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Jane C. Murphy
*University of Baltimore School of Law*, jmurphy@ubalt.edu

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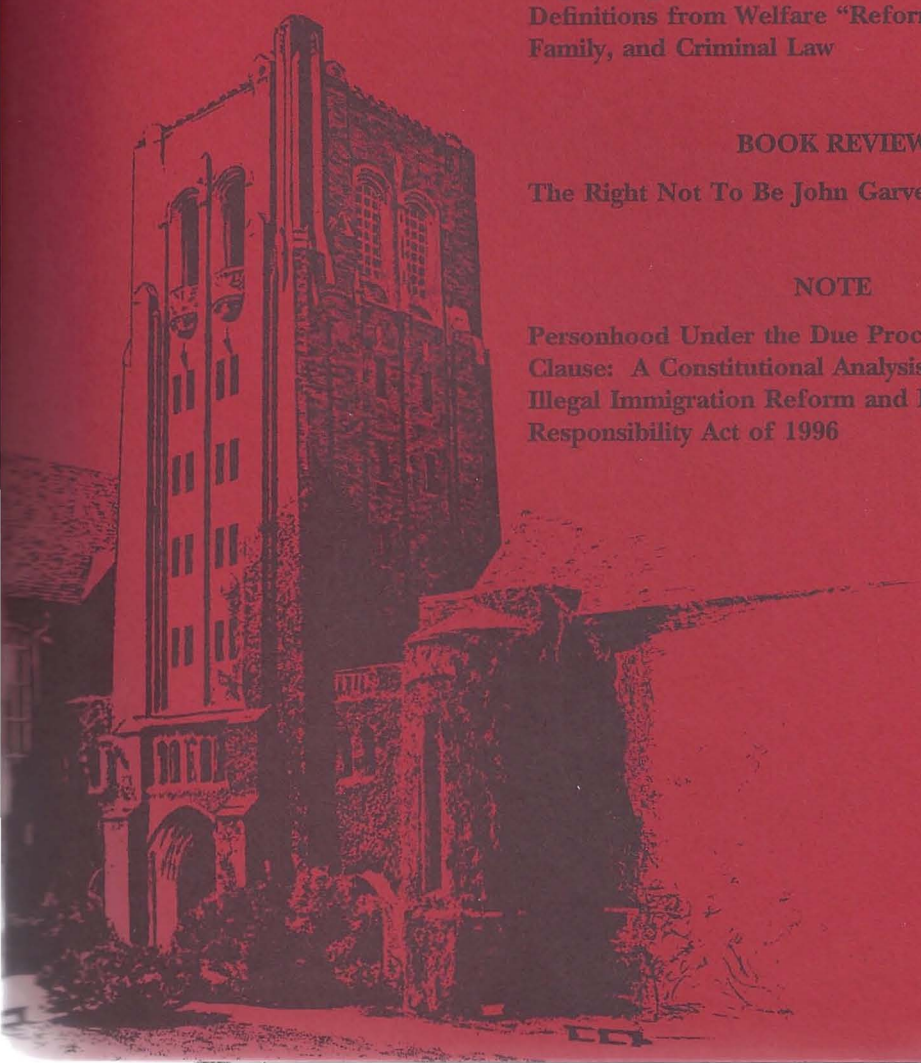

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# LEGAL IMAGES OF MOTHERHOOD: CONFLICTING DEFINITIONS FROM WELFARE "REFORM," FAMILY, AND CRIMINAL LAW

*Jane C. Murphy*†



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† Associate Professor & Director of the Family Law Clinic, University of Baltimore School of Law, B.A. 1975, Boston College; J.D. 1978, New York University School of Law.

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## INTRODUCTION

Until recently, legal scholars have written very little about the subject of motherhood.[1] There is even confusion about how to define "mother" under the law.[2] As one commentator stated: "[W]ho *is* a mother no longer has a simple answer, now that genetic contribution, gestation, and stroller pushing may each be provided by a different woman."[3] Despite this inattention and confusion, an analysis of the areas of family, welfare, and criminal law clearly shows whom the law rewards as a good mother.[4] Judicial and legislative pronouncements about when mothers may have custody of their children, when mothers may or must work, and with whom mothers may live are all

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1 However, other disciplines, such as history, psychology, theology, and philosophy, have extensively explored motherhood for some time. *See, e.g.*, NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER 9 (1978) (arguing that "women's mothering is a central and defining feature of the social organization of gender and is implicated in the construction and reproduction of male dominance itself"); LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON 1880-1960 (1988) [hereinafter GORDON, HEROES OF THEIR OWN LIVES] (reviewing historical development of family violence); LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE 1890-1935 (1994) [hereinafter GORDON, PITIED BUT NOT ENTITLED]; ADRIENNE RICH, OF WOMAN BORN: MOTHERHOOD AS EXPERIENCE AND INSTITUTION (1976) (distinguishing the social institution of motherhood from the individual experience of motherhood); RUDOLF SCHAFFER, MOTHERING (1977) (exploring the psychological aspects of motherhood); JANE SWIGART, THE MYTH OF THE BAD MOTHER: THE EMOTIONAL REALITIES OF MOTHERING (1991) (exploring the "psychology of nurturing"); Nancy J. Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, *in* FEMINISM AND PSYCHOANALYTIC THEORY 79 (1989).

2 One judge in a recent surrogacy opinion stated, "[W]e really have no definition of 'mother' in our law.... [M]other was presumed to be so basic that it was without need of definition." Smith v. Jones, No. 85-532014, slip op. at 9 (Mich. Cir. Ct. Mar. 14, 1986).

3 Carol Sanger, *M is for the Many Things*, 1 S. CAL. REV. L. & WOMEN'S STUD. 15, 18 (1992).

4 Feminist legal scholars have begun to explore the subject of motherhood. These writings have generally concluded that the law stereotypes mothers and fails to take into account the different experiences of mothers. These scholars contend that the law tends to evaluate mothers according to an idealized standard requiring mothers to be all-sacrificing, chaste, and selfless nurturers regardless of their circumstances. *See, e.g.*, MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES (1995) [hereinafter FINEMAN, THE NEUTERED MOTHER]; MARTHA ALBERTSON FINEMAN, *Preface to* MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD, at ix, x (Martha Albertson Fineman & Isabel Karpin eds., 1995) [hereinafter MOTHERS IN LAW]; Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95, 97-98 (1993) [hereinafter Roberts, *Motherhood and Crime*]; Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, 1 AM. U. J. GENDER & L. 1, 10-16 (1993) [hereinafter Roberts, *Racism*]; Dorothy E. Roberts, *Unshackling Black Motherhood*, 95 MICH. L. REV. 938, 948-51 (1997) [hereinafter Roberts, *Black Motherhood*]; Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 399-409 (1996); *A Symposium on Reconstructing Motherhood*, 1 S. CAL. REV. L. & WOMEN'S STUD. 9 (1992).

entrenched in a legal construct of ideal motherhood. The stereotype these laws embody is that of a self-sacrificing, nurturing, married, and stay-at-home mother. Adherence to this stereotype, however, assumes that mothers are equal and autonomous wage earners when the law considers mothers' economic rights and responsibilities.

The primary way that the state imposes its conflicting definitions of motherhood is through its criteria for determining whether a woman has the right to raise her children and whether she has access to the means for supporting those children. An examination of the laws governing child placement, child support, and welfare reveals a series of double binds and conflicting obligations for mothers, making continued custody of children an uncertainty whenever mothers deviate from the "ideal."

The way mothers behave has changed dramatically in the last forty years.[5] Much of family law is premised on the ideal construction of the family that presumes an arrangement that is almost nonexistent today—a mother at home with minor children and a father working outside the home.[6] The law sets standards for child placement decisions, however, based on a view of a mother's proper role that has changed little since the 1950s. Mothers are expected to be married, to stay at home, to be available to their children around the clock, and preferably to be both monogamous and heterosexual.

The adherence to these stereotypes, however, yields to an assumption of equality when the law considers mothers' economic rights and responsibilities. Contrary to women's actual experiences, the law assumes mothers enjoy both an autonomy that permits them to make choices without regard to their children's needs and an equality of economic opportunity between mothers and fathers.

Two points guide the discussion of how the law defines "motherhood." First, any discussion of the legal regulation of motherhood must acknowledge that "good" and "bad" mothers do exist.[7] This Article's exploration of the legal definitions of those categories does not aim to eliminate them entirely, but rather, to clarify further the meaning of these definitions in the law, and to test their adequacy in

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5 The primary areas of change have been in patterns of work and marriage. Many more women with young children now work outside the home than ever before, and female-headed, single parent households are at an all time high. *See infra* note 28.

6 Since 1987, only 10% of U.S. households follow this pattern. *See* CHILDREN, FAMS. & SOC. SERVS. COMM., NATIONAL CONF. OF STATE LEGISLATURES, FAMILY POLICY: RECOMMENDATIONS FOR STATE ACTION 51 (Candace L. Romig ed., 1989).

7 For thoughtful discussions of both the stereotypes and the complex reality of "bad mothers," see Marie Ashe, *Postmodernism, Legal Ethics, and Representation of "Bad Mothers," in* MOTHERS IN LAW, *supra* note 4, at 142; Marie Ashe, *The "Bad Mother" in Law and Literature: A Problem of Representation*, 43 HASTINGS L.J. 1017 (1992); Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75 (1993); Jane M. Spinak, *Reflections on a Case (of Motherhood)*, 95 COLUM. L. REV. 1990 (1995).

describing mothers. Do the law's current definitions of good and bad mothers capture the complexities of women's lives? When mothers are in some sense bad mothers and fail to provide adequate care for their children, how can the legal system most effectively intervene? Does the law's construct of mothers' rights versus children's rights ignore the fundamental bond that exists between most mothers and their children? Finally, does the law's tendency to blame mothers for all harm that befalls their children undermine other policies seeking to increase the visibility and accountability of fathers?

A second and related point is that any discussion of the legal system's response to mothers must both acknowledge the centrality of race and class, and recognize that some issues transcend class. Throughout this Article, the examples of the ways that the law both devalues and punishes mothers often focus on poor women of color. Poor minority women frequently bear the punishment for deviating from the stereotype of the ideal mother, whereas white middle-class and wealthy women reap the rewards for being good mothers. In custody and child support proceedings, however, middle class women experience the same problems in their struggle to keep and support their children that poor women face in abuse and neglect proceedings, and coping with welfare law. Although the settings differ, the law's expectation that mothers be both ideal workers and ideal caretakers crosses class lines.

Part I of this Article explores the traditional idealized view of motherhood that child placement statutes and court decisions reflect. These laws include statutes and case law in custody disputes between parents and in child protection proceedings under civil and criminal laws where the dispute is between the parent and the state. Part II contrasts the legal construct of motherhood that child placement laws embody with the legal image of mothers in child support and welfare law.

Part III examines the impact of these conflicting images of motherhood on a particular group of mothers—battered women. Battered women illuminate the thesis of this Article in a variety of ways. Being battered often pushes middle class women into poverty. The legal issues for these mothers may often move from conflicts with their partners over custody and child support disputes to struggles with the state in welfare and child protection proceedings. Battered mothers often fall short of the law's ideal image of motherhood, becoming subject to civil and criminal sanctions. At the same time, being battered makes them particularly unable to live up to the law's presumptions about economic equality. This Part considers whether the sanctions imposed on battered mothers are appropriate methods of protecting children and making mothers accountable for actions that truly en-

danger children. Further, it explores how laws governing economic benefits affect the choices of battered women, and whether the legal system adequately accounts for these constraints when evaluating maternal conduct.

This Article then contextualizes theories about the law's view of motherhood by examining how the law operates in practice where battered women come before the courts to resolve child placement or economic disputes. By closely examining three cases—a contested custody and support case between two parents, a child protection proceeding where the state sought to remove a child from a mother's care, and the criminal prosecution of a mother accused of failing to protect her child from her partner's abuse—the Article reaches some conclusions about the harm that flows to women and children from the law's conflicting images of motherhood.

Finally, the Article makes some preliminary conclusions about reforms that may assist the legal system in responding more appropriately to mothers in general and, in particular, mothers who are victims of domestic violence. These reforms call for changes in the law's response to both child placement decisions and policies affecting families' financial support. Courts and child welfare bureaucracies evaluating child abuse and neglect allegations must move away from assumptions that mothers and their children are adversaries. In most cases, particularly where the mother is also a victim of abuse, protecting children is often best achieved by protecting their caretaker parent—their mother. Policies designed to ensure financial support for children need to re-emphasize fathers' financial responsibility to their children and recognize mothers' limitations in shifting from childrens' primary caretaker to their financial provider.

## I

## THE "GOOD MOTHER" IN LAW: MOTHERS AS CARETAKERS

The legal discourse about motherhood has tended toward classification—ascribing a set of criteria to a woman without any reference to her life circumstances. As Martha Fineman describes it: "Mother has been neutered in several senses. She is taken out of contexts. In policy decisions, just as she is de-gendered, Mother is also de-raced and de-classed. Mother is treated as though she has no ethnic or cultural community that helps to define her."[8] This tendency to "classify" rather than consider individual circumstances is present particularly in child placement decisions.

8 FINEMAN, THE NEUTERED MOTHER, *supra* note 4, at 67.

A. Child Custody

One context in which the law defines the characteristics of the good mother may be found in the contested custody case.[9] The tendency to stereotype and idealize women in custody law is grounded in the history of this area of law. Through the early nineteenth century in this country, fathers almost invariably received custody of their children upon divorce or separation.[10] Mothers had neither the legal nor the economic means to raise their children unless they were married to the fathers. The state regarded children as the father's property, subject to his control both during the marriage and after its dissolution.[11] Consistent with mothers' general loss of legal status and power upon marriage,[12] they had neither rights nor access to their children if the mother did not live with the father. As Blackstone wrote, "[A] mother, as such, is entitled to no power, but only to reverence and respect."[13]

The rationale for the paternal right to custody evolved into the concept of economic reciprocity—the father conferred financial support, inheritance rights, and other income benefits, and, in exchange, had the right to the earnings and custody of the children.[14] In one nineteenth century custody case, a New York judge, applying the paternal preference, explained the connection between a father's superior economic circumstances and his paramount right to custody:

> In this country, the hopes of the child in respect to its education and future advancement, is mainly dependent upon the father; for this he struggles and toils through life; the desire of its accomplishment operating as one of the most powerful incentives to industry and thrift. The violent abruption of this relation would not only tend to wither these motives to action, but necessarily in time, alienate the father's natural affections; and if property should be accu-

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9 Child custody in this Section refers to disputes between private parties, primarily parent versus parent. Custody disputes between parents and the state are discussed *infra* Part I.B.

10 *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 234-85 (1985); SUZANNE RAMOS, THE COMPLETE BOOK OF CHILD CUSTODY 32 (1979). For an examination of custody law in an earlier period of history, see MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 1-47 (1994) (examining the treatment of children during colonial times as economic assets with "custody" granted through relationships established in indenture contracts or apprenticeships).

11 *See* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 178, 181-82 (1916).

12 *See* WOMEN AND THE LAW § 3A.02[1]-[2] (Carol H. Lefcourt et al. eds., 1996).

13 1 WILLIAM BLACKSTONE, COMMENTARIES *441.

14 *See* Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1064-68 (1979).

> mulated, the child under such circumstances could hardly expect to inherit it.[15]

Rules that absolved fathers of the obligation to support children placed in their mother's custody further reinforced the paternal preference based on economic superiority.[16]

By the middle of the twentieth century, a maternal or "tender years" presumption had replaced the paternal preference.[17] The presumption provided that mothers should have custody of their children, particularly those under age five.[18] This presumption was grounded in the view that women's natural disposition toward nurturing made them the preferred caretakers.[19] Both the assumed biological superiority of mothers as parents and social custom, which assigned responsibility for parenting to mothers, justified the doctrine.

Early defenders of this doctrine idealized maternal love. As one court put it, "[m]other love is a dominant trait in even the weakest of women, and as a general thing surpasses the paternal affection for the common offspring, and, moreover, a child needs a mother's care even more than a father's."[20] Another judge in a Wisconsin court in 1921

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15 People *ex rel.* Nickerson, 19 Wend. 16, 18 (N.Y. 1837).

16 *See* Brow v. Brightman, 136 Mass. 187 (1883) (stating such a rule). This rule was not significantly eroded until the 1920s. *See* Rena K. Uviller, *Fathers' Rights and Feminism: The Maternal Presumption Revisited*, 1 HARV. WOMEN'S L.J. 107, 113 (1978).

17 Katherine Hunt Federle, *Looking for Rights in All the Wrong Places: Resolving Custody Disputes in Divorce Proceedings*, 15 CARDOZO L. REV. 1523, 1536 (1994).

18 *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 19.4, at 799 (2d ed. 1988) (indicating that, while few courts define "tender years," the "presumption would clearly apply to a child under five years").

19 *See* Uviller, *supra* note 16, at 114. The view of mother as nurturer generally confined mothers to the domestic sphere and excluded them from the world of politics. The earliest idealized image of mother in this country did have a political dimension, however, which dates back to the colonial period in this country. One commentator describes the concept of the Republican Mother:

> [In the early Republic, the] role of guarantor of civic virtue . . . could not be assigned to a formal branch of government. . . . [T]he crucial role was thought to be the mother's: the mother who trained her children, taught them their early lessons, shaped their moral choices. . . . Motherhood was discussed almost as if it were a fourth branch of government, a device that ensured social control in the gentlest possible way. . . . The Republican Mother was to encourage in her sons civic interest and participation. She was to educate her children and guide them in the paths of morality and virtue. But she was not to tell her male relatives for whom to vote. She was a citizen but not really a constituent.

Stephen A. Conrad, *The Rhetorical Constitution of "Civil Society" at the Founding: One Lawyer's Anxious Vision*, 72 IND. L.J. 335, 355 (1997) (quoting LINDA K. KERBER, WOMEN OF THE REPUBLIC: INTELLECT AND IDEOLOGY IN REVOLUTIONARY AMERICA, at xii, 199-200, 283 (1980)).

20 Freeland v. Freeland, 159 P. 698, 699 (Wash. 1916); *see also* Ellis v. Johnson, 260 S.W. 1010, 1012 (Mo. Ct. App. 1924) (arguing for the maternal preference on grounds that it is "known by all men that no other love is quite so tender, no other solicitude quite so deep, no other devotion quite so enduring as that of a mother"). Some feminists favor

theorized, "For a boy of such tender years nothing can be an adequate substitute for mother love . . . because in her alone is duty swallowed up in desire; in her alone is service expressed in terms of love."[21] Justice Fulbright of the Missouri Court of Appeals wrote in 1938: "There is but a twilight zone between a mother's love and the atmosphere of heaven . . . ."[22] Justice Terrell of the Florida Supreme Court gave the ultimate tribute to mothers in 1941:

> [S]he is morally[,] spiritually, and biologically best suited to care for [the child] during infancy and adolescence. She is more sensitive to influences that are derogatory to its health and character and has been known to pursue it to the gutter and retrieve it after the father had abandoned it. In deeds, springing from innate nobleness, the mother is the peer of the father and when it comes to instinctive and intuitional powers, she is much his superior.[23]

However, this presumption only benefited women who conformed to the ideal. In another case two years later, Justice Terrell wrote: "If she goes and returns as a wage earner like the father, she has no more part in [child care] than he and it necessarily follows that all things else being equal, she has no better claim when the matter of custody is at issue."[24] Even under a system in which the maternal presumption was the rule in all fifty states, courts generally deprived the mother of custody if she was believed to be mentally unfit, failed to provide a healthy home, or was guilty of adultery or abandonment.[25]

With the advent of the women's movement in the 1960s and 1970s, the maternal preference came under attack. By the 1980s, the "best-interests-of-the-child" standard had replaced the maternal preference standard in most jurisdictions.[26] Despite its apparent gender

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reinstatement of the tender years doctrine on the grounds that women are usually the actual caretakers of the children, and that the bias against women by the white, male judges who decide custody cases makes such a rule necessary to give women a fair shot at custody. *See, e.g.*, PHYLLIS CHESLER, MOTHERS ON TRIAL: THE BATTLE FOR CHILDREN AND CUSTODY 239-68 (1986) (discussing judicial biases); *see also* Mary Becker, *Maternal Feelings: Myth, Taboo, and Child Custody*, 1 S. CAL. REV. L. & WOMEN'S STUD. 135, 154-158 (1992) (discussing, together with the studies cited therein, male bias in decisionmaking, but favoring a maternal deference standard).

21 Jenkins v. Jenkins, 181 N.W. 826, 827 (Wis. 1921) (modifying the trial court's custody determination, and awarding the mother custody of her three-year-old son).

22 Tuter v. Tuter, 120 S.W.2d 203, 205 (Mo. Ct. App. 1938).

23 Randolph v. Randolph, 1 So. 2d 480, 481 (Fla. 1941).

24 Watson v. Watson, 15 So. 2d 446, 447 (Fla. 1943).

25 *See, e.g.*, Blackburn v. Blackburn, 168 So. 2d 898, 902 (La. Ct. App. 1964) (finding a mother, shown to be adulterous, profane, and an alcoholic and substance abuser, unfit for custody); Parker v. Parker, 158 A.2d 607, 610 (Md. 1960) (depriving an adulterous mother of custody despite her "confession of error and avowal of repentance"); Wilson v. Wilson, 590 P.2d 1136, 1138 (Mont. 1979) (finding, on balance, that the children in question would be better off with their father, rather than their adulterous mother, even though he would have to employ child care).

26 *See* CLARK, *supra* note 18, § 19.4.

neutrality, the best-interests-of-the-child standard permits judges to decide custody cases based on their own conceptions of the "good mother." Even its proponents recognize that the values of the judges who apply this standard define it:

> To make custody turn on the "best interests" of the child means that a court must decide what conduct and circumstances are desirable and what are not. The criteria for this decision, if not supplied by the parents themselves, must derive from the judge's views of good child rearing and good citizenship.[27]

Given the indeterminate nature of the standard, inconsistent application of the standard and few predictable rules typify contemporary custody cases.

When it comes to expectations about a mother's role, however, some patterns do exist. Despite the fact that a vast majority of mothers with children at home work for wages,[28] custody law makes clear that a working mother is less than ideal.[29] Mothers who work

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27 Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1156.

28 Married mothers who work outside the home and who have children between the ages of six and seventeen years have increased from a rate of 39% in 1960 to 76% in 1995. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 400 (1996). Among married mothers with children under the age of six years, labor force participation has increased from about 19% in 1960 to 64% in 1995. *See id.* These numbers reflect a substantial increase in working married mothers, but the change has been most dramatic among middle and upper class married women because poor single mothers have always worked. *See* Sanger, *supra* note 4, at 464 (citing ALICE KESSLER-HARRIS, OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES viii (1982)).

29 *See, e.g.*, Bezou v. Bezou, 436 So. 2d 592, 594 (La. Ct. App. 1983) (upholding an award of custody to a father who was a doctor, on the ground that, although both parties were morally fit, the mother was a professional woman who would be "understandably busy in the pursuit of her career" and was not a "traditional housewife available to her child at all hours of the day"); *see also* Cooley v. Cooley, 411 So. 2d 750, 752-53 (La. Ct. App. 1982) (awarding custody to a father who worked twelve hours a day, reasoning in part that the mother's housekeeping practices left "something to be desired," and that she was a young woman trying to establish herself in a business career); *In re* Marriage of Estelle, 592 S.W.2d 277 (Mo. Ct. App. 1979) (affirming the trial court's finding that law requiring that a mother's employment be treated as a negative parental attribute does not violate equal protection); Masek v. Masek, 228 N.W.2d 334, 337 (S.D. 1975) (upholding the trial court's award of custody to a full-time working father, rather than the mother who worked part-time as a teacher, because the mother's "primary interests are in her musical career and outside of the home and family"); McCreery v. McCreery, 237 S.E.2d 167, 170 (Va. 1977) (upholding the trial court's award of custody to a father, observing that while both parents work full time, the mother had a "preoccupation with the 'glamour of her work'").

Custody cases that tend to punish working women may reflect the broader public sentiment which responds to genuine problems experienced by children of *working parents* by blaming *working mothers*. *See, e.g.*, SUSAN FALUDI, BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN 27-29 (1991) (citing a *New England Journal of Medicine* study which inflated statistics concerning infertility in women in their early thirties and which urged women, therefore, to have children before embarking on their careers); IRIS KRASNOW, SURRENDERING TO MOTHERHOOD (1997) (describing the joys of stay-at-home mothering); *see also* Julia Kagan, *Survey: Work in the 1980s and 1990s*, WORKING WOMAN, Aug. 1993,

outside the home are increasingly at risk in custody disputes, particularly when they seek financial security or independence through demanding careers. In a number of recent well-publicized cases, working women lost custody in part because of long hours and "workaholic" values,[30] or because of a decision to accept a scholarship and enroll full time in college which would require placing their child in a day-care center.[31] Single working mothers are particularly at risk when they are in custody disputes with fathers who have remarried "stay-at-home" wives. Courts have shown a preference for these conforming stepmothers.[32]

Another context in which the courts, under the best-interests-of-the-child standard, have defined the good mother is when a father challenges a mother's custody because she seeks to relocate for professional or personal reasons. Trial judges have repeatedly threatened mothers with the loss of custody of their children when they desire to relocate to find a better job,[33] to remarry,[34] or to be closer to their

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at 18, 20 (reporting that a majority of respondents to survey agreed that a woman's first responsibility is the care of her children); Sally Quinn, *Mothers at War: What Are We Doing to Our Kids?*, WASH. POST, Feb. 10, 1991, at C1 (examining the problems of wartime separation of mothers and children, and concluding that women should be forbidden from going to war).

30 *See* Prost v. Greene, 652 A.2d 621, 624-25 (D.C. 1995) (upholding trial court's decision to award custody to full-time working father after deciding that mother was more devoted to her career, despite testimony from court-appointed psychologist that the children were primarily attached to their mother); Richmond v. Tecklenberg, 396 S.E.2d 111 (S.C. Ct. App. 1990) (granting custody of six-year-old daughter to father because of mother's commitments as a physician, despite father's comparable work schedule); *see also* D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark's Double Bind*, 6 HASTINGS WOMEN'S L.J. 295 (1995) (using prosecutor Marcia Clark's custody battle to describe the way courts use a women's career against her).

31 *See* Ireland v. Smith, 547 N.W.2d 686, 688-89 (Mich. 1996) (reversing trial court's award of custody to father, finding the trial court's speculation that there was "'no way that a single parent, attending an academic program at an institution as prestigious as the University of Michigan, can do justice to their studies and to raising of an infant child,'" to be unsupported).

32 *See, e.g.*, Puzzuoli v. Puzzuoli, No. CA 89-310, 1990 WL 32446, at *1 (Ark. Ct. App. Mar. 21, 1990) (affirming trial court's decision which found both parents fit, but awarded custody to father because, in her father's care, the child would be cared for by a stepmother, as opposed to the daycare center the mother was forced to use); Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986) (noting that the trial court granted custody to father because, among other reasons, his new wife would provide in-home care for his child).

33 *See, e.g.*, Towne v. Towne, 546 N.Y.S.2d 213, 214 (App. Div. 1989) (affirming finding that mother's move to Florida to accept promotion from senior secretary to administrative assistant would justify transfer of custody to father, where mother failed to demonstrate that she could not have found comparable work in area where the current custody arrangement was maintainable). *But see In re* Marriage of Burgess, 913 P.2d 473, 480-81 (Cal. 1996) (reversing trial court on the ground that it is unrealistic to expect former spouses to stay in the same location, and it was improper for a court to exert pressure on them to do so).

34 *See, e.g.*, Domingues v. Johnson, 593 A.2d 1133, 1140-41 (Md. 1991) (finding that a mother's remarriage and relocation to another state may justify a transfer of custody to father).

families after divorce.[35] As one commentator described it, when relocation threatens a father's right to visit or maintain joint custody, courts routinely burden mothers with a choice between relocation or custody because it is "assumed that the mother alone would sacrifice her economic and social interests to maintain her relationship with her [child]."[36] When fathers seek to relocate, however, these same assumptions about sacrificing such interests for the child often do not exist.[37]

Examining the impact of economic superiority on custody decisions also demonstrates the double bind that the law's view of ideal motherhood places on women. Despite the unfavorable view of mothers who work for wages, mothers who are the economically dependent parent may have this status held against them. Several states expressly list economic criteria as a factor that a judge either may or must consider when determining custody.[38] Favorable economic circumstances, or the likelihood of the availability of material advantages, gives the wealthier parent an edge in custody disputes.

