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Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others

MARY E. BECKER

Child abuse is an awkward topic for feminists and feminism. Feminists and feminist theory tend to focus on problems women face in society and in the legal system, on the ways in which both need to change to give women a more equitable share of the good things in life. Thus, the central question is identifying and analyzing ways in which women are, in some sense, victimized, i.e., treated unfairly by current social or legal systems. But women are not only victims in homes in which children are abused; they are often guilty themselves as agents who abuse children or fail to protect them.

Child abuse is particularly a problem for feminism on the level of high theory.¹ Feminist theory tends to emphasize women's sameness to men, as in liberal feminism;² to emphasize women's lack of power, as in radical feminism;³ or to celebrate women's unique characteristics, particularly as mothers

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1. Activists in the women's domestic violence community have worked effectively for both women and children in abusive homes, recognizing much better than high theory the complexity of women's lives and of their relationships with children.

2. For examples of liberal feminism, see Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U Pa L Rev 955 (1984); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 Women's Rights L Rep 175 (1982); Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 NYU Rev L & Soc Change 325 (1984); Ruth Bader Ginsburg, *Gender and the Constitution*, 44 U Cin L Rev 1 (1975); Ruth Bader Ginsburg and Barbara Flagg, *Some Reflections on the Feminist Legal Thought of the 1970s*, 1989 U Chi Legal F 9.

3. For discussions of radical feminism, see, for example, Catharine A. MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* 101-41 (Yale,

and caretakers, as in cultural feminism.⁴ None of these approaches deal well with women as agents who hurt others: mothers who sometimes fail their children.⁵ Hedonic feminism, with its focus on narrative and the emotional quality of women's lives as lived,⁶ has perhaps the greatest potential to describe realistically women's necessarily complex relationships with children, but hedonic feminism's focus on *women* tends to exclude from consideration the pain in children's lives, even when connected to the pain in women's lives.⁷ Thus, one general problem child abuse poses for feminism is that all strands of feminism tend to focus on women and their needs under the current social and legal order, rather than on women as beings who abuse power and fail to protect their children.

In addition, child abuse is a difficult topic because gender bias operates on many levels. Because of this bias, mothers are likely to be found liable for abuse and neglect regardless of the identity of the actor. If one looks at who is charged with abuse and neglect in juvenile courts, this worry is verified: it is almost always only the mother, though often the mother is charged with

1979); Catharine A. MacKinnon, *Feminism Unmodified: Discourses of Life and Law* 46-62 (Harvard, 1987); Catharine A. MacKinnon, *Toward a Feminist Theory of the State* 1-12 (Harvard, 1989).

4. For examples of cultural feminism, see Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard, 1982); Nel Noddings, *Caring: A Feminine Approach to Ethics and Moral Education* (Berkeley, 1984). Although some legal academics are sometimes classified as cultural feminists, see Marie Ashe and Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 Tex J Women & L 75, 104-05 nn 143-44, 146 (1993) (classifying Christine Littleton and Robin West as cultural feminists), I know of no legal academics who classify themselves this way. Among legal academics, "cultural feminist" seems always to be a term used to describe others of whom one is critical. See Mary Becker, Cynthia Grant Bowman, and Morrison Torrey, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* 98 (West, 1994).

5. For more detailed discussion of the problems child abuse poses for liberal, radical, and cultural feminism, see Ashe and Cahn, 2 Tex J Women & L at 101-07 (cited in note 4). For discussions of feminism's focus on women as victims and the need to hold women responsible for child abuse, see Jean Bethke Elshtain, *Battered Reason: The New Feminist Jurisprudence*, New Republic 25, 28-29 (Oct 5, 1992); Alice Miller, *Banished Knowledge: Facing Childhood Injuries* 76-81 (Doubleday, 1990).

6. For a discussion of hedonic feminism, see Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 Wis Women's L J 81 (1987). See also Mary E. Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S Cal Rev L & Women's Stud 133 (1992).

7. Not all strands of contemporary legal feminism are mentioned in the text. For a discussion of postmodern feminism and child abuse, see Ashe and Cahn, 2 Tex J Women & L at 107-09 (cited in note 4) (suggesting that postmodernism has the potential to be a valuable tool in understanding bad mothering but not offering concrete postmodern legal analysis of child abuse or specific suggestions for legal standards). One might also apply pragmatic feminism, see Margaret Jane Radin, *The Pragmatist and the Feminist*, 63 S Cal L Rev 1699 (1990). Under pragmatic feminism, one would consider the inevitable advantages and disadvantages of various legal standards or approaches from the perspective of women. Again, as with the feminist theories discussed in the text, the problem is the exclusive focus on women.

failing to protect and the active abuser was a man.⁸ Feminists are therefore reluctant to agree that women should be liable, not only for their own abuse and neglect, but also for the abuse and neglect of others.

There is a profound tendency in our culture to blame mothers (not fathers) for all problems children face (and all problem children).⁹ Mother-blaming has deep roots and persists to the present in modern disciplines such as psychology and psychiatry.¹⁰ In legal proceedings, this bias operates as an unspoken and unconscious double standard for mothers and fathers, such that mothers are expected to be much better and more powerful parents than fathers, always putting their children's needs above their own and protecting their children from all harm.¹¹ Mothers are likely to be held liable in tort and criminal law for harm caused by men under circumstances in which, were the situation reversed, the father would *not* be regarded as responsible. This bias seems also to suggest one reason why we are so willing to hold individual mothers responsible, even criminally, for their failures, while being, as a society, profoundly unwilling to care for children ourselves even when mothers cannot realistically be relied on to provide good care.¹²

The problem is not simply gender biases resulting in double standards. Several dichotomies make it difficult to deal with a mother's complex relationships with her children, particularly abused children (i.e., abused by either the mother or someone else while in the mother's custody and under circumstances such that the mother knew or should have known about the abuse but did not take adequate steps to protect the child). One is the good mother-bad mother dichotomy. We tend to see mothers as either saintly good mothers, like the Madonna, who have no interests apart from perfect service to their children,

8. Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U Chi L Sch Roundtable 1, 7 (1995).

9. Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 Vand L Rev 1665, 1682 (1990); Evan Stark and Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 Intl J Health Serv 97, 101-02 (1988); Linda Gordon, *Heroes of Their Own Lives: The Politics and History of Family Violence* 107, 262-63 (Viking, 1988) (finding that mothers were blamed in the past regardless of whether other factors, such as poverty or racial status, were the cause of children's problems). Female survivors of incest tend to blame their mothers more than their fathers. See Janet Liebman Jacobs, *Reassessing Mother Blame in Incest*, 15 Signs 500, 500-01 (1990).

10. See, for example, Harlan R. Heinz and Sharon Heinz, *Emotional Incest: The Tragedy of Divorcing Families*, 7 Am J Family L 169, 171 (1993); Catherine McBride-Chang, Carol Nagy Jacklin, and Chandra Reynolds, *Mother-Blaming, Psychology and the Law*, 1 S Cal Rev L & Women's Stud 69 (1992); Paula J. Caplan and Ian Hall-McCorquodale, *Mother-Blaming in Major Clinical Journals*, 55 Am J Orthopsychiatry 345, 350 (1985) (finding that there were very few changes in the incidence of mother-blaming between 1970 and 1976 and between 1976 and 1982 and that the incidence of mother-blaming was only slightly affected by author's sex).

