP cases, it is only fair to allow the defendant a chance to use that same information to ask the court to better understand her actions.

Introducing the BWS defense does not necessarily mean acquittal. The charges could be amended to lesser charges. Some charges could be dropped so that the woman faced fewer charges and less overall time. With amended sentencing guidelines, a woman who was able to successfully use the defense may just face less overall time. In some cases, acquittal may be appropriate. But, having variability here will help appease critics. Women may still have some consequences and therefore the overall goal of FTP laws is not lost on this subsection of women and mothers. Introducing this defense simply allows the court to account for her behavior and better effectuate change.

Even if BWS is allowed as a defense for FTP cases, there are still concerns to be addressed state-by-state. Importantly, if a state chooses to recognize BWS as a defense for FTP, who will pay for the expert witness? Expert witnesses are costly and these women likely have very limited resources. The woman may be represented by a public defender who may have to ask the state to help cover the cost of the expert witness.²¹⁵ Although states and federal courts have allowances to help indigent defendants,²¹⁶ it can be difficult for defendants to obtain that funding. Furthermore, the BWS defense alone is not enough to protect abused woman. The defense is tough to successfully use and rarely able to be exercised, mainly due to strong public opposition. Statutes and sentencing guidelines²¹⁷ must include the option of leniency for abused women and account for the ways that they have protected their children.

215. Meghan Millea, *Battered Woman Syndrome Defense is Denied for Feb. 26 Trial*, TIMES REP. (Feb. 12, 2013, 12:04 PM), <http://www.timesreporter.com/x711918827/Battered-woman-syndrome-defense-is-denied-for-Feb-26-trial>.

216. Laura D. Warren, *The Indigent Defendant's Toolbox: Debating the Addition of the Battered Woman Syndrome Expert*, 69 U. CHI. L. REV. 2033, 2034 n.84 (2002).

217. Richard S. Frase & Kelly Lyn Mitchell, *What Are Sentencing Guidelines?*, U. MINN. (Mar. 21, 2018), <https://sentencing.umn.edu/content/what-are-sentencing-guidelines> ("Sentencing guidelines are a set of standards that are generally put in place to establish rational and consistent sentencing practices within a particular jurisdiction").

B. Affirmative Defenses in State Statutes and Changes to Sentencing Guidelines

Some states include affirmative defenses in their statutes regarding child neglect and endangerment. Typically, the statutes specify that there must be “reasonable apprehension” that attempting to stop the abuse would result in significant harm to the person or the child.²¹⁸ These affirmative defenses are helpful for ensuring the statutes are not punishing the wrong group, but they currently do not provide enough protection. First, we know that an abused woman will see an interaction or instance of abuse very differently from a non-abused person. Her view of when harm can occur, how substantial it will be, and how her intervening can negatively impact the situation is not the same as it would be for the average person. In order for these affirmative defense clauses to apply to an abused woman, there likely would be a need for both evidence of her abuse to show her apprehension of getting physically involved and expert testimony to help interpret her perception and actions.

Alternatively, Ohio’s statute’s affirmative defense applies when the person did not have the ability to prevent the abuse but requires “timely and reasonable steps to summon aid.”²¹⁹ This caveat will often work against an abused mother. Even if the court finds that she was unable to prevent the abuse and is justified in her actions, the requirement for seeking help is a hindrance to her using the defense. Because the average person is not able to account for the psychological and physical barriers of an abusive relationship, an abused woman will likely not be able to seek help for the abused child in a manner that an average person considers proper and timely. Without understanding that a woman knew it would be safer to tend to the child herself or wait until the abuser is gone seek help, it is improbable that a jury would find that an abused woman met the criteria for this defense.