Even when statutes do not require or even authorize the judge to consider economic circumstances, many judges still do so under the guise of granting custody to the more "stable" parent[39] or the parent

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35 *See, e.g.*, Ramirez-Barker v. Barker, 418 S.E.2d 675, 679-80 (N.C. Ct. App. 1992) (affirming trial court order transferring primary physical custody from mother to father if mother relocated to be closer to her family).

36 Sanger, *supra* note 4, at 418. The context for Sanger's comment is a discussion of "move away" custody cases in which she focuses on the California case of *In re Marriage of Fingert*, 271 Cal. Rptr. 389 (Cal. Ct. App. 1990). In *Fingert*, a mother sought modification of a custody order that required her son to live with her and attend school for three weeks a month in northern California and fly to southern California to live with his father and attend a different school one week a month. *Fingert*, 271 Cal. Rptr. at 390. Even though the mother had primary custody for the three years following her divorce and sought a change that appeared to be in the best interest of the child, the trial court denied the mother's request and ordered her to move to southern California or give up custody of her child. *See id.* at 391. The mother appealed, and the California Court of Appeals vacated the trial court's order. *Id.* at 393. For a detailed discussion of the *Fingert* case, see Christine A. Littleton, *Does It Still Make Sense to Talk About "Women"?*, 1 UCLA WOMEN'S L.J. 15, 37-51 (1991).

37 *See, e.g.*, Overall v. Overall, 512 N.W.2d 851 (Mich. Ct. App. 1994) (affirming trial court's decision granting father custody and allowing father to relocate to another state to improve his financial situation, despite expert testimony that the mother had greatest nurturing potential to care for child and the father's admission that he hit the mother on one occasion). Recognizing the need for more "rationality and consistency" in custody relocation decisions, the American Academy of Matrimonial Lawyers has recently developed a model statute for custody relocation. *Nation's Top Divorce Lawyers Suggest Uniform Relocation Rules*, MD. FAM. L. MONTHLY, June 1997, at 22.

38 *See, e.g.*, FLA. STAT. ANN. § 61.13(3)(c) (West 1996 & Supp. 1997); MICH. COMP. LAWS ANN. § 722.23(3)(c) (West 1996); N.D. CENT. CODE § 14-09-06.2(1)(c) (1991 & Supp. 1997); VT. STAT. ANN. tit. 15, § 665(b)(2) (1989).

39 Craig v. McBride, 639 P.2d 303, 304 (Alaska 1982) (finding father's "'relatively more stable circumstance'" a deciding factor in trial court granting the father custody).

providing the "best" home[40] or the more "secure" environment.[41] Given the fact that women still earn substantially less than men,[42] this preference for the economically advantaged spouse often hurts mothers in custody cases.

The case law under the best-interests-of-the-child standard also reveals a set of norms regarding sexual practices which, if violated, also result in the bad mother label and the potential loss of custody. The most typical cases involve attempts to control the sexual behavior of a divorced or separated mother seeking to gain or maintain custody. These cases most often arise in the context of a noncustodial father attempting to wrest custody from the custodial mother based upon her cohabitation with a boyfriend. The court often views a mother's new boyfriend suspiciously, perceiving him either as a possible danger to the children or as a distraction for the mother, diverting time and attention that she should devote to the children.[43] By contrast, a court may view a father's new girlfriend as bringing stability to his life and as a source of child care.[44]

The courts have responded to a custodial mother's live-in boyfriend in two ways. In some cases, courts have held that the mother's cohabitation outside of marriage is itself harmful to the children, and warrants state intervention either through a change in custody[45] or

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40 Perkins v. Perkins, 589 S.W.2d 588, 592 (Ark. Ct. App. 1979) (awarding the father custody, and noting that the father had an apartment big enough to allow the child his own room, and that the father was contemplating buying a home).

41 Burchard v. Garay, 724 P.2d 486, 488 (Cal. 1986) (noting that the trial court, in awarding custody to the father, impermissibly relied on its finding that the father was "financially" better off than the mother); Dempsey v. Dempsey, 292 N.W.2d 549, 553 (Mich. Ct. App. 1980), *aff'd in part, rev'd in part*, 296 N.W.2d 813 (Mich. 1980) (noting the trial court's finding that the father had a "greater interest and the capacity to continue to maintain" the family home).

42 Women earn an average of seventy-six cents for each dollar that men earn. *See* Gary Belsky, *Women Worry More Than Men About Money*, MONEY, June 1996, at 24, 25. Although the "wage gap" has narrowed in the last twenty years, wages for low-income women have remained stagnant. *See* Laurence E. Lynn, Jr., *Ending Welfare Reform as We Know It*, AM. PROSPECT, Fall 1993, at 83, 86; *see also infra* notes 171-80 and accompanying text (discussing how women's role as mothers further disadvantages them economically).

43 *See, e.g.*, Melancon v. Bergeron, 598 So. 2d 694, 697-98 (La. Ct. App. 1992) (denying a mother custody and noting the longstanding belief of Louisiana courts that "where a parent . . . live[s] in open and public adultery with a paramour . . . the parent [is] morally unfit to maintain custody of children").

44 *See, e.g.*, Puzzuoli v. Puzzuoli, No. CA 89-310, 1990 WL 32446, at *3 (Ark. Ct. App. Mar. 21, 1990) (expressing concern that the father lived with his fianceé before marriage, including times when his minor child had overnight visitation, yet finding that the presence of the then girlfriend, now stepmother, was a positive factor in the court's decision to grant father custody).

45 *See, e.g.*, Jarrett v. Jarrett, 400 N.E.2d 421, 424-25 (Ill. 1979) (finding that the mother's open and continuing cohabitation with her boyfriend endangered her children's moral development); *In re* Marriage of Thompson & Thompson, 449 N.E.2d 88, 92 (Ill. 1983) (distinguishing *Jarrett*, and granting custody to father who had committed adultery and cohabited with a girlfriend and his children); *Melancon*, 598 So. 2d at 697 (finding that

the imposition of restrictions on the mother's behavior as a condition to her maintaining custody.[46] Evidence demonstrating similar paternal extramarital conduct often does not affect the punitive response against mothers.[47]

In a second category of cases, the courts are less punitive to sexually active single mothers, requiring a demonstrated nexus between the mother's alleged immorality and harm to the child.[48] In others, the courts have held that the mother's involvement in an extramarital affair is a factor to consider in the custody decision, but that it does not by itself justify a change.[49]

Custody case law also suggests that heterosexuality is a prerequisite to good motherhood. Courts are fairly consistent in labeling both mothers and fathers that actively engage in homosexual relationships as poor moral examples for their children.[50] However, consistent with the pattern of greater judicial scrutiny of the nonmarital sexual rela-

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granting mother physical custody of the children was an abuse of discretion because the mother had lived in "open concubinage" with her boyfriend for over three years, with no intention of getting married, while the father had remarried and could provide a stable environment); Brown v. Brown, 237 S.E.2d 89, 91 (Va. 1977) (affirming the trial court's finding that, solely by reason of her adulterous cohabitation, the mother was unfit to be a custodial parent).

46 *See, e.g.*, Parrillo v. Parrillo, 554 A.2d 1043, 1045 (R.I. 1989) (finding that the court could prohibit a wife from spending the night with cohabitant in her house while her children were present).

47 *See, e.g.*, Simmons v. Simmons, 576 P.2d 589, 591-93 (Kan. 1978) (awarding custody to the father because, among other reasons, the mother's fiancee had spent the night in her home, even though the father lived with his girlfriend in a hotel room and had allowed his lover to stay there while the children were present); Flournoy v. Flournoy, 392 So. 2d 1096, 1098 (La. Ct. App. 1980) (awarding custody to the father even though both the father and mother engaged in adulterous relations, reasoning that the father's affair was more "discreet" than the mother's); Ford v. Ford, 419 S.E.2d 415, 417 (Va. Ct. App. 1992) (finding that a father who moved himself and his daughter into the home of a woman with whom he was having an adulterous relationship was not an unfit custodian).

48 *See, e.g.*, Swain v. Swain, 406 A.2d 680, 683-84 (Md. Ct. Spec. App. 1979) (finding that the chancellor did not abuse his discretion by awarding custody to a mother because the child was not adversely affected by the mother's adulterous relationship); *see also* Hosain v Malik, 671 A.2d 988, 1005 (Md. Ct. Spec. App. 1996) (quoting *Swain* with approval, stating that "[t]here [was] nothing 'repugnant' or even foreign, in a court considering adultery as [only one] factor in determining the best interest of the child").

49 *See, e.g.*, Fletcher v. Fletcher, 504 N.W.2d 684, 688 (Mich. Ct. App. 1993), *aff'd in part, rev'd in part on other grounds*, 526 N.W.2d 889 (Mich. 1994) (reversing trial court's award of child custody to the father because of the "poor moral example" set by the mother who had two extramarital affairs); Tucker v. Tucker, 910 P.2d 1209, 1215 (Utah 1996) (holding that the trial court properly considered the mother's lack of "moral example" in cohabiting with another person before the divorce, and affirming transfer of custody to the father); Judith R. v. Hey, 405 S.E.2d 447, 450-51 (W. Va. 1990) (overturning a trial court order requiring a custodial mother who was cohabitating with a man to either marry him within 30 days or lose custody to her former husband, but noting that the cohabitation would be a factor to be considered on a petition for modification).

50 While some more recent decisions have required a demonstrated nexus between harm to the child and the parent's sexual orientation, the majority of state courts still hint that a parent's homosexuality is a negative factor in the best-interests-of-the-child analysis.

tionships of mothers than that of fathers, the majority of cases discussing same sex relationships involve mothers rather than fathers.[51]

In recent years, appellate courts have begun to curb the broad discretion of trial judges hearing custody cases. This development has limited the tendency to punish mothers who do not conform to the stereotypical married, homemaker, asexual, sacrificing mother. Unfortunately, the fact that appellate courts have overturned some punitive trial court decisions does not significantly reduce the potential for punishing "nonconforming" mothers. First, the broad discretion trial judges have received under the best-interests-of-the-child standard makes reversal of custody decisions relatively uncommon.[52] In addition, given the costs of litigating a custody case, very few people have the financial means to appeal an adverse decision.[53]

Further, even in the rare cases where a mother does have the resources to appeal and win, she may lose custody for several years while the appeal is pending. For example, in *Burchard v. Garay*,[54] the trial court awarded custody to a father, who had refused to acknowledge paternity, pay support, or visit the child until she was fifteen months old, on the grounds that he was financially stable and had a new wife who would provide in-home care for the child.[55] Although the California Supreme Court reversed the trial court's decision, the appellate court did not direct the trial court to award custody to the mother.[56] Four years had elapsed since the court had transferred the

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*See* Linda D. Elrod, *Family Law in the Fifty States 1994-95: Case Digests*, 29 FAM. L.Q. 775, 810-11 (1996).

51 *See* WOMEN AND THE LAW, *supra* note 12, § 7.01, at 7-3 to 7-4 n.6. Courts have transferred custody from lesbian mothers without clear evidence that the sexual orientation of the mother has had an adverse impact on the children, solely on the theory that prejudices in the community may hurt the children. *See, e.g.*, Ward v. Ward, No. 95-4814, 1996 WL 491692, at *3 (Fla. Dist. Ct. App. Aug. 30, 1996) (affirming trial judge's custody transfer of an eleven-year-old girl to her father who had served eight years in prison for killing his first wife and was presently living with his fourth wife, citing mother's lesbian relationship and child's exposure to R-rated movies as the basis); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (protecting children living in "a small, conservative community" from the "possible ostracizing" that they might encounter as a result of their mother's "'alternative life style'"); Bottoms v. Bottoms, 457 S.E.2d 102, 108 (Va. 1995) (holding that lesbian conduct is an "important consideration" in determining parent's unfitness in custody case); Hertzler v. Hertzler, 908 P.2d 946, 952 (Wyo. 1995) (stating that the trial court's decision restricting a divorced mother's visitation with her children based upon the court's disapproval of the mother's lesbian lifestyle will not be overturned where the restrictions serve the children's best interests).

52 *See* Carl E. Schneider, *Discretion, Rules, and Law: Child Custody and the UMDA's Best-Interest Standard*, 89 MICH. L. REV. 2215, 2245 (1991).

53 *See, e.g.*, Jane C. Murphy, *Access to Legal Remedies: The Crisis in Family Law*, 8 BYU J. PUB. L. 123, 130 (1993).

54 724 P.2d 486 (Cal. 1986).

55 *Id.* at 487-88.

56 *Id.* at 493.

child's custody to the father.[57] The appellate court remanded the case to the trial court to determine whether it would be "in the best interests of the child" to change custody again.[58]

Finally, trial court decisions that require mothers to conform to outmoded stereotypes—even if the decisions are successfully overturned or appealed—have an impact on the context in which other mothers in the jurisdiction negotiate and bargain on custody issues. As Carol Sanger puts it, "mothers aware of local judicial practices bargain under a very dark shadow indeed."[59]

## B. Child Protection Proceedings

### 1. *Civil Proceedings*

For many poor women, single mothers, and women of color, the battle to retain custody of their children is often not with the children's father, but with the state.[60] Despite the different circumstances in cases where mothers battle the state for custody of their children, and those in which they battle the children's father, many of the characteristics of the ideal mother carry forward in the adjudication of these cases. An understanding of the historical and cultural context in which courts hear child protection cases is critical to an analysis of the ways that judges respond to the mothers who appear before them.

Britain's Elizabethan Poor Law,[61] which separated the children of the poor from their families, served as a model for early child welfare programs in this country. Seventeenth century laws of Maryland, Massachusetts, New York, and Pennsylvania, for example, specifically authorized magistrates to "b[i]nd out" or indenture children of the poor over parental objections.[62] Because the state viewed fathers as the

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57 *See id.*

58 *Id.*

59 Sanger, *supra* note 4, at 470.

60 Despite his lack of involvement, a biological father whose paternity has been established must always be named as a party in any custody proceeding. In child protection cases brought by the state, very little attention is paid to ensuring the fathers' presence. In "private" custody cases, however, the need to prove that every effort was made to give a father notice can be a major obstacle in obtaining a custody order for some mothers. *See generally* Ann Shalleck, *Child Custody and Child Neglect: Parenthood in Legal Practice and Culture, in* MOTHERS IN LAW, *supra* note 4, at 308 (providing a case study of child custody proceedings and the obstacles it presented to a single black mother). Shalleck interprets the father's absolute right to notice and participation in private custody cases as evidencing the laws' insistence on the father's "centrality within [the family] unit," even where he has had no involvement of any kind. *Id.* at 321-22.

61 An Act for the Relief of the Poor, 1601, 43 Eliz., ch. 2, § 1 (Eng.).

62 HOMER FOLKS, THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN 9 (Arno Press Inc. 1971) (1900). When unwed mothers gave birth, the children were routinely separated from their mothers upon weaning and "bound out" to a master. MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 24-36 (1994). The history of state intervention to separate

legal custodians of their children, the father's behavior was the focus for state intervention:

> [A]lthough, in general, parents are intrusted with the custody . . . of their children, yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found, that a *father* is guilty of gross ill-treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education.[63]

The juvenile court system in the United States was created at the turn of the twentieth century to assist the State in its role of *parens patriae*, or parent of the country.[64] Almost since the moment of their creation, juvenile courts have sparked criticism and calls for reform.[65]

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black mothers from their children has an even longer history. "Black mothers' bonds with their children have been marked by brutal disruption, beginning with the slave auction where family members were sold to different masters and continuing in the disproportionate state removal of Black children to foster care." Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141, 146 (1995).

63 2 JOSEPH STORY, EQUITY JURISPRUDENCE § 1341, at 588-89 (12th ed. 1877) (emphasis added) (footnotes omitted).

64 *See* Sanford J. Fox, *Juvenile Justice Reform*, 22 STAN. L. REV. 1187, 1192-93 (1970). The concept of *parens patriae* was incorporated in the 1899 statute establishing the first juvenile court in this country. It provided that "the care, custody and discipline of a child shall approximate as nearly as may be that which should be given by its parents." Act of April 21, 1899, §21, 1899 Ill. Laws 137. This statute became the model for juvenile court legislation throughout the country. Typically, a juvenile court has limited jurisdiction over child protection matters where the state has intervened. *See* Donald N. Duquette, *Child Protection Legal Process: Comparing the United States and Great Britain*, 54 U. PITT. L. REV. 239, 255 (1992). The court of general jurisdiction commouly has jurisdiction over private custody and visitation disputes between parents. *See id.* A growing consensus in favor of integrating family disputes before a single court is emerging, but very few states have implemented this policy. *See* Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775 (1997); *see also* Mason P. Thomas, Jr., *Child Abuse and Neglect Part I: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 326-27 (1972) (discussing the incorporation of the concept of *parens patriae* in the early Illinois child custody statute).

65 *See, e.g.*, ANTHONY M. PLATT, THE CHILD SAVERS: THE INVENTION OF DELINQUENCY 9-14 (1969); Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J., 1992, at 1, 2, 17 (Issue No. 2).

Lawyers,[66] child advocates,[67] and most often, a complex child welfare bureaucracy[68] have assumed responsibility for investigating reports of abuse or neglect of children and presenting these cases to the courts.[69] Efforts to protect children from abusive or neglectful caretakers have taken many forms, from the creation of large orphanages and foundling homes to the relocation of children from the city to the country. Eventually, most jurisdictions settled on the present day foster care system as a way to protect children whose families apparently could not care for them.

During the 1970s, elected officials and commentators began to examine the child welfare system and concluded, for the most part, that it was inadequately protecting children and their families.[70] The state too frequently, and sometimes unnecessarily, removed children from their families and placed them in foster homes or institutions.[71] Once removed, usually from their mothers, children were seldom reunited with their mothers, and lingered in temporary care rather than going to new homes with adoptive families.[72]

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66 *See* Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577, 582 (1997) (describing the heavy caseloads and inconsistent training of lawyers appointed to parents and, in some jurisdictions, children involved in child protection cases). "[M]others are the worst represented parties in juvenile court. . . . Nationally, parents frequently have no access to counsel, or courts may only assign intermittent representation, such as in hearings to determine temporary custody or to terminate parental rights." Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children on the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 5 (1995).

67 Volunteer lay advocates for children in abuse and neglect cases, known as Court Appointed Special Advocates ("CASAs"), often serve as the child's advocate, even if the child has an attorney. For a description of this program, now operating in fifty states, see JOHN HUBNER & JILL WOLFSON, SOMEBODY ELSE'S CHILDREN: THE COURTS, THE KIDS, AND THE STRUGGLE TO SAVE AMERICA'S TROUBLED FAMILIES 45-46 (1996).

68 The central players in the bureaucracy are "workers." The workers receive reports of abuse or neglect, conduct investigations, and throughout the process, make recommendations that play a key role in determining whether a mother keeps her children. *See infra* notes 82-84 and accompanying text.

69 The assignment to hear child protection cases may go to a judge or, very often, a lower-paid, less prestigious hearing officer. *See* Edwards, *supra* note 65, at 34 (describing the practice in many jurisdictions of assigning juvenile cases to nonjudges to save money, and "because judges cannot or do not want to handle all the emotional and tiring work").

70 *See, e.g.*, Robert H. Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976).

71 *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, MODEL CHILD PROTECTION ACT WITH COMMENTARY 24 (Aug. 1977). Recent trends suggest that the cycle may be swinging back, with much criticism directed toward the child welfare bureaucracy for failing to remove children. *See, e.g.*, LOIS G. FORER, UNEQUAL PROTECTION: WOMEN, CHILDREN, AND THE ELDERLY IN COURT 41-42 (1991); RICHARD J. GELLES, THE BOOK OF DAVID: HOW PRESERVING FAMILIES CAN COST CHILDREN'S LIVES (1996).

72 *See* Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 423-24 (1983) (discussing the harm to children as a result of "foster care drift").

As a result, Congress passed the Adoption Assistance and Child Welfare Act of 1980.[73] Among its major provisions, the Act requires judges to determine whether the state has made "reasonable efforts" both to enable children to remain safely at home *before* placing them in foster care, and to reunite foster children with their biological parents.[74] This Act has received criticism for going too far in the opposite direction, for it gives the bureaucracy a financial incentive to leave children with their parents by conditioning federal foster care funds on a state's compliance with the obligation to make reasonable efforts to keep families together.[75] Nevertheless, this legislation still guides states' child welfare proceedings today.

The standards each state applies in implementing the federal mandates on intervention and removal of children from their homes are even less refined and particularized than the broad best-interests-of-the-child standard judges use in private custody disputes.[76] To assist the courts in making the choice between parents (usually mothers) and foster care or adoption by a third party, the statutes generally do not explicitly impose particular standards of behavior.[77]

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73 Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.) (conditioning state receipt of federal funds on compliance with federal policy and procedural standards governing placement, disposition, and review where children are in foster care or at risk of being placed in foster care).

74 42 U.S.C. §§ 672(a)(1), 671(a)(15) (1994).

75 *See* HUBNER & WOLFSON, *supra* note 67, at 19. In fact, there is much evidence that, for those children who are removed, "foster care drift" continues today. A 1995 report found that one in ten foster children remains in state care longer than 7.4 years. *See* Conna Craig, *What I Need Is a Mom: The Welfare State Denies Homes to Thousands of Foster Children*, 73 POL'Y REV. 41, 45 (1995). At least 40,600 foster children have been in care for five years or longer; another 51,300 have been in care between three and five years. *See id.* "System kids, on average, live with three different families, though [ten] or more placements is not uncommon." *Id.*; *see also* SALLY MILLEMANN, A STUDY OF BARRIERS TO THE PLACEMENT OF FOSTER CARE CHILDREN IN PERMANENT HOMES 11 (1995) (finding that children remain in foster care in Baltimore City, Maryland an average of 4.5 years before adoption); Jill Sheldon, *50,000 Children Are Waiting: Permanency, Planning and Termination of Parental Rights Under the Adoption Assistance and Child Welfare Act of 1980*, 17 B.C. THIRD WORLD L.J. 73, 73 n.5 (1997); Louise Kiernan & Sue Ellen Christian, *Juvenile Court Plays the Waiting Game*, CHI. TRIB., Feb. 7, 1997, § 2, at 1 (citing a study finding that over 90% of children who came into foster care in 1993 and 1994 had not been returned home by mid-1996). In 1986, slightly fewer than 60% of children in foster care were either reunited with their families or placed with a parent, relative, or other caregiver. *See* NATIONAL COMM'N ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 288 (1991) [hereinafter BEYOND RHETORIC].

76 Indeed, the standard for evaluation of the states' efforts to implement the federal child welfare statutes has itself been held too vague for courts to enforce. *See* Suter v. Artist M., 503 U.S. 347 (1992).

77 An impatience with the slow pace at which children move through the child welfare system has encouraged legislators to develop some rules to supplement the broad discretionary abuse and neglect standard. *See* 325 ILL. COMP. STAT. ANN. 5/3 (West 1993 & Supp. 1997); IND. CODE ANN. § 31-6-4-3.1(1)(b) (Michie Supp. 1996); MASS. GEN. LAWS ch. 119, § 51A (1994); NEV. REV. STAT. ANN. § 432B.330(1)(b) (Michie 1996); OKLA. STAT. ANN. tit. 10, § 7001-1.3(10)(a)(3) (West Supp. 1997). For example, a new Connecticut

Rather, state statutes authorize child protective agencies and courts to intervene and remove a child upon a finding that the child is neglected, abused, or in imminent danger of abuse.[78]

While these statutes' goal seems to be child protection, the language of the laws permits intervention on the basis of the caretaker's—that is, mother's—conduct rather than harm to the child.[79] In addition, like the best-interests-of-the-child standard, the concepts of "neglect" and "abuse" are somewhat vague and indeterminate.[80] In private custody cases, appellate decisions provide "rules" that set standards for parents, particularly mothers. Custody rules tend to punish nonconforming mothers but the rules are at least challenged and evaluated from time to time. In child protection proceedings, however, appellate courts rarely examine the underlying values and judgments that courts use to apply the standards.[81] Child protective service work-

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statute provides that a child under the age of one year can be put up for adoption if a parent has not been in contact with the child for sixty days. *See* An Act Concerning the Reporting, Investigation and Prosecution of Child Abuse and the Termination of Parental Rights, Conn. Pub. Acts 246 (1996). Some states have also recently passed legislation permitting removal of a child at birth if a mother abuses drugs during her pregnancy.

78 Although there is variation among standards for state intervention, the language of state statutes generally allows intervention based on: abandonment; physical, sexual, or emotional "abuse"; or failure to protect a child from abuse or educational or medical neglect. *See, e.g.*, CAL. PENAL CODE § 270 (West 1988); D.C. CODE ANN. § 16-2301(9)(b) (1997) (defining a neglected child as one "who is without proper parental care or control . . . necessary for his or her physical, mental, or emotional health"); MASS. ANN. LAWS Ch. 119, § 51 (Law Co-op 1994); N.M. STAT. ANN. § 32A-4-2 (Michie 1995 & Supp. 1997); VT. STAT. ANN. tit. 33, § 4912 (1991 & Supp. 1996). Some state abuse and neglect statutes have been interpreted to reach a mother's prenatal conduct as well, justifying removal of infants who test positive for controlled substances at birth. *See, e.g.*, FLA. STAT. ANN. § 415.503(9)(A)(2) (Supp. 1997); 705 ILL. COMP. STAT. ANN. 405/2-3(1)(c) (West 1993 & Supp. 1997); IND. CODE ANN. § 31-6-4-3.1(I)(b) (Michie Supp. 1996); MASS. GEN. LAWS ch. 119, § 51A (1994); NEV. REV. STAT. ANN. § 432B.330(1)(b) (Michie 1996); OKLA. STAT. ANN. tit. 10, § 121101(4)(c) (West Supp. 1991).

79 *See* Michael Wald, *State Intervention on Behalf of "Neglected Children": A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1000-02 (1975).

80 *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 45 (1980) (Blackmun, J., dissenting) ("The legal issues posed by the State's petition [to remove a child from the home because of abuse or neglect] are neither simple nor easily defined. The standard is imprecise and open to the subjective values of the judge."); *see also* ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 456 (3d ed. 1995) (describing standards for state intervention to remove an abused or neglected child from parental custody as "exceedingly broad and ill-defined statutory provisions").

81 Appellate decisions have largely been limited to challenges that the statutory standards are unconstitutionally vague. *See, e.g., In re* J.T., 115 Cal. Rptr. 553, 556 (Cal. Ct. App. 1974) (holding that statute was not unconstitutionally vague); *In re* Huber, 291 S.E.2d 916, 918 (N.C. Ct. App. 1982), *appeal dismissed*, 294 S.E.2d 223 (N.C. 1982) (same); State v. McMaster, 486 P.2d 567, 571 (Or. 1971) (same); *In re* K.B., 302 N.W.2d 410, 411 (S.D. 1981) (same); *In re* Aschauer, 611 P.2d 1245, 1250 (Wash. 1980) (same). *But see* Roe v. Conn., 417 F. Supp. 769, 779-80 (M.D. Ala. 1976) (holding that Alabama's child neglect law violates due process and is unconstitutionally vague and an unconstitutional infringement on the fundamental right to family integrity); Alsager v. District Court, 406 F. Supp.

ers who may have little or no experience[82] or specialized education make most of the decisions in this arena.[83] These workers make largely discretionary judgments about bad mothering and their underlying assumptions are, for the most part, unexamined and unchallenged. Conversations with workers reveal a deep bias about bad mothering based on race, class, and poverty.[84]

An examination of the application of these standards in the few existing reported appellate decisions reveals that despite the "invisibility" of the rules guiding courts' application of abuse and neglect standards, many of the characteristics of the "ideal mother" from the custody context also exist in child protection proceedings.[85] This is due both to the nature of the interventions leading to juvenile court proceedings and to the characteristics of the juvenile court itself.

