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## Criminal Liability for Parents Who Fail to Protect

Anne T. Johnson\*

### Introduction

Terri Williquette was a working mother of two children—a seven-year-old son and an eight-year-old daughter. While she worked, she left the children at home in the care of their father, Bert. During his hours alone with the children, Bert Williquette subjected them to extended physical and sexual abuse, including beatings with a metal stick, forcing them to eat feces, and engaging in oral and anal intercourse with the children. The children's mother, Terri, was never present during the abuse, but both children testified they told her about what their father was doing to them.<sup>1</sup> Terri never acted to protect her children from the horrors they were forced to suffer at the hands of their father.

On November 15, 1983, the State of Wisconsin charged Terri Williquette with two counts of criminal child abuse under Wisconsin Statute section 940.201.<sup>2</sup> She was charged with failing to prevent her husband from abusing her children. The Circuit Court of Door County dismissed the charges. On appeal by the state, the Court of Appeals of Wisconsin reversed, holding that while a parent's failure to protect was not a direct act of abuse under section 940.201, it constituted aiding and abetting in the crime of child abuse.<sup>3</sup> In light of her legal duty to protect her children, Terri Williquette's knowledge of the abuse and her failure to prevent it supported an inference of her intent to assist in the crime.<sup>4</sup>

Ms. Williquette appealed and the Supreme Court of Wisconsin affirmed the decision of the appellate court.<sup>5</sup> The supreme court concluded, however, that Ms. Williquette could be prose-

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1. *State v. Williquette*, 129 Wis. 2d 239, 245-46, 385 N.W.2d 145, 147-48 (1986) [hereinafter *Williquette I*].

2. Wis. Stat. Ann. § 940.201 (West 1982); See *infra* text accompanying notes 6-7.

3. *State v. Williquette*, 125 Wis. 2d 86, 370 N.W.2d 282 (Ct. App. 1985), *aff'd* 129 Wis. 2d 239, 385 N.W.2d 145 (1986) [hereinafter *Williquette I*].

4. *Id.* at 90-91, 370 N.W.2d at 285.

5. *Williquette II*, 129 Wis. 2d 239, 385 N.W.2d 145 (1986).

cuted *directly* for the crime of child abuse under section 940.201, as well as for the crime of aiding and abetting child abuse.<sup>6</sup> The Wisconsin child abuse law, section 940.201, states that "[w]hoever tortures a child or subjects a child to cruel maltreatment, including, but not limited, to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm . . . is guilty of a Class E felony."<sup>7</sup> While the statute does not expressly include acts of omission within the definition of child abuse,<sup>8</sup> the supreme court interpreted the statute to include the failure to protect a child from known maltreatment.<sup>9</sup> The court held that Ms. Williquette had an affirmative duty as a parent "to protect her children from a foreseeable risk of cruel maltreatment."<sup>10</sup> By ignoring her children's pleas and continuing to leave them with her husband, who she knew was abusing them, Ms. Williquette's conduct was considered one of the causes of the abuse.<sup>11</sup>

Terri Williquette's situation is not unusual. The fact that her case made it all the way to the state supreme court is unusual. Child abuse is disconcertingly prevalent in this country.<sup>12</sup> Too often when an adult hurts a child, another adult is present and aware of the abuse. Instead of preventing the abuse, the second adult knowingly allows it to happen, as Terri Williquette did. By allowing Terri Williquette to be charged under section 940.201, the Wisconsin Supreme Court held her equally responsible for the injury to her children.<sup>13</sup>

Terri Williquette's conviction raises some serious questions about what constitutes child abuse, and the appropriate remedies for this abhorrent crime. Was Ms. Williquette's crime of passively allowing the abuse to continue on the same scale as the actual abuse committed by her husband? How broadly can we construe parental duty? Will criminal liability for the failure to protect help eradicate child abuse in this country? Will criminal liability

6. *Id.* at 256, 385 N.W.2d at 152.

7. Wis. Stat. Ann. § 940.201 (West 1982).

8. *Id.*

9. *Williquette II*, 129 Wis. 2d at 262, 385 N.W.2d at 155.

10. *Id.* at 262, 385 N.W.2d at 155.

11. *Id.*

12. It is estimated that over one million children are physically abused or neglected each year in the United States alone, while another 100,000 to 500,000 are sexually abused annually. See John E.B. Myers, *The Legal Response to Child Abuse: In the Best Interest of Children?* 24 J. Fam. L. 149, 169-70 (1985).

13. Terri Williquette was charged with two counts of child abuse under Wis. Stat. § 940.201 for failing to protect each child from repeated sexual and physical abuse by their father. Although not reported in the case record, one may assume that Bert Williquette was also charged under § 940.201 for at least two counts of physical and sexual abuse of his children.

for Terri Williquette help heal the Williquette children, or make their mother a better parent? How do we get parents to protect their children from harm?

This article addresses these questions. It focuses specifically on Terri Williquette's "crime"—the failure of a parent to protect her children from abuse. Section I of the article traces the judicial and statutory development of criminal laws dealing with child abuse, specifically addressing the progression from a total absence of laws protecting children to laws that criminalize the failure to protect. Section II discusses three major rationales behind the decision to prosecute for the failure to protect—punishment, deterrence, and rehabilitation. In this section, the effectiveness of holding a parent criminally liable for failure to protect her<sup>14</sup> children is analyzed in terms of fulfilling the purposes of these rationales. The final section of the article sets out suggestions for an "ideal" program for parents who fail to protect their children from abuse.

## I. Development of Child Abuse and Neglect Laws for the Protection of Children

### A. *National Commitment to the Protection of Children*

Child abuse such as that suffered by the Williquette children is neither a recent nor a unique phenomenon. Abuse of children has existed throughout the ages and around the world.<sup>15</sup> For centuries children were regarded as property, having virtually no rights.<sup>16</sup> It was believed that "parents . . . had the right to do almost anything they wished with their children."<sup>17</sup> Children were valued as economic assets or objects of amusement.<sup>18</sup> It has only been within the last two centuries that there has been a growth of interest in children's rights and a move to actively protect them from abuse. In 1874, the sensational newspaper coverage of one egregious case of child maltreatment prompted intervention on be-

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14. For purposes of simplicity, this article will use the feminine nouns and pronouns when referring to parents who fail to protect. This is not to say, however, that only men abuse children and only women fail to protect them from abuse. Certainly either parent may take either role. For cases involving women who abuse while the man takes the passive role, see *infra* note 62.

15. For an overview of the history of child abuse, see, Samuel X. Radbill, *Children in a World of Violence: A History of Child Abuse*, in *The Battered Child* 3 (C. Henry Kempe, M.D. & Ray E. Helfer, M.D. ed., 3d ed. 1980).

16. See A. Schwartz & H.L. Hirsch, *Child Abuse and Neglect: A Survey of the Law*, in *Child Abuse* 32 (Amnon Carmi & Hanita Zamrin ed. 1984).

17. Mildred Daley Pagelow, *Family Violence* 154 (1984).

18. *Id.* at 151.

half of the child.<sup>19</sup> The Society for the Prevention of Cruelty to Animals was the only agency available to intervene as there was no established social agency concerned with the protection of children.<sup>20</sup> In response to this case and the publicity surrounding it, the Society for the Prevention of Cruelty to Children was formed.<sup>21</sup>

Government involvement in the protection of children has been continually affected by the dilemma of balancing family autonomy with coercive intervention by the state.<sup>22</sup> On the one hand, parents' rights to raise their children without interference from the state has been established through a long line of Supreme Court cases:<sup>23</sup> parents have a right to guide their children's education;<sup>24</sup> unmarried and divorced parents cannot be deprived of their rights to the care and custody of the minor children without procedural safeguards;<sup>25</sup> and parents even have a constitutional right to institutionalize a child without formal adversarial hearings.<sup>26</sup>

Summing up the Supreme Court's traditional view of parental rights, Chief Justice Burger wrote in *Parham v. J.R.*: "Our jurisprudence historically has reflected Western Civilization concepts of the family as a unit with broad parental authority over

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19. Catherine J. Ross, *The Lessons of the Past: Defining and Controlling Child Abuse in the United States*, in *Child Abuse, An Agenda for Action* 63, 74 (George Gerber, Catherine J. Ross & Edward Zigler ed. 1980).

20. The famous case of "Mary Ellen" was the impetus for the formation of agencies designed for the protection of children. Eight-year-old Mary Ellen Wilson was kept locked in the apartment of the family to whom she had been indentured. She was rarely bathed or fed, and was repeatedly beaten. When she was discovered by a charitable worker in 1873, the New York City police department and other agencies refused to become involved. It was not until the Society for the Prevention of Cruelty to Animals petitioned the court in Mary Ellen's behalf that action was taken and the abuser jailed. The child was sent to an orphanage and later was indentured to another family. *See id.* *See also* Barbara J. Nelson, *Making an Issue of Child Abuse* 5-11, 53-54 (1984).