11. Stark and Flitcraft, 18 Intl J Health Serv at 102 (cited in note 9).

12. See Minow, 43 Vand L Rev at 1682-83 (cited in note 9); *De Shaney v Winnebago County Dep't of Social Services*, 489 US 189, 192-96 (1989).

or as demonic bad mothers who at best are wholly indifferent to their children and at worst delight in hurting their children.

This problem is exacerbated by criminal law's tendency to see the defendant as either entirely culpable for, or entirely innocent of, certain crimes, despite the well-known association between crime and socioeconomic class. Our culture in general has this same tendency: to view people as *either* agents or victims, though all human beings act at various times—and sometimes even at the same time to varying degrees—as free and independent agents and as passive or reactive “victims” behaving in conformity with requirements imposed by others. This point is particularly true for battered women, who in their own lives are often agents—coping in impressive ways under terrifying conditions—and yet also victims.¹³ More specifically, mothers of abused children are often partially responsible for their children's abuse and partially victims themselves. Neither feminism nor criminal law deals effectively with such complex moral culpability.

These problems are further complicated by biases based on class and race. Middle-class European American child rearing practices and standards are often used for families of all classes and races. Minority women, particularly African American women, are likely to be seen as the demonic bad mother as soon as they deviate at all from middle-class European American child rearing standards, despite the fact that often they lack the resources to meet such standards. Part of our societal unwillingness to care for children—to give children the safety nets they need to develop under reasonable conditions—is the result of race and class bias. We tend to see the children who need such safety nets as mostly poor and minority, mostly poor and African American, and therefore disposable, throw-away children.¹⁴ A related problem is that Americans tend to see the solution to crime as individual punishment rather than social change despite clear associations between crime and social conditions.¹⁵ This is particularly a problem for battered women since effective solutions require social change.

Such problems cannot be solved by a new legal standard or rule. Class, race, and gender biases operate on levels that cannot be eliminated so simply. Further, as mature adults, women should often be held responsible for harms done to their children by themselves and even by others, despite these inequi-

13. For a discussion of how difficult it is to see women as both agents and victims, see Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, in Martha Fineman and Roxanne Mykitiuk, eds, *The Public Nature of Private Violence: The War on Women* 59, 62-73 (Routledge, 1994).

14. See Derrick Bell, *And we are not Saved: The Elusive Quest for Racial Justice* 162-77 (Basic, 1987).

15. R. Emerson Dobash and Russell P. Dobash, *Women, Violence, and Social Change* 290-92 (Routledge, 1992) (comparing responses in Great Britain and the United States to domestic violence and noting that American solutions are more likely to be therapeutic, that is, focused on changing individuals, rather than systemic, that is, correcting social practices).

ties.

Although I agree that a very high standard of maternal responsibility is appropriate, there is little point in merely holding mothers responsible under high standards. Mothers in families in which husbands or boyfriends are abusive face many obstacles to protecting their children, a number of which are within the legal system itself and many of which could be eliminated or softened if taxpayers and legislatures were willing to spend resources to make exit possible and safe for mothers and children. I focus on obstacles facing mothers in abusive families, with an eye toward identifying places in which the situation of both women and children could be improved by giving more power to women so that they are more likely to protect their children effectively. I argue that, in addition to holding mothers responsible, any sincere commitment to the well-being of children must include making it easier for mothers to escape abusive households.

I therefore discuss the double binds facing mothers in abusive families. Although a mother may be found criminally or civilly liable for injuries caused by an abusive man in the household, she is offered little in the way of social support necessary to escape with their children. Part of the problem is the legal system itself. In divorce cases, judges often dismiss evidence of a husband's violence against the mother as irrelevant and dismiss evidence of his violence against or abuse of the children as fabricated by the mother to give her an edge in the divorce negotiations. Sometimes, to be sure, there are conflicts between the interests of these mothers and their children. But often their needs overlap, and in this Article I try to identify some such areas.

In Section I, I discuss the relevant empirical evidence on why women stay and how children are hurt by living in violent or abusive households. In Section II, I discuss a mother's legal liability for abusive acts of others. In Section III, I identify double binds facing women in abusive households in light of the combination of legal liability and the difficulty of protecting their children effectively through separation. Finally, I suggest legal and social reforms that would improve the chances of children escaping abusive households.

I. Domestic Violence and Abuse: Why Women Stay and How Children Are Hurt

In this Section, I discuss some of the reasons why women stay in relationships in which they or their children are abused by a husband or lover as well as how children are hurt in such relationships.

Women stay for a variety of reasons. A woman may stay because she still loves her husband or boyfriend and hopes that he will change. A woman does not love the abuse but, rather, she loves the man with whom she has shared many good moments and built a family. A woman is likely to have been socialized as a caretaker, a being responsible for the well-being of those around her, even at significant personal cost. The abusive man may be emotionally dependent on the woman and would feel pain were she to leave. He loves and needs her; therefore she loves him and stays. This is love, or how a

woman is taught to feel and express love. And the woman who stays for these reasons may be right. He *may* reform. Perhaps the abuse *will* end and the children will be better off in a two-parent family.¹⁶

A woman may stay because she has learned, often in religious settings or from her family of origin, that *she* is the one responsible for the quality of the marriage, that keeping the family together is of primary importance, and that she should forgive and forget each incident as it passes.¹⁷

A woman may stay because she has lived in settings in which interpersonal violence was perceived as normal.¹⁸ As a child, she may have experienced or observed abuse and learned at an early age that abuse is a legitimate way to resolve conflicts or a normal part of married life and an ordinary expression of concern and love for a spouse or children. A woman may stay because she has become a "giving self" who thinks only of meeting the needs of others and not of herself as an agent with her own legitimate needs.¹⁹ As a result of the abuse and the ways in which it weakens a woman's sense of self, she may become (like a hostage of terrorists) so emotionally dependent on the abuser that she cannot easily imagine, let alone seek, permanent separation. For many women, sexual abuse heightens many of these problems, since even mentioning it to anyone will produce strong feelings of shame and such abuse can be quite effective in undermining any sense of self.

A woman may stay because she believes that her *character* causes the violence; that is, the violence is the result of some inherent personality flaw in herself.²⁰ A woman stays because she does not realize that her conduct can affect her environment.²¹

A woman may stay because she has few economic options and no safe options. She may be right. Poverty is also hazardous for children, and women and children often become poor at divorce.²² And there may be no safe way

16. Mahoney, *Victimization or Oppression?* at 74 (cited in note 13).

17. See, for example, Mary E. Becker, *The Politics of Women's Wrongs and the Bill of "Rights": A Bicentennial Perspective*, 59 U Chi L Rev 453, 465-66 (1992); Joanne Carlson Brown and Rebecca Parker, *For God So Loved the World?*, in Joanne Carlson Brown and Carole R. Bohn, eds, *Christianity, Patriarchy, and Abuse: A Feminist Critique* 1, 3 (Pilgrim, 1989). See also Annie Imbens and Ineke Jonker, *Christianity and Incest* 264-76 (Patricia McRay trans, Fortress, 1992) (discussing ways in which Christianity supports incest).