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10, 19, 24 (S.D. Iowa 1975) (holding Iowa's parental termination statutes were unconstitutionally vague and deprived parents of both substantive and procedural due process); Davis v. Smith, 583 S.W.2d 37, 44 (Ark. 1979) (finding Arkansas statute too vague to meet due process requirements). Indeed, the Supreme Court did not review a case from a juvenile court until 1966, and it has heard very few cases since then. *See* HUBNER & WOLFSON, *supra* note 67, at 275-76 (noting that *Kent v. United States*, 383 U.S. 541 (1966) was the first case in which the Court reviewed a juvenile court decision); FORER, *supra* note 71, at 21.

82 *See* Annie Woodley Brown & Barbara Bailey-Etta, *An Out-of-Home Care System in Crisis: Implications for African American Children in the Child Welfare System*, 76 CHILD WELFARE 65, 68-69 (1997) (noting the high turnover of child protective service workers); MILLEMANN *supra* note 75, at 41 (finding lack of knowledge and experience of workers contributes to children's lack of permanent homes).

83 *See* Appell, *supra* note 66, at 601 (citing Sheryl Brissett-Chapman, *Child Protection Risk Assessment and African American Children: Cultural Ramifications for Families and Communities*, 76 CHILD WELFARE 45, 60 (1997) (noting the "deprofessionalization" of the child welfare bureaucracy)). Not all people in the child welfare bureaucracy described as "social workers" or caseworkers are certified social workers. A social worker is one who engages in social case work, social group work, community organization, administration of social work programs, social work education, social work research, or any combination of the above in accordance with social work principles and methods. Certified social workers must have at least a master's degree or equivalent degree in social work, and must pass an examination satisfactory to the State Board for Social Work. *See* John R. Carrieri, *Social Worker's Legal Handbook, in* CHILD ABUSE, NEGLECT AND THE FOSTER CARE SYSTEM 1997: EFFECTIVE SOCIAL WORK AND THE LEGAL SYSTEM, THE ATTORNEY'S ROLE AND RESPONSIBILITIES, at 7, 27 (PLI Litig. & Admin. Practice Course Handbook Series No. C-175, 1997).

84 These observations are based on the author's personal experience and the experience of others. As Director of the Family Law Clinic at the University of Baltimore School of Law, the author has observed child protective service ("CPS") workers investigating cases of abuse and neglect in a variety of contexts over the last ten years in Baltimore. In addition, the author participated in a training program for CPS workers from local departments of social service in Maryland. The author's observations about CPS worker bias are confirmed by other professionals working in child welfare. *See, e.g.*, Ashe & Cahn, *supra* note 7, at 97-98 (noting the tendency by child protective service caseworkers to remove children from mothers without considering the risks associated with transferring children from maternal care to foster care).

85 For a description of the steps in typical child protection proceedings, from the report of abuse to the removal and placement of the child, see Appell, *supra* note 66, at 582.

First, because mothers overwhelmingly are the custodians and caretakers of children,[86] they are, in most cases, the focus of the state's intervention in cases of allegations of child abuse or neglect.[87] As noted, from their inception, child welfare programs focused on poor children.[88] The children of single mothers (particularly women of color) are particularly at risk of removal.[89] Living in a single-parent household increases the risk that a child will live in poverty.[90] Both poverty and the loss of regular contact with both parents pose risks to

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86 Mothers are most often the custodians of children in single parent families. The majority (88%) of children living in single parent homes live with their mother. *See* ARLENE F. SALUTER, U.S. DEP'T OF COMMERCE, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1994, at ix (1996); *see also* WORKING GROUP ON WELFARE REFORM, FAMILY SUPPORT, AND INDEPENDENCE, U.S. DEP'T OF HEALTH & HUMAN SERVS., BACKGROUND PAPERS ON WELFARE REFORM: CHILD SUPPORT ENFORCEMENT 3 (1994) (citing a similar statistic). Even though the total number of children under the age of eighteen has stayed relatively stable, the number of children affected by divorce, separation, and unwed parents continues to rise. *See* SALUTER, *supra*, at viii-xii. Increasing numbers of children now face life in a single-parent family. In 1994, 27% of children under the age of 18 lived in a *female-headed* family, up from 12% in 1970. *See id.* In addition, even in two-parent families, multiple studies have demonstrated both that mothers who stay at home and those that work outside the home undertake the majority of child care responsibilities. *See* Becker, *supra* note 20, at 154-58, and studies cited therein; *see also* ARLIE HOCHSCHILD, THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME 6-7 (1989) (concluding, after studying fifty working couples, that women's progress in the workforce will be stalled unless men take more responsibility for child care and housework).

87 One attorney charged by statute with representing "custodial parents" in child protection proceedings throughout the State of Maryland estimates that 90-95% of her office's clients are mothers. Interview with Linda K. Koban, Chief Attorney for the Child in Need of Assistance Unit, Division of the Office of the Public Defender, State of Maryland (June 23, 1997) (notes on file with the author).

88 *See* FOLKS, *supra* note 62; Thomas Ross, *The Rhetoric of Poverty: Their Immortality, Our Helplessness*, 79 GEO. L.J. 1499, 1501 (1991).

89 *See* Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 79 (1995) (arguing that the application of a best interests standard in the context of adoption increases the likelihood that poor and minority women will lose their children in contested adoptions); Brown & Bailey-Etta, *supra* note 82, at 71, 74-75 (noting that African American children make up 42.4% of the children in foster care, disproportionate to their 15% representation in the general population); *infra* note 127 (noting that women of color are subjected to heightened scrutiny); *see also* Martha Albertson Fineman, *Intimacy Outside the Natural Family: The Limits of Privacy*, 23 CONN. L. REV. 955, 959-61 (1991) (arguing that single mothers are subject to state supervision and control because they deviate from social norms); Roberts, *Racism*, *supra* note 4, at 13-15 (arguing that the state intervenes more often in Black homes because Black mothers are more likely to be supervised by social workers and child welfare workers, who apply culturally biased standards); Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 541 (1983-84) (arguing that the misunderstanding of cultural family patterns results in a disproportionate number of minority children in foster placements).

90 Women head 88% of single-parent families with children. *See* SALUTER, *supra* note 86, at ix. A majority, just over 50%, of these female-headed families are poor. *See* JOEL F. HANDLER & YEHESKEL HASENFELD, WE THE POOR PEOPLE: WORK, POVERTY AND WELFARE 54 (1997) (citing H.R. COMM. ON WAYS & MEANS, 103D CONG., 1ST SESS., OVERVIEW OF ENTITLEMENT PROGRAMS: 1993 GREEN BOOK 1308 (Comm. Print 1993)). Among black female-headed families, nearly 60% are below the poverty line. NATIONAL RES. COUNCIL, WHO

child welfare.[91] Many commentators have suggested, however, that intervention results, at least in part, from the child welfare system's adherence to the traditional idealized definition of the "good mother" rather than from thorough investigations and documentation of child abuse and neglect.[92] As Bernardine Dohrn has observed:

> From the beginning, the juvenile courts and the broader social welfare system intervened in the lives of destitute women to regulate and monitor their behavior, punish them for "deviant" mothering practices, and police the undeserving poor. Women were locked at the center of the private sphere of the family; their sole responsibility was to produce healthy offspring and provide for the well-being of men. Poor women, single women, and women who worked outside the home failed, by definition, to meet this responsibility. The legal and social welfare apparatus developed to regulate and punish these "bad" mothers by "saving" their children.[93]

A corollary to the juvenile courts' tendency toward "mother-blaming" is the lack of accountability of fathers in those courts. One longtime child advocate recently suggested that we rename juvenile court "mothers' court" because of the absence of fathers from child welfare proceedings.[94] Fathers, although named as parties in child protection proceedings if their identities are known, are rarely present.[95] They often live apart from the mother and children, maintain little or no contact with the children, and their whereabouts are often unknown.[96] The failure of parents to support their children emotionally

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CARES FOR AMERICA'S CHILDREN?: CHILD CARE POLICY FOR THE 1990s, at 27 fig.2-9 (Cheryl D. Hayes et al. eds., 1990).

91 *But see* NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997) (arguing that the stigma surrounding single parents as bad parents is unjustified); FINEMAN, THE NEUTERED MOTHER, *supra* note 4, at 5 (arguing that the basic family unit should be seen as mother and child rather than man and woman).

92 *See, e.g.*, STEVEN MINTZ & SUSAN KELLOGG, DOMESTIC REVOLUTIONS: A SOCIAL HISTORY OF AMERICAN FAMILY LIFE 128-29 (1988) (explaining that courts punish parents deemed to have fallen short of ideal standards); RICH, *supra* note 1, at 52 (noting that even though economic forces and political oppression may account for her poverty and unemployment, a mother's character is in question if she has "failed" her children).

93 Dohrn, *supra* note 66, at 6 (footnotes omitted) (citing, inter alia, GORDON, HEROES OF THEIR OWN LIVES, *supra* note 1, at 114).

94 *See* Susan Leviton, Founder, Advocates for Children and Youth, Remarks to Attorney General and Lt. Governor's Family Violence Council in Baltimore, Md. (Mar. 13, 1996) (on file with author).

95 Interestingly, courts are much less vigilant in enforcing notice provisions for fathers in child protection cases than they are in private custody disputes. *See* Shalleck, *supra* note 60, at 321-24.

96 *See* Ashe & Cahn, *supra* note 7, at 77, 79; Dohrn, *supra* note 66, at 5. In Maryland, it is estimated that fathers are active participants in about 20% of child protection cases involving their children. *See, e.g.*, Interview with Linda Koban, *supra* note 87. A few states have begun to make greater efforts to bring fathers into court at the initial stages of abuse and neglect proceedings. In the Unified Family Court in Jefferson County, Kentucky, for example, a Family Mediation Diversion Project has been implemented. A caseworker initi-

and financially falls within most states' definitions of child neglect.[97] Fathers' lack of involvement in their children's lives, however, immunizes then from civil or criminal prosecution for neglect.[98] It is the behavior of mothers, not fathers, that juvenile courts scrutinize.[99]

Appellate courts reviewing the actions of juvenile courts also focus on mothers' lifestyles and child-rearing practices rather than on harm to the child. After reviewing the language in judicial decisions terminating mothers' parental rights, one commentator noted:

> In making their decisions, judges often rely on the myths of good mothers and bad mothers and in so doing, perpetuate and re-create the myths of motherhood. . . .
>
> In cases terminating parental rights, however, the judges do not feel compelled to define the nexus between the behavior or status of the mother and harm to the child. Because they assume that their readers have internalized the same mythology, they often give information that appeals to the reader on a non-rational level: once you know this one piece of information about this mother (or these pieces of information), it is clear what the result in this case should be.[100]

Within the last few decades, courts have used a mother's overnight male visitors and visits to "taverns,"[101] her "promiscuous behav-

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ates pre-court mediation at the point of preparing a neglect or abuse petition. The mediation is structured to make real efforts to bring in any significant family or community members, including putative fathers at an early stage. Information Sheet on the Family Mediation Diversion Project, Jefferson Cty. Fam. Ct. (1997) (on file with author).

97 *See* sources cited *supra* note 78; *see also* VA. CODE ANN. § 63.1-248.2 (Michie 1995) ("'*[a]bused or neglected child*' means any child less than eighteen years of age . . . [w]hose parents or other person responsible for his care abandons such child").

98 Of course, the state may institute civil or criminal proceedings against absent fathers for failure to pay child support. Despite increased efforts in this area, however, relatively few fathers are held accountable even in this limited way. *See* ELAINE SORENSON, THE URB. INST., NONCUSTODIAL FATHERS: CAN THEY AFFORD TO PAY MORE CHILD SUPPORT? (preliminary findings rev. 1994) (finding over 80% of all noncustodial fathers either paid no child support or spent less than 15% of their personal income on child support); *see also* Editorial, *Hitting Deadbeats Where It Hurts*, ATLANTA J. & CONST., Mar. 18, 1995, at 22A ("Each year, 23 million children nationwide are denied $34 billion in financial support owed by their own parents—95 percent of them fathers.").

99 *See generally* Mary E. Becker, *Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for Acts of Others*, 2 U. CHI. L. SCH. ROUNDTABLE 13 (1995) (noting the existence of a double standard in judgments regarding parenting in child protection proceedings depending on whether the parent is the mother or father); Dohrn *supra* note 66, at 3 (noting that "[f]athers, step-fathers, and 'boyfriends' . . . are absent during the legal and moral adjudication of mothers"); Roberts, *Motherhood and Crime*, *supra* note 4 (exploring the way laws criminalizing certain maternal actions construct the meaning of motherhood).

100 Odeana R. Neal, *Myths and Moms: Images of Women and Termination of Parental Rights*, 5 KAN. J.L. & PUB. POL'Y 61, 67 (1995).

101 *In re* Yardley, 149 N.W.2d 162, 164-65 (Iowa 1967); State v. Greer, 311 S.W.2d 49, 51 (Mo. Ct. App. 1958).

ior" over a period of several years,[102] her decision to live in a communal setting,[103] or her having an illegitimate child[104] as bases for the removal of her children. More recently, cases have focused on the mother's substance abuse,[105] mental illness,[106] incarceration,[107] poverty,[108] or her partner's physical abuse of the caretaker mother or her children[109] as bases for removing a child, leading in many cases to termination of the mother's parental rights. Even in cases where mothers take steps to protect their children from abusive partners, mothers have had their parental rights terminated on the ground that such mothers are likely to enter into abusive relationships in the future.[110]

While all of the above-mentioned circumstances—substance abuse, mental illness, imprisonment, poverty, domestic violence—have an impact on a child's welfare, judges frequently ground their findings in these cases in stereotypical assumptions of bad mothering, rather than in demonstrated harm to the child.[111] Bernardine Dohrn

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102 *In re* C, 468 S.W.2d 689, 692 (Mo. Ct. App. 1971).

103 *See In re* Anonymous, 238 N.Y.S.2d 422, 423-24 (Fam. Ct. 1962); *In re* Watson, 95 N.Y.S.2d 798, 799-800 (Dom. Rel. Ct. 1950).

104 *See In re* Cager, 248 A.2d 384, 387 (Md. 1968) (reversing the trial court's decision that a child was neglected solely because of the fact that he lived with a mother who had another illegitimate child living with her).

105 *See* Janet L. Dolgin, *The Law's Response to Parental Alcohol and "Crack" Abuse*, 56 BROOK. L. REV. 1213 (1991) (discussing cases finding parental misconduct when parents abuse drugs and alcohol).

106 *See* Paul Bernstein, *Termination of Parental Rights on the Basis of Mental Disability: A Problem in Policy and Interpretation*, 22 PAC. L.J. 1155 (1991).

107 *See* Philip M. Genty, *Protecting the Parental Rights of Incarcerated Mothers Whose Children Are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 17 FORDHAM URB. L.J. 1 (1989).

108 *See* Ross, *supra* note 88, at 1517-32.

109 *See In re* A.D.R., 542 N.E.2d 487, 490, 492 (Ill. App. Ct. 1989) (holding that the continuing physical abuse of one parent by another, even where the child was not physically abused, would cause emotional damage to the child, and thus constitutes child neglect creating an "environment injurious to the minor's welfare"); *In re* S.O., 483 N.W.2d 602, 604 (Iowa 1992) (terminating a mother's parental rights for failure to protect her children from a violent partner); *In re* V.B., 491 N.W.2d 168, 169 (Iowa Ct. App. 1992) (same).

110 *See* Judge Raymond Sbawcross, Domestic Violence and Child Abuse: Mothers Charged With Failure to Protect, Remarks at the 58th Annual Conference for the National Council of Juvenile and Family Court Judges in Baltimore, Md. (July 9-12, 1995) (describing termination of parental rights cases in Michigan) (on file with author).

111 Appellate courts occasionally overturn trial judges' decisions that appear to be based upon stereotypes rather than actual harm to the child. *See* Shapley v. Texas Dep't of Human Resources, 581 S.W.2d 250, 253-54 (Tex. Civ. App. 1979) (reversing trial court order terminating mother's parental rights, rejecting the trial court's assessment that the mother presented a danger to her child, and recognizing that the mother's delay in reporting the father's abuse may have been because of fear of her husband); *In re* Betty J.W., 371 S.E.2d 326, 332-33 (W. Va. 1988) (reversing an order terminating mother's parental rights, recognizing the role the father's abuse played in the mother's actions as well as the ineffectiveness of the social service department in providing help). As in private custody disputes, to obtain such review, the mother must have effective legal representation. However, large

aptly summarizes the way in which modern juvenile courts punish mothers:

> Juvenile courts are typically misogynist and culturally biased; they developed as "mother-blaming" institutions where fathers are absent and larger social forces are virtually invisible. Few would deny that racism, poverty, unequal household relations, inadequate housing, unemployment, failing schools, drugs, and other factors affect which families are petitioned into juvenile court. Yet the legal system conceals these conditions behind the cloak of legal objectivity. Women and children have no names in juvenile court proceedings; they are referred to as "Mother" or "Minor." With judicial caseloads of three thousand to four thousand families per judge, parties before the court cannot be viewed as individuals. Instead, they blur into one long and undifferentiated failure. . . . In this context, juvenile court proceedings do not articulate, represent, or acknowledge the social conditions of women's lives.[112]

Removal of children from an abusive or neglectful home may seem an appropriate short-term strategy for protecting children. Studies demonstrate, however, that there is a limited likelihood of reunification after removal,[113] and that risks to children in foster care are substantial.[114] Given these circumstances, courts should make decisions about removal of a child with as complete an understanding of the mother's circumstances as possible. If she has participated in the abuse or neglect of her children, courts should identify the contributing factors. Courts must always explore the possibility of domestic violence and develop appropriate resources and conditions for the return of the children. If a mother's partner has abused or neglected the children, the court should consider removal of the abusive parent or boyfriend rather than removal of the children.[115]

### 2. *Criminal Proceedings*

The criminal law also plays a significant role in defining the good mother by regulating women's relationships with their children. Through laws regulating a woman's behavior from pregnancy through

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caseloads and limited resources often result in inadequate legal representation of mothers in abuse and neglect cases. *See supra* note 66. Even when such representation exists, the review often takes place after extended periods of separation of mother and child. *See, e.g., In re Betty J.W.*, 371 S.E.2d at 333.

112 Dohrn, *supra* note 66, at 4-5 (citations omitted).

113 *See supra* note 75.

114 *See* BEYOND RHETORIC, *supra* note 75, at 288.

115 A survey of approximately fifty child protective service workers in Maryland taken during a training program on child maltreatment and domestic violence revealed that few, if any, workers understood they could petition for a court order to remove the batterer from a home where the batterer had abused minor children or threatened them with abuse. *See supra* note 84.

her child's young adulthood, criminal law consistently punishes women who deviate from what the law perceives as their "natural capacity to nurture and protect."[116]

Much of mothers' behavior that the criminal law punishes is behavior which puts children at risk, and courts should both sanction and discourage it. However, like the laws governing civil child protection proceedings,[117] criminal laws often focus on punishing a woman's behavior when she deviates from her role as mother, rather than on preventing harm to the child. Moreover, the criminal context provides another example of the way that the law holds mothers, as opposed to fathers, responsible for harm and violence to their children.

a. *Regulating Pregnancy*

The first point at which the criminal law attempts to regulate a mother's conduct is during pregnancy. By 1996, two hundred women in thirty-five states had been charged with abusing an unborn child.[118] Many of these prosecutions were based upon illegal drug use during pregnancy.[119] State and federal prosecutors have criminally charged women who use drugs during pregnancy under two theories. The first, violation of the drug trafficking laws, has proven vulnerable to reversal on appeal.[120] Courts have overturned convictions on the

116 Roberts, *Motherhood and Crime*, *supra* note 4, at 111. Social science research on child abuse that informs the criminal law also reflects this view of the mother as selfless and unquestioningly nurturing: "[T]he mother is not only expected to be most deeply and intimately concerned with child-rearing; she is also at fault should any mischance occur in that process. No matter who actually harms the child, mother has failed in her duty to create a safe environment for her young." *Id.* (quoting Judith Martin, *Maternal and Paternal Abuse of Children: Theoretical and Research Perspectives*, *in* THE DARK SIDE OF FAMILIES: CURRENT FAMILY VIOLENCE RESEARCH 293, 300 (David Finkelhor et al. eds., 1983)).

117 *See supra* Part I.B.1.

118 *See* Scot Lehigh, *Common Sense, or a New Way to Ban Abortion?*, BOSTON GLOBE, Sept. 15, 1996, at D1 (citing a study by the Center for Reproductive Law and Policy); *see also* FALUDI, *supra* note 29, at 424-25 (1991) (citing cases in which pregnant women have been criminally charged for using prescription drugs, drinking alcohol, neglecting doctors' advice, and having sex with their husbands).

119 *See* Lehigh, *supra* note 118; *see also* Drew Humphries et al., *Mothers and Children, Drugs and Crack: Reactions to Maternal Drug Dependency*, *in* THE CRIMINAL JUSTICE SYSTEM AND WOMEN: OFFENDERS, VICTIMS, AND WORKERS 167-79 (2d ed. 1995) (discussing the criminalization of pregnancy); Jan Hoffman, *Pregnant, Addicted—and Guilty?*, N.Y. TIMES, Aug. 19, 1990, § 6, at 34 (noting that prosecutors in Florida, Georgia, Massachusetts, Michigan, and South Carolina have charged women for "delivering" crack to their fetuses or babies).

120 *See* LYNN M. PALTROW ET AL., CRIMINAL PROSECUTIONS AGAINST PREGNANT WOMEN: NATIONAL UPDATE AND OVERVIEW (American Civil Liberties Union Found. 1992) (providing a state-by-state summary of criminal prosecutions against pregnant women); *see also* Johnson v. State, 602 So. 2d 1288, 1296 (Fla. 1992) (reversing mother's conviction for delivering drugs to a minor because statute did not include drug use during pregnancy); Jackson v. State, 833 S.W.2d 220 (Tex. Ct. App. 1992) (reversing mother's drug possession conviction under drug trafficking statute based on evidence of cocaine found during stillborn's autopsy).

ground that states designed trafficking statutes to apply to the sale of controlled substances between "born persons."[121] Thus, using them to convict pregnant women violates due process, for there was no notice that such laws applied to pregnancy.

States have also pursued prosecutions of pregnant substance abusers under criminal child abuse and neglect statutes. In such cases, states have alleged that maternal drug use during pregnancy imposes serious health risks on the developing fetus or will result in postnatal trauma, including narcotic withdrawal and physical and mental defects.[122] The principal legal challenge to these types of prosecutions is that states did not draft criminal child abuse statutes to cover prenatal conduct,[123] and that, consequently, a fetus is not considered an abused or neglected "child" under such statutes.[124] Whatever the result of this politically charged jurisprudential debate, there is every indication that finding a way to punish mothers who abuse substances during their pregnancies continues to be a popular activity for judges[125] and legislatures.[126]

Although few would disagree that public policy should seek to discourage prenatal drug use, the problem with choosing criminal child abuse prosecutions as a method of discouragement is that it suffers from the same flaws as other forms of regulation of mothers. First, it disproportionately punishes poor women of color.[127]

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121 *Johnson*, 602 So. 2d at 1292.

122 *See* Mark Curriden, *Holding Mom Accountable*, A.B.A. J., Mar. 1990, at 50, 51 (noting that cocaine and crack babies are often born with neurological, endocrinological, cardiac, and respiratory defects).

123 *See, e.g.*, State v. Gray, 584 N.E.2d 710 (Ohio 1992) (holding that a mother could not be convicted of child endangerment based on prenatal substance abuse).

124 *See, e.g.*, Reinesto v. Superior Court, 894 P.2d 733, 735 (Ariz. Ct. App. 1995) (holding that a heroin-addicted baby did not satisfy the plain language of the criminal statute, because the injury must be to a living child, not a fetus who later became a child).

125 The South Carolina Supreme Court recently upheld a conviction for prenatal drug use, recognizing the viable fetus as a person. Whitner v. State, 492 S.E.2d 777, 779-81 (S.C. 1997) (finding that a fetus is a "child" for purposes of child abuse statute, and upholding mother's conviction for child abuse for ingesting crack during third trimester).

126 Recent legislation attempts to regulate more indirectly the conduct of pregnant women by imposing criminal liability on persons who are obligated to report child abuse and who fail to report fetal alcohol syndrome or fetal drug dependency. *See, e.g.*, UTAH CODE ANN. § 62A-4a-411 (1997) (holding any person required to report a case of suspected fetal alcohol syndrome or drug dependency, who willfully fails to do so, guilty of a misdemeanor).

127 Poor women of color are more likely to be prosecuted because the activities of these mothers are generally subject to more scrutiny than the activities of white, middle class or wealthy mothers. *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991). Most maternal drug use cases stem from reports from medical providers who see pregnant women in hospitals and clinics. In public hospitals, a drug history is a routine part of a medical examination. In private obstetricians' offices, it is rare. *See Children of Substance Abusers: Hearing Before the Subcomm. on Children, Fams., Drugs and Alcoholism of the Sen. Comm. on Labor and Human Resources*, 101st Cong., 2d Sess. 63 (1989) (statement of Kary L. Moss, American

Although many commentators who have discussed this new use of the criminal law have focused on the conflict between protecting the fetus and the mother's right to privacy, Dorothy Roberts has argued persuasively that the real issue is that these "prosecutions [punish] poor Black women for having babies."[128]

The second problem with criminalizing the conduct of pregnant women is that it ignores the role of the fathers whose conduct may also adversely affect their unborn children.[129] Fathers are virtually unaccountable for the children they father outside of marriage unless paternity is established.[130] Policy initiatives attempting to make fathers accountable for their children have generally tried only to get fathers to provide their children with financial support.[131]

Furthermore, although ample evidence exists that prenatal drug use increases avoidable risks during pregnancy, many negative effects

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Civil Liberties Union); Carol Angel, *Addicted Babies: Legal System's Response Unclear*, L.A. DAILY J., Feb. 29, 1988, at 1, 24; *see also* Ira J. Chasnoff et al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990) (concluding from their study that illicit drug use is common among pregnant women regardless of race and socioeconomic status, yet black women visiting public clinics were ten times more likely to be reported to health authorities than white women seeing private obstetricians); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 BUFF. L. REV. 737 (1991) (observing class and race bias in the prosecution of pregnant women for exposing their unborn children to drugs).

128 Roberts, *Black Motherhood*, *supra* note 4, at 939. Roberts notes that, as of 1992, 75% of the 160 documented prosecutions against pregnant women for using drugs were brought against women of color. *Id.* at 938; *see also* Roberts, *supra* note 127 (arguing that the punishment of drug addicts, mostly Black women, who choose to carry their pregnancies to term, violates their constitutional right to equal protection and privacy regarding their reproductive choices).

129 *See, e.g.*, Dolgin, *supra* note 105, at 1221 (examining the negative effects of paternal alcohol misuse on children); Ruth E. Little & Charles F. Sing, *Father's Drinking and Infant Birth Weight: Report of an Association*, 36 TERATOLOGY 59 (1987) (finding a significant link between paternal drinking prior to conception and decreased infant birth weight); Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 803 (1990) (noting the lack of an adequate support system, for example, an absent father, is a dominant risk factor for drug-using women who pose a high risk of child neglect); Jun Zhang et al., *A Case-Control Study of Paternal Smoking and Birth Defects*, 21 INT'L J. EPIDEMIOLOGY 273 (1992) (examining the association between paternal smoking and birth defects).

130 *See, e.g.*, MD. CODE ANN., Fam. Law § 10-203 (1991) (providing criminal sanctions for parents who fail to provide support). Before a parent can be convicted of willfully failing to support his child, paternity must be established. *See* State v. Rawlings, 381 A.2d 708 (Md. Ct. Spec. App. 1978).