21. *See* Ross, *supra* note 19, at 74.

22. Eli H. Newberger & Richard Bourne, *The Medicalization and Legalization of Child Abuse*, in *Critical Perspectives on Child Abuse* 139 (Richard Bourne & Eli H. Newberger ed. 1979).

23. Pamela D. Mayhall & Katherine Eastlack Norgard, *Child Abuse and Neglect: Sharing Responsibility* 266-67 (1983).

24. *See, e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205 (1970) (state cannot require school attendance after eighth grade for Amish children when it burdens free exercise of religion); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (state cannot require public school attendance); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state cannot prohibit German instruction in the schools).

25. *See, e.g.*, *Stanley v. Illinois*, 405 U.S. 645 (1972) (unmarried father cannot be deprived of custody of children on death of mother without a hearing); *May v. Anderson*, 345 U.S. 528 (1953) (parent's right to care of minor children crucial in decision that sister state need not recognize custody decree obtained ex parte).

26. *See Parham v. J.R.*, 442 U.S. 584 (1979).

minor children."<sup>27</sup> While recognizing that child abuse and neglect do exist in our society, Burger went on to state: "That some parents 'may at times be acting against the interests of their children' . . . creates a basis for caution, but is hardly a reason to discard wholesale those pages of human experience that teach that parents generally do act in the child's best interests."<sup>28</sup>

On the other hand, these traditional parental rights must be limited by the "legitimate rights and interests of children."<sup>29</sup> In response to this concern for the rights of children, the doctrine of *parens patriae* has developed in this country as the underlying justification for intervention in the parent-child relationship.<sup>30</sup> *Parens patriae* "is the state's limited paternalistic power to protect or promote the welfare of certain individuals, like young children and mental incompetents, who lack the capacity to act in their own best interests."<sup>31</sup> Before intervening in the family relationship, however, "the state must show that the child's parents are either unfit, unable, or unwilling to care for the child adequately."<sup>32</sup> In extreme cases, therefore, concern for children may override the parents' right to raise their children without interference from the state.

In the past two decades this country has committed itself to the protection of its children. In 1974, Congress passed the Child Abuse Prevention and Treatment Act, P.L. 93-247.<sup>33</sup> This Act established a National Center on Child Abuse and Neglect and provided state grants to develop child abuse prevention, treatment, and research programs.<sup>34</sup> In 1978, Congress extended the Act to include new programs to prevent and treat sexual abuse.<sup>35</sup> Additional funding was provided in 1981 to extend the programs through fiscal year 1983.<sup>36</sup>

Even with this legislation, however, studies in the late 70's

27. *Id.* at 602.

28. *Id.* (quoting *Bartley v. Kremens*, 402 F. Supp. 1039, 1047-48 (E.D. Pa. 1975), *vacated and remanded*, 431 U.S. 119 (1977)).

29. See 442 U.S. at 630 (Brennan, J., concurring in part and dissenting in part).

30. See Jeanne M. Giovannoni & Rosina M. Becerra, *Defining Child Abuse* 51 (1979). See also Schwartz & Hirsch, *supra* note 16, at 32.

31. Note, *Developments in the Law—The Constitution and the Family*, 93 Harv. L. Rev. 1156, 1199 (1980).

32. *Id.* at 1201-02.

33. The Child Abuse Prevention and Treatment Act of 1974, Pub. L. No. 93-247 (codified as amended at 42 U.S.C. §§ 5101-5106 (1982)).

34. 42 U.S.C. §§ 5101-5106 (1982).

35. The Child Abuse Prevention and Treatment and Adoption Reform Act, Pub. L. No. 95-266 (codified as amended at 42 U.S.C. §§ 5101-5106 (1982)).

36. The Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35 (codified as amended at 42 U.S.C. § 5107 (1982)).

and early 80's continued to show an increase in the incidence of child abuse and neglect in this country.<sup>37</sup> In response, Congress passed the Child Abuse Amendments of 1984,<sup>38</sup> demonstrating its "firm conviction that research, prevention and treatment efforts in the areas of child abuse and neglect and sexual abuse must continue with an identifiable national focus."<sup>39</sup> These amendments included the extension of appropriations through fiscal year 1987, increases in yearly appropriations, and the authorization of \$4 million per year expressly for the funding of sexual abuse prevention and treatment programs.<sup>40</sup> In order to qualify for these funds, states must have in effect a law providing for the reporting and investigation of all known and suspected cases of abuse.<sup>41</sup> All fifty states have enacted child abuse reporting statutes meeting the requirements of the Act.<sup>42</sup> These laws impose a duty on professionals working with children to report suspected cases of child abuse and neglect. The failure to do so makes one guilty of a misdemeanor.<sup>43</sup> The list of professionals required to report suspected abuse of children varies, but generally it includes doctors, teachers,

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37. The National Center on Child Abuse and Neglect study for the year extending from May 1, 1979 to April 30, 1980, estimated 652,000 cases of child abuse and neglect in the United States. A study by Dr. Murray Straus of the University of New Hampshire in 1975 revealed that an estimated 1.8 million children per year are *severely* battered, and about 6.5 million are abused. The American Humane Association statistics for 1981 showed 851,000 substantiated reports of child abuse and neglect. S. Rep. No. 246, 98th Cong., Sess. 4, reprinted in 1984 U.S. Code Cong. & Admin. News 2918, 2921.

38. The Child Abuse Amendments of 1984, Pub. L. No. 98-457 (codified as amended at 42 U.S.C. §§ 5101-5107 (Supp. 1985)).

39. S. Rep. No. 246, reprinted in 1984 U.S. Code Cong. & Admin. News at 2922.

40. The Child Abuse Amendments of 1984, Pub. L. No. 98-457 (codified as amended at 42 U.S.C. § 5101-5107 (Supp. 1985)).

41. 42 U.S.C. § 5103(b) (Supp. 1985). This section also requires that the law provide for immunity of reporters from prosecution; that the state take immediate steps to protect children found to be abused or neglected; that the state demonstrate there are adequate personnel, training, and programs available to assure that all cases of abuse and neglect will be effectively handled; that the state provide for confidentiality of records, cooperation between law enforcement agencies, courts, and social service agencies, guardians ad litem for children involved in court proceedings, and dissemination of information to the public about the issue of child abuse, neglect, and treatment methods available; that the level of state funding not be reduced below the level in 1973; and that, where possible, parent organizations dealing with the issues of child abuse and neglect get preference in the distribution of funds.

42. For more information on child abuse reporting statutes, see Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 Geo. Wash. L. Rev. 243 (1982).

43. See, e.g., Minn. Stat. § 626.556, subd. 6 (Supp. 1985) ("A person mandated by this section to report who knows or has reason to believe that a child is neglected or physically or sexually abused, . . . and fails to report is guilty of a misdemeanor.") The laws relieve people who report in good faith from civil or criminal liability. See, e.g., Minn. Stat. § 626.556, subd. 4 (Supp. 1985).

child care workers, nurses, and law enforcement officers.<sup>44</sup>

Through the Child Abuse Acts and Amendments, the country has demonstrated a national concern for the protection of children. With this national commitment and funding, the states must implement programs and enact laws which will ensure that the national goal of the protection of children is met.

### *B. State Involvement in Protection of Children*

#### 1. Laws criminalizing child abuse.

The non-accidental physical injury of children can be prosecuted under criminal assault and battery statutes.<sup>45</sup> In the event of injury to a child resulting in death, states have relied on homicide and manslaughter statutes to convict the offender.<sup>46</sup> Even with these available criminal sanctions, states have moved further to ensure the safety of those unable to protect themselves; thus recognizing that children *are* different from adults and require more protection. In addition to the mandatory reporting laws, most states have enacted statutes that impose criminal sanctions on persons convicted of hurting children.<sup>47</sup> The criminal child abuse statutes that resulted from this concern for the protection of children can be divided into two categories: those that punish people who actually commit the abuse ("commission" statutes); and those that include acts of omissions, as in exposing the child to a risk of danger, or neglecting to perform a duty of care and protection ("omission" statutes).

All but two states<sup>48</sup> have enacted criminal child abuse laws.<sup>49</sup>

44. Minn. Stat. § 626.556, subd. 3 (Supp. 1985) includes "[a] professional or the professional's delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, or law enforcement. . . ." Wis. Stat. Ann. § 48.981(2) (West 1987) lists all persons required to make reports, including:

physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, other medical or mental health professional, social or public assistance worker, school teacher, administrator or counselor, child care worker in a day care center or child caring institution, day care provider, alcohol or other drug abuse counselor, member of the treatment staff employed by or working under contract with a county department . . . , physical therapist, occupational therapist, speech therapist, emergency medical technician-advanced (paramedic), ambulance attendant or police or law enforcement officer. . . .