18. This is not to say that women from abusive homes seek or ask for abuse, but that they, like other humans, learn what is acceptable from their social experiences.

19. West, 3 Wis Women's L J at 93 (cited in note 6).

20. Donald G. Dutton, *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* 97-117 (Allyn & Bacon, 1988).

21. One might suspect that a woman may stay because she believes (as does her abuser) that she has somehow *caused* the abuse by behaving in certain ways and that it is she herself who is guilty and ultimately responsible. But empirical studies suggest that women who blame their own past behavior for past violence are actually *more*, not less, likely to escape abusive relationships, apparently because they are more likely to believe that, having been responsible for what happened in the past, they can also control their futures. See *id* at 117-18.

22. See Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 503-10 (cited in note

to escape, since violent men find separation extremely threatening. Often, a woman is murdered *after* she leaves her abusive spouse.²³ If there are children, it is virtually impossible to hide entirely from the abuser for more than a short time; there are too many ways he is likely to be able to track a mother down. Especially in truly dangerous households, separation may only heighten the risk of serious harm to women and children.²⁴

A woman may stay because she doubts that anyone will believe her if she accuses the abuser of spousal or child abuse (sexual or physical). A woman may stay out of fear that *he* might be right: if she seeks a divorce, he will get custody of the children, perhaps because of some defect in herself such as alcoholism or drug addiction related to the abuse. A woman may stay because she fears that she cannot ensure her own ability to continue to care for her children if she leaves. She may fear that even if her stories of abuse are believed, the state will take custody of her children because past abuse will be evidence of *her* unfitness as a mother.

A woman may stay because she has literally nowhere to go; shelters are notoriously short of room, particularly for mothers with children, and have time limitations—such as thirty days—that make them inadequate as transitional housing for an effective escape. Even on a short-term basis, shelters are far from ideal housing situations, and often do not permit boys over a certain age, making them inadequate for many mothers.

Children are hurt by all forms of violence and abuse, whether or not it is directed against themselves. Children are obviously hurt when they themselves are abused psychologically, physically or sexually. But children are also hurt by living in a household in which their mother is abused. A boy who witnesses abuse as a child is more likely to be abused or abusive himself when he becomes a husband, a father, a stepfather, or a boyfriend of a woman with children.²⁵ When he becomes an abuser, the harm here is not simply to those he hurts, but to himself: he may end up dead or jailed as a result of his violence and is likely to lead an emotionally pain-filled life as he becomes the person he despised as a child, unable to form healthy adult relationships with sexual partners or children. Other children may grow into adults who avoid intimate relationships because of fear that they will repeat patterns witnessed or observed earlier. A girl who witnesses abuse is more likely to accept

4).

23. See Mahoney, *Victimization or Oppression?* at 79-81 (cited in note 13).

24. *Id.* at 79-80.

25. On problems witnessing violence and abuse pose for children, see Dutton, *The Domestic Assault of Women* at 103-04, 181-85 (cited in note 20); Mildred Daley Pagelow, *Children in Violent Families: Direct and Indirect Victims*, in Shirley Hill and B. J. Barnes, eds., *Young Children and Their Families: Needs of the Nineties* 47, 57-65 (Lexington, 1982); Michael Hershorn and Alan Rosenbaum, *Children of Marital Violence: A Closer Look at the Unintended Victims*, 55 *Am J Orthopsychiatry* 260 (1985); Jane H. Pfouts, Janice H. Schopler, and H. Carl Henley, Jr., *Forgotten Victims of Family Violence*, 27 *Soc Work* 367 (1982).

relationships in which she is abusive or abused as an adult and is also more likely to abuse her children because she has learned that violence is a normal expression of love.²⁶

II. Double Binds: Legal Responsibility for Staying without Legal or Social Support for Leaving

A parent who stays in a home in which children are abused by the other parent or someone else can, of course, lose custody and even parental rights.²⁷ Mothers are often held criminally accountable for their children's abuse by another, typically a father, stepfather, or boyfriend. Yet social and legal supports for their leaving are absent; indeed, often existing social and legal systems encourage or require their staying in households with abusive men. This Section describes women's legal liability for abuse by men. The following Section then discusses how existing social and legal systems make escape more difficult.

A parent whose child has been harmed by another can be criminally liable for his or her failure to care adequately for the child: an affirmative duty to care for the child may be the basis for holding a parent criminally liable for an act committed by another. Not all states impose criminal liability for another's abuse, but a few do, and the trend seems to be toward increased parental liability for failure to protect. Most states have criminal child-abuse statutes that apply to acts of omission as well as commission.²⁸ In some states, parents have been held criminally liable under general assault or battery,²⁹ manslaughter,³⁰ or second-³¹ or first-degree³² murder statutes as

26. See sources cited in note 25.

27. See, for example, *In re E.P., C.P., and G.P.*, 167 Ill App 3d 534, 521 NE2d 603, 605-06 (1988) (mother, who subsequently agreed to termination of her parental rights, lost custody because of sexual abuse by children's father; mother testified that her fear of him resulted in her ignoring signs of sexual abuse of their daughters); *In the Interest of A.V. & J.V.*, 363 Pa Super Ct 180, 525 A2d 778, 778, 780-81 (1987) (mother lost custody of her children because of her husband's previous physical abuse of one of them, though the mother is now separated from the husband); *In re Jeffrey R.L.*, 190 W Va 24, 435 SE2d 162, 173 (1993) (mother's parental rights terminated because child had been physically abused and perpetrator had not been identified).

28. See, for example, Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 L & Inequality 357, 365-67 (1987); *People v Scully*, 134 Misc 2d 906, 513 NYS2d 625, 626 (1987) (holding father criminally liable for failing to remove daughter from abusive mother's custody).

29. *People v Bernard*, 149 Ill App 3d 684, 500 NE2d 1074 (1986) (mother liable for aggravated battery as a result of her boyfriend's abuse).

30. See, for example, *Johnson v Florida*, 508 S2d 443 (Fla App 1987) (mother convicted for manslaughter, where killer was mother's boyfriend).

31. See, for example, *Boone v Arkansas*, 282 Ark 274, 668 SW2d 17, 19 (1984) (mother convicted of second-degree murder where killer was her boyfriend).