131 *See infra* notes 193-98 and accompanying text (describing federal initiatives in 1980s to increase child support payments). To counteract some of the more punitive measures of the welfare reform legislation, *see, e.g.*, *infra* Part III.B, President Clinton included a number of provisions in that legislation to enhance child support enforcement. *See* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519 (1996) (examining the sweeping, new child support enforcement legislation included within the Act).

attributed to drug use may have other causes.[132] Low birth weights and growth reductions, which are often linked to the mother's drug use during pregnancy, may have roots in poverty or the lack of prenatal or health care.[133] As one judge, exceptional for his recognition of the need to take into account the broader context of mothers' lives, stated:

> It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which . . . forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.[134]

He also recognized the danger of translating myths of motherhood into judicially defined standards of behavior:

> If a legally cognizable duty on the part of mothers were recognized, then a judicially defined standard of conduct would have to be met. It must be asked, [b]y what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? By what objective standard could a jury be gnided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole? In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?[135]

Most importantly, punishing pregnant women is not the most effective way to protect their unborn children. What is needed are more drug treatment centers that serve pregnant women.[136] The

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132 *See* Dolgin, *supra* note 105, at 1224-26 (finding that studies have not conclusively established the extent of the harm that prenatal drug use poses, and that infants do not always exhibit ill effects).

133 *See* Katha Pollitt, *'Fetal Rights': A New Assault on Feminism,* THE NATION, Mar. 26, 1990, at 409 (discussing the lack of adequate medical care for poor minority women, substandard living conditions, spousal abuse, and poor diet as factors that have a significant impact on pregnancy).

134 Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988).

135 *Id.*

136 In 1989, the House Select Committee on Children, Youth, and Families surveyed two-thirds of the major hospitals in fifteen cities and reported that they had no place to refer pregnant women addicted to drugs for treatment. *See* Karol L. Kumpfer, *Treatment Programs for Drug-Abusing Women,* FUTURE OF CHILDREN, Spring 1991, at 50, 53. Many drug treatment programs do not accept pregnant women out of fear of the litigation that would result if the treatment causes a loss of the pregnancy. *See* Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to their Fetuses,* 16 N.Y.U. REV. L. & SOC. CHANGE 277, 301 (1987-88). In May 1993, the New York Court of Appeals prohibited drug programs from excluding pregnant addicts categorically, without a showing that the exclusion is medically necessary. Elaine W. v. Joint Diseases N. Gen. Hosp., Inc., 613 N.E.2d 523, 525-26 (N.Y. 1993).

threat of prosecution may deter pregnant women who are substance abusers from seeking even the limited treatment options that are available.[137] Incarceration may lead to further maternal drug use[138] and poor prenatal care.[139] Drug treatment centers for pregnant women, better health care, and improved social services are clearly more effective in protecting the health of the mother and her child.[140]

Finally, as one commentator has suggested, attempting to prohibit any behavior that may potentially harm the fetus leads to a slippery slope of regulation of maternal behavior:

> Prosecutions of pregnant women cannot rationally be limited to illegal conduct because many legal behaviors cause damage to developing babies. Women who are diabetic or obese, women with cancer or epilepsy who need drugs that could harm the fetus, and women who are too poor to eat adequately or to get prenatal care could all be characterized as fetal abusers.[141]

The laws that attempt to regulate pregnant women by criminalizing certain conduct during pregnancy fail to take into account the broader context of women's lives. As a result, these laws both fail to ensure healthy newborns and punish women for circumstances—poverty, addiction, lack of health care, and a partner's drug abuse—over which they have little or no control.

### b. *Criminal Prosecution of Mothers for Child Abuse or Neglect*

While prosecuting pregnant women for abuse to fetuses is relatively new, criminal prosecutions of mothers for abuse or neglect of their children have a long history.[142] These criminal prosecutions often occur at the same time as the civil proceedings brought to re-

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137 *See* Lynn M. Paltrow, *When Becoming Pregnant Is a Crime*, CRIM. JUST. ETHICS, Winter-Spring 1990, at 41, 44-45.

138 *See, e.g.*, Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401, 1434 (1990); Andrew H. Malcolm, *Explosive Drug Use Creating New Underworld in Prisons*, N.Y. TIMES, Dec. 30, 1989, at A1.

139 *See* Molly McNulty, Note, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277, 308 & n.209 (1987-88) ("'[I]ncarceration of a pregnant woman is a potential death sentence to her unborn child.'") (quoting Ellen Barry, Director of San Francisco's Legal Services for Prisoners with Children).

140 Some states are moving in this direction. *See, e.g.*, COLO. REV. STAT. § 25-1-212 (1997) (creating a treatment program for high-risk pregnant women, and defining "high risk" as a woman's risk of poor birth outcomes or physical and other disabilities due to substance abuse during the prenatal period); 325 ILL. COMP. STAT. 5/7.3b (West 1993) (requiring health care providers to refer addicted pregnant persons to the local Infant Mortality Reduction Network to obtain counseling and treatment).

141 Paltrow, *supra* note 137, at 42.

142 *See* GORDON, HEROES OF THEIR OWN LIVES, *supra* note 1, at 27-81 (including a historical review of records of the Massachusetts Society for the Prevention of Cruelty to Children from 1880-1910); *see also* A. Schwartz & H.L. Hirsh, *Child Abuse and Neglect: A Survey of*

move children from their mother's care. These prosecutions proceed under a variety of statutory and common law grounds.

States base some prosecutions on direct physical abuse of a child.[143] Criminal prosecution of women who directly abuse their children or place them at risk seems an appropriate legal response to both punish and deter child abuse. Even here, however, women's status as mothers makes them more accountable than fathers within the same legal system.

Although the prevalence of child abuse is well documented,[144] statistics tracking the perpetrators of abuse are difficult to find. Statistics vary on whether men or women abuse children at the same rate or in the same way.[145] Accountability for abuse, however, seems to fall disproportionately on women. Because mothers overwhelmingly are the custodians and caretakers of their children,[146] they are more likely either to engage in abuse or to be held responsible for any abuse or neglect of children in their care and custody. This results from their visibility to those likely to observe their children and report abuse—schools, medical providers, and so forth.[147] Studies confirm that the caretaking parent is more likely to be reported for child abuse.[148] As one commentator notes:

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*the Law (United States of America), in* CHILD ABUSE 31 (A. Carmi & H. Zimrin eds., 1984) (examining criminal punishment of child abuse within the last two centuries).

143 Forty-nine states and the District of Columbia have child abuse statutes that require an act of commission, an act that directly inflicts harm on the child. *See, e.g.*, D.C. CODE ANN. § 16-2301(23) (1997) ("The term 'abused' . . . means a child whose parent, guardian, or custodian inflicts or fails to make reasonable efforts to prevent the infliction of physical or mental injury upon the child . . . ."); MD. CODE ANN., Fam. Law § 5-701(b)(1) (1991 & Supp. 1997) (describing the requisite physical or mental injury of a child by any parent or other person).

144 In 1995, investigations by CPS agencies in 50 states determined that over one million children were victims of substantiated or indicated child abuse and neglect. CPS agencies investigated an estimated two million reports alleging the maltreatment of almost three million children. *See U.S. Dep't of Health & Human Servs., Child Maltreatment 1995: Reports from the States to the National Child Abuse and Neglect Data System* (visited Feb. 3, 1998) <http://www.calib.com/nccanh/services/statutes>.

145 *See* GORDON, HEROES OF THEIR OWN LIVES, *supra* note 1, at 173 (finding mothers were reported as child abuse perpetrators in 46% of cases and fathers in the remaining 54%); ALENE BYCER RUSSELL & CYNTHIA MOHR TRAINOR, AMERICAN HUMANE ASS'N, TRENDS IN CHILD ABUSE AND NEGLECT: A NATIONAL PERSPECTIVE 25 (1984) (finding that men were more likely to have perpetrated both major and minor physical abuse, while women were more likely to be associated with deprivation of necessities).

146 *See supra* note 86 and accompanying text.

147 *See* NATIONAL CLEARINGHOUSE ON CHILD ABUSE & NEGLECT, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD ABUSE AND NEGLECT STATE STATUTE SERIES NO. 1, REPORTING LAWS: DEFINITIONS OF CHILD ABUSE AND NEGLECT (1996) (compiling state reporting laws).

148 *See* RUSSELL & TRAINOR, *supra* note 145, at 25 (analyzing national reports on abuse and neglect from 1979 to 1982 and finding that the caretaking parent is more likely to abuse the child); *see also* GORDON, HEROES OF THEIR OWN LIVES, *supra* note 1, at 173 (stating that fathers are much more likely to abuse children in proportion to how much time fathers spend taking care of children).

> [C]hild abuse is a gendered phenomenon, related to the oppression of women, whether men or women are the culprits, because it reflects the sexual division of the labo[r] of reproduction. . . . [W]omen are always implicated because even when men are the culprits, women are usually the primary caretakers who have been, by definition, in some ways unable to protect the children. When protective organizations remove children or undertake supervision of their caretakers, women often suffer greatly, for their maternal work is usually, trying as it may be, the most pleasurable part of their lives.[149]

In addition to the fact that their role as caretakers of children makes them more likely either to abuse or neglect their children or be reported for it, the ideal image of mothers as caretakers may also work against women when the state makes prosecutorial decisions. As in the child protection proceedings, the laws governing these proceedings permit broad prosecutorial discretion.[150] Prosecutors exercise this discretion against a backdrop of stereotypical good and bad mothers. As two practitioners in this field have noted:

> The definition of "bad mothering" applied in prosecution of child abuse and neglect is a broad one, and few explicit standards curb the discretion of prosecutors. . . .
>
> Such a broad standard allows and requires prosecutors to define appropriate parental behavior according to their discretion. As a result, decisions concerning prosecutions will tend to reflect race, class, and gender biases of prosecutors who have tended to be white, middle-class, and male. Mothering is taken out of its context in abuse prosecution and is judged by a judiciary that assumes middle-class, sexist, and racist norms. Mothers—across classes and cultures—are expected to perform in ways that satisfy those norms.[151]

### c. *Criminal Prosecution of Mothers for Failure to Protect*

All but twelve states have child abuse laws that punish omissions.[152] Under these "failure-to-protect" laws, the caretaking parent's failure to perform the legal duty of protecting a child against abuse or neglect takes the place of the criminal act. Some failure-to-protect statutes require either knowledge of danger to the child or intent to

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149 Linda Gordon, *Feminism and Social Control: The Case of Child Abuse and Neglect*, *in* WHAT Is FEMINISM? 63, 69 (Juliet Mitchell & Ann Oakley eds., 1986).

150 The District of Columbia's child abuse statute was challenged on vagueness grounds. *See In Re* J.A. & L.A., 601 A.2d 69 (D.C. 1991) (challenging the statute on grounds that it failed to establish what type of spanking constitutes excessive corporal punishment).

151 Ashe & Cahn, *supra* note 7, at 98-99 (footnotes omitted).

152 For a summary of failure-to-protect statutes across the country, see V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 236-38 (1996); Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 LAW & INEQ. J. 359, 365-68 (1987).

endanger the child.[153] Most statutes, however, impose "strict liability" by imposing criminal liability on caretakers who "permit" or "create" a substantial risk of injury or neglect without requiring an affirmative act that violates the duty of care or an intent to harm.[154] Nancy Erickson divides cases holding mothers criminally liable under these statutes into three categories:

> (1) defendant [mother] was present when the abuse took place and did nothing to prevent the abuse, (2) [the] defendant [mother] left the child alone with the abuser, knowing that he had in the past abused the child, and (3) [the] defendant [mother] discovered the child in an abused state but failed to seek medical attention for the child.[155]

Criminal prosecution based only upon failure-to-protect statutes may carry the greatest potential for unfairly punishing mothers. Most statutes fail to take into account the context within which a mother exercises her caretaking responsibilities.[156] Mothers tried under these statutes are convicted if their attempts to protect their children are ineffective,[157] or if fear for their safety or their children's safety effectively prevents intervention.[158]

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153 *See, e.g.*, CONN. GEN. STAT. ANN. § 53-21 (West Supp. 1997) (subjecting to criminal liability "[a]ny person who willfully or unlawfully causes or permits any child . . . to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired . . . ."); N.H. REV. STAT. ANN. § 639:3 (1996) (subjecting to criminal liability a person who purposely violates a duty of care, protection or support); OKLA. STAT. ANN. tit. 10, § 7114 (West Supp. 1998) (providing criminal penalties for "[a]ny parent or other person who shall willfully or maliciously . . . injure, torture, maim, use unreasonable force upon a child . . . or . . . cause, procure or permit any of said acts to be done . . . .").

154 *See, e.g.*, N.M. STAT. ANN. § 30-6-1(c) (Michie Supp. 1981), *interpreted in* State v. Lucero, 647 P.2d 406, 408-09 (N.M. 1982) (holding that the mens rea of the defendant who abuses a child or permits such abuse is not an essential element of the crime of child abuse).

155 Nancy S. Erickson, *Battered Mothers of Battered Children: Using Our Knowledge of Battered Women to Defend Them Against Charges of Failure to Act*, *in* 1A CURRENT PERSPECTIVES IN PSYCHOLOGICAL, LEGAL, AND ETHICAL ISSUES: CHILDREN AND FAMILIES, ABUSE AND ENDANGERMENT 197, 200 (Sandra Anderson Garcia & Robert Batey eds., 1991).

156 Only three states include affirmative defenses in failure-to-protect prosecutions for defendants who can prove that interference to protect the child would have resulted in additional injury to the child or to the defendant. *See* IOWA CODE ANN. § 726.6(1)(e) (West 1993 & Supp. 1997); MINN. STAT. ANN. § 609.378(2) (West Supp. 1997); OKLA. STAT. ANN. tit. 21, § 852.1(A) (West Supp. 1998).

157 *See* Phelps v. State, 439 So. 2d 727, 734 (Ala. Crim. App. 1983) (convicting a mother of child abuse, and responding to her claim that she never had an opportunity to leave by concluding that she never made the opportunity); Commonwealth v. Cardwell, 515 A.2d 311, 315 (Pa. Super. Ct. 1986) (finding that a mother may still be convicted for endangering the welfare of her child when her efforts to protect the child are found to be "lame" or "meager"); *see also* Enos, *supra* note 152, at 240-61 (examining the assumptions on which courts rely when determining the fate of battered women and their children).

158 For more examples of women who have been incarcerated for failing to protect their children, see Ann Jones, *Children of a Lesser Mom*, LEAR'S, May 1993, at 30 (including a retarded woman with an IQ of 61, who was sentenced to five to fifteen years for failing to

The assumption underlying these cases—that a mother can always protect her children from a violent partner—is misplaced. A growing body of literature demonstrates the fallacy of this assumption. Experts have pointed to a mother's lack of financial resources,[159] a well grounded fear of increased violence to herself and her children,[160] potential criminal liability for leaving with the children,[161] losing custody for leaving without the children,[162] and being killed[163] or seeing her children killed,[164] as reasons why many mothers do not leave abusive relationships.[165]

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intervene in a beating of her child and failing to leave; a woman who was not even at home when her boyfriend killed her child; and a woman who, attempting to protect one child, watched helplessly while her husband beat another).

159 *See* Kimberlé Williams Crenshaw, *Panel Presentation on Cultural Battery*, 25 U. TOL. L. REV. 891 (1995) (noting the particular problems of inadequate resources for battered women of color); Joan Meier, *Domestic Violence, Character, and Social Change in the Welfare Reform Debate*, 19 LAW & POL'Y 205 (1997).

160 *See* ANGELA BROWNE, WHEN BATTERED WOMEN KILL 115-17 (1987); CAROLINE WOLF HARLOW, U.S. DEP'T OF JUSTICE, FEMALE VICTIMS OF VIOLENT CRIME 5 (1991); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 59 (1991).

161 Women who leave with their children and violate visitation orders may be charged with criminal contempt under a variety of state statutes or under the federal parental kidnapping statute. *See, e.g.*, Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1994).

162 *See* Mahoney, *supra* note 160, at 43-49.

163 Nearly 30% of all women murdered by a lone killer are killed by current or former husbands or boyfriends. *See* RONET BACHMAN & LINDA E. SALTZMAN, U.S. DEP'T OF JUSTICE, NATIONAL CRIME VICTIMIZATION SURVEY, VIOLENCE AGAINST WOMEN: ESTIMATES FROM THE REDESIGNED SURVEY 3 (Aug. 1995); *see also* Mahoney, *supra* note 160, at 5-6 (describing increased risk of physical violence for women who separate from abusers).

164 Although mothers are involved in child homicides, studies estimate that they are responsible for substantially fewer cases than fathers. *See* U.S. ADVISORY BD. ON CHILD ABUSE & NEGLECT, DEP'T OF HEALTH & HUMAN SERVS., A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 13 (1995) (finding most child abuse fatalities are caused by men—fathers, stepfathers, or boyfriends). Media accounts and public reaction to parental homicides reflect the degree to which society has markedly different expectations of mothers and fathers. Consider, for example, the case of Mark Clark from Essex, Maryland who, after his wife left him after repeated abuse and threats, convinced his wife and three children to go shopping for school supplies. *See* David Simon et al., *A Loving Father's Tragic Solution*, BALTIMORE SUN, Sept. 18, 1995, at 1A. As the family pulled into a sbopping center, a bomb Mr. Clark had planted in the car exploded and killed the entire family. *See id.* The story received limited press in the Baltimore area, and much of it expressed sympathy for the murdering father. *See id.* Compare the reaction to Mr. Clark's acts with the reaction to Susan Smith, the South Carolina woman who confessed to killing her two young sons. Smith herself contributed to the publicity surrounding the case by first blaming the deaths of the children on an unknown black assailant. *See* Sheryl McCarthy, *We Haven't Heard the Real Story Yet*, NEWSDAY, Nov. 7, 1994, at 7. What made the Smith story so compelling on a national level, however, was its "painful implosion of the myth of motherhood as sacred and endless self-sacrifice." Cheryl I. Harris, *Myths of Race and Gender in the Trials of O.J. Simpson and Susan Smith—Spectacles of Our Times*, 35 WASHBURN L.J. 225, 229 (1996); *see also* Diana Griego Erwin, *Drowning of Sons Wounds the Myth of Motherhood*, SACRAMENTO BEE, Nov. 8, 1994, at A2 (noting the Smith story sbattered various myths about motherhood).

165 Of course, many women do not leave their abusive partners because of a deep emotional attachment to their partners who are, in many cases, partners of many years and

Judges and juries applying these statutes also seem to impose a much higher duty of care on mothers than on fathers.[166] As one commentator recently admonished the bench:

> Perhaps, before a judge lectures a desperate, frightened woman on what it means to be a good mother, he or she should trade places with her and endure the pain of watching a child's beating, without the ability to leave or with the knowledge that leaving brings a worse fate. Even good mothers sometimes cannot protect their children.[167]

The criminal prosecutions this Section discusses primarily impact children by incarcerating their mothers and depriving them of a parent.[168] Although this outcome may be an appropriate remedy where the mother has participated in abuse or was actually able to prevent it, prosecutors and judges must, in determining criminal culpability, go beyond the narrow stereotypes that define bad mothers. Prosecuting mothers for abuse is not the most effective way to protect children. The threat of criminal sanctions might deter mothers and other observers from taking the positive steps of reporting abuse by fathers and boyfriends, seeking medical care, or pursuing civil or criminal remedies to stop the abuse.[169] Children of incarcerated mothers, even those fortunate enough to end up with relatives rather than in foster care, suffer profoundly.[170] Courts should inflict the loss of a parent

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the fathers of their children. *See* Becker, *supra* note 99, at 18. Recognizing that battered women often have strong emotional bonds to their batterers does not require courts to endorse or excuse behavior that threatens children. Such a recognition, however, would help courts understand the conditions of mothers' lives, and reach decisions that best protect children and their nonviolent caretakers. *See id.* at 22-23.

166 *See* Jill Davis, *Failure to Protect and Its Impact on Battered Mothers, in* NATIONAL COUNCIL OF JUVENILE & FAMILY COURT JUDGES, COURTS AND COMMUNITIES: CONFRONTING VIOLENCE IN THE FAMILY 6 (1995) (comparing a series of reported cases in which mothers were convicted of failure-to-protect crimes or their parental rights were terminated, with *State v. Rundle*, 500 N.W.2d 916 (Wis. 1993), a case that reversed a father's conviction for aiding and abetting physical abuse of his child by failing to take any action).

167 Nancy Hollander, *'Bad' Mothers: Modern Day Witches*, THE CHAMPION, July 1993, at 3.

168 The number of incarcerated women has increased six-fold in the last ten years. *See id.* (noting that some of the increase can be attributed "directly to the epidemic of domestic violence" when women are convicted of child abuse or failing to protect their children.).

169 *See* Erickson, *supra* note 155, at 209. Attorneys representing battered women at a local, domestic violence legal clinic report that they routinely advise women against alleging child abuse in petitions for restraining or civil protection orders, if the burden of proof to obtain the order can be met by referring only to the mother's abuse. Attorneys give this advice because an allegation of child abuse will trigger an investigation by the local Department of Social Services ("DSS"). Past experience of advocates of battered women suggests that the risk that the DSS will remove the children and refer the mother for criminal prosecution far outweighs any benefit from potential services that such an agency might offer a family experiencing violence. *See* Interview with Dorothy Lennig, Chief Attorney, House of Ruth Domestic Violence Legal Clinic (July 8, 1997) (notes on file with author).

170 *See* RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 21 (1997) (stating the "*problem with our child-protective system is that it hurts*

only on children whose parents are violent or unable, even after appropriate intervention, to care for them.

## II
## THE PRESUMPTION OF EQUALITY: MOTHERS AND FINANCIAL SUPPORT

When the law moves from issues governing child placement to regulating the distribution of public or private financial benefits, the double standard for mothers and fathers is no longer evident. Instead, since the 1980s, a presumption of equality has governed laws regulating child support and public benefits for poor mothers with children.[171] Here, the law assumes that parents—again, primarily mothers—caring for infants and small children have equal access to work opportunities. This assumption is misplaced and harms women.

Mothers' gender and role as caretakers disadvantage them in the workplace. Although mothers' diminished earning capacity has long been recognized, statutory and judicial reform has done little to change the situation. Discrimination against women, particularly mothers, in the workplace has a long history.[172] "Concern" for the health of mothers—actual or potential—continues to hinder women's employment opportunities.[173] The wage gap for women has improved from sixty cents for every dollar men earned in 1980,[174] to seventy-six cents in 1997.[175] Although the gap has narrowed, at least for middle- and upper-income women,[176] it still exists.

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*children*"); Philip M. Genty, *Re-Victimizing the Victims: Domestic Violence and the Incarceration of Women*, N.Y. L.J., Mar. 10, 1997, at 82 (noting that incarcerating mothers needlessly separates them from their children).

171 Child support and public benefits law are but two examples of laws governing the allocation of income to mothers that presume equality of opportunity and autonomy of mothers. Although beyond the scope of this Article, a good case can be made that the laws governing alimony, and to some extent, the distribution of marital property, are two more examples. *See* Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 728-29 (1993).

172 In 1908, the Supreme Court upheld protective labor legislation which excluded women from the workforce, declaring that "as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race." Muller v. Oregon, 208 U.S. 412, 421 (1908).

173 Antoinette Sedillo Lopez, *Two Legal Constructs of Motherhood: "Protective" Legislation in Mexico and the United States*, 1 S. CAL. REV. L. & WOMEN'S STUD. 239, 248-53 (1992) (analyzing the "new wave" of protective legislation regulating women's employment as part of a legal strategy to reverse *Roe v. Wade*).

174 *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, at 469 (1996).

175 *See* Belsky, *supra* note 42, at 25.

176 *See* Lynn, *supra* note 42, at 86 (noting wages of low-income women have remained stagnant over last twenty years). Not surprisingly, middle- and upper-class white women in this country also have the greatest opportunities to attain high-ranking jobs. *See* Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35

Moreover, mothers' predominant role in child rearing means that they are particularly disadvantaged in the labor force. Many studies demonstrate that it is women who sacrifice career advancement for parental responsibilities. Mothers, not fathers, opt for the "mommy track" rather than succumbing to the open-ended availability that most high paying, demanding jobs require.[177] Women necessarily take time off for childbirth and, more often than fathers, work part time after their children's birth.[178] Mothers, rather than fathers, take time off to care for sick children[179] or when there is a lack of child care.[180] All of these circumstances limit the work choices of mothers with children at home and disadvantage many mothers in the workplace.

Despite the disadvantages mothers experience as wage earners, an examination of child support and welfare laws reveals an underlying policy decision that custodial parents of small children should be in the workplace rather than at home caring for children. This policy is based upon a flawed premise of women's economic equality, and hurts both mothers and their children.

### A. Child Support Laws

After a court has decided who shall have custody of the children, the court must then decide how to divide the obligation to support the children between the parents. Women who have secured custody of their children may find themselves facing a challenge to support them. In addition to the constraints the law places on their ability to secure a well-paying job in the workplace,[181] current child support laws undermine custodial mothers in significant ways: they often relegate mothers to poverty, for example, they may include economic sanctions for mothers who stay home to care for small children.

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N.Y.L. SCH. L. REV. 309, 333 (1990); *see also* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WOMEN IN THE UNITED STATES: A PROFILE (1995) (revealing that a large wage gap remains between low-income women and men when comparing poorly educated women with their male counterparts with the same level of education).

177 Rebecca Korzec, *Working on the "Mommy-Track": Motherhood and Women Lawyers*, 8 HASTINGS WOMEN'S L.J. 117 (1997); Cindy Skrzycki, *Efforts Fail to Advance Women's Jobs: 'Glass Ceiling' Intact Despite New Benefits*, WASH. POST, Feb. 20, 1990, at A1.

178 *See* Karen Rubin, *Whose Job Is Child Care?*, Ms., Feb. 1987, at 32; *see also* VICTOR R. FUCHS, WOMEN'S QUEST FOR ECONOMIC EQUALITY 58-74 (1988) (stating that "marriage and children severely handicap women's efforts to earn as much as men").

179 *See* Judith Newmark, *Sick-Day Duty: Mother Stays Home 85 Percent of the Time*, ST. LOUIS POST DISPATCH, Nov. 20, 1996, at 4E.

180 *See* Carol Kleiman, *Child Care a Key Cause of Women Leaving Jobs*, CHI. TRIB., Jan. 14, 1991, at C3.

181 *See supra* notes 174-76 and accompanying text.

The roots of the impoverishment of women through inadequate child support[182] can be traced to the historical reliance on a broad discretionary standard to decide the amount of support a noncustodial parent must pay.[183] Although post-divorce child poverty has made child support an area of increased federal and local regulation, until the 1990s, a "court's discretion regarding the amount of child support usually reign[ed] supreme."[184]

The inadequacy of most states' discretionary standards in setting initial child support awards took on critical proportions by the early 1980s.[185] Insufficient child support was a major cause of the spiraling poverty rate among women and children. Of the 9.4 million custodial parents in 1987, 41% had no child support award.[186] When courts did award child support, award levels were often inadequate, thrusting many children and custodial parents into poverty or a seriously diminished standard of living.[187] In 1987, the average child support for the 3.7 million custodial parents who actually received payments was $2,710 per year.[188] Studies estimating the costs of raising children in intact households demonstrate the inadequacy of such amounts of child support.[189] The median award comprised only 37% of the estimated average monthly expenditure for children in a middle-income household and only 55% in a low-income household.[190] When one combines the abysmal record of collecting child support in the 1980s

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182 A census report suggests that the family income available to children declined by about 37% following a parental separation (21% when adjusted for family size) and that a year later, family income was only 69-70% of the level prior to disruption. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FAMILY DISRUPTION AND ECONOMIC HARDSHIP: THE SHORT-RUN PICTURE FOR CHILDREN 1-2 (1991) [hereinafter FAMILY DISRUPTION].

183 *See* LAURA W. MORGAN, CHILD SUPPORT GUIDELINES: INTERPRETATION AND APPLICATION, § 1.01, at 1-3 (1997 Supp.) (describing two factors under preguideline discretionary standard for setting child support as "ability of the obligor parent to pay and the needs of the child"); *see also* CLARK, *supra* note 18, at 719 ("The amount to be awarded . . . lies in the sound discretion of the trial court.").