45. See, e.g., Wis. Stat. Ann. § 940.19 (West 1982); Minn. Stat. §§ 609.221-609.224 (Supp. 1987); N.M. Stat. Ann. §§ 30-3-1, 30-3-5 (1984).

46. See *infra* notes 65-66 and accompanying text.

47. See *infra* notes 49-53 and accompanying text.

48. "States" includes the 50 states and the District of Columbia.

49. The two states which do not make the injury of children a separate and distinct crime are Alaska and Washington. Alaska Stat. § 11.51.100 (1986) defines the crime of endangering the welfare of a child as desertion of the child under circum-



Thirteen of these states require an act of commission<sup>50</sup> —the actual infliction of harm to a child through torture, beating, burning, etc. The rest of the states include acts of omission among the behaviors they proscribe. Of the states with "omission" statutes, eight expressly identify the crime as the violation of a duty of care and/or protection.<sup>51</sup> The remaining states find a person guilty of

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stances which create a substantial risk of injury to the child. Wash. Rev. Code Ann. § 26.44.010 (1986) requires the reporting of abuse of dependent persons, including both children and "[a]dult dependent persons not able to provide for their own protection. . . ." Washington's criminal code does not include separate crimes for the abuse or endangerment of children. One must assume that the crimes of assault and reckless endangerment would include harm to children. Wash. Rev. Code Ann. 9A.36.010-050 (Supp. 1987).

50. Ala. Code § 26-15-3 (1986) (a person is guilty of child abuse "who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years . . ."); D.C. Code Ann. § 22-901 (1981) (a person is guilty of cruelty to children "who shall torture, cruelly beat, abuse, or otherwise willfully maltreat any child under the age of 18 years . . ."); Ga. Code Ann. § 16-5-70 (1984) ("[a]ny person commits the offense of cruelty to children when he maliciously causes a child under the age of 18 cruel or excessive physical or mental pain"); Ill. Ann. Stat. ch. 38, para. 12-4.3 (Smith-Hurd 1987) (a person is guilty of aggravated battery of a child "who intentionally or knowingly . . . causes great bodily harm or permanent disability or disfigurement to any child under the age of 13 years . . ."); La. Rev. Stat. Ann. 14:93 (West 1987) ("[c]ruelty to juveniles is the intentional or criminally negligent mistreatment or neglect . . . whereby unjustifiable pain or suffering is caused . . ."); Md. Ann. Code of 1957 art. 27 § 35A (Supp. 1986) (a person is guilty of child abuse "who causes abuse to the child . . ."); Mass. Ann. Laws Ch. 265 § 13B (Law. Co-op. Supp. 1987) (a person may be imprisoned who "commits an indecent assault and battery on a child under the age of fourteen . . ."); N.J. Stat. Ann. § 2C:24-4 (West Supp. 1987) (a person is guilty of endangering the welfare of a child "who causes the child harm that would make the child an abused or neglected child . . ."); Ore. Rev. Stat. Ann. § 163.205 (Butterworth 1985) (criminal maltreatment of a child includes behavior that "intentionally or knowingly causes physical injury or injuries to the dependent person"); S.D. Codified Laws Ann. § 26-10-1 (1984) (a person is guilty of abuse of a minor "who abuses, exposes, tortures, torments or cruelly punishes a minor in a manner which does not constitute aggravated assault"); Tenn. Code Ann. § 39-4-401 (1982) (a person is guilty of child abuse "who maliciously, purposely, or knowingly . . . treats a child under eighteen (18) years of age in such manner as to inflict injury or neglects . . . so as to adversely affect its health and welfare . . ."); W. Va. Code § 61-8-24 (Supp. 1986) (a person is guilty of cruelty to children "who shall cruelly ill treat, abuse, or inflict unnecessarily cruel punishment upon, any infant or minor child . . ."); Wis. Stat. Ann. § 940.201 (West 1982) ("tortures a child or subjects a child to cruel maltreatment . . .").

51. Haw. Rev. Stat. § 709-904 (1985) ("[a] person commits the offense of endangering the welfare of a minor . . . by violating or interfering with any legal duty of care or protection owed such minor."); Me. Rev. Stat. Ann. tit. 17-A, § 554 (1983) (the crime of endangering the welfare of a child includes knowingly endangering "the child's health, safety or mental welfare by violating a duty of care or protection"); Miss. Code Ann. § 97-5-39 (Supp. 1986) (a person may be found guilty of child abuse who "omits the performance of any duty"); Mont. Code Ann. § 45-5-622 (1986) (a person may commit the offense of endangering the welfare of children "by violating a duty of care, protection, or support"); N.H. Rev. Stat. Ann. § 639:3 (1986) (the crime of endangering the welfare of a child includes "purposely violating a duty of care, protection or support he owes to such child"); Ohio Rev. Code

child abuse who allows non-accidental injury to a child,<sup>52</sup> or who creates a substantial risk for such injury to occur.<sup>53</sup>

One of the problems that may arise when an affirmative duty to protect a child is created is fear of retaliation by the abuser. Protecting a child from someone who is violent and angry could prove dangerous to the intervener. To alleviate this danger, two states have expressly included an affirmative defense in their statutes.<sup>54</sup> In order to exercise the defense, the defendant must have reasonably believed that to interfere would result in additional injury to the child or to the defendant.<sup>55</sup> Case law, however, indicates that courts are reluctant to accept this defense, because protecting a child does not necessarily require risking additional injury.<sup>56</sup> Other options include removing the child at another time, or reporting the abuse to those who can prevent it.<sup>57</sup>

While protecting children who cannot protect themselves is the rationale behind the state child abuse statutes, states are cognizant of the delicate balance that must be maintained between the rights of children and the rights of parents. Many states include in their child abuse statutes statements regarding their commitment to protecting children *and* to strengthening families. For example, Minn. Stat. § 626.556 (1986) reads in part: "[T]he public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse; to strengthen the family and make the home, school, and community

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Ann. § 2919.22 (Anderson Supp. 1987) (endangering children includes "violating a duty of care, protection, or support"); 18 Pa. Cons. Stat. Ann. § 4304 (Purdon 1983) (the crime of endangering the welfare of a child is committed "by violating a duty of care, protection or support"); Wyo. Stat. 6-4-403 (Supp. 1987) (a person commits the crime of endangering children "by violating a duty of care, protection or support").

52. See, e.g., Okla. Stat. Ann. tit. 21 § 843 (West 1983) ("Any parent or other person who shall willfully or maliciously injure, torture, maim, or use unreasonable force upon a child . . . or who shall cause, procure or permit any of said acts to be done . . ."); Conn. Gen. Stat. Ann. § 53-21 (West 1985) ("who willfully or unlawfully causes or permits any child . . . to be placed in such a situation that its life or limb is endangered, or its health is likely to be injured, or its morals likely to be impaired . . .").

53. See, e.g., Mo. Ann. Stat. § 568.050 (Vernon Supp. 1987) ("A person commits the crime of endangering the welfare of a child if: (1) He knowingly acts in a manner that creates a substantial risk to the life, body or health of a child . . .").

54. See Minn. Stat. § 609.378 (1984) and Iowa Code Ann. § 726.6.1.e (West Supp. 1986).

55. In Minnesota, "[i]t is a defense to a prosecution (for knowingly permitting the continuing physical or sexual abuse of a child) that at the time of the neglect there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect would result in substantial bodily harm to the defendant or the child in retaliation." Minn. Stat. § 609.378 (1986).

56. See *infra* notes 63-64 and accompanying text.

57. See *infra* note 63 and accompanying text.

safe for children by promoting responsible child care in all settings. . . .”

The State of Washington has taken an even stronger position on the importance of maintaining the sanctity of the family. The declaration of purpose, which precedes the statutes concerning abuse of dependent persons, reads as follows:

The bond between a child and his or her parent, custodian, or guardian is of paramount importance, and any intervention into the life of a child is also an intervention into the life of the parent, custodian, or guardian; however, instances of non-accidental injury, neglect, death, sexual abuse and cruelty to children by their parents, custodians or guardians have occurred, and in the instance where a child is deprived of his or her right to conditions of minimal nurture, health, and safety, the state is justified in emergency intervention based upon verified information; and therefore the Washington state legislature hereby provides for the reporting of such cases to the appropriate public authorities. It is the intent of the legislature that, as a result of such reports, protective services shall be made available in an effort to prevent further abuses, and to safeguard the general welfare of such children. . . . *Provided further*, That this chapter shall not be construed to authorize interference with child-raising practices, including reasonable parental discipline, which are not proved to be injurious to the child's health, welfare, and safety.<sup>58</sup>

Despite a commitment to maintaining the integrity of the family, states have determined that intervention is warranted in some instances for the protection of children. When a child is gravely injured, states are willing to prosecute the abuser. Some states have taken the next step in protecting children by prosecuting adults for behavior that seriously endangers a child's life, including the failure to protect.