32. In two recent Illinois cases consolidated on appeal, mothers were held criminally guilty of first-degree murder for their boyfriends' murder of their children. *Illinois v Staniel*, 153 Ill 2d 218, 606 NE2d 1201 (1992) (although court does not clearly state

well as under child abuse statutes,³³ for acts committed by another. Mothers have also been liable in tort for abuse by fathers, stepfathers, or boyfriends.³⁴

Adults in a household should be responsible for injury to the child if they knew or should have known about the abuse and could have taken steps to prevent the abuse by leaving with the children or reporting the abuse to the authorities. The assumption should be that the adult who was not literally a hostage—not literally coerced at every available second—*could* have acted to end abuse. Although the adult might have found herself or himself in circumstances such that protection of the child seemed impossible, the child is still a child. No matter how weak the mother, she is in a much better position than the child to prevent abuse and owes a duty of care to her children. As Alice Miller, the contemporary Swiss psychologist who has done much work on child abuse, has pointed out, "[t]he situation of an adult woman confronted by a brutal man is not the same as that of a small child."³⁵

The adults around the child are necessarily responsible for the child's well-being. In extreme cases, such responsibility should carry with it criminal penalties, even if the adult did not herself or himself perform abusive acts. And an adult's obligations to a child do not diminish because the adult herself is also abused by the perpetrator.³⁶ Vis-a-vis a child, all adults in the child's household should be responsible civilly, criminally, and morally. Unless we are willing to recognize a general *diminished* capacity defense—a defense easier to establish than incapacity,³⁷ duress, and insanity—criminal liability is appropri-

that mothers were convicted of *first-degree* murder, the opinion does say *murder*, and second-degree murder is available in Illinois in limited circumstances, none of which would apply, see Ill Rev Stat ch 720, ¶ 5 §§ 9-1, 9-2 (1993)); see also *Illinois v Novy*, 173 Ill Dec 565, 597 NE2d 273, 295 (1992) (mother liable for first-degree murder because of her own acts or, in the alternative, her accountability for acts of dead child's father).

33. See, for example, *New Mexico v Williams*, 100 NM 322, 670 P2d 122, 123-24 (1983), *aff'd* on other grounds, 849 P2d 358 (1993) (mother criminally liable under child abuse statute for her husband's abuse of her four year old daughter, though mother was pregnant and herself abused by her husband).

34. As far as I have been able to tell, the tort cases all involve maternal liability for acts of a man. See, for example, Becker, Bowman, and Torrey, *Feminist Jurisprudence* at 290 (cited in note 4) (describing Minnesota case in which a jury held a mother jointly liable in tort for father's sexual abuse of daughter (\$2.4 million award) and a Texas case in which a judge held a mother jointly liable for sexual abuse by the stepfather (\$3.4 million in damages)).

35. Miller, *Banished Knowledge* at 77 (cited in note 5). See also Alice Miller, *Breaking Down the Wall of Silence: The Liberating Experience of Facing Painful Truth* (Dutton, 1991); Alice Miller, *The Untouched Key: Tracing Childhood Trauma in Creativity and Destructiveness* (Doubleday, 1990); Alice Miller, *Thou Shalt Not Be Aware: Society's Betrayal of the Child* (Farrar, Straus, Giroux, 1984); Alice Miler, *For Your Own Good: Hidden Cruelty in Child-Rearing and the Roots of Violence* (Farrar, Straus, Giroux, 1983).

36. For a case in which a stepmother, who may have been abused herself by the dead child's father, is held liable for first-degree murder either because she killed the child or because she knew of, and helped cover up, the father's abuse, see *Novy*, 597 NE2d at 295.

37. Generally, incapacity is narrowly defined as physical capacity and thus would not

ate under generally applicable standards. And even were we to recognize such a defense in other contexts, its application would be troubling here, where the crime is injury to a child who is more vulnerable than the defendant and whose life has been ended or permanently damaged by the defendant's action or inaction.

True, such liability is likely to be imposed unevenly, given pervasive class, race, and gender biases in our culture. Yet bias against mothers cannot preclude maternal responsibility unless we are willing to ignore harm to children (half of whom are girls) as a remedy for systematic biases in our culture. To the extent possible, of course, standards should be designed so as to minimize the operation of bias in their application. For example, less discretionary standards are better than discretionary standards to the extent they provide protection for a group against whom judges are likely to be biased.³⁸ Ordinary standards should be applied even-handedly when mothers are defendants, but this does not always seem to be the case today. For example, a specific intent crime like first-degree murder should not be used to hold a mother responsible for the killing of her child by another when it would not be used in analogous situations.³⁹

Holding an abused adult liable criminally or civilly is not, however, likely to be an effective way to protect living children from future abuse. And even for the adult who is not abused herself, there may be more effective ways to protect children than vicarious maternal liability. The next Section explores some ways in which legal and social changes could foster safe exit for mothers and children.

III. Escape

If mothers, even abused mothers, are civilly and criminally liable for the abuse of their children by fathers, husbands, or boyfriends, then social and legal systems must support their efforts to escape to safety with their children. But these systems today present women with a number of double binds

normally justify an omission on the ground that the defendant was, for example, afraid of the abuse or mentally incapable of acting. See Paul H. Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 NY L Sch L Rev 101, 119-23 (1984).

38. See Becker, 1 S Cal Rev L & Women's Stud at 175-78 (cited in note 6) (making point in context of custody disputes).

39. Compare *Tennessee v Maupin*, 1991 Tenn Crim App LEXIS 818, *11-12 (1991) (reversing first-degree murder conviction of mother for aiding and abetting her boyfriend's murder of her two year old son because "[T]here was no evidence from which a jury could rationally conclude beyond a reasonable doubt that the defendant was actually present for, participated in, intended for Hale to commit, or knew about Hale's committing the death-causing abuse. . . .") with *Staniel*, 606 NE2d at 1209 (upholding mothers' convictions for first-degree murder under aiding and abetting statute under similar circumstances). See also *Novy*, 597 NE2d at 296 (upholding stepmother's conviction for first-degree murder on alternative grounds, including that she might be responsible, as aider and abetter, for acts of child's father).

because the mother's removal of her children from an abusive household may increase her problems, rather than eliminate them. I mention three major areas in which change is appropriate: treatment of allegations of abuse at divorce; general changes to divorce laws; and improvements to safety nets.

A. ALLEGATIONS OF ABUSE AT DIVORCE

During divorce proceedings, when a woman alleges that her spouse has abused her or their children, she faces two particular problems. The judge and other professionals involved in the case may disbelieve her allegations, believing instead that the allegations were made for a strategic purpose: to strengthen her bargaining position in divorce negotiations. And to the extent she alleges abuse of *herself*, the judge and experts involved in the proceeding may conclude that the abuse is irrelevant to the father's fitness as a custodial parent. I begin with the second point and then discuss the credibility problems the mother is likely to face when she complains that he has abused their children.

1. The (ir)relevance of his abuse of her.

As discussed above, abuse of the mother harms children in many ways, even when they are not also abused. Yet many family court judges consider abuse of the mother irrelevant to whether the father should get custody absent evidence of specific harm to the children in the case before them.⁴⁰ In Illinois, for example, a trial judge *can* take into account a father's violence against the mother in a custody determination, but the judge *need not*. Such violence is only one of many factors upon which the trial court can base its discretionary custodial decision. In one Illinois case, the father received custody after killing the mother (upon release after thirteen months in prison).⁴¹ Many of the state studies of gender bias in the courts describe this as a widespread problem: judges often refuse to conclude that a man who has abused the children's mother is unfit to be a custodial parent.⁴²

In 1992, Louisiana enacted a statute creating a presumption that an abusive

40. See, for example, *In re Matter of the Welfare of P.L.C. and D.L.C.*, 384 NW2d 222 (Minn App 1986) (awarding custody to father who had abused children's mother during their marriage rather than to children's grandparents; couple had been divorced and mother had died of cancer); *Bartasavich v Mitchell*, 324 Pa Super Ct 270, 471 A2d 833 (1984) (remanding for further evidentiary hearing on the question of whether father, who had killed mother, should get custody); *In re James M.*, 65 Cal App 3d 254, 135 Cal Rep 222 (1976) (affirming trial court's refusal to terminate father's parental rights even though he had killed mother after she divorced him); *In the Interest of H.L.T.*, 164 Ga App 517, 298 SE2d 33 (1982) (reversing trial court's termination of parental rights of father who had killed mother).