184 HARRY D. KRAUSE, CHILD SUPPORT IN AMERICA: THE LEGAL PERSPECTIVE 10 (1981).

185 For the source of this discussion, see Jane C. Murphy, *Eroding the Myth of Discretionary Justice in Family Law: The Child Support Experiment*, 70 N.C. L. REV. 209, 226-29 (1991).

186 *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CHILD SUPPORT AND ALIMONY: 1987, at 1 (1990) [hereinafter CHILD SUPPORT].

187 *See* Lucy Marsh Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 Denv. U. L. Rev. 21, 50 (1979).

188 *See* CHILD SUPPORT, *supra* note 186, at 1-2.

189 *See, e.g.*, Jessica Pearson & Nancy Thoennes, *Will This Divorced Woman Receive Child Support?*, 25 JUDGES J. 40, 42-43 (1986) (describing the project that examined the child support implications of various custody arrangements, and finding, among other things, that the level of support awarded in the cases examined fell "far below the costs of rearing children estimated by economists."); Karen Seal, *A Decade of No-Fault Divorce: What It Has Meant Financially for Women in California*, FAM. ADVOC., Spring 1979, at 10, 13-15 (estimating that child support awards comprise less than half the actual costs of raising a child).

190 *See* Seal, *supra* note 189, at 13-15.

with the inadequate level of awards, the dimension of this crisis becomes clear.[191] In addition to the inadequacy of the award itself, the traditional system of virtually unlimited judicial discretion in this area led, as it had done in other areas, to "pronounced disparities in award amounts from court to court, from judge to judge, and from case to case."[192]

Congress became concerned with the lack of objective guidelines for establishing support obligations and the resulting inconsistencies in awards, as well as the overall problem of inadequate awards.[193] In response to this crisis in child support, Congress enacted a series of related statutes addressing the child support problem beginning in the 1980s.

In 1988, Congress passed the Family Support Act,[194] which requires every state to establish presumptive child support guidelines as a condition for continued federal funding of the state's welfare program.[195] A number of requirements of this Act strengthened the federal push for standardized child support decisions. Under this statute, the child support guidelines that each state adopts must presumptively establish the appropriate child support obligation in any child support proceeding.[196] The Act preserves limited judicial discretion because decisionmakers may make a specific finding that application of the guidelines would be unjust or inappropriate in a particular case, as determined under criteria each state establishes.[197] As a result of the federal legislation, every state has adopted some type of child support formula.[198]

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191 In 1987, only 50% of the women with child support orders received the full amount. Almost 25% received partial payments, while the other 25% received nothing. *See* CHILD SUPPORT, *supra* note 186, at I.

192 Sally F. Goldfarb, *What Every Lawyer Should Know About Child Support Guidelines*, 13 FAM. L. REP. 3031, 3032 (1987).

193 *See* H.R. REP. No. 527, at 49 (1983).

194 Pub. L. No. 100-485, § 103, 102 Stat. 2346-48 (1988) (codified, as amended, in scattered sections of 42 U.S.C.).

195 45 C.F.R. § 301.10 (1997) (stating that an approved state plan is a condition for federal financial assistance); *id.* § 302.56(a) (requiring that state plans contain child support guidelines).

196 42 U.S.C. § 667(b)(2) (1994).

197 *Id.*

198 *See* JANICE T. MUNSTERMAN ET AL., NATIONAL CTR. FOR STATE COURTS, CHILD SUPPORT GUIDELINES: A COMPENDIUM SUMMARY OF CHILD SUPPORT GUIDELINES (1990). The Income Shares Model, which the majority of states have adopted, employs various economic studies to identify the percentage of family income the child(ren) would have received if the parents lived together. The income of both parents is combined to calculate the basic child support obligation. *See* Irwin Garfinkel et al., *Child Support Orders: A Perspective on Reform*, FUTURE OF CHILDREN, Spring 1994, at 84, 87-88. This basic amount is then pro-rated between the parents in proportion to their respective incomes. *See id.* at 87-88. The noncustodial parent must pay his or her share as child support; the custodial parent presumably pays his or her share directly to the child(ren). *See id.* In this model, because the economic studies of intact families suggest that families spend a decreasing percentage

The impact of the adoption of child support guidelines on the economic circumstances of custodial mothers has been mixed. Early reports indicated that guidelines had improved the lot of custodial parents,[199] but more recent studies have focused on the increasing rate of child poverty despite the imposition of guidelines and other child support reforms of the 1980s.[200] Recent statistics indicate, for example, that the number of custodial parents without child support orders is increasing[201] and that collecting child support from noncustodial parents remains difficult.[202] Even more surprisingly, the amount of the average child support order has decreased since 1987. Custodial parents received an average child support payment of $2650 in 1991 compared to $2710 in 1987.[203]

For those mothers who are able to obtain and enforce child support orders, other provisions in state child support guidelines still undermine their efforts to support their children. These provisions may, in effect, devalue and penalize parents who either stay home or reduce their work schedule to care for children. Despite the entry of huge numbers of women into the workplace, the mother most often reduces her work schedule or takes time off from work.[204] The concept of penalizing the parent who has "voluntarily impoverished" himself or herself, and has thereby reduced his or her child support obligation, is well-established in child support law.[205] The courts pe-

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of total income on children as income levels increase, the guidelines provide for noncustodial parents at higher income levels to pay a declining percentage of income. *See id.* at 88-89. In addition, most income shares formulas include cost-sharing for certain child-related expenditures such as child care and extraordinary medical expenses. *See id.* at 89.

199 *See, e.g.*, Irwin Garfinkel et al., *Child Support Guidelines: Will They Make a Difference?*, 12 J. FAM. ISSUES 404 (1991) (predicting that award levels would rise upon implementation of the guidelines); Murphy, *supra* note 185, at 231-40 ("The consensus . . . is that [the] guidelines are working."); Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 FAM. L.Q. 325, 332 (1991) (citing studies showing increased awards after implementation of the guidelines).

200 *See, e.g.*, Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 479-81 (1994) (book review)

201 Of the 11.5 million custodial parents in 1992, 50% did not have child support orders. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, WHO RECEIVES CHILD SUPPORT?, at 1 (June 1995) [hereinafter WHO RECEIVES SUPPORT]. This compares to 41% of custodial parents without orders in 1987. *See* CHILD SUPPORT, *supra* note 186, at 1.

202 In 1991, only 37% of women with child support orders received some or all of the payments due. Sixty-three percent received nothing as compared to 25% in 1987. *See* WHO RECEIVES SUPPORT, *supra* note 201, at 1; CHILD SUPPORT, *supra* note 186, at 1.

203 *See* WHO RECEIVES SUPPORT, *supra* note 201, at 2; CHILD SUPPORT, *supra* note 186, at 1.

204 *See supra* notes 177-80 and accompanying text.

205 *See, e.g.*, CLARK, *supra* note 18, § 17.1, at 720 (noting that "the courts must determine whether [a parent's] actual earnings demonstrate a good faith choice of career or whether the parent's earnings are being held at a low level for the purpose of frustrating a child support order."). For a comprehensive analysis of the statutes and reported cases on the voluntary unpoverishment doctrine, see MORGAN, *supra* note 183, § 2.04.

nalize such parents, usually custodial mothers who stay home with young children, by imputing income to them, basing a child support order on their capacity to earn rather than their actual income.[206]

When the children under stay-at-home mothers' care are children of the child support obligor, statutes and courts have "permitted" mothers to stay at home and care for the children without penalty only under limited circumstances. This exception to the presumption of voluntary impoverishment for stay-at-home parents generally applies only to parents caring for very young children of ages ranging from six months to six years.[207] When the children under stay-at-home mothers' care are children of a subsequent marriage or relationship, and not the children of the obligor, some states will impute income by statute or case law to a mother caring for those children, even if the children are newborns or toddlers.[208] The following case best illustrates the impact of this "child care penalty" on mothers.[209] Mary Smith is separated or divorced and is the custodial parent of three children—ages three, six, and eight—from her former marriage. The separation or divorce may have occurred under any

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206 Although some states' guideline formulas do not look at the income of the custodial parent in making a child support order, most do under the Income Shares Model. *See* MUNSTERMAN ET AL., *supra* note 198.

207 *See, e.g.*, COLO. REV. STAT. § 14-10-115(7)(b)(1) (1997) (applying the exception where child of the parties is 30 months old or younger); KY. REV. STAT. ANN. § 403.212(2)(d) (Banks-Baldwin 1997) (applying the exception where child of the marriage is three years old or younger); LA. REV. STAT. ANN. § 9:315.9 (West 1991) (applying exception where a child of the parties is under the age of five); MD. CODE ANN., FAM. LAW § 12-204(b)(2)(ii) (1991 & Supp. 1996) (applying exception where child for whom parties are jointly responsible is under two years old); ALASKA RULES OF COURT, CR 90.3, Committee Commentary IIIC (applying the exception where child of the parties is under two years of age); ANN. R. N.C., N.C. CHILD SUPPORT GUIDELINES, INCOME (3) (applying exception where child of the marriage is under the age of three).

Some states do not draw a distinction between the parent who stays at home to care for a child of the child support obligor, and a parent who stays at home to care for a child of a new partner. Rather, these states merely provide that income will be imputed unless the parent is staying at home to care for a young child. *See, e.g.*, IDAHO R. CIV. P. (6)(c)(6), § 6(4)(c)(1) (providing that for imputed income, a parent is not deemed underemployed if caring for a child not more than six months of age); IND. CHILD SUPP. G. 3, Commentary 2(d) (noting that it is not the intent of the guidelines to force all custodial parents into the workforce); MASS. CHILD SUPP. G. II(H) (forbidding the court from imputing income to a custodial parent with children who are under the age of six and living in the home).

208 *See, e.g.*, *In re* Marriage of Spears, 529 N.W.2d 299 (Iowa Ct. App. 1994); Canning v. Juskalian, 597 N.E.2d 1074 (Mass. App. Ct. 1992); Muller v. Muller, 524 N.W.2d 78 (Neb. Ct. App. 1994); Bencivenga v. Bencivenga, 603 A.2d 531 (N.J. Super. Ct. App. Div. 1992); Guskjolen v. Guskjolen, 499 N.W.2d 126 (N.D. 1993); *see also supra* note 207 (listing statutes that protect parents caring for young children of the first relationship, implicitly permitting imputation of income where children cared for are from a subsequent relationship).

209 This case is based on a composite of cases in which the author has provided representation in the Circuit Court for Baltimore City, Maryland. Unlike many of the other areas of law which punish mothers, the child care penalty is more pronounced as the income of the parents increases. The higher the mother's potential income, the greater the penalty, if her income is imputed to her while she is caring for children at home.

circumstances—Mary may have initiated the divorce, she and her husband may have reached a mutual decision to end the marriage, or her husband may have left her for another woman. Assume further that a Maryland divorce agreement provides that, as is most often the case, Mary will have physical custody of the children.[210] Both parties earn $45,000 a year and, under the governing child support formula, as the noncustodial parent, Mr. Smith will pay about $870 per month for child support.[211]

In Maryland, because Mary's youngest child is not under two, she must work full-time or be deemed voluntarily impoverished.[212] This would result in the court imputing income to Mary in its calculation of its child support order to the children's father.[213] Thus, if Mary decided to work part-time or stay at home to care for the children, Mr. Smith's child support obligation would be calculated as though Mary were earning a full-time salary.[214] It is irrelevant that Mary's decision not to work benefits both parties' children and that the deduction of income from Mary's child support award may seriously affect her ability to support the children.

If Mary has a child by anyone other than her former husband, she receives an even more severe financial penalty for staying at home to care for that child. If she takes any time out of the work force for pregnancy, delivery, or care of the infant, Maryland will view her as voluntarily impoverishing herself.[215] Maryland would impute her full income to her for purposes of calculating child support for the children of her first marriage.[216] If she marries the father of the new

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210 *See* WHO RECEIVES SUPPORT, *supra* note 201, at 1. Eighty-six percent of custodial parents are mothers (9.9 million out of 11.5 million). *See id.*

211 Under a typical Income Shares Model guideline, if Mary and John each earn $45,000 per year, the child support obligation for the three children for each parent would be $870.50 per month. MD. CODE ANN., FAM. LAW § 12-204(e) (1991 & Supp. 1997). As the noncustodial parent, John's share of the support would be reduced to an order for that amount, and Mary's share would be assumed to be paid in direct support for the child. *See id.* § 12-204(k)(2)-(3). Many studies, however, document that the custodial parent's share of actual support far exceeds the amount designated in the child support formula because the guidelines underestimate the cost of caring for a child. *See, e.g.*, Marsha Garrison, *Child Support and Children's Poverty*, 28 FAM. L.Q. 475, 479 (1994) (book review).

212 *See* MD. CODE ANN., FAM. LAW § 12-204(b)(ii) (1991 & Supp. 1997) (providing that the only exception to the voluntary impoverishment rule for healthy adults is for parents taking care of children of parties to the proceeding who are under the age of two).

213 *See id.* § 12-204(b).

214 Mary would continue to receive $870.50 a month rather than $1023, the amount she would be owed if the support were calculated based on her husband's income alone. *See id.* § 12-204(e).

215 *See id.* § 12-204(b)(ii). For a recent case applying the doctrine of voluntary impoverishment to a mother in another context in Maryland, see *Wagner v. Wagner*, 674 A.2d 1, 21-24 (Md. Ct. Spec. App. 1996) (holding that a mother who accepted a below normal wage for her position had voluntarily impoverished herself).

216 *See* MD. CODE ANN., FAM. LAW § 12-204(b)(ii) (1991 & Supp. 1997).

infant, she must consequently continue to work or depend upon her new husband to assist in the support of the children from the first marriage. If the father of the infant has abandoned her, or she has chosen not to marry him and cannot collect child support for the new child,[217] the economic consequences are far more severe. Mary faces the substantial burden of providing care for her newborn and supporting her older children by means of child support calculated under a formula that assumes she is working full-time.[218]

If Mary does not have custody of the children, the economic consequences of starting a new relationship and having children are even harsher. As the noncustodial parent, she would be subject to a child support order. If Mary takes any time off from work during a pregnancy from a new relationship or during the child's infancy, she remains subject to a continuing obligation to pay $870 per month for the children from her first marriage, despite her loss of income.[219] To the extent she remarries or cohabitates, she may have the assistance of a husband or partner to pay the child support for the children from her first marriage. If she instead remains single, she may have the impossible choice of either providing care for her newborn and risking jail for failing to support her older children,[220] or not taking any time off for the birth of her newborn.

Thus, under many scenarios, Mary and other divorced mothers may face harsh economic consequences for divorcing while their children are young, particularly if they attempt to start a new family. Although custodial fathers of young children may also have to work, the adverse impact falls primarily on mothers because women most often assume the responsibility of taking care of the children after divorce.[221]

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217 There is a high probability that Mary is receiving little or no child support. *See supra* note 98 and accompanying text.

218 Again, Mary would continue to receive $870.50 a month rather than $1023 a month, which is the amount Mr. Smith would have to pay if his income was recognized for what it is, the sole income available to support the children. *See supra* note 214.

219 The Family and Medical Leave Act, 29 U.S.C. §§ 2601-2654 (1994), provides some protection, but only protects job security, and does not require paid maternity leave.

220 Parents who fail to comply with child support orders are subject to incarceration under civil and criminal contempt statutes. *See, e.g.*, LA. REV. STAT. ANN. § 14-74 (West 1982); MICH. COMP. LAWS ANN. § 750.161 (West 1996); MISS. CODE ANN. § 97-5-3 (1994 & Supp. 1997).

221 *See* Judith Bond Jennison, *The Search for Equality in a Woman's World: Fathers' Rights to Child Custody*, 43 RUTGERS L. REV. 1141, 1176 (1991) (noting that "mothers obtain sole custody in ninety percent of the cases"). The predominance of mothers as custodial parents appears to reflect the agreement of divorcing parents rather than a judicial preference for mothers. *See* Stephen J. Bahr et al., *Trends in Child Custody Awards: Has the Removal of Maternal Preference Made a Difference?*, 28 FAM. L.Q. 247, 264-65 (1994) (studying custody decisions covering one jurisdiction from 1970-1993).

Scholars and policymakers have paid limited attention to the codification of the policy that is pushing parents of young children into the workforce.[222] Lewis Becker's recent article on the voluntary-reduction-of-income doctrine contains one of the more comprehensive analyses of the "child care" penalty.[223] In his article, Becker argues for a factor-based discretionary approach to resolve this issue.[224] However, despite his detailed and thorough analysis of applicable statutes and judicial decisions, Becker fails to acknowledge that most parents staying at home to care for children are mothers and most child support obligors are fathers.[225] Although he notes that the resolution of this issue will have an impact on the important public policy "that children ought to receive adequate care,"[226] and that the financial burdens of child care should be apportioned equitably between the parents,[227] he never recognizes that these statutes reflect a public policy consensus that devalues the work of "mothering." Moreover, in developing a list of the various competing interests at stake, he never acknowledges the presumed benefit fathers receive when the mother cares for the children.[228]

A 1992 Pennsylvania court decision contains one of the few explicit acknowledgements of the gendered nature of this issue.[229] Focusing on the pressures placed on a mother caring for a newborn from a second marriage, the court held that a rule imputing income to a mother in this situation

> is another destructive step in a culture which appears bent on destroying family stability. It also will increase the pressure on women with second families to abort pregnancies and to abandon children, or to give up on second marriages with children when the stress of either going to work or forcing the second husband to support her children by a prior marriage becomes unbearable.[230]

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222 *See* Lewis Becker, *Spousal and Child Support and the "Voluntary Reduction of Income" Doctrine*, 29 CONN. L. REV. 647, 648 (1997); Karl A.W. DeMarce, Note, *Devaluing Caregiving in Child Support Calculations: Imputing Income to Custodial Parents Who Stay Home with Children*, 61 MO. L. REV. 429, 429-30 (1996).

223 Becker, *supra* note 222, at 703-11.

224 *Id.* at 708, 711 (acknowledging the critiques of reliance on discretion in family law decisionmaking, but concluding discretion will lead to decisions that are "fair" to fathers, mothers, and children).

225 *Id.* at 703-11.

226 *Id.* at 701.

227 *Id.* at 652.

228 This is a benefit to fathers because their children will most likely benefit from home care. *See* Estin, *supra* note 171, at 791-802 and studies cited therein.

229 *See* Atkinson v. Atkinson, 616 A.2d 22 (Pa. Super. Ct. 1992) (holding that the resolution of the issue of whether to impute income to a stay-at-home parent should not turn on whether the mother is caring for her children of a subsequent marriage, as opposed to the children of a previous marriage, but rather on the mother's earning capacity).

230 *Id.* at 24.

It is tempting to resort to broad judicial discretion to insure fairness in resolving this issue.[231] Prior experience with broad standards like the best interests of the child, however, suggest problems with this approach.[232] To promote a policy that values the work of child-rearing and protects children, child support laws should, at a minimum, prohibit imputing income to a parent who is caring for preschool children of the obligor.[233] The question of whether the state should consider caring for children of a second relationship to be voluntary impoverishment is more complex. Here, the multifactored approach that looks at the earning capacity of the stay-at-home parent may be more appropriate.[234] Such an approach provides some protection to impoverished mothers who may have no source of income other than child support. This approach recognizes the value of child rearing while also accepting that, in some circumstances, the benefit to older children from a parent's income may outweigh the benefit to younger children of that parent's staying at home.

### B. Welfare

In situations where one parent—again overwhelmingly the mother—is left as the sole provider for her children because of the other parent's abandonment or disability, she can turn to the state for

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231 Some statutes or courts hearing these cases have developed factors to be considered, such as age and special needs of the child, cost of child care, and earning capacity of stay-at-home parent, rather than a fixed rule. *See, e.g.*, FLA. STAT. ANN. § 61.30(2)(b) (West Supp. 1996) (authorizing the court to refuse to impute income to a primary residential parent, if it finds it necessary for the parent to stay home with the child); 27 S.C. CODE ANN. REGS. §114-4720 A(5) (1992) (allowing a court to "take into account the presence of young children or handicapped children who must be cared for by the parent, necessitating the parent's inability to work"); UTAH CODE ANN. § 78-45-7.5(7)(d)(iv) (1996 & Supp. 1997) (forbidding the court to impute income if "unusual emotional or physical needs of a child require the custodial parent's presence in the home"); WYO. STAT. ANN. § 20-6-302(b)(xi)(C) (Micbie 1997) (authorizing the court to consider the "presence of children of the marriage in the parent's home and its impact on the earnings of that parent"); ALA. R. JUD. ADMIN. 32(B)(5) (allowing the court to take into account the presence of a young or physically or mentally disabled child, necessitating the parent's need to stay in the home and the inability to work); IND. CHILD SUPP. G. 3, Commentary 2(d) (noting that the "need for a custodial parent to contribute to the financial support of a child must be carefully balanced against the need for the parent's full-time presence in the home"); MONT. ADMIN. R. 46.30.1513(2)(d)(iv) (providing that the court shall not impute income if "unusual emotional and/or physical needs of the child require the custodial parent's presence in the bome"); *see also* McAlexander v. McAlexander, No. 92 CA 21, 1993 WL 420206, at *5-6 (Ohio Ct. App. Oct. 18, 1993) (refusing to adopt a per se rule on whether declining employment to care for a newborn child is a voluntary reduction of income, and noting that the best interests of the children whose support was at issue was the overall determining factor).

232 *See* Murphy, *supra* note 185, at 211-26.

233 A couple of states have reached this conclusion. *See supra* note 207 (citing Indiana and Massachusetts statutes).

234 The court in *Atkinson*, 616 A.2d at 22, takes this approach.

assistance in providing support for the children.[235] Traditionally, Aid to Families with Dependent Children ("AFDC") has been the predominant form of assistance for single mothers and their children.[236] At its inception, Congress designed the program to encourage "the care of dependent children in their own homes."[237] Thus, in its earliest form, AFDC and its predecessor programs valued mothers by conceptualizing the payments to single mothers as compensation for labor beneficial to society—raising and caring for children.

Since the adoption of the first welfare statute in 1935, the underlying public policy—that children's welfare is tied to the availability of their mothers as caretakers—has gradually eroded.[238] Since the early 1960s, benefits for poor mothers have been linked to the mother's willingness to work in "appropriate" settings.[239] The government expected black mothers in the South, for example, to work as domestics or farmhands to justify public support for their fatherless children.[240] By the late 1960s, Congress amended AFDC to provide incentives for

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235 Women—typically mothers who are divorced or separated from, or have never been married to, the fathers of their children—represent almost all of the adult Aid to Families with Dependent Children ("AFDC") recipients in this country. *See* Jeffrey Lehman & Sheldon Danziger, *Ending Welfare, Leaving the Poor to Face New Risk*, FORUM APPLIED RES. & PUB. POL'Y, Winter 1997, at 43-44 n.4 (indicating that of the 90% of families without a father receiving AFDC, 37% of AFDC recipients were divorced, widowed, or separated, and 53% were never married). A few single fathers received assistance, and a somewhat larger number of two-parent families satisfied the stringent eligibility requirements for two-parent families. *See id.* at 33-34. However, among the roughly 4.8 million families that received AFDC benefits in a typical month in fiscal year 1993, almost 90% were fatherless. *See id.*

236 In 1935, Congress created a program called "Aid to Dependent Children." *See* Social Security Act, 42 U.S.C. § 301 et seq. (1935). In 1962, Congress renamed this welfare program "Aid to Families with Dependent Children." "Mother's Aid" programs established by state and local governments from 1910-20 served as models for both of these federal programs. *See* GORDON, PITIED BUT NOT ENTITLED, *supra* note 1, at 37. These programs provided "assistance to 'deserving' poor single mothers with children to defray the costs of raising children in their own homes and to deter child labor and the institutionalization of fatherless children." *Id.*

237 42 U.S.C. § 601 (1964).

238 *See* Gary Burtless, *The Effect of Reform on Employment, Earnings and Income*, *in* WELFARE POLICY FOR THE 1990'S 103, 105-06 (Phoebe H. Cottingham & David T. Ellwood eds., 1989); *see also* Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817 (1994) (exploring the modern view of welfare reform that emphasizes the need for recipients to become economically self-sufficient). In its original form, Congress limited aid to widows. *See id.* at 824. As the typical AFDC mother changed in the 1950s, Congress added divorced and separated mothers to the entitlement categories. *See id.* at 825. In the 1960s, as a result of the civil rights and women's movements, the government extended the program to women of color and single women who had never married. *See id.* By the 1980s, a majority of AFDC recipients were never-married mothers and their children. *See* Lehman & Danziger, *supra* note 235, at 36.

239 Jeffrey Lehman & Sheldon Danziger, *Reflections on Welfare Reform*, LAW QUADRANGLE NOTES, Winter 1994, at 34, 36-37.

240 *See id.*

mothers receiving aid to work and, in some instances, to make participation in job training a prerequisite for receiving benefits.[241]

In the early 1970s, Congress enacted legislation that required mothers of school-age children to register for work and training in order to receive aid.[242] In the following decade, by enacting the Family Support Act of 1988,[243] Congress took another significant legislative step in redefining the goal of welfare from supporting poor children to creating incentives for poor mothers to obtain employment outside the home.[244] The Family Support Act expanded the pool of AFDC recipients who must work or accept job training to render mothers whose children have reached the age of three eligible for aid.[245]

Thus, for nearly thirty years, the government has imposed some kind of federal work requirement on welfare recipients. In recent years, however, both political and public rhetoric have reflected a broader consensus that poor women should spend their time working rather than caring for their children. This consensus culminated in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "PRWORA"),[246] which abolished AFDC and replaced it with a system of block grants that go directly to the states.[247] Under the PRWORA, the states can fashion welfare plans that require most recipients to work, and also can impose mandatory maximum time limits for assistance to needy families.[248] President Clinton's remarks as he signed the bill reflected this view that poor women and children who receive welfare are no longer among the deserving poor:

> "The typical family on welfare today is very different from the one that welfare was designed to deal with 60 years ago." In contrast to needy Depression-era Americans, modern Americans who get aid "are trapped on welfare for a very long time, exiling them from the entire community of work that gives structure to our lives."[249]

The political rhetoric that has accompanied this shift in policy reflects the widely held view that welfare mothers are the cause of many social problems. Throughout recent years, key political leaders and policyworkers have blamed welfare for a range of social problems,

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241 Social Security Act of 1967, 42 U.S.C. § 602(A), (C) (1967).

242 *See* JOEL F. HANDLER & YEHESKEL HASENFELD, THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA 154 (1991).

243 Pub L. No. 100-485, 102 Stat. 2343 (1988) (codified at 42 U.S.C. §§ 601-687 (1988)).

244 *Id.*

245 *Id.*

246 Pub. L. No. 104-193, 110 Stat. 2105 (1996).

247 *Id.*

248 *Id.*

249 Francis X. Clines, *Clinton Signs Bill Cutting Welfare; States in New Role*, N.Y. TIMES, Aug. 23, 1996, at A1.

from poverty[250] and family violence[251] to racial tension.[252] Commentators suggest a variety of theories to explain this shift in socioeconomic policy. Politics provided the most obvious and immediate impetus for the replacement of AFDC with the PRWORA. Viewed in the context of contemporary presidential politics, the PRWORA represents a political compromise between a Democratic President and a Republican Congress, rather than a consensus on public policy built over time. Although candidate Clinton had promised in 1992 to "end welfare as we know it," only when the Republicans gained control of Congress in 1994 was he forced to respond to proposals to dismantle the AFDC programs.[253]

Other accounts of this policy shift suggest that it represents more of a culmination of long-term trends rather than a radical departure from existing policy. One such long-term trend is society's devaluing of mothering, the work of caring for children. As Carol Sanger notes in her thoughtful and comprehensive examination of the law's response to mothers' decisions to leave their children:

> [U]nlike the early twentieth century when mothering as public service was recognized and compensated (however stingily) through the widespread enactment of mothers' pensions, social consensus regarding the importance of maternal caretaking and public responsibility for some of its costs no longer exists. . . . Current welfare reforms are premised on the belief that a working mother as role model is more important for poor children than whatever they might gain from a homebound but publicly supported mother.[254]

Other commentators have analyzed this shift, which devalues mothering, by contrasting the law's current response to full-time, mostly male wage earners who are temporarily unemployed due to layoffs with mothers who are temporarily unemployed and staying at home to care

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250 A political consensus among some liberals and most conservatives has emerged which blames single mothers receiving AFDC for "weakened commitment to competence, work, and responsible living" which leads to poverty. Lynn, *supra* note 42, at 84.