2. Convictions for the failure to protect.

a. *Imposition of a parental duty.*

Thirty-five states have recognized that parental duties extend beyond the duty not to abuse children. These states, through the inclusion of acts of omission in their child abuse statutes, expressly acknowledge that parents owe a duty of care and protection to their children.<sup>59</sup> State legislatures and courts have demonstrated a willingness to use their statutes to convict people for failing to protect when another person's direct abuse of a child results in death or serious bodily harm.

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58. Wash. Rev. Code Ann. § 26.44.010 (1986).

59. See *supra* note 51 and accompanying text.

Parents have a duty to support, nurture, sustain, and protect their children.<sup>60</sup> The courts have held that the duty of a parent to protect is that which a reasonably prudent person would do to prevent harm to another.<sup>61</sup> Both parents share this duty.<sup>62</sup> Removing the child from the situation, evicting the abuser, or reporting the abuse to authorities would satisfy this parental duty.<sup>63</sup> The non-abusive parent need not physically stop the abuse,<sup>64</sup> but she cannot

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60. See, e.g., *State v. Fabritz*, 276 Md. 416, 348 A.2d 275 (1975), *cert. denied*, 425 U.S. 942 (1976) (affirmative duty to provide medical care to child); *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (1960) (mother's duty imposed by Code to provide support, care, nurture, welfare and education).

The Child Welfare League's standards for child protective services discusses parental responsibilities as follows:

In our society, both parents and children have natural and legal rights that are accompanied by corresponding responsibilities enforceable by law. Parents are responsible for giving their children the love, care and protection they need; and for providing, within their ability and the resources available to them . . .

—protection and supervision of the child's well-being. . . .

Standards for Child Protective Services § 0.7 (Child Welfare League 1980).

61. See, e.g., *State v. Adams*, 89 N.M. 737, 738, 557 P.2d 586, 587 (Ct. App. 1976), *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976) (after mother's abuse of child resulted in death, father convicted of negligent homicide for "failure to do an act which one is under a duty to do and which a reasonably prudent person in the exercise of ordinary care would do to prevent injury . . . to another."); *Worthington v. State*, 409 N.E.2d 1261, 1274 (Ind. Ct. App. 1980) (father convicted of neglect in drowning death of child for failure to exercise his statutory duty to "discover and act in a reasonable manner"); *State v. Williams*, 100 N.M. 322, 670 P.2d 122 (Ct. App. 1983), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983) (mother convicted of child abuse because she failed to act as reasonably prudent person and allowed her child to remain with abusive father); *Smith v. State*, 408 N.E.2d 614, 622 (Ind. Ct. App. 1980) ("The standard of care is what a reasonable parent would do or not do under the circumstances.").

62. Though we usually think of mothers as being the persons guilty of a failure to protect their children from abuse by fathers or boyfriends, several cases have found fathers liable for failing to protect their children from the abuse of their wives. See, e.g., *State v. Portigue*, 125 N.H. 352, 481 A.2d 534 (1984) (father convicted of child endangerment for failing to prevent wife's beating of their child); *State v. Kamel*, 12 Ohio St. 3d 306, 466 N.E.2d 860 (1984) (doctor father convicted after failing to secure further medical attention for son after wife's beatings); *Worthington v. State*, 409 N.E.2d 1261 (Ind. Ct. App. 1980) (father convicted in drowning death of daughter in view of evidence that he had witnessed or heard wife's previous abuse).

63. See, e.g., *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (1960) (appellant could easily have removed child from danger); *State v. Williams*, 100 N.M. 322, 670 P.2d 122 (Ct. App. 1983), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983) (failure to remove or seek help was proximate cause of child's injuries); *Lott v. State*, 686 S.W.2d 304 (Tex. Ct. App. 1985) (despite evidence of mother's dependence on boyfriend for drugs which allegedly kept her from leaving him and obtaining necessary medical care for her child, her conviction was upheld).

64. See, e.g., *State v. Williams*, 100 N.M. 322, 324, 670 P.2d 122, 124 (Ct. App. 1983), *cert. denied*, 100 N.M. 259, 669 P.2d 735 (1983) (mother claimed her pregnancy and her husband's threats prevented her from intervening—court held that "[t]he issue is not whether defendant physically stopped the abuse, but whether she

ignore her duty and knowingly allow a child to suffer at the hands of another.

*b. Convictions under "omission" statutes.*

When a child dies as a result of abuse which a parent failed to prevent, that parent may be charged with criminal negligence<sup>65</sup> or negligent homicide.<sup>66</sup> Several courts, however, have allowed the prosecution of the negligent parent under the state child abuse statute, either in conjunction with charges of negligent homicide<sup>67</sup> or independently.<sup>68</sup> In cases where the abuse results in severe bodily injury to the child, the non-acting parent is charged under the child abuse statute.<sup>69</sup> Courts have stressed the parental duty in such cases. An Ohio court convicted a father after the death of his child at the hands of the mother for "an inexcusable failure to act in discharge of one's duty to protect a child."<sup>70</sup> A Texas court, sustaining a conviction of a mother for her child's death caused by a boyfriend, stated: "[A]ppellant was the natural and custodial parent who had a duty to provide medical care and protection for the child. She knew the child was being abused over an extended period of time, and that it was [the boyfriend] who was beating her child."<sup>71</sup>

Parents cannot be convicted under these statutes based only on their presence in the home.<sup>72</sup> They must have witnessed the abuse of the child<sup>73</sup> or have been aware that abuse occurred when

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was negligent in failing to take some action to avoid foreseeable abuse or to seek help once it started.").

65. *See, e.g.*, *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (1960).

66. *See, e.g.*, *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (Ct. App. 1976) *cert. denied*, 90 N.M. 7, 558 P.2d 619 (1976).

67. *See, e.g.*, *People v. Northrop*, 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197 (Ct. App. 1982) (conviction of second degree murder and felony child abuse); *People v. Atkins*, 53 Cal. App. 3d 348, 125 Cal. Rptr. 855 (Ct. App. 1975) (involuntary manslaughter, battery, and endangering the person and health of a child).

68. *See, e.g.*, *State v. Kamel*, 12 Ohio St. 3d 306, 466 N.E.2d 860 (1984); *State v. Portigue*, 125 N.H. 352, 481 A.2d 534 (1984).

69. *See, e.g.*, *State v. Wardlow*, 20 Ohio App. 3d 1, 484 N.E.2d 276 (Ct. App. 1985) (mother convicted of child endangerment for failure to either remove daughter or evict boyfriend after known rape by mother's boyfriend of her 13-year-old daughter); *State v. Williams*, 100 N.M. 322, 670 P.2d 122 (Ct. App. 1983) (affirmed conviction of mother for child abuse after failure to act following abuse by father).

70. *State v. Kamel* 12 Ohio St. 3d at 309, 466 N.E.2d at 863.

71. *Lott v. State*, 686 S.W.2d 304, 309 (Tex. Ct. App. 1985).

72. *See People v. Northrop*, 132 Cal. App. 3d 1027, 182 Cal. Rptr. 197 (Ct. App. 1982). In that case, the court held that the jury instruction "properly informed the jury that appellant could not be found guilty . . . unless the evidence established that she wilfully permitted her child to be placed in a health-endangering situation. . . . [She] could not be found guilty of the crimes simply based upon her presence in the house." *Id.* at 1040, 182 Cal. Rptr. at 205.

73. *See State v. Portigue*, 125 N.H. 352, 481 A.2d 534 (1984) (defendant was

the child was left in the perpetrator's care.<sup>74</sup> In Terri Williquette's case, the court imputed knowledge of the abuse to Ms. Williquette based on the evidence that the children had told her about the abuse by their father.<sup>75</sup>

Some courts use the "omission" statute to convict a parent or other responsible person in cases where it is unclear exactly who committed the abuse. For example, in a California case, a child died from hemorrhaging caused by a severe skull fracture.<sup>76</sup> The California Court of Appeals stated: "[b]ased on the evidence presented at trial, [defendant] could have violated section 273a subd. 1 . . . in three different ways. She could have assaulted Raelynn herself, permitted someone else to assault Raelynn in her presence, or placed Raelynn in a life threatening situation by leaving her with the person who had previously battered her daughter."<sup>77</sup> The court affirmed defendant's conviction of second degree felony murder for the death of her daughter because "the omission to act is no different from an act which produces the same result; either is *likely* to result in death."<sup>78</sup>

In an earlier California case, the court admitted that it was not clear whether the jury convicted the defendant of involuntary manslaughter based on her own abusive actions or based on a failure to protect the child from her boyfriend's abuse.<sup>79</sup> Thus, some courts are willing to use child endangerment statutes to make sure that the parent is punished, even in cases where it is unclear whether or not the parent actually committed any of the abuse. The only prerequisite is that the parent knew the abuse was occurring.