41. *In re Lutgen*, 177 Ill App 3d 954, 532 NE2d 976 (1988).

42. See, for example, Nevada Supreme Court Task Force on Gender Bias in the Courts, *Justice for Women* 43 (1988); Washington State Task Force on Gender and Justice in the Courts, *Gender & Justice in the Courts* 66 (1989); Maryland Special Joint Committee, *Gender Bias in the Courts* 31, 37 (1989).

parent should not have sole or joint custody of his children. This presumption is rebuttable only on showing that the abuser has completed a treatment program, is not abusing alcohol or illegal drugs, and the child's best interest requires custody with the abuser.⁴³ More typical statutes provide that domestic abuse is one of many factors judges can weigh in whatever way seems appropriate in determining the child's best interests with respect to sole custody.⁴⁴ Given the reluctance of many judges to hold that a man who has abused his wife should not therefore be a custodial parent unless there is specific evidence of the abuse harming these children—though spousal abuse does harm children—this strong presumption is a much-needed reform, one that would give abused women more confidence in separating from the abuser, since under this statute the children are less likely to end up in the abuser's custody.⁴⁵

2. Credibility of her allegations of abuse at divorce.

During a divorce, a mother who alleges that her children have been abused is often not believed. Many judges⁴⁶ and mental health professionals⁴⁷ believe

43. La Rev Stat Ann § 364 (West 1992).

44. State statutes, with the exception of Louisiana's, do not require that any significant weight be given to a parent's past abuse of the other parent in determining sole custody. See, for example, Alaska Stat § 25.20.090(8) (1993) (enumerating domestic violence as one of ten factors relevant to determining the best interests of the child); Colo Rev Stat Ann § 14-10-124(1.5)(m) (West 1993) (enumerating abuse as one of thirteen factors relevant to determining the best interest of the child). Many of these statutes also provide that abuse should cut against concluding that joint custody is likely to be in the best interest of the child when one parent is the abuser, but these statutes do not create anything as strong as Louisiana's (rebuttable) presumption. Colo Rev Stat Ann § 14-10-124(1.5)(m) (West 1993). See also Iowa Stat Ann § 598.41(3)(i) (West 1993) (providing that past abuse is relevant to joint custody if safety of abused parent or child would be at risk); NH Rev Stat Ann § 458:17(II)(c) (1993) (evidence of domestic violence suggests that joint custody might be inappropriate). For more extensive discussions of custody standards and domestic violence, see Barbara J. Hart, *Mediation of Custody Disputes*, 43 Juv & Family Ct J 37 (1992); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 Vand L Rev 1041 (1991); Harvard Law Review, *Developments in the Law: Legal Responses to Domestic Violence*, 106 Harv L Rev 1498, 1597-1620 (1993).

45. Empirical data are not available to establish how often abusers seek custody of children. But anecdotal evidence suggests that abusive husbands routinely seek or threaten to seek custody. See Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 Mich L Rev 1 (1991).

46. See, for example, Cahn, 44 Vand L Rev at 1072-74 (cited in note 44) (noting that judges often make this assumption); Marcy Laurino, *Special Report, Custody Wars: Moms Held Hostage*, 17 Ms 89-95 (Dec 1988) (same); Nancy Thoennes and Jessica Pearson, *Summary of Findings from the Sexual Abuse Allegations Project*, in E. Bruce Nicholson and Josephine Bulkley, eds, *Sexual Abuse Allegations in Custody and Visitation Cases* 1, 4, 12 (ABA, 1988) (same). Gender bias task forces routinely describe such bias as a problem. See, for example, *Report on the New York Task Force on Women in the Courts*, 15 Fordham Urban L J 11, 116-17 (1986-87); Administrative Office, Judicial Council of the Courts of California, *Achieving Equal Justice for Women and Men in the Courts: Draft Report of the Judicial Council Advisory Committee on Gender Bias in the Courts* 43 tbl

that allegations of paternal abuse are fabricated at divorce to give the mother an advantage with respect to custody, support, or property arrangements.

Yet if the mother whose children are being abused will not be believed if she seeks custody at divorce, she may well be right in concluding that the children are best off with her continued silence. Accusing the father leads to divorce in most circumstances, and the children are probably better off with her in the home with the father, rather than in the sole or joint custody of the father. Our inability to believe mothers when they do complain of paternal sexual or physical abuse of children is inconsistent with holding mothers criminally and civilly responsible for a father's injuries to the children.

Actually, what empirical evidence there is suggests that even at divorce most allegations of paternal sexual abuse are true. Such allegations are actually rare, probably only somewhere between two and fifteen out of every one thousand divorce filings involve allegations of sexual abuse.⁴⁸ Overall, only about eight percent of sexual abuse allegations (in all settings) are "demonstrably false."⁴⁹ One of the few empirical studies on false allegations of abuse at divorce is a clinical, non-random setting with a sample of only twenty cases. These researchers found that only twenty percent of the allegations of child sexual abuse arising in the context of custody or visitation disputes appeared to be unfounded.⁵⁰

5 (1990); Meredith Sherman Fahn, *Allegations of Child Sexual Abuse in Custody Disputes: Getting to the Truth of the Matter*, 25 Family L Q 193, 195 (1991).

47. See, for example, Heinz and Heinz, 7 Am J Family L at 171 (cited in note 10) ("[S]erious situations occur when an alienating parent [at divorce] (in most situations, the mother) blames the other for sexual abuse of a child or children."); Corey L. Gordon, *False Allegations of Abuse in Child Custody Disputes*, 2 Minn Family L J 225 (1985); William F. McIver, *The Case for the Therapeutic Interview in Situations of Alleged Sexual Molestation* 9 Champion 11 (1986); Domeena C. Renshaw, *When Sex Abuse is Falsely Charged*, 19 Med Aspects of Hum Sex 44, 116 (1985).

48. Thoennes and Pearson, *Summary of Findings* at 4 (cited in note 46) (finding that about two percent to twenty percent of all family court cases dealing with custody or visitation also contain allegations of sexual abuse. Since about ten percent to fifteen percent of divorce cases with minor children have custody contests, these authors conclude that sexual abuse allegations are likely to occur in two to fifteen out of every one thousand divorces).

49. David P. H. Jones and J. Melbourne McGraw, *Reliable and Fictitious Accounts of Sexual Abuse to Children*, 2 J Interpersonal Violence 27, 38 (1987).