251 *See* Karen Hosler, *Dole Draws Fire with Comments on Crime; Candidate Criticized for Appearing to Link Spousal Abuse, Welfare,* BALTIMORE SUN, May 31, 1996, at 8A (quoting 1996 presidential candidate Bob Dole, who blamed welfare programs for increases in domestic violence); Robert Scheer, *Gingrich, Savaging Welfare, Is on a Fool's Errand,* L.A. TIMES, Nov. 28, 1995, at B9 (describing Gingrich's false "depiction of [a slain pregnant woman] as the product of an immoral welfare culture").

252 *See* Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals,* 102 YALE L.J. 719, 719 (1992) (noting that Bush and Quayle blamed the Los Angeles riots on welfare initiatives); Seth Sutel, *Quayle: Welfare to Blame,* BOSTON GLOBE, May 14, 1992, at 13; Michael Wines, *White House Links Riots to Welfare,* N.Y. TIMES, May 5, 1992, at A1.

253 For an analysis of the political context of Clinton's support of the PRWORA, see Peter Edelman, *The Worst Thing Bill Clinton Has Done,* ATLANTIC MONTHLY, Mar. 1997, at 43, 43-45.

254 Sanger, *supra* note 4, at 498-99.

for their children.[255] Laid-off workers receive unemployment insurance, while mothers staying at home to care for children receive welfare. Despite their similarity as temporary compensation, unemployment insurance is viewed as "contributory" and "earned,"[256] while welfare is viewed as "noncontributory" and "unearned."[257] Those "on unemployment" neither suffer the same stigma nor shoulder the blame for the variety of social ills that those on welfare experience.

In her review of the evolution of welfare programs prior to the PRWORA, Martha Minow argues that recent work requirement "reforms" are not departures from longstanding policy, but rather "reiterations of longstanding lines of social cleavage."[258] Despite the feverish recent pitch of rhetoric blaming welfare for a wide range of seemingly unrelated societal problems,[259] longstanding negative views in American political discourse about poor people, particularly women and African Americans, may better explain these reforms.[260] The single mother on welfare embodies immorality, deviancy, and the lack of will that gave rise to today's massive social problems. This category of motherhood, whether described as welfare queen or unwed mother, now symbolizes much of what is wrong with society. As Minow describes it, "lacking a job means degeneracy; having a child without the ongoing presence of a father means moral deviance; being a mother in these circumstances means nurturing a next generation of pathology; and receiving welfare means being a debit to society."[261]

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255 Despite the image of welfare recipients as long-term unemployed women, not only do fewer than half of the families that received AFDC receive it for more than 36 months, but most families received aid for no more than two years at a time. *See* CENTER ON SOC. WELFARE POLICY AND LAW, WELFARE MYTHS: FACT OR FICTION?, at 7 (1996). More than two-thirds of the adults who received AFDC had been employed either while they received aid or before they applied for it. *See id.* at 21; *see also supra* text accompanying notes 239-41 (noting various incentives that AFDC provides to mothers who work).

256 M.M. Slaughter, *The Legal Construction of "Mother," in* MOTHERS IN LAW, *supra* note 4, at 73, 90.

257 *Id.*

258 Minow, *supra* note 238, at 819.

259 *See supra* notes 250-52 and accompanying text.

260 *See* The Negro Family: The Case for National Action ("The Moynihan Report"), *reprinted in* LEE RAINWATER & WILLIAM L. YANCEY, THE MOYNIHAN REPORT AND THE POLITICS OF CONTROVERSY 39 (1967) (identifying patterns in Black families, including the "destructive" impact of matriarchy in the Black community); STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 110-13 (1992) (comparing 1989 media stories blaming African-Americans for their poverty with very similar accounts from 1889).

261 Minow, *supra* note 238, at 837 (citing Wahneema Lubiano, *Black Ladies, Welfare Queens, and State Minstrels: Ideological War by Narrative Means, in* RACE-ING JUSTICE, ENGENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 323, 332 (Toni Morrison ed., 1992)); *see also* HANDLER & HASENFELD, *supra* note 90, at 9-10 (noting that, while the historical purpose of AFDC was to permit poor women to stay home with their children, its focus has always been on regulating mothers

Against this political and social background, it is not surprising that Congress, whether by political compromise or broad social consensus, decided to "end welfare as we know it" by moving mothers from the home to the workplace.[262] The PRWORA accomplishes this in a variety of ways, but principally, by changing the overall structure of the program. The AFDC system had been one of entitlement in two senses. First, it provided a federally defined guarantee of assistance to families with children who met their state's statutory definition of need and complied with other conditions of state law.[263] Second, it guaranteed states a federal matching share of the money needed to provide benefits to all qualified families.[264] The PRWORA replaces federal guarantees in both areas with block grants to the states 1) that permit each state to decide whom to include or exclude from welfare benefits[265] and 2) in amounts that will remain fixed, regardless of changing levels of need in the states.[266]

The two PRWORA provisions that most directly regulate mothers' conduct 1) impose time limits on the receipt of benefits and 2) require mothers to work as a condition to receiving assistance.[267] The Act also prescribes a cumulative lifetime limit of five years in which any individual can receive benefits.[268] However, states are free to impose shorter time limits.[269]

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while virtually ignoring the responsibilities of fathers). *But see* DAVID ZUCCHINO, MYTH OF THE WELFARE QUEEN (1997) (analyzing the stereotypes and misinformation surrounding families on welfare by focusing on two mothers on welfare who, despite poverty and lack of education, engage in activism to help the homeless in Philadelphia).

262 The PRWORA has several other provisions that introduce substantial budget cuts for benefits to legal immigrants, cuts in food stamps and child nutrition programs, as well as extensive changes in the federal child support laws. For a critique of these provisions, see Edelman, *supra* note 253. For a discussion of how those provisions also indirectly regulate mothers' conduct, see PAULA ROBERTS, CENTER FOR LAW & SOC. POLICY, FAMILY LAW ISSUES AND THE "PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY ACT OF 1996" (1996).

263 42 U.S.C.A. § 601 (1995). The PRWORA eliminated individual entitlement to assistance. 42 U.S.C.A. § 601(b) (West Supp. 1997).

264 42 U.S.C.A. § 603 (1995).

265 42 U.S.C.A. § 602(a)(1)(B)(iii) (West Supp. 1997).

266 *Id.* § 603(a)(1)(A).

267 *Id.* § 602(a)(1)(A)(iii).

268 Pub. L. No. 104-193, § 103(a), 110 Stat. 2112 (1996). However, an exception to the five-year lifetime limit allows families that have been receiving assistance for five years to occupy up to 20% of the caseload. *See id.*, 110 Stat. at 2138. Although this provision may appear to provide the states with the flexibility needed to deal with the most severe hardship cases, 20% may be inadequate, given that about 50% of the pre-PRWORA caseloads are families that have received assistance for more than five years. *See* Edelman, *supra* note 253, at 50.

269 As of June, 1997, at least 20 states had opted for shorter time limits for at least part of their caseloads. *See* NATIONAL GOVERNORS ASSOC. CTR. FOR BEST PRACTICES, SUMMARY OF SELECTED ELEMENTS OF STATE PLANS FOR TEMPORARY ASSISTANCE FOR NEEDY FAMILIES 6-19 (Nov. 20, 1997). The shortest time limit is 12 months, imposed by Texas, with most states in this group opting for two years. *See id.*

The work participation guidelines require all benefit recipients to work.[270] States can exempt from work participation single custodial parents caring for children under six years old, if the parent can demonstrate an inability to obtain needed child care.[271] Again, states can toughen these federally imposed work requirements.[272]

These changes to the conditions for receiving public aid reflect the general trend in laws governing maternal conduct. When the custody of their children is challenged, women are expected to meet a legal standard of an ideal nurturer. At the same time, the state expects them to perform in the work world as though their child care responsibilities had never affected their work skills and opportunities.

The presumption of mothers' autonomy and equality as wage earners is even more damaging for mothers who need welfare. First, even if every mother on welfare could leave her child care responsibilities to enter the workforce, jobs are generally unavailable to these mothers. Lack of education, suffering from disabilities, and lack of skills are often what put them on welfare in the first place.[273] Moreover, as the country's demand for unskilled workers decreases,[274] per-

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270 This work requirement will be imposed on a state's caseload over a period of five years. Twenty-five percent of the caseload—that is, mothers—must be working or in training in 1997, the first year of implementation. *See* 42 U.S.C.A. § 607(a)(1).

271 *See id.* § 607(e)(2). The determination as to whether this and most other exceptions under the PRWORA apply to a given applicant is within the discretion of the state. *See id.* In many states, the worker is vested with exercising this discretion. For a discussion of the problems that have resulted from this approach, see Barbara Vobejda & Judith Havemann, *In Welfare Decisions, One Size No Longer Fits All*, WASH. POST, June 30, 1997, at A1.

272 *See* 42 U.S.C.A. § 607(b)(5). "[A] State may, at its option, not require an individual who is a single custodial parent caring for a child who has not attained 12 months of age to engage in work . . . ." *Id.* For example, Ohio exempts from work training requirements only single parents with children under the age of one, instead of the federal requirement of age three. OHIO REV. CODE ANN. § 5101.81(B)(6)(a) (Anderson Supp. 1996); *see also* FLA. STAT. ANN. § 414.065(3)(d) (West Supp. 1998) (exempting from work requirements "one custodial parent with a child under 3 months of age"); WIS. STAT. ANN. § 49.193(2)(a) (West 1997) (requiring parents of a child at least one year of age to participate in work requirements).

273 A Washington State study revealed that 36% of the welfare caseload had untreated learning disabilities. *See* Edelman, *supra* note 253, at 53. Another recent study found that 30% of welfare recipients are women either caring for disabled children or disabled themselves. *See* Pamela Loprest & Gregory Acs, *Profile of Disability Among AFDC Families*, URB. INST. POL'Y & RES. REP., Summer/Fall 1996, at 10, 11. The same study found that 16.6-20.1% of female welfare recipients have some disability that limits their work, with 8.4-10.6% having a serious job disability that prevents performance of at least one work-related function. *See id.* at 11. For a review of the failure of prior federal efforts to move welfare recipients into the paid workforce, see Minow, *supra* note 238, at 831-34.

274 *See* Lynn, *supra* note 42, at 86-87. Recent reports indicate that for those low-skilled jobs that exist, unions and other organizations representing unskilled workers are organizing to prevent displacement of existing workers by welfare recipients. *See* Brenda J. Buote, *Hopkins to Retain Unskilled Employees*, BALTIMORE SUN, Mar. 17, 1997, at 1B (attributing tensions among employers, unions, and state welfare agencies to subsidies given to employers to replace current employees with "welfare-to-work trainees").

sistent patterns of racial and gender discrimination compound the problem for welfare recipients.[275]

While job prospects for the typical welfare recipient were bleak prior to the PRWORA,[276] this new legislation offers little in terms of funding for job creation, wage subsidies, training, placement, and support and retention services.[277] As Peter Edelman observed:

> [T]he deck is stacked against success, especially in states that have high concentrations of poverty and large welfare caseloads. The basic issue is jobs. *There simply are not enough jobs now.* Four million adults are receiving Aid to Families with Dependent Children. Half of them are long-term recipients. In city after city around America the number of people who will have to find jobs will quickly dwarf the number of new jobs created in recent years.[278]

One need only observe impoverished mothers for a short time to begin to appreciate the challenges of maintaining employment while raising children in poverty.[279] Lack of transportation makes grocery shopping, school drop-offs, job training, or other regular commitments away from home a daily challenge. Low income housing often comes without washing machines or conveniently located laundromats. Tight budgets also mean frequent negotiations to maintain even irregular telephone and utility service. Without a phone, impoverished mothers must travel by public transportation to transact "business" with creditors, schools, and local social service agencies in person.

Having the full responsibility for child rearing makes it extremely difficult for poor women to enter the job market when their children

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275 *See* Lynn, *supra* note 42, at 87; *see also* Teresa L. Amott, *Black Women and AFDC: Making Entitlement out of Necessity*, *in* WOMEN, THE STATE AND WELFARE 280, 280, 292 (Linda Gordon ed., 1990) (arguing that welfare should be seen as "a vital source of income" to single black mothers because race and sex discrimination limit meaningful employment opportunities for these women); Diana Pearce, *Welfare Is Not* for *Women: Why the War on Poverty Cannot Conquer the Feminization of Poverty*, *in id.* at 265, 268-69 (identifying "[t]he disadvantaged position of women in the labor market" as one of the key causes of "the feminization of poverty").

276 For a detailed account of the limited job prospects for a mother on welfare, see Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1979-85 (1993).

277 For an account of one state's attempt to find jobs for its new welfare-to-work program and the barriers its welfare recipients faced, see Kathy Lally, *Reworking Welfare: Maryland Recipients Join the Push for Self-Sufficiency*, BALTIMORE SUN, Feb. 2, 1997, at 1A.

278 Edelman, *supra* note 253, at 52; *see also* WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996) (discussing the high rate of inner-city joblessness).

279 Since 1989, the author has directed the Family Law Clinic at the University of Baltimore School of Law, in which approximately 20 students each year represent 60 to 80 low-income clients, primarily women and children, in domestic cases. This experience provides substantial opportunity for close observation of the challenges facing impoverished mothers and their children.

are very young. The chronic shortage of quality, affordable child care is a problem for all working parents,[280] but presents even greater obstacles for women receiving welfare.[281] Limited transportation and available resources considerably narrow the child care choices for both the urban and rural poor.[282] For the urban poor, the challenge of child rearing intensifies as children grow older. Keeping children safe from gangs, drugs, and violence[283] requires constant vigilance that may not comport with a full-time job, particularly when no other parent lives in the house.

These problems are compounded for women who are welfare recipients as a result of domestic violence.[284] The PRWORA gives states the option of screening all welfare applicants to determine whether they are victims of domestic violence, and to waive certain welfare program requirements for "good cause."[285] Although it reflects some Congressional recognition of the impact of domestic violence on its victims, the provision may be largely ineffective. First, the Act does not require states to adopt the provision and many states have not yet

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280 *See* Sandra L. Hofferth, *Child Care in the United States Today*, FUTURE OF CHILDREN, Summer/Fall 1996, at 41, 52 ("In 1993, parents . . . paid amounts ranging from $1.49 . . . for relative care to $2.85 per hour for sitter care (in 1993 dollars). This represents an increase of about 20% over about [3.5] years . . . for center-based care, family child care, and relative care and about a 12% increase for sitter care."). A University of Colorado study that examined child care centers found that 85% of the centers in the study provided mediocre or poor quality services. *See* COST, QUALITY, AND CHILD OUTCOMES IN CHILD CARE CENTERS: TECHNICAL REPORT 320 fig.15.1 (Suzanne W. Helburn ed., June 1995); Hofferth, *supra*, at 66.

281 The PRWORA does include a provision that will increase child care funding. 42 U.S.C.A. § 601 (West Supp. 1997). However, the Congressional Budget Office estimates that the legislation falls more than $13.1 billion short of providing enough funding for the work requirements to be satisfied over the 1997-2002 period. CONGRESSIONAL BUDGET OFFICE, CONGRESSIONAL BUDGET OFFICE MEMORANDUM: FEDERAL BUDGETARY IMPLICATIONS OF THE PERSONAL RESPONSIBILITY AND WORK OPPORTUNITY RECONCILIATION ACT OF 1996, at 12 (1996). Reports from the states on the adequacy of the increased funding for child care are mixed. *See, e.g.*, Jason DeParle, *U.S. Welfare System Dies As State Programs Emerge*, N.Y. TIMES, June 30, 1997, at A1 (reporting sharp increases in child care spending in many states, but noting that shortages still exist, and reporting concerns that increased support for child care may be short term); Tatiana With Ribadeneira, *Welfare Rules Strain Child Care Programs*, Mar. 30, 1997, BOSTON GLOBE, at 7 (describing the shortages in day care in one Boston neighborhood where substantial numbers of mothers are leaving home to work or perform community service under new welfare rules).

282 *See* THERESA FUNICIELLO, TYRANNY OF KINDNESS: DISMANTLING THE WELFARE SYSTEM TO END POVERTY IN AMERICA 10-11 (1993) (describing one woman's struggle to stay off welfare and maintain a job with limited resources for child care, appropriate clothing for work, and other expenses).

283 *See* JAMES GARBARINO ET AL., CHILDREN IN DANGER: COPING WITH THE CONSEQUENCES OF COMMUNITY VIOLENCE 1-4 (1992).

284 For a general discussion of the impact of welfare "reform" on domestic violence victims, see UNDERSTANDING WOMEN'S POVERTY: A SYMPOSIUM ON THE RELATIONSHIP OF DOMESTIC VIOLENCE AND WELFARE RECEIPT, 19 LAW & POL'Y 117 (1997).

285 42 U.S.C.A. § 608(a)(7)(C)(i) (allowing a hardship exemption for battered individuals, defined as individuals who have been battered or subjected to extreme cruelty).

done so.[286] Further, the statute leaves it to the states to determine how to assess who is a victim of domestic violence.[287] Caseworkers exercise this discretion with little or no domestic violence training.[288]

The cost of conforming to the dual standard of ideal mother and unencumbered wage earner will be high for welfare-to-work mothers. If these mothers lack vigilance, and leave children unsupervised and exposed to street dangers or domestic dangers from violent boyfriends or husbands, they are at great risk of losing their children to another relative or the state. A noncustodial father who has had little contact with his child often looks better to a court than a mother who has struggled for years with an imperfect record of child rearing.[289] The current public benefits scheme presents the same double bind that is so common to the law governing maternal conduct: get a job, support yourself, but do not deviate from the ideal mother standard or you will lose your children.

## III
## THE BATTERED WOMAN AS "BAD MOTHER"

This Part explores how the conflicting legal images of motherhood affect battered mothers. Mothers who are victims of domestic violence most strikingly feel the impact of the double standard that laws governing their right to care for their children, on the one hand, and laws regulating their access to economic support during child rearing years, on the other, impose on mothers.

### A. The Impact of Domestic Violence on Maternal Responsibilities

The staggering dimensions of family violence[290] are well-documented. Women[291] and children[292] are overwhelmingly the victims. The victimized women come from all racial, ethnic, religious, and so-

286 As of December 1997, 23 states and Puerto Rico had adopted some or all provisions of the Family Violence Option in their welfare plans. *See* NOW LEGAL DEFENSE & EDUC. FUND, SUMMARY OF STATE ACTIVITY REGARDING FAMILY VIOLENCE PROVISIONS IN THEIR STATE WELFARE PLANS (Dec. 9, 1997).

287 42 U.S.C.A. § 608(a)(7)(c).

288 *See* Vobejda & Havemann, *supra* note 271.

289 *See infra* text accompanying notes 363-64.

290 For purposes of this Article, family violence includes neglect or abuse (physical, psychological, or sexual) of one family member or intimate partner by another.

291 *See* RONET BACHMAN, U.S. DEP'T OF JUSTICE, VIOLENCE AGAINST WOMEN: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT 6 (1994) (reporting that between 1987 and 1991 over 90% of the victims of recorded domestic violence were women); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, VIOLENCE BETWEEN INTIMATES 2 (1994) (showing the rate of victimization by an intimate is ten times greater for women than for men).

292 Family members physically abuse at least 2 million children annually. *See* AMERICAN MED. ASS'N, FAMILY VIOLENCE: BUILDING A COORDINATED COMMUNITY RESPONSE 1 (1996).

cioeconomic groups, as well as from all age levels and educational backgrounds.[293] Battering by a spouse or intimate partner is the single largest cause of injury to women in the United States.[294]

Physical abuse within a family very often extends to the children.[295] In a review of medical records, Stark and Flitcraft found that battered women are six times more likely to have been accused of child abuse than unbattered women.[296] In homes with spousal abuse, the father or father-figure was three times more likely also to abuse the children as compared with families without such abuse.[297] The father abused approximately 50% of the abused children in these homes, the battered woman abused 35% of the abused children, and others or both the man and woman abused the remaining fifteen percent.[298]

In a national random survey, Strauss and Gelles also found a substantial correlation between wife abuse and child abuse: in homes where wife abuse was present, both partners were more likely to abuse their children than if there had been no wife abuse.[299] The survey also found that when wife abuse was severe, 77% of the children had also suffered physical abuse at some time during their lives.[300]

Notwithstanding the clear correlation between maternal abuse and child abuse, there is little research exploring the depth of this connection.[301] Existing research rarely goes beyond establishing the

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293 *See* LENORE E. WALKER, THE BATTERED WOMAN 18-19 (1979).

294 *See* MARYLAND ATTORNEY GENERAL'S & LT. GOVERNOR'S FAM. VIOLENCE COUNCIL, STOP THE VIOLENCE: A CALL TO ACTION, RECOMMENDATIONS AND ACTION PLAN 1 (1996) [hereinafter STOP THE VIOLENCE].

295 One Colorado study reported that 53% of husbands who battered their wives also abused their children. *See* LENORE E. WALKER, THE BATTERED WOMAN SYNDROME 59 (1984); *see also* Liane V. Davis & Bonnie E. Carlson, *Observations of Spouse Abuse: What Happens to the Children?*, 2 J. INTERPERSONAL VIOLENCE 278 (1987) (reviewing the literature on children of battered women, and presenting the results of a study of children in shelters with their mothers). A study of children in shelters for battered women found higher rates of child abuse in families where there is wife abuse than in other families. *See Women, Violence & the Law: Hearing Before the House Select Comm. on Children, Youth & Fams.*, 100th Cong. 4 (1987).

296 Evan Stark & Anne H. Flitcraft, *Women and Children at Risk: A Feminist Perspective on Child Abuse*, 18 INT'L J. HEALTH SERVS. 97, 102 (1988).

297 *See id.* at 106.

298 *See id.*

299 MURRAY A. STRAUSS & RICHARD J. GELLES, PHYSICAL VIOLENCE IN AMERICAN FAMILIES: RISK FACTORS AND ADAPTATIONS TO VIOLENCE IN 8,145 FAMILIES 409 (1990).

300 *Id.* (finding that in families where fathers abused their wives, approximately 50% of fathers and 27% of mothers surveyed abused their children three or more times a year).

301 As part of the recent exploration of mothers and the law, feminist scholars have begun exploring the legal system's response to battered mothers and their children. *See, e.g.*, Appell, *supra* note 66; Ashe & Cahn, *supra* note 7; Tonya Plank, *How Would the Criminal Law Treat Sethe? Reflections on Patriarchy, Child Abuse, and the Uses of Narrative to Re-Imagine Motherhood*, 12 WIS. WOMEN'S L.J. 83 (1997); Symposium, *Domestic Violence, Child Abuse, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 1 (1995); *Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues*, 58 ALB. L. REV. 957 (1995).

nexus between the two kinds of abuse[302] and documenting the harm to the victims, particularly children who witness domestic violence.[303]

To begin evaluating the legal system's response to battered mothers, legal scholars and policymakers need to clarify the ways that battering actually interferes with a mother's ability to care for her children. Further, they need to understand the legal system's current response to battered mothers. A brief review of how the battered mother is likely to fall short of the "ideal mother" standard starts to identify how the system can move from "mother blaming" to "mother accountability." Such a shift in approach is crucial to developing effective strategies for protecting mothers and children.

As discussed earlier, the "good mother" is one who is married, providing her children with a father who lives in the home and supports the family.[304] Most battered mothers do not fit in this category. Women are often blamed for staying with their abusers, but when women who are victims of domestic violence separate from or divorce their abusive partners, they assume the negative label of "single mothers."[305] These separations usually result in economic hardship, often forcing the mother to go on welfare.[306] In addition, a battered mother seeking to avoid immediate physical danger to herself or seeking long- or short-term medical care might have to violate the legal

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302 *See, e.g.*, NATIONAL CTR. ON WOMEN & FAM. LAW, THE EFFECT OF WOMAN ABUSE ON CHILDREN 32-34 (1991).

303 A number of studies have reported on the harm to children who witness domestic violence. For example, one study focused on 25 children who witnessed their mothers being abused. Jane H. Pfouts et al., *Deviant Behaviors of Child Victims and Bystanders in Violent Families, in* EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY 79-99 (Robert J. Hunner & Yvonne Elder Walker eds., 1982). Of the 25 children, 53% acted out with parents, 60% with siblings, 30% with peers, 33% with teachers; 16% had appeared in juvenile court, 20% were labeled truant, 58% were below average or failing in school; caseworkers labeled 40% as anxious and 48% as depressed. *See id.* at 95; *see also* Randy H. Magen et al., Evaluation of a Protocol to Identify Battered Women During Investigations of Child Abuse and Neglect (July 22, 1995) (paper presented at the 4th Int'l Fam. Violence Res. Conf. at the Univ. of N.H., on file with author).

304 *See supra* text accompanying note 6.

305 *See* Lewis Okun, *Termination or Resumption of Cohabitation in Woman Battering Relationships: A Statistical Study, in* COPING WITH FAMILY VIOLENCE: RESEARCH AND POLICY PERSPECTIVES 107, 111 (Gerald T. Hotaling et al. eds., 1988) (noting that 43% of the women studied left abusive relationships); Michael J Strube & Linda S. Barbour, *Factors Related to the Decision to Leave an Abusive Relationship*, 46 J. MARRIAGE & FAM. 837, 840 (1984) (examining factors related to the decision to leave an abusive relationship and revealing that 70.5% of battered women eventually left a violent partner).

306 Women who separate from their abusers experience economic hardship in at least two ways. First, the loss of income from the abuser can be devastating for the mother and children. Second, the abuser may work in a variety of ways to undermine his former partner's ability to support herself and her children after separation. *See* Meier, *supra* note 159, at 206-12 (citing JODY RAPHAEL, PRISONERS OF ABUSE: DOMESTIC VIOLENCE AND WELFARE RECEIPT (1996)). Mothers who are victims of domestic violence were extremely dependent upon AFDC when it was available. *See* Martha F. Davis & Susan J. Kraham, *Protecting Women's Welfare in the Face of Violence*, 22 FORDHAM URB. L.J. 1141, 1141-43 (1995).

and cultural proscription against mothers leaving their children, even temporarily.[307] These characteristics of the battered mother—being single, on welfare, and temporarily separated from her children—may result in the "bad mother" label, a label that carries with it potential civil and criminal sanctions from the legal system, even when the children have not suffered physical harm.

Many battered women deal with other circumstances that genuinely interfere with their children's welfare and that reinforce their bad mother status. The children of battered women are at a substantially higher risk of direct emotional or physical harm than children from nonviolent homes.[308] The harm these children experience includes both physical harm and the effects of witnessing violence.[309]

Children also suffer because mothers who are victims of domestic violence may be physically disabled from injury, sometimes on a regular basis.[310] Finally, battered women may self-medicate these injuries, abusing drugs or alcohol at higher rates than the general female population, necessarily interfering with their ability to care for their children.[311]

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307 *See* Sanger, *supra* note 4, at 384-438.

308 One expert described the harm in the following manner:

> In the vast majority of families, women are the primary caretakers of children. Therefore the devastation of their lives caused by their partner's abuse and coercion affects the children .... Battered women are physically and emotionally worn down by the abuse. This may interfere with a woman's capacity to meet her children's needs. The partner's efforts to isolate the woman may result in the children being denied access to other family members who could offer support and nurturance to the child.
>
> Battering is a major cause of homelessness. Children suffer physical and emotional consequences when they are forced to leave their home ....
>
> Children are also damaged when used as a pawn in the abuser's attempt to hurt his partner. Attempts to undermine the woman's authority as a parent, convince the child that the mother is worthless, initiating custody battles or violating visitation agreements are common tactics that harm children.