### c. *Constitutional challenges to "omission" statutes.*

Statutes that create liability for the failure to take protective action have withstood constitutional challenges on both vagueness

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aware of the beatings of his daughter by his wife and had even witnessed some of the beatings).

74. *Jakubczak v. State*, 425 So. 2d 187, 188-89 (Fla. Dist. Ct. App. 1983) (mother knew "that the infant had previously suffered serious injuries—not self-inflicted—while in the exclusive care and custody of the husband").

75. *See Williquette II*, 129 Wis. 2d 239, 245-47, 385 N.W.2d 145, 147-48 (1986).

76. *People v. Benway*, 164 Cal. App. 3d 505, 508, 210 Cal. Rptr. 530, 531 (Ct. App. 1985).

77. *Id.* at 510, 210 Cal. Rptr. at 533.

78. *Id.* at 512, 210 Cal. Rptr. at 534.

79. *People v. Atkins*, 53 Cal. App. 3d 348, 360, 125 Cal. Rptr. 855, 863 (Ct. App. 1975). *See also State v. Schultz*, 8 Ohio App. 3d 352, 457 N.E.2d 336 (Ct. App. 1982) (affirmed trial court decision that mother was guilty of at least one violation of R.C. 2919.22, either by abusing the child herself, or by allowing her boyfriend to do so, violating a duty of protection).

and equal protection grounds. Defendants have challenged the "omission" statutes claiming that the language is so vague it does not provide sufficient notice of what constitutes the crime or the requisite intent. Courts have held, however, that the use of the words "may," "unreasonably," or "duty of care" are not so indefinite that they cannot be understood by the average person of ordinary intelligence.<sup>80</sup> The statutes put the public on notice that permitting another person to abuse a child may be grounds for liability.<sup>81</sup>

Challenges for the failure to properly define the level of intent required for liability have also been unsuccessful. In 1975, New Mexico's child abuse statute read only, "[a]buse of a child consists of a person knowingly, intentionally or negligently and without justifiable cause, causing or permitting a child to be: [abused]."<sup>82</sup> The trial court in *State v. Lucero* dismissed defendant's indictment, holding the statute unconstitutional. The court found that the lack of distinction between intentional, knowing, and negligent acts, and the lack of provisions for lesser included offenses according to a defendant's culpability denied equal protection of the laws.<sup>83</sup>

The Court of Appeals of New Mexico reversed, interpreting the child abuse statute broadly to impose "strict liability" or "liability without fault."<sup>84</sup> The court defined a strict liability statute as "one which imposes criminal sanction for an unlawful act without requiring a showing of criminal intent."<sup>85</sup> It held that a strict liability standard could be imposed when "the public interest in

80. See, e.g., *People v. Hoehl*, 193 Colo. 557, 568 P.2d 484 (1977) ("may" interpreted to mean "a reasonable probability"); *State v. Fisher*, 230 Kan. 192, 194-95, 631 P.2d 239, 241-42 (1981) ("may" interpreted to mean "reasonable probability" or "likelihood," "unreasonably" means "the doing of or omitting to do something that the average person, possessing ordinary mental faculties, would not have done or would not have omitted under all of the attendant and known circumstances"); *State v. Sammons*, 58 Ohio St. 2d 460, 391 N.E.2d 713 (1979) (interpreted "duty of care" to refer to the norm in society which is for parents to see that their children are adequately nourished, clothed, housed, and protected from harm).

81. See, e.g., *People v. Mann*, 646 P.2d 352 (Colo. 1982) (definition of child abuse in statute clear enough to provide notice of proscribed conduct); *State v. Sammons*, 58 Ohio St. 2d 460, 391 N.E.2d 713 (1979), *appeal dismissed*, 444 U.S. 1008 (1980) (dismissed claim that "duty of care" language in statute was "fatally indefinite"); *Commonwealth v. Mack*, 467 Pa. 613, 618, 359 A.2d 770, 772 (1976) ("[p]hrases such as 'endangers the welfare of the child' and 'duty of care, protection or support' . . . are easily understood and given content by the community. . .").

82. *State v. Lucero*, 87 N.M. 242, 243, 531 P.2d 1215, 1216 (Ct. App. 1975), *cert. denied*, 87 N.M. 239, 531 P.2d 1212 (1975) (citing N.M. Stat. Ann. § 40A-6-1 (Supp. 1973)).

83. *Id.* at 243-44, 531 P.2d at 1216-17.

84. *Id.* at 244, 531 P.2d at 1217.

85. *Id.*

the matter is so compelling or . . . the potential for harm is so great that the interests of the public must override the interests of the individual."<sup>86</sup> The state's interest in the prevention of cruelty to children was within the police power.<sup>87</sup> The court went on to say that "[w]hether an act prohibited by § 40A-6-1[88] . . . is committed intentionally, knowingly or negligently is immaterial. The Legislature has the authority to make a negligent act a crime as well as an intentional one."<sup>89</sup> New Mexico has continued to apply its strict liability standard to its child abuse statutes, holding that the mens rea of the defendant who abuses a child or who permits such abuse is not an essential element of the crime.<sup>90</sup> What matters is that a child was injured.

*d. Convictions under "commission" statutes.*

Some states that do not expressly include acts of omission in their child abuse statutes have still been willing to convict a parent for failing to protect. This has been done through a broad interpretation of the statute's language, or through the crime of aiding and abetting.

Before the Wisconsin Supreme Court imposed direct criminal liability on Terri Williquette for the failure to protect,<sup>91</sup> the state court of appeals held she could be charged with aiding and abetting child abuse.<sup>92</sup> The elements of aiding and abetting include an intent to aid the commission of a crime and conduct that actually aided in the crime's execution.<sup>93</sup> The court held that where the defendant had a duty to act, an omission of such action could aid in the execution of a crime.<sup>94</sup> Terri Williquette, as a parent, had a duty to protect her children. Because she allegedly knew of her husband's abuse but failed to intervene in any way to stop the abuse, "[h]er knowing failure to intervene would reasonably indicate an intent to assist the perpetrator. . . . Inaction in this situation supports an inference of an intent to assist the crime."<sup>95</sup>

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86. *Id.*

87. *Id.* at 245, 531 P.2d at 1218.

88. N.M. Stat. Ann. § 40A-6-1 was recodified in 1973 as N.M. Stat. Ann. § 30-6-1 (West 1984).

89. *Lucero*, 87 N.M. at 245, 531 P.2d at 1218.

90. *See, e.g., State v. Coe*, 92 N.M. 320, 587 P.2d 973 (Ct. App. 1978), *cert. denied*, 92 N.M. 353, 588 P.2d 554 (1978); *State v. Fuentes*, 91 N.M. 554, 577 P.2d 452 (Ct. App. 1978), *cert. denied*, 91 N.M. 610, 577 P.2d 1256 (1978); *State v. Lucero*, 98 N.M. 204, 647 P.2d 406 (1982).

91. *Williquette II*, 129 Wis. 2d 239, 385 N.W.2d 145 (1986).

92. *Williquette I*, 125 Wis. 2d 86, 370 N.W.2d 282 (Ct. App. 1985).

93. *Id.* at 89, 370 N.W.2d at 284.

94. *Id.* at 90, 370 N.W.2d at 285.

95. *Id.* at 91, 370 N.W.2d at 285.



In *State v. Walden*,<sup>96</sup> the North Carolina Supreme Court found a mother guilty of aiding and abetting her boyfriend in the assault of her child. The court discussed at length the affirmative legal duty of parents to protect their children with "reasonable" measures.<sup>97</sup> The court held that "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed."<sup>98</sup>

Wisconsin's child abuse statute section 940.201 holds people guilty of felonies who torture or subject a child to cruel maltreatment. The crime is further defined as "including, but not limited, to severe bruising, lacerations, fractured bones, burns, internal injuries or any injury constituting great bodily harm. . . ."<sup>99</sup> The Wisconsin Supreme Court concluded in *State v. Williquette*, that "a parent who knowingly permits another person to abuse the parent's own child subjects the child to abuse within the meaning of sec. 940.201."<sup>100</sup>

Despite the charge that the court was "usurping the legislative prerogative to make the criminal law,"<sup>101</sup> the Wisconsin Supreme Court included acts of omission as well as acts of commission in its interpretation of criminal child abuse. The court used statutory interpretive techniques of giving words their accepted, ordinary meaning, and looking to the underlying purpose of the statute<sup>102</sup> to reach its decision that Terri Williquette's inaction was proscribed by the statute.<sup>103</sup>

Three years earlier in 1983, the Court of Criminal Appeals of Alabama had interpreted Alabama's child abuse statute as encompassing both acts of omission and acts of commission.<sup>104</sup> In *Phelps v. State*,<sup>105</sup> the court affirmed the conviction of a mother for child abuse. Her husband had inflicted the injuries resulting in the death of her son. Defendant did nothing to prevent the abuse. The court found that Ms. Phelps knew about the abuse of her

96. 306 N.C. 466, 293 S.E.2d 780 (1982).