50. David P. H. Jones and Ann Seig, *Child Sexual Abuse Allegations in Custody or Visitation Cases: A Report of 20 Cases*, in E. Bruce Nicholson and Josephine Bulkley, eds, *Sexual Abuse Allegations* 20, 29 (cited in note 46). The study included all the clinic's cases within a certain period (1983-1985) in which there was a legal dispute over custody or visitation and charges of sexual abuse. Not only is the sample of twenty cases very small, but is likely biased because of the non-random nature of the population:

There were several possible directions of bias in our sample. As the [clinic] had a reputation for evaluating cases of abuse and neglect we might have been referred cases where there was an impression by at least one of the professionals involved, that abuse was indeed occurring. On the other hand, this direction of bias was probably offset by the knowledge that one of us . . . was interested in evaluating potentially false allegations. Another bias was towards seriousness and complexity. As the [clinic] is a tertiary referral resource, we tended to see complex cases,

There are many reasons for such allegations to arise only at or after a divorce, since few marriages could survive thereafter.⁵¹ There are also a number of reasons for a mother not to make false abuse allegations. First, a mother is likely to be regarded as responsible for the prior abuse by many who learn of it; *her* reputation will suffer.⁵² Indeed, recall that a mother may be held criminally or civilly liable for earlier sexual abuse by a husband, as discussed earlier. Thus, her allegations raise the possibility that she will be subject to criminal or tort penalties.⁵³

Second, her allegations increase the possibility that *she* will be regarded as an *unfit* custodial parent, either because she did not prevent earlier abuse or because her allegations will be disbelieved and she will be seen as lying, vindictive, and hostile. If she is believed, she may lose custody to the local child welfare agency or to the child's grandparents or other relatives because she did not prevent the abuse.⁵⁴ One attorney describes these problems:

Usually she says, "I can't really believe he'd be doing this, but . . . ", or they've seen something that's got them worried but they're also feeling guilty and ashamed. It makes them feel people will consider them bad moms if it's true. People will question how observant and caring they are. Lots of times you have to convince them to discuss it. I'll explain to them that custody and visitation hinge on it, and child support flows from that. Also, if they wait [to bring the charge up] until it looks like dad will have easy access to the kids, they'll be asked 'why did you wait so long to say something?' The hardest part is that, in all honesty, you have to tell her that her concern about losing the children [because she failed to prevent the abuse] is valid.⁵⁵

If she is regarded as hostile to the father, the mother will be disfavored for custody under the friendlier-parent provisions in many state custody statutes. Under these provisions, a court considers how receptive each parent is toward the other parent's continued involvement with the child. For example, the Illinois custody statute provides that in deciding what custodial arrangement is in the child's best interest, the court shall consider "the willingness and ability of each

sometimes further complicated by professional disagreement. Thus we cannot claim that this series of representative of all similar cases in the Denver area.

Id at 23.

51. Thoennes and Pearson, *Summary of Findings* at 14 (cited in note 46); Irene Hanson Frieze and Angela Browne, *Violence in Marriage* 11 Family Violence 163, 179-82 (Chicago, 1989).

52. Thoennes and Pearson, *Summary of Findings* at 13 (cited in note 46).

53. See notes 26-33 and accompanying text.

54. See, for example, *In re E.P., C.P., C.P., & G.P.*, 521 NE2d at 606 (mother agrees to termination of her parental rights after authorities learned of her husband's sexual abuse of their children); *In the Interest of A.V. and J.V.*, 525 A2d at 778 (mother who is separated from her husband loses custody of infant daughter and son because of father's physical abuse of daughter).

55. Thoennes and Pearson, *Summary of Findings* at 5 (cited in note 46).

parent to facilitate and encourage a close and continuing relationship between the other parent and the child.”⁵⁶ The Illinois best-interest statute also provides that “[t]he court shall presume that the maximum involvement and cooperation of both parents regarding the physical, mental, moral, and emotional well-being of their child is in the best interest of the child.”⁵⁷ These presumptions are likely to mean that if her allegations of abuse are disbelieved—regarded as fabricated to give her an edge in divorce or custody proceedings—she will be seen as a less appropriate custodial parent for having voiced them. And if she does lose custody because she is not believed, custody is likely to go to the abuser.⁵⁸

As noted earlier, if we do not believe a mother's allegations when she complains of paternal abuse, we cannot regard mothers as criminally or civilly responsible for such misconduct. And whether or not she is believed, her allegations are likely to negatively affect her chances of retaining custody of her children. Thus, a mother has many incentives *not* to make false allegations. Indeed, she has many incentives not to voice *true* allegations.

If we do not believe mothers when they complain of abuse, we cannot regard them as causally responsible in criminal or tort proceedings for harm to the child by another. This point holds even if *most* allegations of paternal abuse are fabricated (which does not seem to be the case⁵⁹); routine disbelief of such allegations destroys the causal link between her failure to complain of his abuse and the children's continuing suffering. If she would not be believed, speaking would not lead to safety for the children and could lead to greater harm for them, since speaking up might result in the child being in the custody of the abuser.

Thus, two changes are needed in response to a woman's allegations of abuse at or after divorce proceedings. First, we need to establish clear and strong presumptions that a father who has abused a mother is not a fit custodian for his children, as the recently-enacted Louisiana statute does. Second, we need to change the common presumption that women who complain of abuse by the father in a divorce setting are engaged in strategic fabrication. In this setting, as in others, most allegations of child abuse are true. And disbelief is inconsistent with holding mothers criminally and civilly liable for abuse by the father when they live in the same household, know of the abuse, and fail to protect the children. Other, more general changes in divorce laws and practices would also be important in empowering these mothers to be able to protect their children.

56. Ill Ann Stat ch 750 ¶ 5 § 602(a)(7) (West 1994). See also Colo Rev Stat Ann § 14-10-124(1.5)(f) (West 1989); Fla Stat Ann ¶ 61.13(3)(b), (j) (West 1994); Mo Ann Stat § 452.375.2(8) (Vernon 1993); Mont Code Ann § 40-4-223(1)(b) (1985); Nev Rev Stat Ann § 125.480(3)(a) (Michie 1991).

57. Ill Ann Stat ch 750 ¶ 5 § 602(c) (West 1994). See also Colo Rev Stat Ann § 14-10-124(1) (West 1989); Fla Stat Ann § 61.13(2)(b) (West 1994); Mo Ann Stat § 452.375.3 (Vernon 1993); Mont Code Ann § 40-4-223(1) (1985).

58. Maria Laurino, *Custody Wars: Moms Held Hostage*, Ms. 89 (Dec 1988).

59. See notes 47-49 and accompanying text.

B. CHANGES IN DIVORCE LAWS

Women will be empowered (and children in violent households thereby protected) by a number of reforms in divorce laws needed by most women, particularly poor ones. Women and children need better economic protection at divorce, including higher support and maintenance standards as well as more effective collection methods, particularly for self-employed fathers and fathers who switch jobs often. State agencies already required to enforce child support for mothers (under federal law) need to develop far more effective and efficient procedures.⁶⁰

The discretionary best-interest standard—which applies in almost all American jurisdictions⁶¹—does not require trial judges to give particular weight to the parent who has been the child's primary caretaker in the past. As a result, mothers who have been primary caretakers and who therefore have an extremely strong commitment to post-divorce custody, will trade post-divorce economic well-being (for themselves and their children) for a maternal custody agreement, rather than risk losing custody when it is determined in the judicial black box of the discretionary best-interest standard. This problem is exacerbated by the parents' relative economic strength. The person who has been primary caretaker of the children will, for that very reason, tend to have fewer economic resources to use in a judicial battle for custody, a battle whose outcome is fairly uncertain under such a discretionary standard. And the expense of the battle is maximized by the open-ended nature of this standard and the routine use of expensive "experts."⁶²

For the mother who has been married to an abusive man (abusive to his wife or to the children), these fears are likely to be particularly strong. Violent men routinely use children as hostages, threatening their wives with loss of the children if they leave them.⁶³ Strengthening the mother's bargaining position at divorce with a custody standard—such as West Virginia's primary caretaker provision⁶⁴—that protects with greater reliability her relationship with her

60. See Paula Roberts, *The Case for Fundamental Child Support Reform*, 13 Fair Share 8 (Jul 1993); Joan Pennington, *Family Law Developments*, 25 Clearinghouse Rev 1158, 1169 (1992).