JANN JACKSON, INTERVENTION WITH CHILDREN WHO HAVE WITNESSED ABUSE 3 (1990), *quoted in* BEVERLY BALOS & MARY LOUISE FELLOWS, LAW AND VIOLENCE AGAINST WOMEN (1994); *see also* Bonnie E. Rabin, *Violence Against Mothers Equals Violence Against Children: Understanding the Connections*, 58 ALB. L. REV. 1109, 1112-14 (1995) (summarizing studies describing both direct and indirect harm to children living in homes where mothers are victims of domestic violence).

309 *See supra* note 308 and accompanying text.

310 Abuse by husbands or boyfriends is the single largest cause of physical injury to women in America, more common than burglary, muggings, and other physical crime combined. *See* STOP THE VIOLENCE, *supra* note 294, at 1.

311 *See* Mary Ann Dutton, *Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Woman Syndrome*, 21 HOFSTRA L. REV. 1191, 1221-22 (1993); *see also* ANTONE C. FELIX III & KATHLEEN F. MCCARTHY, MASSACHUSETTS DEP'T OF SOC. SERVS., AN ANALYSIS OF CHILD FATALITIES 1992, at 12 (1994) (reporting that of the 67 child fatalities in Massachusetts in 1992, 29 were in families where the mother identified herself as a victim of domestic violence, and in half of the domestic violence cases, the mother was also reported to have a substance abuse problem).

All of these circumstances combine to place battered mothers in the bad mother category, possibly subjecting them to intense legal scrutiny and regulation. An examination of the legal system's response reveals that intervention may occur simply because of these mothers' status as single or welfare mothers. Moreover, even where intervention occurs because the children need protection, the legal system's punitive response is neither appropriate nor effective for protecting children of battered mothers.

### B. The Legal System's Response When Child and Mother Abuse Intersect: Case Studies

Courts evaluate the conduct of battered mothers in a variety of contexts.[312] A battered mother whose partner has abused her child may be a defendant in a criminal prosecution for "failure to protect."[313] That same mother may also be a complaining witness herself in a criminal case against her abuser[314] or a petitioner seeking a civil protection order.[315] Finally, she may be a defendant in a civil proceeding in which the state or the child's father seeks to remove or place limitations on her ability to care for her children.[316] In addition to formal court proceedings, a battered mother may also have involvement with countless law enforcement, court personnel, and social service agencies that may not coordinate or share information.[317] The following case studies illustrate how battered mothers fare in these various settings.

#### 1. *Case Study Number 1: Mothers in Juvenile Court*[318]

Barbara W., a thirty-year-old African-American mother of two daughters, was in many ways different from the typical mother who

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312 Since 1988, all 50 states have enacted civil and criminal remedies for victims of family violence. *See* Meredith Hofford & Richard J. Gable, *Significant Interventions: Coordinated Strategies to Deter Family Violence, in* FAMILIES IN COURT 89, 91 (Meredith Hofford ed., 1989).

313 *See supra* Part I.B.2.c.

314 *See, e.g.*, Donna Wills, *Domestic Violence: The Case for Aggressive Prosecution*, 7 UCLA WOMEN'S L.J. 173 (1997) (describing the role of the criminal law in punishing batterers).

315 *See, e.g.*, JANE C. MURPHY ET AL., INCREASING ACCESS TO JUSTICE FOR MARYLAND'S FAMILIES 19-23 (1992) (describing the process of obtaining a civil protective order in Maryland).

316 *See* Appell, *supra* note 66, at 581-87; Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041 (1991).

317 *See, e.g.*, STOP THE VIOLENCE, *supra* note 294, at 7 (noting that in Maryland, an abused mother and child may seek help from the legal system through the police, a court commissioner, a victim service program, a lay advocate or lawyer, the civil court, the State's Attorney, the criminal court, Child Protective Services, the juvenile court, the Department of Social Services, and the Division of Parole and Probation.).

318 This case study is based upon a civil child protection proceeding in the Juvenile Court in Baltimore, Maryland. As part of a broader study of the legal system's response to battered mothers, the author interviewed key prosecutors and defense attorneys in

appears in juvenile court to defend against charges that she abused or neglected her children.[319] At the time of her court appearance, Barbara W. "was employed as a teacher's aide in a public school and was close to earning her college degree."[320] She had recently married and was living with her new husband and her two daughters, ages four and one, from previous relationships.[321]

During the course of Barbara's relationship with her new husband, Jack, his behavior was typical of batterers.[322] Prior to their marriage, they had a brief but intense courtship.[323] Jack was attentive and neither verbally nor physically abusive towards Barbara or the children.[324] Shortly after they married, he became a different person, arguing often with Barbara and, after a few months, slapping and hitting her on a regular basis.[325] During this early period of the marriage, Jack occasionally "smack[ed]" the children, but did not physically injure them.[326]

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Maryland who manage the prosecution of child abuse cases or the defense of parents in Child in Need of Assistance ("CINA") civil proceedings. For some of the findings from the first phase of that study, see STOP THE VIOLENCE, *supra* note 294. This case study and the two that follow are a result of that research. Because most of the proceedings in both Case Study Number 1 and Case Study Number 2 are not a matter of public record, the real names of the parties have been changed. Although the use of first names for clients is not customary in the author's clinical program, first names have been used here for easy identification.

319 For characteristics of the typical mother appearing in juvenile court, see *supra* notes 86-93 and accompanying text (describing the greater likelihood of state intervention in families headed by poor, single mothers).

320 *See* Transcript of Interview by Susan Rodgers with Linda Koban, Chief Attorney for the Child in Need of Assistance Unit Division of the Office of the Public Defender, State of Maryland, and Attorney for Barbara W. 1 (Aug. 18, 1995) [hereinafter Transcript of Interview with Linda Koban] (transcript on file with author).

321 *See In re A & B*, Nos. 89408003, 89408004 at 33-34 (Baltimore City Ct. Sept. 7, 1994) (names altered to preserve confidentiality) (transcript of hearing, on file with author) [hereinafter *A & B* Transcript]; Transcript of Interview with Linda Koban, *supra* note 320, at 1.

322 For a description of behavior typical of batterers, see Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF ABUSE app. 1 at 88 (Martha Albertson Fineman et al. eds., 1994) (cataloging, on a "Power and Control Wheel," a list of behaviors indicative of abusiveness which include physical, emotional, and sexual abuse). The list of behaviors on the Power and Control Wheel indicates that abusers frequently use a variety of behavioral strategies along with physical abuse to achieve power and control over family members. *See id.* Those tactics include: emotional, economic, and sexual abuse and the use of children, threats, male privilege, intimidation, and isolation. *See id.*

323 The parties became involved in November 1993, and were married in February 1994. *See A & B* Transcript at 32, 34.

324 *See id.* at 32-33.

325 *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1. During the proceedings, the mother testified that her husband monitored her time (to the point of making her account for every minute), accused her of having affairs with other men, and was rude to her friends. *See A & B* Transcript at 74.

326 *In re A & B* at 2 (Baltimore City Ct. July 15, 1994) (adjudicatory stipulation) [hereinafter Adjudicatory Stipulation] (on file with author).

In a pattern typical of batterers, Jack followed the incidents of physical abuse with loving behavior, expressing both remorse and a willingness to change. For her part, Barbara accepted his promises and hoped that things would get better.[327] Following a usual pattern in battering relationships, the loving contrition phase would be followed by a tension building phase in which Jack would be edgy and likely to engage in verbal abuse with little or no provocation.[328] Barbara knew Jack's behavior in this phase meant that physical abuse would follow unless she was very careful and compliant.[329] During this time, she became very tense, feeling both helpless and afraid that anything she did could result in a new round of physical abuse towards her or possibly the children.[330]

Following one particular tension building phase, Jack exploded at his four-year-old stepdaughter, Brooke. After learning that she had been "bad at day care," he grabbed her, took her out of the living room (where Barbara was) and into another room, and beat her with a belt.[331] Barbara heard her husband yelling and her daughter crying, but she did not go into the room.[332] According to Barbara, she knew, from repeated past experience with this cycle of violence, that her intervention would further enrage her husband, and thus place her daughters and herself at greater risk of physical injury.[333]

After her husband stormed back into the living room, Barbara went to her daughter and found her injured as a result of the blows from her husband's belt.[334] Although one-year-old Anna avoided serious injury during this tirade, her stepfather still slapped her because "she would not stop crying."[335] Following the incident, Barbara took her daughter to her mother's house.[336] After hearing Barbara's story and observing her granddaughters, Barbara's mother called the police and her pastor and then took her granddaughters to the hospital.[337]

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327 *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1. Barbara's story is consistent with research Lenore Walker performed in which she identified the cycle of violence in relationships involving domestic violence. LENORE E. WALKER, TERRIFYING LOVE 37, 42-47 (1989); WALKER, *supra* note 295, at 95-104. The three stages that cycle within a battering relationship are a tension-building phase, a period of violent incidents, and a loving contrition period. *See* WALKER, *supra*, at 37, 42-47 (1989); *see also* MARY ANN DUTTON, EMPOWERING AND HEALING THE BATTERED WOMAN 28-29 (1992) (discussing the cycle of violence theory); WALKER, *supra* note 295, at 95-104 (same).

328 *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1.

329 *See id.*

330 *See id.*

331 *See id.*

332 *See id.*

333 *See id.* at 1-2.

334 *See id.* at 1.

335 Adjudicatory Stipulation, *supra* note 326, at 2.

336 *See id.* at 1.

337 *See id.*

The hospital staff examined both girls, treated Brooke for her injuries, and filed a report of suspected child abuse with the Baltimore City Department of Social Services ("DSS").[338]

After determining that the children could only be protected through emergency action, the caseworker then filed a petition with the Juvenile Court seeking to have both of Barbara's children declared "Child in Need of Assistance" ("CINA").[339] The petition also sought to immediately remove the children from the mother's home and to secure an order granting custody of the children to the Department of Social Services.[340]

The petition named Barbara as a respondent in the proceeding in Juvenile Court, but listed the children's biological fathers as unknown.[341] Because he had no legal obligation to provide care for the children, Jack, the stepfather, was not named as a defendant in this proceeding.[342] The petition described Brooke's injuries and stated that her stepfather had caused these injuries and had also beaten her in the past.[343] It also noted that one-year-old Anna had a facial scratch, scars on her chest, and diaper rash.[344] Finally, the petition alleged that Barbara's mother had "failed to protect" her daughters from abuse and was in the home during Brooke's recent beating.[345] The petition did not include any facts related to Jack's abuse of Barbara.[346]

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338 *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1. *See generally* MD. CODE ANN., FAM. LAW § 5-704 (1991 & 1997 Supp.) (requiring health practitioners to report suspected child abuse).

339 For the statutory definition of a "child in need of assistance," see MD. CODE ANN., CTS. & JUD. PROC. § 3-801(a) (1995 & 1997 Supp.) ("'Child in need of assistance' is a child who requires the assistance of the court [in part] because . . . [h]is parents, guardian, or custodian are unable or unwilling to give proper care and attention to the child and his problems . . . .").

340 *See* Petition of DSS, *In re A & B* (Nos. 89408003, 89408004) (Baltimore City Ct. Mar. 1994) [hereinafter Petition of DSS].

341 *Id.*

342 *See, e.g.*, Brown v. Brown, 412 A.2d 396, 402 (Md. 1980) ("That the legal duty to support does not ordinarily encompass a stepchild is beyond doubt."). *See generally* CLARK, *supra* note 18, at 263-64 (explaining that the common law does not impose on stepparents a duty to support stepchildren absent a voluntary assumption of such a duty).

343 Petition of DSS, *supra* note 340.

344 *Id.*

345 *Id.*

346 *Id.* While CPS workers in Maryland have started training on domestic violence issues, this lack of attention to potential battering of the mother during child abuse investigations and court proceedings is typical. *See, e.g.*, Dohrn, *supra* note 66, at 7-8 (noting that "[j]uvenile court [proceedings] typically fail[ ] to identify domestic violence, advocate on behalf of the battered mother or hold the abusive partner accountable for his violent behavior"). Some states have made more progress in this area. *See, e.g.*, Enos, *supra* note 152, at 250 n.137 (describing Massachusetts's experience with training CPS workers in domestic violence).

The court held a brief hearing to consider the petition. Although Barbara was present, she was not represented by counsel.[347] The caseworker who conducted the initial investigation was the only witness at the hearing.[348] After the hearing, the court issued an order for shelter care, authorizing the removal of both children from their mother's care.[349] Although the court placed the children in the grandmother's care, it granted custody of the children to the DSS.[350] Barbara was granted supervised visitation two months later.[351]

The stepfather, Jack, was arrested and charged with child abuse.[352] Although Barbara obtained a civil protective order,[353] which prevented Jack from returning to the home, she also lent Jack's mother money to help her post bail for Jack's release from jail.[354]

Barbara first had an opportunity to present her side of the case in juvenile court at the disposition hearing held over eight months after removal of the children.[355] Barbara and her attorney presented testimony that: (1) the incident involving the beating with the belt was the first incident in which her husband had physically abused either of the children;[356] (2) she had removed the children as soon as it was safe to do so;[357] and (3) she had taken all steps to keep the stepfather away from the children, including obtaining a civil protection order,[358] cooperating fully in Jack's criminal prosecution,[359] and partici-

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347 *See In re A & B*, Nos. 89408003, 89408004 (Baltimore City Ct. Mar. 21, 1994) (docket entries) (names altered to preserve confidentiality) [hereinafter Docket Entries] (noting that mother appeared pro se); *see also In re A & B* (Baltimore City Ct. May 18, 1994) (appearance notice) (indicating that Office of the Public Defender did not enter its appearance until after date of hearing to consider petition).

348 *See* Docket Entries, *supra* note 347 (indicating that (1) a caseworker was present and filed a petition, subpoena duces tecum, and witness summons for next hearing, and (2) no other witnesses were present).

349 *In re A & B* at 1 (Baltimore City Ct. May 18, 1994) (order granting shelter care).

350 *Id.*

351 *See id.*

352 *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1.

353 *See, e.g.*, MD. CODE ANN., FAM. LAW §§ 4-504 to 4-506 (1991) (providing a procedure by which victims of family violence may obtain an order that, inter alia, requires the abuser to stay away from the residence of the victims).

354 *See A & B* Transcript at 35. When asked why she posted bail, Barbara testified that she thought Jack had "changed," and was "ready to make a better life for himself" and "was really sorry." *Id.* at 36-37. This response reflects a typical pattern of behavior in couples experiencing the "loving contrition" of domestic violence. *See, e.g.*, WALKER, *supra* note 293, at 95-96 (describing loving contritions phase).

355 Fathers also have notice and an opportunity to be heard at this stage, but are most often absent from these proceedings. *See supra* notes 94-98 and accompanying text.

356 *See A & B* Transcript at 33-34.

357 *See id.* at 34.

358 *See id.* at 99.

359 *See id.* at 101-02.

pating in a counseling program for victims of domestic violence at a local domestic violence program.[360]

Counsel represented Brooke's birth father at the hearing. The attorney's cross-examination of Barbara repeatedly emphasized that Barbara had stayed in another room while her husband beat her daughter.[361] On redirect, Barbara testified that she did not go into the other room because, based on her past experiences with her husband, she was afraid that her intervention would further endanger her child and herself.[362]

The worker from the DSS also testified, recommending that Brooke's birth father receive custody of Brooke.[363] The worker made this recommendation without ever visiting the maternal grandmother's home to investigate the care that Brooke received, and despite the fact that the birth father had had little or no contact with Brooke up until this point.[364] The worker also testified that, in her opinion, Barbara's three sessions at the House of Ruth did not give Barbara the ability to adequately provide for her children.[365] Despite Barbara's efforts to keep Jack away from the children, and the fact that Barbara had no prior history of failing to protect her children or of abusing or neglecting them, the judge refused to return the children to their mother.[366] His questions and comments from the bench focused almost exclusively on the fact that Barbara had contributed money toward her husband's bail.[367] The judge commented that, by taking such action, Barbara had endangered the children and evidenced her lack of concern for their welfare.[368]

In his decision not to return the children to their mother, the judge also emphasized the availability of the children's fathers as alternative caretakers.[369] The judge was impressed with the fact that both fathers had retained counsel and attended the hearing.[370] He placed little importance on the mother's testimony indicating that neither

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360 *See id.* at 103-04.

361 *See id.* at 62.

362 *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1-2.

363 *See A & B* Transcript at 11.

364 *See id.* at 18-19.

365 *See id.* at 11-12.

366 The judge stated "[s]he's not exercised good decision-making when it comes to selecting the men in her life. The last one [that she selected] beat her child while she cowered in fear in another room. She essentially left this three or four-year-old child defenseless while this brute worked his will." *Id.* at 240.

367 *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1.

368 *See id.*

369 During Barbara's counsel's cross-examination of Brooke's birth father, the judge stated: "Now the father is right there. He's doing everything he's supposed to do, and more. He's protective and caring of the child. Shouldn't the Court focus on what he's doing now?" *A & B* Transcript at 154.

370 *Id.*; Transcript of Interview with Linda Koban, *supra* note 320, at 2-3.

father had played any part in caring for, supporting, or maintaining regular contact with his daughter since her birth.[371] With regard to the battered child, Barbara testified that Brooke's father never visited the child after her birth, and regularly ignored Barbara and her daughters when he saw them in church.[372]

The judge ordered that Barbara and the birth fathers have regular visitation, and allowed placement to remain with the maternal grandmother, but the DSS retained custody.[373] After over seven more months of court-ordered classes and evidence of continued separation from Jack, Barbara finally regained custody of her daughters.[374]

The ultimate result in this case makes sense: the court required a mother to separate from a husband who hurt her child. However, what is both typical and disturbing about this case is that at no point—from the child welfare agency's investigation and removal of the children to the restoration of custody over one year later—did anyone ask whether the husband had physically abused the mother. Despite the overwhelming evidence that households with abused children are often households with abused mothers,[375] neither the child protective service worker, nor the lawyers for the children and the DSS, nor the judge hearing the case ever inquired about the possibility that Barbara was a victim of domestic violence. Such an inquiry would have provided the child welfare agency and its lawyers who were evaluating this case with valuable insights. Perhaps that information might have focused the energy and limited resources of the child welfare agency on securing removal of the stepfather, rather than the children, from the home.[376]

Even if the agency correctly determined that the girls needed to be removed, the fact that the mother was a battered spouse would have provided valuable information for developing the "reunification plan," which lays out, among other things, the steps that the mother

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371 At one point, Barbara's counsel attempted to introduce testimony that Brooke's father, upon finding out Barbara was pregnant, tried to persuade her to have an abortion, but the judge found it irrelevant. *A & B* Transcript at 17.

372 *See id.* at 166-67.

373 *Id.* at 241-42.

374 *See In re B* at 1, No. 89408004 (Baltimore City Ct. Apr. 10, 1995) (stipulation) (indicating that Barbara's older daughter was returned to her on March 13, 1995, and the younger daughter was returned on April 10, 1995). The DSS continued to monitor Barbara's care of her daughters under an "order of protective supervision" until June 13, 1995. *Id.* The court ordered Barbara to attend both child abuse and domestic violence counseling, and she began attending domestic violence counseling shortly after her daughter was beaten. *A & B* Transcript at 25.

375 *See supra* notes 295-300 and accompanying text (describing studies finding correlation between child abuse and abuse of mothers).

376 The failure to act to remove the abusive father from the home is unfortunately not surprising. *See supra* note 98 (describing the failure of child welfare agencies to use civil protection orders to remove abusers from the homes of their victims).

must take to have her children returned to her.[377] For example, the plan in this case included parenting classes designed to help abusive parents to control their violent behavior.[378] While these classes may have provided Barbara with some useful insights, counseling for battered women and children would have more directly addressed the problem that put Barbara's children at risk: her relationship with an abusive man.[379]

Another disturbing aspect of this case is that if the children's grandmother had not been available as a caretaker, this baby and toddler would have been placed either in foster care or with fathers with whom they had had little contact since birth. Finally, the case starkly demonstrates the different standards that the legal system imposes on mothers and fathers. Although the judge condemned Barbara's choice of husbands and her inability to protect her children from their stepfather, he ignored both birth fathers' lifelong neglect of their children.

The judge's failure to consider the circumstances of the mother's life—particularly her battering and the complex dynamics of her relationship with her husband—hampered his ability to render an informed decision in this case. As Barbara's attorney pointed out:

> When we first came into court the only thing the judge could really think of to say was that she had given the bail money, that if she really cared about the safety of her children she would have left the guy in jail. I thought this was really cruel. That was really the main reason the judge didn't return the kids to her at that point, because he said she had really endangered them by taking that action. I think he wasn't paying attention to the real dynamics. She was emotionally involved with her husband. I guess it was like the mother was asking for it in the judge's opinion.
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> . . . .
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> The whole thing goes back to what the judges spoke about in our training for attorneys doing this work, about what mothers are supposed to be.
>
> The juvenile court judges talk about maternal instinct, the high standards that mothers are held up to in protecting their kids. You know just like [mothers] should literally throw [themselves] on the floor for [their children]. I just don't know how realistic they are. That is probably the issue that the judges needed to be educated on.

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377 *See supra* note 74 and accompanying text (describing states' obligations, under 42 U.S.C. § 671(a)(15) (1994), to develop a plan to reunify children with parents after removal for abuse or neglect).

378 *See* Adjudicatory Stipulation, *supra* note 326, at 1.

379 Although the stipulation in this case required Barbara to complete counseling at the House of Ruth, Barbara and her attorney initiated this counseling with no knowledge by or assistance from the worker developing the reunification plan. *See* Transcript of Interview with Linda Koban, *supra* note 320, at 1.

> They should be trained about how the abuse wears [mothers] down. How frightened you feel. So you can't protect your kids. You have this so called maternal instinct that could be displaced by fear and especially when you take into consideration all the other conditions that these people live under.[380]

### 2. *Case Study Number 2: Mothers as Criminal Defendants*[381]

In October 1994, Vanessa M., a twenty-five-year-old resident of Baltimore, Maryland was arrested and charged with contributing to child abuse.[382] At the time of her arrest, she was in the hall outside her apartment with her injured two-year-old daughter, Chelsea.[383] Chelsea had suffered severe facial injuries (her face was swollen so much that her eyes were nearly closed), and a three-inch, third-degree burn on her thigh.[384] After the police incarcerated Vanessa upon arrest, Chelsea was taken from her mother's care.[385]

In addition to charging the child's mother, the police charged Vanessa's boyfriend, eighteen-year-old Hank, with child abuse and assault and battery.[386] Although the police officer later testified that she noticed Vanessa had visible bruises on her face at the time of her arrest, the police neither conducted an investigation into the cause of the mother's injuries nor charged Hank with any crime for her injuries.[387]

In February 1995, five months after the arrest, the prosecutor from the Child Abuse Unit at the Baltimore City State's Attorney's Office began to prepare the case for trial.[388] The prosecution's theory stated that, although the boyfriend had intentionally inflicted the injuries, the mother had failed to intervene or to seek prompt medical attention after Chelsea had sustained the injuries.[389] According to the police report, Vanessa did not seek medical attention for Chelsea un-

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380 *Id.* at 1, 4-5.

381 This case study is based upon a criminal prosecution in Baltimore, Maryland. For a description of the sources upon which the study is based, see *supra* note 318.

382 *See* Incident Report Complaint No. 8J-15104, Baltimore, Md. Police Dep't (Oct. 18, 1994) [hereinafter Incident Report] (transcript on file with author). For the text of Maryland's child abuse law, see MD. CODE ANN., CRIMES & PUN. § 35(C) (1996); Palmer v. State, 164 A.2d 467, 474 (Md. 1960) (holding that a mother can be criminally responsible for failing to protect her child from abuse by a third person).

383 *See* Transcript of Interview with Julie Drake, Chief Attorney, Child Abuse Prosecution Unit, State's Attorney's Office in Baltimore, Md. 4 (Aug. 2, 1995) [hereinafter Transcript of Interview with Julie Drake] (transcript on file with author).

384 *See* Incident Report, *supra* note 382.

385 Vanessa was released after 24 hours, but Chelsea was not returned to her. *See* Transcript of Interview with Julie Drake, *supra* note 383, at 2.

386 *See* Incident Report, *supra* note 382.

387 *See* Transcript of Interview with Julie Drake, *supra* note 383, at 3. The arresting officer had been on the force for four years. *Id.*

388 *See id.* at 2.

389 *See id.* at 2-3.

til more than twenty-four hours after Hank had beaten her.[390] Moreover, police and prosecutors assumed that Vanessa had continued to protect her boyfriend and was not concerned with the child's welfare.[391]

The prosecutor first received information raising the possibility that Vanessa had also been a victim of Hank's abuse when Vanessa's aunt, who happened to work in the courthouse where the case was pending, approached the prosecutor during her preparation for trial.[392] Vanessa's aunt described to the prosecutor her suspicion that Hank had regularly physically abused Vanessa during their relationship.[393] She also insisted that the police report, which indicated that Vanessa had substantially delayed seeking medical help for her daughters, must have been wrong.[394]

The prosecutor then approached Vanessa's public defender to see whether she could provide any information regarding her client's possible victimization.[395] The defense attorney acknowledged that Vanessa might be a victim of abuse, but did not offer any further information or details about the circumstances surrounding the events leading to Vanessa's arrest.[396] The public defender also refused to allow the prosecutor to interview Vanessa.[397]

Most prosecutors would have ended the investigation and negotiations with the defense at that point.[398] However, this prosecutor had training and knowledge obtained outside her employment about the links between child abuse and domestic violence, and, therefore, persisted in convincing Vanessa's attorney to focus on domestic violence as a relevant consideration for both the defense attorney and the prosecutor.[399] The prosecutor suggested that if Vanessa sought domestic violence counseling and testified for the state against Hank, she would "stet" the case.[400]

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390 Incident Report, *supra* note 382.

391 *See* Transcript of Interview with Julie Drake, *supra* note 383, at 3.

392 *See id.*

393 *See id.*

394 *See id.*

395 *See id.*

396 *See id.*

397 *See id.*

398 *See* Julie Drake, Remarks at the Governor's Third Conference on Child Abuse & Neglect: Responding to Change (Apr. 28, 1995) (notes on file with author).

399 *See* Transcript of Interview with Julie Drake, *supra* note 383, at 3-4.

400 *See id.* at 4. For the statutory provision on a "stet," see MD. CODE ANN., 1 MD. RULES, R. 4-248(a) (1998). A "stet" disposition indefinitely postpones trial of a charge. The stetted charge may be rescheduled for trial at the request of either party within one year and thereafter only by order of the court for good cause shown. *Id.* While Vanessa was charged with this crime and its disposition would remain on her record, a "stet" means the state would never prosecute the charges as long as she refrained from involvement in further criminal activity for a year.