97. *Id.* at 473-76, 293 S.E.2d at 785-86.

98. *Id.* at 476, 293 S.E.2d at 787.

99. Wis. Stat. Ann. § 940.201 (West 1982).

100. *Williquette II*, 129 Wis. 2d at 242-43, 385 N.W.2d at 147.

101. *Id.* at 275, 385 N.W.2d at 161 (Heffernan, C.J., dissenting).

102. *Id.* at 248-49, 385 N.W.2d at 149-50.

103. *Id.* at 261-62, 385 N.W.2d at 155.

104. Ala. Code § 26-15-3 (1975) reads: "A responsible person . . . who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child . . . shall, on conviction, be punished by imprisonment . . . for not less than one year nor more than 10 years."

105. 439 So. 2d 727 (Ala. Crim. App. 1983).

twenty-month-old son and had a duty to prevent it.<sup>106</sup> Defendant "did voluntarily fail to remove the child . . . from the custody, care or control of [the stepfather] who had repeatedly subjected the child . . . to acts of beating or burning or kicking, said omission thereby worsening or aggravating the injuries or conditions which lead [sic] to the death . . . in violation of section 26-15-3 . . ." <sup>107</sup>

States appear to have made the protection of children a priority. Despite the dilemmas raised by the conflict between the rights of children to protection and the rights of parents to raise their children free from state intervention, states have moved toward requiring more protection for children.<sup>108</sup> Parents can no longer do whatever they please with their children. Those who harm their children will be punished.

Protection of children does not stop there, however. Many legislatures and courts are imposing a legal duty on parents to protect their children. Inherent in the right to raise children is the duty to support and protect them. Just as states will now punish professionals who fail in their professional duty to report suspected child abuse, there appears to be a growing willingness to punish parents who fail in their parental duty to protect their children. As the problem of child abuse continues to grow in this country, states are willing to take more drastic measures to stop harm to children.

## II. Rationales Behind Criminal Liability

Children need protection. They cannot protect themselves. We expect parents to fulfill this role, but when they are unwilling or unable to do so, the state will intervene. Criminal liability for

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106. *Id.* at 734.

107. *Id.* at 732.

108. Montana has expressly acknowledged the dilemma that the imposition of criminal liability for child endangerment places on states. In comments following their child endangerment statute, the Montana commission stated:

This section penalizes a limited class of misbehavior by a parent or other person legally responsible for the care and supervision of children. This offense can be committed only by an act or omission in violation of a legal duty. That legal duty may be one which does not itself carry a penal sanction; this section adds the penal sanction when violation of the duty creates a known danger to the child. Although the commission recognizes that prosecution of parents will seldom be a constructive solution to intra-family problems, it seems worthwhile to retain a penal sanction for gross breach of parental responsibility . . .

Mont. Code Ann. § 45-5-622 (1987) (Commission Comments). Like Montana, most recent child abuse legislation has weighted the balance between parents' rights and children's rights in favor of protecting endangered children. See Douglas J. Besharov, *The Legal Aspects of Reporting Known and Suspected Cases of Child Abuse and Neglect*, 23 Vill. L. Rev. 458, 461 (1978).

the failure to protect is one means the state can use to protect children. The underlying rationales in holding people criminally liable for their actions are punishment, deterrence, and rehabilitation.<sup>109</sup>

We believe that someone who allows a child in their care to suffer harm should be punished. It is a horrible crime which society cannot excuse. Ideally by punishing offenders, others are deterred from committing the same crime. Parents who learn of the conviction are put on notice of the consequences of failing to protect their own children and will take appropriate action. Finally, we want to rehabilitate the offender, so that the crime does not recur. Criminal liability provides the access necessary for rehabilitation and treatment.

The doctrine of *parens patriae* justifies intervention in a family because it is in the best interest of the child.<sup>110</sup> The question that arises, however, is whether the decision to prosecute a mother for allowing someone to injure her child is in the best interest of the child.<sup>111</sup> Although criminal sanctions against the actual abuser have been available for a long time, debate continues about the effectiveness of such sanctions.<sup>112</sup> Commentators question whether the process and subsequent punishment are not worse than the crime in terms of possible adverse effects upon the child.<sup>113</sup> Many of the same concerns arise with liability for the failure to protect. There are, however, other concerns unique to this particular situation. In light of the fact that courts are convicting people like Terri Williquette, we must examine the policy rationales behind

109. See Franklin E. Zimring and Gordon J. Hawkins, *Deterrence: The Legal Threat in Crime Control*, 1-3 (1973). Incapacitation is another rationale often cited for criminal liability. See Jack R. Gibbs, *Crime, Punishment, and Deterrence* 21-22 (1975). Since jail terms tend to be the exception in child abuse cases, however, this article does not consider incapacitation as a justification for criminal liability.

110. See *supra* notes 30-32 and accompanying text.

111. One group of commentators has suggested that, rather than using the "best interests" standard for determining appropriate placements in custody cases, courts should use the guideline of "the least detrimental available alternative for safeguarding the child's growth and development." Joseph Goldstein, Anna Freud, Albert J. Solnit, *Beyond the Best Interests of the Child* 53 (1979) (hereinafter Goldstein). Goldstein argues this guideline "should serve to remind decisionmakers that their task is to salvage as much as possible out of an unsatisfactory situation. It should reduce the likelihood of their becoming enmeshed in the hope and magic associated with 'best,' which often mistakenly leads them into believing that they have greater power for doing 'good' than 'bad.'" *Id.* at 63.

112. See, e.g., B.M. Dickens, *Child Abuse and Criminal Process: Dilemmas in Punishment and Protection*, in *Child Abuse* 77 (1984). See also Myers, *supra* note 12, at 149.

113. See Dickens, *supra* note 112 at 79-87; Myers, *supra* note 12, at 178-85.

such decisions and determine whether criminal liability is an effective means to the ends.

### A. Punishment.

The image of intentionally hurting a child is repugnant to most of us. We cannot imagine ever doing it, nor can we imagine sitting passively by while someone else abuses a child. When we hear of a case like Terri Williquette's, where a mother knew of the unforgivable physical, sexual, and emotional abuse her husband inflicted upon their two children, we are outraged. We, as a society, want that parent punished. She has violated our conception of what a parent should be. She has failed to protect her babies, a role that she is in the best position to fulfill. Although criminal sanctions may appease society's feelings of outrage, the interests of the individuals involved may not be furthered by such action.

#### 1. Implications for the non-abusing parent.

Abuse in a family is symptomatic of deeper problems. Such problems need treatment, not punishment.<sup>114</sup> If one of the goals of our child abuse laws is to strengthen the family,<sup>115</sup> punishing the non-abusive parent for failure to protect may be an ineffective way to accomplish that goal. A parent's failure to protect may stem from a general inability to cope with the stresses of life, rather than from any intentional desire to cause harm to a child. Punishment may relieve society's guilt, but, at the same time, may further victimize the parent.

The dynamics of an abusive family are very complex.<sup>116</sup> Mutual dependence—both economic and emotional—is often a characteristic. This dependence hinders the ability to get out of the relationship.<sup>117</sup> To leave a spouse, even if he is abusing one's children, may require a tremendous sacrifice.<sup>118</sup>

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114. See Nigel Parton, *The Politics of Child Abuse* 152 (1985). See also Murray A. Strauss, *Stress and Child Abuse*, in *The Battered Child*, *supra* note 15 at 86-103; Norman Polansky, Mary Ann Chalmers, Elizabeth Bittenweiser & David Williams, *Damaged Parents, An Anatomy of Child Neglect* 25-31 (1981) (hereinafter Polansky).

115. See *supra* notes 57-58 and accompanying text.

116. Myers, *supra* note 12, at 245. In describing families involved in intrafamilial sexual abuse, commentators have used adjectives such as "dysfunctional," "disorganized," and "nonfunctioning." Morris J. Paulson, Louise Strouse & Anne Chaleff, *Intrafamilial Incest and Sexual Molestation of Children*, in *The Rights of Children* 39, 44 (James S. Henning ed. 1982) (hereinafter Paulson). See also Polansky, *supra* note 114, at 29-31.

117. See C. Henry Kempe, *Incest and Other Forms of Sexual Abuse*, in *The Battered Child*, *supra* note 15, at 198, 205.

118. Women are reluctant to leave spouses who batter them or their children. It

An abusing spouse may be the sole source of financial support for the family. Particularly when the non-abusing spouse is not working, the decision to leave with the children can result in a drastic decline in family income. One study found that the difference in mean monthly income between father-present households and father-absent households ranged from \$200-\$300 less for the father-absent households.<sup>119</sup> The study concluded that "[t]o be fatherless was to be low-income."<sup>120</sup> The father-absent family may be forced to depend on others or on the state for support.