61. The discretionary best-interest standard applies in all states except West Virginia and Minnesota. See Becker, 1 S Cal Rev L & Women's Stud at 168-71 (cited in note 6).

62. Robert H. Mnookin and Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L J 950, 964-65 (1979).

63. For a discussion of children as hostages, pressuring mothers to conform to the demands of a patriarchal culture, see Dorothy E. Roberts, *Motherhood and Crime*, 79 Iowa L Rev 95 (1993). See also Mahoney, 90 Mich L Rev at 1 (cited in note 45).

64. In *Garska v McCoy*, 167 W Va 59, 278 SE2d 357, 363 (1981), Justice Neely of the West Virginia Supreme Court articulated a primary-caretaker standard as an interpretation of the West Virginia best-interest statute, W Va Code 48-2-15 (1980) ("[T]here shall be no legal presumption that, as between the natural parents, either the father or the mother should be awarded custody of said children, but the court shall make in award of custody solely for the best interest of the children based upon the merits of each case.").

children, will make it easier to escape an abusive household, and will thereby serve to lower violence and abuse against children in such households.

Many states have preferences or presumptions in favor of joint custody or the friendlier parent, i.e., the one more willing to share parental responsibilities after divorce.⁶⁵ Both are dangerous for children and mothers in abusive households. This presumption is not, of course, necessary to make joint custody available to parents who get along well enough to desire the arrangement. The effect of the presumption is rather to pressure other families into agreeing to joint custody or to order it over the objections of one parent. An abusive husband can use a credible threat to seek joint custody to keep the mother in the household, making it more difficult for her to escape with the children. And the continuing post-divorce contact and communication required by true joint physical custody is likely to be extremely harmful to both the mother and children of violent or abusive men. Abusive men do routinely control women through their children, so these possibilities are neither remote nor theoretical.⁶⁶

Under the primary-caretaker standard, a trial judge is to consider only facts relevant to who cared for the child in the past, particularly in terms of physical care and socialization, including:

inter alia, the performance of the following caring and nurturing duties of a parent: (1) preparing and planning of meals; (2) bathing, grooming and dressing; (3) purchasing, cleaning, and care of clothes; (4) medical care, including nursing and trips to physicians; (5) arranging for social interaction among peers after school, i.e., transporting to friends' houses or, for example, to girl or boy scout meetings; (6) arranging alternative care, i.e., babysitting, day-care, etc.; (7) putting child to bed at night, attending to child in the middle of the night, waking child in the morning; (8) disciplining, i.e., teaching general manners and toilet training; (9) educating, i.e., religious, cultural, social, etc.; and, (10) teaching elementary skills, i.e., reading, writing and arithmetic.

Garska v McCoy, 278 SE2d at 363. Even the primary caretaker standard may, however, give trial judges too much discretion to rule against primary-caretaking mothers on the basis of biases. See Becker, 1 S Cal Rev L & Women's Stud at 69 (cited in note 6) (discussing problems in the way primary caretaker has been applied by West Virginia trial courts—judging from appellate decisions—during statute's first ten years).

65. For a general discussion of joint custody, see, for example, Joanne Schulman and Valerie Pitt, *Second Thoughts on Joint Child Custody: Analysis of Legislation and Its Implications for Women and Children*, 12 Golden Gate L Rev 539 (1982). For discussion of problems battered women face under joint custody, see Mahoney, 90 Mich L Rev at 43-49 (cited in note 45); Becker, 1 S Cal Rev L & Women's Stud at 187 (cited in note 6). For a general discussion of friendlier parent provisions, see Schulman and Pitt, 12 Golden Gate L Rev at 554-56, 572-77 (cited in this note). These statutes are similar to presumptions favoring joint custody in terms of reinforcing the power of an abusive spouse. See Becker, 1 S Cal Rev L & Women's Stud at 170, 184-88 (cited in note 6) (discussing friendlier parent provisions and problems with that preference and with joint custody preferences). Mediation will also be similar in effect to the extent mediators push for joint custody or for a solution favoring the friendlier parent or some other solution problematical in light of violence. See *id.* at 170. Mediators are not, of course, always aware of the domestic violence in the family.

66. See Mahoney, 90 Mich L Rev at 43-49 (cited in note 45) (discussing routine use of custody threats or litigation by abusive men attempting to control women who are trying to separate).

And recent empirical work on children in joint custody arrangements indicates that joint custody is detrimental to children when parental conflict is high.⁶⁷

A father's rights advocate might respond with the following question: but what of the need to protect children who have been abused by mothers, by empowering fathers to escape with the children? But under any of the reforms suggested here, the father could argue that the mother was an unfit custodial parent because she was abusive. And the biases in the culture against mothers who are anything short of ideal would operate to make a father's allegations credible, perhaps even too credible.⁶⁸

On a systemic basis, empowerment of mothers (rather than fathers) is likely to improve the well-being of children for a number of reasons. In general, in our culture women are primarily responsible for children. The well-being of mothers and children is therefore more closely linked in general than is the well-being of fathers and children. Empowered mothers will have more assets and hence be better able to care for their children. Children are likely to be physically safer if mothers themselves can escape abusive men. Although mothers should be criminally and civilly responsible for harm to their children as a result of their own abuse or their failure to protect their children from the abuse of others (given that the mother knows, or should know, of the abuse), society cannot show a meaningful commitment to children without other changes designed to empower women and, hence, indirectly empower children.

Reforms to divorce law are likely to be particularly important to women in abusive homes. I have suggested a number of reforms: better child support standards and enforcement mechanisms; the adoption of the primary caretaker custody standard in place of the best-interest standard; and the elimination of friendlier parent provisions and of joint custody preferences or presumptions. Women and children in abusive homes also need better safety nets to support them when they try to separate from the abuser. Some needed reforms in this area are described in the next Section.

67. See Janet R. Johnston, Marsha Kline, and Jeanne M. Tschann, *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 *Am J Orthopsychiatry* 576, 588 (1989); Rosemary McKinnon and Judith Wallerstein, *Joint Custody and the Preschool Child*, 4 *Beh Sci & L* 169 (1986); Susan B. Steinman, Steven E. Zimmelman, and Thomas Knoblauch, *A Study of Parents Who Sought Joint Custody Following Divorce: Who Reaches Agreement and Sustains Joint Custody and Who Returns to Court*, 24 *J Am Acad Child Psychiatry* 554 (1985); J. Rainer Twiford, *Joint Custody: A Blind Leap of Faith*, 4 *Beh Sci & L* 157 (1986) (reviewing literature and reaching similar conclusion regarding continuing conflict).