It is difficult to write a statute that is neither under-inclusive nor over-inclusive. While some states have taken a step towards recognizing that there can be extenuating circumstances that impact the ability to intervene, abused mothers are still left vulnerable. Therefore, in addition to having affirmative defenses built into the statutes, states should include instructions for leniency in their sentencing guidelines to account for abused mothers’ circumstances. Amending the sentencing guidelines would help create consistency and remind judges to consider the full set of circumstances surrounding an event, not just the outcome. Judges should be encouraged to look at a woman’s history of being abused, whether she participated in abusing the child, her psychological state, and her means to remove herself and her child from the abusive

218. IOWA CODE § 726.6(1)(e) (2018); MINN. STAT. § 609.378(2) (2017); OKLA. STAT. tit. 21, § 852.1 (2017).

219. OHIO REV. CODE ANN. § 2903.15(B) (LexisNexis 2018).

environment. While some courts have begun to do this on their own,²²⁰ the state should play a role in looking out for this vulnerable population.

VI. CONCLUSION

Instead of requiring prosecution of mothers as though they were the abuser, the statutes and sentencing guidelines should be amended to be more lenient and responsive to abused mothers. Implementing better affirmative defense options for abused women and ensuring they are available will be a big step towards refocusing the harshest penalties of FTP laws away from abuse victims. While society should encourage those who are in a position to prevent abuse to do so, the law should not punish victims for being victims. The laws should protect women who are not in a reasonable position to report abuse or leave, so the abused women are not facing decades in prison. Instead, the government and society should be looking at ways to end the abuse epidemic.

Additionally, there are numerous community-based ways to combat childhood abuse: improving access to education, employment opportunities, family planning, and safe sex; offering support groups and shelters; and creating programs to foster community engagement and trust of authorities or the government. Moreover, incarcerating a non-abusive parent will not significantly decrease the risk of future abuse for that child. Children in residential or foster care may experience even higher rates of abuse and victimization than the average population.²²¹

Many mothers are unaware of the services and legal protections that exist to support them and their children. Educating all women and mothers about services that are available to them as early as possible will enable those in need to seek out help and know how to properly break ties with the abuser. States also need to ensure that all women have access to the safeguards they are expected to use in situations of domestic abuse. Additionally, law enforcement and social service providers should receive specialized training on how to interact with victims of abuse. The victims may not be in a rational mental state, and it is important that the first interactions these women and children have foster their trust in the social and legal systems.

While it is vitally important to encourage mothers to report abuse of their children, FTP laws alone do not promote a safer environment.

220. *E.g.* United States v. Whitetail, 956 F.2d 857, 863-864 (1992).

221. Mary I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, 18 CHILD ABUSE & NEGLECT 577, 578 (1994); Daniel Pollack & Gary L. Popham, Jr., “*Wrongful Death*” of Children in Foster Care, 31 U. LA VERNE L. R. 25, 26 (2009); *See generally* Carolyn A. Kubitschek, *Holding Foster Care Agencies Responsible for Abuse and Neglect*, 32 HUM. RTS. 6 (2005).

The laws and courts need to be able to fully examine the situation of the mother and the child involved. Understanding the plight of an abused woman and the daily struggle she faces should allow for leniency in some circumstances. Knowing that an abused woman faces an alternate view of reality because of the psychological and emotional trauma she has faced, should allow for courts, prosecutors, and even the public to extend understanding or sympathy. Accounting for the ways she did try to protect her children and used the actual resources she had available, is a reasonable provision that should be included when looking at an FTP case. FTP laws were not enacted to punish victims of abuse; they are designed to encourage those who are capable to report the abuse of someone who is vulnerable. An abused mother has likely seen the legal system fail her and her children. She may have little or no resources available. It is unrealistic to expect her to believe that simply reporting the abuser will end the harsh reality she and her children face.

*“The well-intentioned efforts to help victims must be judged by their results, not our intentions.”*²²²

222. Belinda Luscombe, *When Not to Arrest an Abuser in a Domestic Violence Case*, TIME (Mar. 5, 2014), <http://time.com/12682/when-not-to-arrest-an-abuser-in-a-domestic-violence-case/> (quoting Lawrence Sherman, the man who led the research leading to mandatory arrest laws, now speaking out against mandatory arrest laws).