The decision to leave an abusing partner is often compounded by the lack of places to go. Abusive families tend to be socially isolated, with few resources outside the home.<sup>121</sup> In some instances, a woman's family will encourage her to remain in the violent relationship in order to keep the family intact.<sup>122</sup>

Emotional dependence is another factor in a parent's decision to stay in a destructive relationship. Some women cannot imagine being alone again. They feel that life with an abusive partner is better than life with no partner at all.<sup>123</sup> Some women claim that they still love the man who has abused their children.<sup>124</sup> For a mother to acknowledge the abuse and take actions to stop it is to threaten the security of the family unit.<sup>125</sup> A mother may be unwilling to do this despite the fact that the family unit she is protecting is dysfunctional.<sup>126</sup>

Our society must take some responsibility for the inability of some women to leave abusive partners. Sex-role stereotyping persists. Society still encourages girls to assume such feminine char-

has been theorized, however, that mothers of preschool-aged children who have been sexually abused by the fathers are *more* likely to leave the abusers. This may be due to the higher level of outrage because of the age of the children or the shorter duration of the relationships, which may affect the dependence on the relationships the women feel. Jill Waterman, *Family Dynamics of Incest with Young Children*, in *Sexual Abuse of Young Children* 215-19 (1986).

119. Polansky, *supra* note 114, at 138-39.

120. *Id.* at 139.

121. Stephen Bittner & Eli H. Newberger, *Child Abuse: Current Issues of Etiology, Diagnosis, and Treatment*, in *The Rights of Children*, *supra* note 116, at 64, 72-73.

122. See Lenore E. Walker, *The Battered Woman* 145-46 (1979).

123. See, e.g., *Mobley v. State*, 85 N.E.2d 489, 492 (Ind. 1949) (mother admitted she did not stop the abuse of her child because she was afraid her boyfriend would leave her). See also Polansky, *supra* note 114, at 144.

124. Paulson, *supra* note 116, at 55.

125. See Robert M. Horowitz & Howard A. Davidson, *Protection of Children from Family Maltreatment*, in *Legal Rights of Children* 273 (R.M. Horowitz & H.A. Davidson ed. 1984) (hereinafter Davidson). Battered women have stated "that they did not want to deprive their children of their fathers by breaking up their marriages." Walker, *supra* note 122, at 149.

126. Davidson, *supra* note 125, at 273.

acteristics as timidity and dependency, while boys are rewarded for their aggressive, independent behavior.<sup>127</sup> Women have been conditioned to believe they are helpless and will not be able to survive independently.<sup>128</sup> Women are also socialized to believe their value is measured by their success as wives<sup>129</sup> and mothers.<sup>130</sup> From the time they are small children, women learn that "marriage is forever," "you made your bed, now lie in it," and "divorced women are responsible for their marital failures."<sup>131</sup> The decision to remove the children from an abusive setting may require overcoming a sense of shame or embarrassment for failing as a mother/wife.<sup>132</sup>

Socialization also factors into perceptions of violence. We live in a violent society. Many people believe that physical punishment is not necessarily wrong. In fact, studies have shown that between 84 and 97 percent of parents discipline their children using some form of physical punishment.<sup>133</sup>

If a woman was raised in a physically punitive environment, she is more likely to view such child rearing techniques as justified, or necessary to teach appropriate behavior.<sup>134</sup> Children who have been abused learn to associate violence with the people they love.<sup>135</sup> They may not know anything else. These children grow up believing that parents hit you because they care. Therefore, as an adult, the fact that one's spouse abuses the children may be seen as an inevitable fact of life—an expression of love.

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127. See Pagelow, *supra* note 17, at 122-23. See also Walker, *supra* note 122, at 51, 145-46.

128. See David Finkelhor, *Psychological, Cultural and Family Factors in Incest and Family Sexual Abuse*, in *Child Abuse: Commission and Omission* 263, 266 (Joanne Cook & Ray Bowles ed. 1980).

129. Studies done on abused wives have shown that women who are battered often stay in the relationship because of a sense of shame and responsibility. "Women in our culture are encouraged to believe that the failure of a marriage represents their failure as a woman. . . ." Pagelow, *supra* note 17, at 309 (citing Del Martin, *Battered Wives* 81 (1976)).

130. See Gertrude J. Williams, *Toward the Eradication of Child Abuse and Neglect at Home*, in *Traumatic Abuse and Neglect of Children at Home* 588, 597 (Gertrude J. Williams & John Money ed. 1980).

131. Walker, *supra* note 122, at 146.

132. See Kempe, *Incest and Other Forms of Sexual Abuse*, in *The Battered Child*, *supra* note 15, at 198, 199. See also Shirley O'Brien, *Child Abuse, A Crying Shame* 30 (1980).

133. Richard J. Gelles, *Violence Toward Children in the United States*, in *Critical Perspectives on Child Abuse* 53 (Richard Bourne & Eli H. Newberger ed. 1979).

134. See Ross D. Parke, *Socialization into Child Abuse: A Social Interactional Perspective*, in *Child Abuse: Commission and Omission*, *supra* note 128, at 295, 300-01. See also Richard Gelles, *A Profile of Violence toward Children in the United States*, in *Child Abuse, An Agenda for Action*, *supra* note 19, at 82, 102.

135. Strauss, *supra* note 114, at 86, 89.

The idea of a "cycle of violence" or "violence begetting violence" has become popular as one way to explain the prevalence of family violence.<sup>136</sup> While some studies support the concept, definitive answers are not yet available.<sup>137</sup> Research on incestuous families has shown that a large proportion of the mothers are from backgrounds of emotional deprivation, abuse, desertion by their own fathers, and unsatisfactory past relationships with men.<sup>138</sup> Similarly, studies on neglectful families have shown that more than three out of every five mothers who neglect their children had experienced abuse themselves as children. There is a "ring of common-sense logic" to the idea of a cycle of violence, but commentators caution that strong empirical support is missing.<sup>139</sup>

Fear may be another motivating factor to explain a parent's failure to protect. A parent may genuinely fear that an action to protect a child might provoke retaliation against herself or the child.<sup>140</sup> The abuser who has been accused may be angry at the reporter or the child for the disruption in his life, particularly if incarceration was involved.<sup>141</sup> In situations where incarceration is not used, restraining orders may not necessarily protect a family from further abuse.<sup>142</sup> Judges can issue restraining orders requiring the abuser to stop the violence and stay away from the victim. If the abuser disobeys the order, contempt of court citations and arrest orders usually result.<sup>143</sup> While such orders are said to be 80% effective, some people, particularly attorneys, feel that the abuser will not obey a restraining order as it "is simply a piece of paper which cannot force a batterer to cease his violent behavior."<sup>144</sup>

Often, drug or alcohol dependence is another complicating factor in the abusive family situation.<sup>145</sup> Sometimes the abuser is chemically dependent and the abuse occurs only when he is intoxi-

136. For an overview of the literature on the "cycle of violence," see Pagelow, *supra* note 17, at 223-57.

137. *Id.* at 256.

138. Paulson, *supra* note 116.

139. Pagelow, *supra* note 17, at 254.

140. See *supra* notes 54-55 and accompanying text.

141. See Richard Bourne, *Child Abuse and Neglect: An Overview*, in *Critical Perspectives on Child Abuse*, *supra* note 133, at 1, 12. See also Mayhall & Norgard, *supra* note 23, at 271.

142. See Lenore E. Walker, *The Battered Woman Syndrome* 141 (1984).

143. Walker, *supra* note 122, at 210-11.

144. *Id.* at 211.

145. See Edward Zigler, *Controlling Child Abuse in America: An Effort Doomed to Failure?*, in *Critical Perspectives on Child Abuse*, *supra* note 133, at 171, 185. See also Bernard Horowitz & Isabel Wolock, *Material Deprivation, Child Maltreatment, and Agency Interventions Among Poor Families*, in *The Social Context of Child Abuse and Neglect* 137, 168-69 (Leroy H. Pelton ed. 1985).

cated. This makes it easier for the non-abusing spouse to ignore or excuse the abuse rather than act to prevent it. In other cases, the non-abusing parent may be the one with the dependence. Drug or alcohol addiction may prevent her from adequately providing for and protecting her children.<sup>146</sup>

A parent who fails to protect her child from another's abuse has not fulfilled the expectations that society places on her. She is expected to be a "good" parent and not allow her children to be victimized. Yet, in many cases, the parent is a victim as well. Punishment for her behavior only continues the victimization.