Once the stet was entered and Vanessa became the state's witness, the prosecutor was finally able to interview her and ask questions about her own victimization and how that had affected her ability to care for her children.[401] In the course of this conversation, the prosecutor learned that Vanessa had indeed been a victim of domestic violence over most of her approximately one-year relationship with Hank.[402] Hank's physical abuse had in the past left Vanessa with facial bruises.[403]

The prosecutor also learned that on the day of Chelsea's beating, Vanessa had left the apartment to take her older daughter to school.[404] While she was out, Hank had struck Chelsea in the face and burned her with a hot spatula and multiple cigarettes.[405] When Vanessa returned and discovered Chelsea's injuries, she told Hank that she was taking Chelsea to the hospital.[406] In behavior typical of batterers,[407] Hank refused to let her leave.[408] He bolted the door, took out a knife and held it up to her throat, keeping Vanessa and her daughter in the apartment for the next twenty-four hours.[409] When Hank finally left the apartment, Vanessa ran out and called for help.[410] The police arrived, observed the child's injuries, and subsequently arrested Vanessa.[411]

After the prosecutor heard the full story, she realized the inadequacy of the legal system's response:

> I stetted the case. She became a state's witness at which point [the boyfriend] pled. He pled guilty to physical child abuse and got a 15 year jail term which mom was real happy with but what upset me about this case is that when I sat down and talked to [Vanessa] after I entered stet, the story she told me was horrendous.
>
> . . . He shouldn't have just pled guilty to physical child abuse. It wasn't *just* that she didn't have a chance to seek medical treatment and this *wasn't* a simple battery on her. He held her hostage after he hurt the two year old. . . .
>
> And the bottom line is that [that] man should have been charged with false imprisonment and assault with a dangerous and deadly weapon for putting the knife up against her throat. I could have gotten twice the sentence I did and she would never have to

401 *See* Transcript of Interview with Julie Drake, *supra* note 383, at 4.
402 *See id.*
403 *See id.* at 3, 4.
404 *See id.* at 4.
405 *See id.*
406 *See id.*
407 *See* Mahoney, *supra* note 322, app. 1 at 88 (setting forth behavior patterns of batterers, including isolation and intimidation).
408 *See* Transcript of Interview with Julie Drake, *supra* note 383, at 4.
409 *See id.*
410 *See id.*
411 *See id.*

> worry about him getting out on parole and coming looking for her which she is worrying about now. But I wasn't told by the police or her attorney.[412]

Although the evidence against Vanessa seemed to merit further investigation and re-evaluation, she was simply arrested and prosecuted. Mothers are typically prosecuted under these circumstances.[413] Under current practice in failure-to-protect cases like Vanessa's, prosecutors and defense attorneys see little downside risk in failing to explore the existence of domestic violence and its impact on the disposition of the mother's case.[414] The prosecutor's main objective in Vanessa's case was to secure a conviction against the real offender, the boyfriend.[415] Prosecuting Vanessa strengthened the case against Hank because Vanessa had to tell the story of Hank's beating Chelsea. The prosecutor in such a situation is likely to be unconcerned with the mother's potential acquittal because the real threat to public safety is the violent boyfriend.

From the perspective of Vanessa's defense attorney, her client's story would provide an effective defense at trial. The goal of the defense is to obtain an acquittal, and the young and overzealous defense attorney, relatively secure in the knowledge that her client's story will deliver an acquittal at trial, sees little or no benefit in sharing information or cooperating with the prosecutor in the early stages of a case.[416] In most cases, neither the prosecutor nor the defense attorney seem concerned with the impact that criminal charges, pretrial incarceration, and testifying at trial will have on defendants like Vanessa or on those defendants' roles as mothers. Children are removed, at least temporarily, and mothers like Vanessa undergo increased scrutiny in any future encounters with the child welfare bureaucracy. In addition, as in the civil child protection case, children, at least temporarily, lose the parent who has been their principal caretaker.

### 3. *Case Study Number 3: Mothers as Defendants in Divorce and Custody Proceedings*[417]

Wanda Schoenewetter and Scott Bates were married in a rural Maryland town in 1981.[418] They lived together for six years and had two children, Clifford and Scott. In 1988, Wanda filed for divorce on

412 *Id.*

413 *See supra* notes 152-58 and accompanying text and cases cited therein.

414 *See* Transcript of Interview with Julie Drake, *supra* note 383, at 3-4.

415 *See id.* at 3.

416 *See id.* at 3-4.

417 This case study is based on *Schoenewetter v. Bates*, No. 238 (Md. Ct. Spec. App. Oct. 30, 1989) (per curiam). Because the facts in this case are part of a public record, the names have not been changed.

418 Brief for Appellant at 2, Schoenewetter v. Bates, No. 238 (Md. Ct. Spec. App. Oct. 30, 1989) [hereinafter Brief].

the grounds of constructive desertion.[419] At the time of the divorce, the parties' children were ages ten and eight.

A divorce decree that incorporated terms of a settlement that the parties had reached was granted in June 1988.[420] Among other things, the parties agreed that the mother "would have custody of the children and that [the father] would have visitation every other weekend, alternate major holidays, and [thirty] days each summer."[421]

Initially, the father visited his children.[422] As time progressed, he stopped going to court-ordered counseling and began to verbally abuse Wanda and the children.[423] Because of this behavior, the mother ceased communications with him,[424] and he stopped requesting visitation.[425]

The divorce agreement quickly unravelled. At post-divorce hearings that Wanda had brought to enforce the agreement, she testified about the father's continuous abuse of her and the children throughout the marriage and following the divorce.[426] She testified that soon after the divorce, the father broke into her house, chased one child around the house with a knife, assaulted the child, destroyed and stole property, and assaulted a police officer.[427] The judge denied her request to call the police officer from the assault incident to testify.[428] She also testified that the father harassed her over the telephone, the children feared the father, and that the father failed to appear for a visitation during the month prior to the hearing.[429] Wanda described a variety of the father's abusive behaviors, ranging from the annoying to the life-threatening.[430] She testified that the father threatened to

419 *See* Complaint for Absolute Divorce at 2, Bates v. Bates, CA No. 87-394 (Md. Cir. Ct. May 7, 1987). For the relevant statutory provision, see MD. CODE ANN., FAM. LAW § 7-103(a)(2) (1991). In order to obtain a divorce on constructive desertion grounds, the parties have to be separated for one year and the moving party must prove that he or she left the marital residence because the conduct of one spouse made it impossible for the other spouse to stay in the marital home and to maintain his or her "health, self-respect and reasonable comfort." Lemley v. Lemley, 649 A.2d 1119, 1127 (Md. Ct. Spec. App. 1995).

420 *Bates* (CA No. 87-394) (decree of absolute divorce).

421 *Id.*

422 *See* Brief, *supra* note 418, at 3.

423 *See id.*

424 *See id.*

425 *See id.*

426 *See id.* at 4.

427 *See id.*

428 *See id.*

429 *See id.*

430 *See id.*

kill her and the children,[431] and had hit the minor children.[432] She further testified that the Department of Social Services had investigated the father and ordered him to stay away from the children,[433] and that he had failed to pay child support,[434] had terminated the minor children's health insurance,[435] and had made harassing phone calls.[436] In a court-ordered psychological assessment of the children and the parties, the children reported that their father had hit them and had threatened to place them in a foster home, and that they were anxious about the father's threats to kill them and their mother.[437] The psychologist recommended that the father be denied overnight visitation with the children, and that the Department of Social Services terminate his visitation with the children if it ever found evidence of child abuse.[438] Cumulatively, the evidence presented a compelling picture of serious spousal and child abuse.

The father denied the charges of child abuse.[439] The judge refused Wanda's counsel's request that he interview the children, declaring that the children might be brainwashed like "'Manchurian candidates.'"[440] Treating the mother's allegations about the children's abuse as untrustworthy, the judge appeared to require no less than a conviction for child abuse before it would be willing to modify the visitation order:

> I don't think that . . . the Court really . . . tends to discount this child abuse business. I mean, it's almost like one of those things that becomes vogue today. People start[ed] a couple years ago, read about it in a magazine. Yeah, I can't get him, or I can't get her

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431 *See id.* "[H]e called me, and I just hang up on him, because we've had so much abuse from him, calling up, threatening me, telling me that he's putting you and those f-ing kids out of the house, and I'm going to fix you, I'm going to get you." Transcript at 16-17, Bates v. Bates, CA No. 87-394 (Md. Cir. Ct. Apr. 26, 1989) [hereinafter Bates Transcript II]. "He has told me and he's told them that he will kill them." *Id.* at 56.

432 *See id.* at 15. "He chased my oldest son around with a knife, knocked him around, broke up things in the house, and stole things out of it, and he was arrested then for assaulting a police officer." *Id.* at 15.

433 *See id.* at 54. "He's hurt my kids. Social Services blocked him from seeing the children, they proved it." *Id.*

434 *See* Brief, *supra* note 418, at 13. "Like the first foreclosure statement, I didn't know anything . . ., until he come out [of] the post office, and told me that I'm putting you and those f-ing kids out, and he's waving the paper." Bates Transcript II, *supra* note 431, at 23.

435 *See* Bates Transcript II, *supra* note 431, at 18. "They are in counseling at school, Scottie is, but after, in August, I could not afford it anymore, as I said, Mr. Bates cancelled my children's medical insurance and their life insurance. There's no money coming anywhere." *Id.*

436 *See id.* at 16-17, 56. "Everytime that he calls me, I hang up. There is, I've already had [a] police report filed on phone harrassment [sic] from him." *Id.* at 17.

437 Report on Well-Being of Parties' Minor Children at 5-7, Bates v. Bates, CA No. 87-394 (Md. Cir. Ct. May 13, 1988).

438 *See id.* at 8.

439 *See* Brief, *supra* note 418, at 4.

440 *Id.*

> on anything else, well, I'll charge a little bit of this child abuse, and get the Department of Social Services people running up and down the road, and cause a big stink. Bring him up there and we'll have it.
>
> What happens in 99% of these cases? The State's Attorney gets up and says Your Honor, we can't prove this case, we [nol] pros. Well, by that time, all the damage is done anyway.
>
> This is, he was never convicted of child abuse. Child abuse in Maryland . . . is a 15 year felony.
>
> That's exactly what it is. The case comes up, it's not proved, it's thrown out of Court. . . . [R]eal child abuse is one of the most horrifying crimes that there can be. But, true cases are not . . . all that many.[441]

The court ordered continued visitation.[442] Shortly after the court's order, the children returned from a visit with their father and told Wanda that he had again abused them and threatened to kill them.[443] They told her that he had also threatened to kill her, had taken them on a hunting trip where he pointed a gun at them, had squirted them with deer blood, and had driven while intoxicated with the children in the truck.[444] Wanda contacted the local DSS, who told her there was nothing that the DSS could do. She then left Maryland in fear for the lives of herself and her children.[445]

After the father discovered her departure, he filed a Complaint for Contempt and sought an ex parte order granting him an immediate change of custody.[446] The trial court granted the motion and ordered that the father have permanent custody of the minor children.[447] The court also found Wanda in contempt of court and fined her $20,000, providing that she could purge her contempt by turning the children over to the father, but freezing distribution of the proceeds of the sale of her property until she purged her contempt.[448]

The court based the decision to change the custody of the two minor children on a single incident of visitation denial. The court stated:

> [I]f a party determines as the Court feels as a matter of fact she [i.e., the mother] has determined, that that party is not going to abide by

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441 Bates Transcript II, *supra* note 431, at 47-48 (last omission in original).

442 *See id.* at 48.

443 Affidavit of Wanda Schoenewetter at 2, *Bates* (CA No. 87-394) [hereinafter Schoenewetter Affidavit].

444 *Id.* at 2-3; Affidavit of Clifford Bates at 9-10, *Bates* (CA No. 87-394).

445 Schoenewetter Affidavit, *supra* note 443, at 3 (CA No. 87-394).

446 Complaint to Cite for Contempt and Ex Parte Relief for Immediate Change of Custody, *Bates* (CA No. 87-394).

447 *Bates*, CA No. 87-394 (Jan. 4, 1989) (court order).

448 *Id.*

> orders of courts insofar as visitation is concerned. That seems to me [to be] extraordinarily strong evidence that that person is unfit to have custody. Because it has to be recognized by all parties it seems to me that ultimately when they're involved in litigation it is indeed up to the courts to determine in connection with custody and visitation what the nature and extent of those rights are going to be. And if one party thereafter who has custody says well, I'm simply not going to abide by it, I'm not going to allow custody, it seems to me that that gives a court a basis from which it may fairly and rationally draw the inference that that person should not have custody.[449]

The trial court's disposition of Wanda's case demonstrates the double bind that custody proceedings place on mothers who are victims of domestic violence and have children at risk of violence. Choosing to deny the father visitation based on her fear of his violent behavior, the mother faced the serious and costly ramifications of contempt of court proceedings. In addition, as this case demonstrates, denial of visitation can lead to loss of custody. If Wanda had granted the father visitation despite what her children had told her, and this decision had resulted in injury to them, her failure to protect her children could have resulted in criminal prosecution or loss of her children to the state.[450]

The DSS's refusal to assist Wanda limited her options even more. The DSS, however, was under no obligation to assist her. The Supreme Court held in *DeShaney v. Winnebago County Department of Social Services*[451] that the state has no affirmative duty to protect an abused child.[452] The response of the DSS, coupled with the court's refusal to fully hear her request to modify the father's visitation, effectively barred Wanda's access to the legal system.

In addition, this case demonstrates Martha Fineman's contention that mothers are "taken out of contexts."[453] The trial judge "classified" Wanda Schoenewetter as someone who "is not going to abide by orders of courts," and therefore unfit to have custody of her children.[454] The court failed to consider the circumstances of her refusal

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449 Transcript at 37, Bates v. Bates, CA No. 87-394 (Md. Cir. Ct. Apr. 6, 1989) [hereinafter Bates Transcript I].

450 In addition to criminal sanctions, failure to protect a child constitutes grounds for the initiation of child protection proceedings. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 3-801(e)(1) (1995 & 1997 Supp.) (defining "child in need of assistance," in part, as a child whose "parents . . . are unable or unwilling to give proper care and attention to the child"). For an application of this definition in the context of a failure-to-protect case, see Case Study Number 1, *supra* Part III.B.1. It can even result in termination of parental rights. *See, e.g.*, MD. CODE ANN., FAM. LAW § 5-313 (1991 & Supp. 1997).

451 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989).

452 *Id.* at 202-03.

453 FINEMAN, THE NEUTERED MOTHER, *supra* note 4, at 67.

454 Bates Transcript I, *supra* note 449, at 37.

to obey the court order, her own victimization, her desire to protect her children, and the impact of the order on the children.

Finally, this case demonstrates the dual standard that the law imposes on mothers and fathers. After withholding court-ordered visitation, this mother was deemed "unfit." At the time the court awarded the father custody, there was ample evidence in the record of the father's violence towards his wife and children, as well as his lack of commitment to his children's financial security. Despite this behavior, the court was willing to "reward" him with the children in order to punish the mother for her rebellious refusal to obey the court's visitation order.[455]

## CONCLUSION

The dichotomy that this Article highlights between the law's view of mother as self-sacrificing nurturer and as equal wage earner resembles the longstanding debate among feminists about "sameness" and "difference."[456] Justification for separate treatment of women based on their status as mothers reinforces the ideal image of motherhood that hurts women in child placement decisions and also raises the specter of a long history of gender discrimination. On the other hand, ignoring the interrelationship between child rearing responsibilities and economic self-sufficiency leads to public policy that hurts families, particularly women and children. While feminist theory[457] has never adequately resolved the sameness/difference conflict, the theory offers valuable tools for the task of rethinking the legal image of motherhood. Its "high valuation of context"[458] pushes advocates, courts, and scholars away from the law's current narrow stereotypes of mothers, and forces a broader and more careful consideration of women as mothers. This Article's analysis of family, criminal, and welfare law has been an attempt to provide such a broader and more careful consideration. Examining these bodies of law from the per-

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455 An appellate court ultimately overturned the trial judge's decision. The appellate court remanded the case for a rehearing of the custody matter before another judge. Schoenewetter v. Bates, CA No. 328 (Md. Ct. Spec. App. Oct. 30, 1989). As discussed above, *see supra* notes 52-58 and accompanying text, even when the losing party has the resources to successfully appeal an adverse custody ruling, the loss at trial and the appeal process exact an emotional and financial toll on both mothers and children. In this case, Wanda Schoenewetter and her children suffered substantially as a result of these proceedings. *See* Interview with Karen Czapanskiy, Attorney for Wanda Schoenewetter (Aug. 18, 1997) (notes on file with author).

456 For a discussion of different schools of feminist thought that explore the sameness/difference debate, see Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 829-41 (1990).

457 I use the term feminist theory to describe liberal, cultural, radical, and post-modernist feminism. For an excellent account of how these different branches of feminist theory have considered motherhood, see Ashe & Cahn, *supra* note 7, at 101-09.

458 *Id.* at 109.

spective of mothers illustrates both problems with, and potential changes in, the legal system's response to mothers as caretakers and financial supporters of their children.

The child placement cases demonstrate the tendency of the legal system to conceptualize child placement decisions as mother versus child. This construct ignores the profound bond—resulting from reproductive labor, or the emotional bond that primary caretaking creates, or from both—that most mothers feel for their children. Recognition of this bond should be—absent clear evidence to the contrary—a starting point for courts and caseworkers who are often too quick to view mothers and children as adversaries.

This tendency to cast mother and child as adversaries has a particular impact on battered mothers and their children. The two systems responding to these mothers and children—the child welfare bureaucracy and the domestic violence service providers—have long viewed themselves as adversaries.[459] The child welfare system has generally failed to recognize that the most effective tool to protect children may not be removing them from their mothers' care. In some situations—particularly the failure-to-protect cases that this Article examines—protection of children means addressing a situation that endangers both mother and child. Furthermore, domestic violence advocates and the courts hearing domestic violence cases view their primary roles as protecting the adult victim rather than the children. The goals of the two systems—child welfare and the elimination of domestic violence—should not, however, be viewed as incompatible. Recent trends, although still in their infancy, offer reason for hope. Several initiatives, primarily from the social scientists, indicate that the legal and social service systems responding to family violence are recognizing and working out supportive relationships that will benefit both constituencies.[460]

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459 *See, e.g.*, LAUDAN Y. ARON & KRISTA K. OLSON, EFFORTS BY CHILD WELFARE AGENCIES TO ADDRESS DOMESTIC VIOLENCE: THE EXPERIENCE OF FIVE COMMUNITIES (1997); Mary McKernan McKay, *The Link Between Domestic Violence and Child Abuse: Assessment and Treatment Considerations*, CHILD WELFARE, Jan.-Feb. 1994, at 29, 32-33 (stating that "when agencies assisting victims of domestic violence interfaced with the child welfare system . . . philosophies and values clashed").

460 *See, e.g.*, ARON & OLSON, *supra* note 459; Jeffrey L. Edleson, Mothers and Children: Understanding the Links Between Woman Battering and Child Abuse (Mar. 31, 1995) (presented at the Strategic Planning Workshop on Violence Against Women, National Inst. of Justice, in Wash., D.C., on file with author); Susan Schechter, Model Initiatives Linking Domestic Violence and Child Welfare (June 8-10, 1994) (paper presented at Integrating Policy and Practice for Families, a conference on Domestic Violence and Child Welfare, in Racine, Wis., on file with author); Susan Schechter & Jeffrey L. Edleson, In the Best Interest of Women and Children: A Call for Collaboration Between Child Welfare and Domestic Violence Constituencies (June 8-10, 1994) (paper presented at Integrating Policy and Practice for Families, a conference on Domestic Violence and Child Welfare, in Racine, Wis., on file with author); Susan Schechter & Anne L. Ganley, Domestic Violence: A National

The responses of the various lawyers and judges in the three case studies also illustrate the way in which the "law isolates each woman's maternal duties from other facets of her life."[461] In proceedings to decide custody between parents, to remove abused and neglected children, or to punish their mothers, the failure of lawyers and courts to inquire into the ways in which abuse of mothers interferes with their ability to care for their children may hurt the very children that the state seeks to protect. The exclusion of relevant evidence is a possible outcome, and placement decisions are often not in the best interests of the children.

The courts evaluated the mothers in these case studies according to the ideal mother standard, a standard which is inadequate to fashion appropriate remedies. While Barbara and Vanessa's behavior may have contributed to injuries that their children suffered, the legal system responded only to part of their stories, and, therefore, did little to change the mother's behavior, or to protect the children. Wanda Schoenewetter's decision to withhold visitation was evaluated without proper consideration of the violent and irresponsible actions of her ex-husband. The trial court's decision, designed to sanction a mother for violating a court order, ultimately harmed the children whom the court was entrusted with protecting. Here, too, practitioners and clinical scholars have begnn to develop materials to assist judges and lawyers involved in child placement disputes. These new materials, unlike their predecessors, highlight the need to view mothers in a broader context.[462]

This Article's analysis of child support and welfare law also demonstrates that existing public policies create economic burdens for many mothers that the courts ignore when evaluating those mothers' conduct. The case studies of Barbara's and Vanessa's child welfare and criminal cases reveal that they were punished for staying with violent partners who were their primary source of economic support. In the divorce case, Wanda's efforts to collect economic benefits under her separation agreement ultimately led to court proceedings that removed the children from her custody. Current welfare and child support law offer little protection for these women.

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Curriculum for Family Preservation Practitioners (1995) (presented at the Family Violence Prevention Fund in S.F., CA, on file with author).

461 Roberts, *Motherhood and Crime, supra* note 4, at 113.

462 In child protection cases, the most recent training materials provide tools for lawyers and judges to broaden the factual inquiry to more fully consider the circumstances of the mother and children before the court. *See, e.g.*, KAREN AILEEN HOWZE, MAKING DIFFERENCES WORK: CULTURAL CONTEXT IN ABUSE AND NEGLECT PRACTICE FOR JUDGES AND ATTORNEYS (1996); JEAN KOH PETERS, REPRESENTING CHILDREN IN CHILD PROTECTIVE PROCEEDINGS: ETHICAL AND PRACTICAL DIMENSIONS (1997).

Under current welfare law, none of the women could expect significant financial support if they needed to rely on public benefits. The new welfare-to-work model fails to assist women experiencing systematic, long-term harassment and abuse even though such abuse clearly interferes with a mother's ability to work. Increased education of policymakers and their constituents can counteract the impulse to treat all welfare mothers in the same way. As noted, the federal government is making an effort to encourage states to consider the impact of domestic violence on mothers' ability to support themselves and their children and to improve child support collection.[463] A number of groups representing mothers and children have organized to pressure more states to adopt such policies.[464]

This Article demonstrates that an adherence to the narrow stereotypes of mothers as caretakers and the illusion of economic equality harms mothers and children. These conflicting images also impact fathers by immunizing them from legal responsibility and devaluing their role in families. The father in Vanessa's criminal case was invisible and unaccountable for any of the injuries his daughter suffered while she was in her mother's care. The judges hearing both Barbara's child welfare case and Wanda's divorce and custody case in some sense "rewarded" the fathers. Ultimately, none of the fathers in the three case studies appeared to have had a full and meaningful relationship with their children. For the most part, these fathers escaped responsibility for their children's economic, emotional, and physical well-being.

There are some signs of positive change. Efforts at improving fathers' financial accountability have been the focus of intense federal scrutiny in the last decade,[465] and the most recent signs hint at some progress.[466] The task of fashioning an appropriate legal response to enhance fathers' physical and emotional support of their children is more complex. Fully acknowledging the primacy of mothers' bonds with their children, as this Article urges courts and policymakers to do, may result in child placement policies that reinforce mothers' dominant role in child rearing. Consistently assuming the role of caretaker, in turn, reinforces the stereotypes and the potential for

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463 *See supra* note 285 and accompanying text; *see also* Paul K. Legler, *The Coming Revolution in Child Support Policy: Implications of the 1996 Welfare Act*, 30 FAM. L.Q. 519, 538-61 (1996) (stating that the vision for child enforcement provisions in the PRWORA is that the payment of child support should be automatic and inescapable).

464 *See, e.g.*, CATHERINE T. KENNEY & KAREN R. BROWN, NOW LEGAL DEFENSE & EDUC. FUND, REPORT FROM THE FRONT LINES: THE IMPACT OF VIOLENCE ON POOR WOMEN 22-23 (1996).

465 *See supra* notes 193-98 and accompanying text.

466 *See, e.g.*, Ann Marie Rotondo, Comment, *Helping Families Help Themselves: Using Child Support Enforcement to Reform Our Welfare System*, 33 CAL. W. L. REV. 281, 282-84 (1997).

sanctions when mothers' actions do not fit the model. This Article advocates developing policies that strike an appropriate balance between valuing the work of mothers who have assumed the role of caretaker and provider, and encouraging, or, in some instances, requiring, fathers to be active participants in their children's lives from the beginning.

Again, some evidence of policies that strike this balance do exist. In the area of child custody, commentators have long urged adoption of a primary caretaker standard,[467] and an increasing number of states have incorporated this concept into their custody law.[468] In addition, more states are beginning to require that courts consider evidence of domestic violence when resolving custody and visitation disputes.[469] In child protection proceedings, increased efforts to bring fathers into the process at the earliest possible stage may benefit families. These programs can only be successful, however, if child welfare personnel and judges rethink the potential role these fathers can play in their children's lives. In the past, when fathers could be found and brought into court, the court viewed them as alternative custodians and, therefore, adversaries of the mothers. In order to meaningfully work toward reunification of children with mothers who have been their long-term custodians, the courts should instead bring fathers in to participate in counseling and mediation. Such mediation should en-

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467 *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 527-38 (1984); Richard Neely, *The Primary Caretaker Parent Rule: Child Custody and the Dynamics of Greed*, 3 YALE L. & POL'Y REV. 168, 180-82 (1984); Nancy D. Polikoff, *Why Mothers Are Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 7 WOMEN'S RTS. L. REP. 235, 241-43 (1982). *But see* Becker, *supra* note 20 (analyzing decisions under the primary caretaker standard and finding it hurts mothers).

468 *See, e.g.*, Maxfield v. Maxfield, 452 N.W.2d 219, 223 (Minn. 1990) ("[T]he golden thread running through any best interests analysis is the importance . . . of [a child's] bond with the primary parent . . . ."); *In re* Maxwell, 456 N.E.2d 1218, 1222 (Ohio Ct. App. 1982) (affirming custody award to mother because she was the primary caretaker, although both parents were fit); *In re* Boldt, 801 P.2d 874, 875 (Or. Ct. App. 1990) (affirming custody award to mother because she had been the primary caretaker); Garska v. McCoy, 278 S.E.2d 357, 364 (W. Va. 1981) (awarding custody to the mother, who was clearly the primary caretaker before the proceedings). *See generally* Phyllis T. Bookspan, *From a Tender Years Presumption to a Primary Parent Presumption: Has Anything Really Changed? . . . Should It?*, 8 BYU J. PUB. L. 75, 84 (1993) (citing a 1982 study of appellate court decisions which "found the idea of primary caretaker increasingly popular in determining custody disputes").

469 Approximately 43 states and the District of Columbia have now enacted custody statutes which permit some form of judicial inquiry into the existence of domestic violence. *See* The Family Violence Project of the Nat'l Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L.Q. 197, 225-27 (1995). These provisions generally either (1) permit or require courts to consider the occurrence of domestic violence between parents as one of several factors relevant to determining the best interests of the child; or (2) create a presumption against an award of custody to a parent who has demonstrated a pattern of violence. *See id.* The majority of states, however, still do not presume that a father who abuses the mother is unfit. *See id.*

courage these fathers to begin or resume regular contact with their children. This regular contact would improve fathers' relationships with children and ease the burden on the caretaking mother. Courts hearing child protection cases should also have the authority to refer cases to proper proceedings for imposing and enforcing child support orders. This legal remedy would provide mothers with the economic support to leave abusive relationships and would otherwise improve the conditions that precipitated state intervention. Such programs have begun in very few states[470] and they should be expanded.

Many of the suggestions for reforming the legal system's response to battered mothers apply to mothers in general. The law must reconceptualize mothers or any individual legally responsible for the full-time care of minor children. Public benefits and child support laws should both take into account the burdens of rearing small children and resist the legal fiction of equal opportunity. At the same time, when the law must evaluate a caretaker, it should apply the same standard to mothers and fathers. The law cannot expect mothers to be self-sacrificing perfect nurturers while exacting lesser sanctions on fathers who assume little or no responsibilities for the care and nurturing of their children.

The rhetoric suggesting that this nation sees our children as its greatest resource is all around us. Few would disagree that "[n]othing is more important to our shared future than the well-being of children."[471] Yet, lawmakers have not accepted the notion that courts should evaluate the adults who care for these children—at this point primarily mothers—in a way that accurately accounts for the circumstances of their lives. The adherence to stereotypes, whether they reflect the nurturing, stay-at-home mother or the child-neglecting, lazy welfare mother, needs to change. At the same time, policymakers must rethink laws governing access to financial support—laws that assume that mothers can quickly and easily transform into economically self-sufficient workers when other support fails.

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470 *See supra* note 77.

471 HILLARY RODHAM CLINTON, IT TAKES A VILLAGE: AND OTHER LESSONS CHILDREN TEACH US 318 (1996).