68. If both parents are abusive (the man to the woman and the woman to the children), maternal custody is appropriate when the mother has been the primary caretaker unless the level of her abuse of the children is such as to warrant removal of the children from her care under abuse and neglect standards applicable to intact as well as single-parent families. This result is supported by empirical evidence on abused children in shelters that demonstrates that, even when it is the mother who has physically abused the children, the children most likely to see a reduction in abuse are those whose mothers leave abusive husbands or boyfriends. See notes 71-73 and accompanying text.

C. STRONGER SAFETY NETS

Given the high correlation between child abuse and maternal abuse,⁶⁹ as a society we need to do what is possible to facilitate women's safe exit with their children from abusive households. If we are truly committed to children's welfare, then we cannot simply rely on mothers who are likely themselves to be abused as well as economically dependent on the abuser. As one commentator has noted, "[o]ur society must take some responsibility for the inability of some women to leave abusive partners."⁷⁰

This means spending scarce resources in a time of severe budgetary constraints on state and federal governments. But unless we are *only* willing to impose responsibility for children's welfare on women likely to be themselves abused, we must spend resources to make it easier for women to leave.⁷¹ Shelter space is limited in most parts of the country. Often there is a time limit at a shelter, such as thirty days, which is far too short a period for an effective transition to an independent establishment, particularly for a mother (like most) without sufficient economic resources. For an effective exit, most mothers of abused children are likely to need longer-term transitional low-cost housing, job training, child care, health care, health insurance, and adequate economic support during the transitional period.

In addition, there is evidence that when women are abused by the men in their lives, their children are also likely to be abused by their mothers or the men in their mothers' lives. Often, it is the mothers in these households who abuse the children, in part because, as primary caretakers, they spend more time with the children and also because women who have been hit by the men in their lives are likely to follow the domino pattern common to violence and hit their children.⁷² In a long-term study of children of abused mothers who had stayed

69. See, for example, Linda McKibben, Edward De Vos, and Eli H. Newberger, *Victimization of Mothers of Abused Children: A Controlled Study*, 84 *Pediatrics* 531 (1989) (reporting very high rate of violence against mothers of abused children; 59.4 percent of mothers in this study were themselves victims of violence).

70. Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protest*, 5 *L & Inequality* 359, 378 (1987).

71. For a discussion of why the criminal justice system is not, in general, likely to be an effective way to protect children, see James Garbarino, 11 *Family Violence* at 219 (cited in note 51).

72. Jean Giles-Sims, *A Longitudinal Study of Battered Children of Battered Wives*, 34 *Family Relations* 205, 205 (1985). For other studies showing high correlations between child abuse and abuse of the mother, see Stark and Flitcraft, 18 *Intl J Health Serv* at 97 (cited in note 9); McKibben, De Vos, and Newberger, 84 *Pediatrics* at 531 (cited in note 69). Although a 1980 study suggests that women and men are equally violent in homes, Murray A. Straus, Richard J. Gelles, and Suzanne K. Steinmetz, *Behind Closed Doors: Violence in the American Family* (Doubleday, 1981), that study was seriously flawed in a number of ways. For example, it did not include degree of injury or level of violence or whether an act was defensive. Nor did it include marital rape, a common and exclusively male-on-female form of violence within heterosexual relationships. See, for example, Frieze

in shelters in the past, most of the reduction in abuse of the children "resulted from women no longer living with abusive men."⁷³ According to this study, for the abused mothers who in turn abused their children, the mother's successful escape from an abusive relationship was the most effective way to lower levels of violence against the children by the mothers as well as by the men.⁷⁴ And, of course, women need to be empowered in order to be able to protect themselves as well as their children.⁷⁵

In sum, better safety nets facilitating the safe exit of women and children from abusive homes should be high on the political agenda if our commitment to protecting children from abuse is genuine. In addition, a number of general reforms to family law would be extremely helpful in empowering women in abusive homes to exit with their children. And when a woman does speak about a man's abuse of her or of her children, we must start with a presumption that she is telling the truth even in a divorce setting. We should assume she is telling the truth both because she is likely to be telling the truth and because we cannot both disbelieve her and hold her liable in tort and criminal law.

IV. Conclusion

In this Article, I have argued that mothers, even when abused themselves, should be held to a high standard of care for their children and should normally be held responsible for their own abuse or neglect of their children and for failing to protect their children from others' abuse and neglect, provided that they knew or had reason to know of the harm to their children. But I have also argued that if we, as a society, are to do more than pay lip service to children's needs, we must also change other parts of the social and legal system to make it easier for women to escape abusive households with their children.

I have suggested a number of reforms. First, paternal abuse of the mother or children should always be regarded as relevant to paternal custody and should create an extremely strong presumption that paternal custody is not in the child's best interest. Second, mothers who make allegations of paternal child abuse

and Browne, *Violence in Marriage* at 180-87 (cited in note 51); Demie Kurz, *Social Science Perspectives on Wife Abuse: Current Debates and Future Directions*, in Pauline B. Bort and Eileen Gail Moran, eds, *Violence Against Women: The Bloody Footprints* 252 (Sage, 1993). More refined studies show that serious violence is overwhelmingly a male-on-female problem in heterosexual relationships. See Frieze and Browne, *Violence in Marriage* at 180-85 (cited in note 51).

73. Giles-Sims, 34 *Family Relations* at 205 (cited in note 72).

74. On empowerment of women as a way to lower child abuse, see Stark and Flitcraft, 18 *Intl J Health Services* at 97 (cited in note 9).

75. On the extraordinarily high correlations between abused mothers and their abused children, see, for example, id; McKibben, De Vos, and Newberger, 84 *Pediatrics* at 531 (cited in note 69); Giles-Sims, 34 *Family Relations* at 205 (cited in note 72).

Men routinely abuse women as a means of control and to coerce them into perfect conformance with women's traditional roles and spheres. See, for example, Stark and Flitcraft, 18 *Intl J Health Serv* at 97 (cited in note 9); Roberts, 79 *Iowa L Rev* at 95 (cited in note 63).

during or after divorce should generally be believed, since what little empirical evidence we have indicates that they are generally telling the truth. And, even if most mothers lie when they make such allegations, we cannot hold mothers criminally and civilly liable for abusive husbands unless we believe these women when they try to exit with their children. If these mothers cannot protect their children by their allegations at divorce, they cannot be regarded as having been the cause of the harm to the child when they stay.

Third, more general changes in custody laws are needed to protect children in homes in which there is paternal abuse of the child or the mother. Preferences for joint custody and for friendlier parent provisions should be eliminated along with the discretionary best-interest standard. Instead, custody should be decided under a nondiscretionary standard, such as West Virginia's primary-caretaker standard. Other reforms are needed to increase the economic assets available to divorced women and children from fathers. In addition, we must expend greater resources on shelter, long-term transitional housing, child care, health care, health insurance, and job training to make escape a more realistic option for women in abusive homes.