## 2. Effect upon the child.

The decision to punish a child abuser too often is determined in light of the effect on the offender, and on society in general. Rarely do we consider the needs of the child victim.<sup>147</sup> We appease society's conscience without considering the effect upon the child. One commentator discussing the dilemmas of criminal prosecution of child abusers (committees as opposed to omitters) wrote: "The paradox or incongruity arises . . . in a court punishing a parent for ignoring a child's welfare while itself ignoring a child's welfare."<sup>148</sup>

In a typical situation of criminal child abuse, the perpetrator will be punished by a jail term and/or a fine.<sup>149</sup> He is usually removed from the family situation at least temporarily. Removing or fining the non-abusing parent as well may not be in the best interest of the child. Parents provide more than just basic need fulfillment and protection to their children. The parent-child relationship is crucial to the child's development.<sup>150</sup> Except in the most extreme instances, the bond between parent and child is not one that should be broken lightly, even temporarily.<sup>151</sup> "Con-

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146. See, e.g., *Lott v. State*, 686 S.W.2d 304, 309 (Tex. Ct. App. 1985) (mother's dependence on drugs supplied by the perpetrator of child's abuse prevented her from leaving him).

147. See Dickens, *supra* note 112, at 85.

148. *Id.*

149. See, e.g., Minn. Stat. § 609.378(b) (1986) ("a parent, legal guardian, or foster parent who knowingly permits the continuing physical or sexual abuse of a child . . . may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than \$3,000, or both").

150. Joseph Goldstein, Anna Freud, Albert J. Solnit, *Beyond the Best Interests of the Child* 10 (1979). See also Goldstein, *supra* note 111, at 9-20; Mia Kellmer Pringle, *The Needs of Children*, in *The Maltreatment of Children* 221, 228 (Selwyn M. Smith ed. 1978).

151. Goldstein et al, writing about child placement generally, have proposed that "[p]lacement decisions should safeguard the child's need for continuity of relationships." Goldstein, *supra* note 111, at 31.



tinuity of relationships, surroundings, and environmental influence are essential for a child's normal development."<sup>152</sup> A child's identity and emotional security spring from that relationship.<sup>153</sup> If it is determined that both parents have violated child abuse laws—through direct abuse and the failure to protect—it is likely the children will be placed in foster care or with relatives “for their protection.” Yet, “[s]afety from physical risk may be in conflict with safety of personality development.”<sup>154</sup>

Even if the non-abusive parent is not incarcerated, there still may be economic repercussions. The costs involved in a trial in terms of time and money create a financial burden on the family. Imposing a fine<sup>155</sup> in lieu of incarceration may increase the economic stress already felt by the family.<sup>156</sup> Fines can also deprive the parent and child of valuable interactive time important to the child's development, as many parents must return to work to repay the amount owed.<sup>157</sup>

The criminal justice process itself is traumatic for child victims.<sup>158</sup> A child may feel she deserved the abuse. When the parent is punished by the criminal system, the child is likely to interpret this as an inappropriate consequence and may feel responsible for the punishment levied on the parent, whom she still loves.<sup>159</sup> The psychological burden on the child if criminal sanctions were imposed on both the perpetrating parent and the non-abusing parent could be devastating. To convict a parent of the failure to protect, there must be evidence that the parent knew of the abuse her children suffered.<sup>160</sup> That evidence is usually provided by the child's testimony that she told her mother. The child, then, may feel that she is effectively convicting both her parents.

Prosecuting a parent for child abuse may result in a “second victimization” for the child victim.<sup>161</sup> Many mental health professionals believe that “legal proceedings can have a profoundly disturbing effect on the mental and emotional health of the child

152. *Id.* at 31-32.

153. See Pringle, *supra* note 150, at 228.

154. Dickens, *supra* note 112, at 85.

155. See, e.g., Miss. Code Ann. § 97-5-39(1) (Supp. 1986) (fine not to exceed \$1,000); Mont. Code Ann. § 45-5-622(3) (1985) (fine not to exceed \$500); Wyo. Stat. Ann. § 6-4-483(c) (1977) (fine not to exceed \$1,000).

156. See Dickens, *supra* note 112, at 84.

157. See *id.*

158. See Myers, *supra* note 12, at 182. See also Mary Avery, *The Child Abuse Witness: Potential for Secondary Victimization*, 7 *Crim. Just. J.* 3-4 (1983).

159. See Bourne, *supra* note 141, at 12.

160. See *supra* notes 72-74 and accompanying text.

161. See Myers, *supra* note 12, at 182-83.

victim."<sup>162</sup> When a parent is prosecuted for the failure to protect, the abusing parent has already been convicted. The child has been through the legal process once. Much of the evidence on which courts must rely to convict a person of child abuse is the testimony of young children.<sup>163</sup> Corroborating evidence is usually scarce because child abuse is a private crime.<sup>164</sup> Rarely are there impartial witnesses to the act.<sup>165</sup> Continuous questioning about the event can be embarrassing and traumatic for the child.<sup>166</sup> To require a child to go through the distressing process a second time in order to punish the non-abusing parent may not be in the child's best interests.

Our society places a high value on the protection of children. The public demands reinforcement of these values through punishment.<sup>167</sup> If, however, we must further victimize both parents and children to achieve that punishment, we should reconsider whether punishment is worth the cost.

### B. Deterrence

Deterrence is a second rationale behind a society's decision to criminalize certain actions. Deterrence is the omission of a criminal act in response to the perceived fear and likelihood that one will be punished for contrary behavior.<sup>168</sup> People generally are deterred from criminal actions by their own inhibitions arising out of a moral code shared by the general public.<sup>169</sup> Most potential criminals, however, do not respond in the same way to their inhibitions, but rather evaluate the risk and severity of punishment against the net advantages to be had from committing the crime.<sup>170</sup>

Many studies have been conducted to evaluate the effect of criminal punishment as a deterrent on individual actors and on the general public as a whole.<sup>171</sup> The data is not yet conclusive about

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162. Avery, *supra* note 158, at 3.

163. Dickens, *supra* note 112, at 81.

164. See Myers, *supra* note 12, at 184-85.

165. Schwartz & Hirsch, *supra* note 16, at 51.

166. See Myers, *supra* note 12, at 184.

167. See Dickens, *supra* note 112, at 87.

168. Jack P. Gibbs, *Crime, Punishment, and Deterrence* 2 (1975).

169. James Q. Wilson, *Thinking About Crime*, *Atl. Monthly*, Sept. 1983, at 72, 77.

170. *Id.* at 79.

171. See, e.g., Alfred Blumstein & Daniel Nagin, *The Deterrent Effect of Legal Sanctions on Draft Evasion*, 29 *Stan. L. Rev.* 241 (1979) (study found that the higher the probability of conviction for draft dodging, the lower the actual rates); Charles A. Murray & Louis A. Cox Jr., *Beyond Probation* 177 (1979) (study found that incarceration of juvenile offenders reduced the recidivism rate substantially); Lawrence W. Sherman & Richard A. Berk, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 *Am. Soc. Rev.* 261 (1984) (actual arrests of spouse abusers,

the effects of criminal sanctions as deterrents. As one social scientist wrote, "[i]n some situations some individuals are deterred from some crimes by some punishments."<sup>172</sup> What does seem clear is that for deterrence to work at all, three factors must be present. First, there must be certainty that the sanction will follow the act.<sup>173</sup> Second, the severity of the sanction must be sufficient to outweigh the advantages to be gained from committing the crime.<sup>174</sup> Finally, the punishment must follow quickly.<sup>175</sup> For general deterrence to occur, public knowledge of criminal sanctions is a necessity.<sup>176</sup> Someone whose act might be deterred must believe that the threat of punishment is directed toward them and will be enforced.<sup>177</sup>

The criminalization of the failure to protect will only act as a deterrent to the extent that it puts people responsible for the care of children on constructive notice that they have a duty to protect the child.<sup>178</sup> Publicizing the existence of the law and the sanctions that result from its violation has been shown to be helpful in deterrence.<sup>179</sup> Only with awareness that others before her have been held liable for failing to stop the abuse of children will a parent be likely to try to prevent abuse or to seek treatment for the family, in order to avoid liability.

Until more parents are charged with the crime of failing to protect, and these charges are publicized in the media to maximize citizen awareness, most parents will remain unaware of their legal responsibility. Adequate methods for increasing public awareness of the duty to protect children and the ensuing sanctions for failing to meet that duty are required to ensure that criminal sanctions will be effective deterrents.

Another positive aspect of notice is that it may relieve some of the emotional burden on the non-abusing parent. She knows, and everyone around her knows, that she must act to prevent the abuse of her children, or she risks criminal liability. The decision

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as opposed to separation and mediation, reduced the likelihood of subsequent reports for the same crime).

172. Gibbs, *supra* note 168, at 11.

173. *Id.* at 117.

174. *Id.* at 130.

175. *Id.* at 104. See also Wilson, *supra* note 169, at 78-88.

176. Franklin H. Zimring & Gordon J. Hawkins, *Deterrence, The Legal Threat in Crime Control* 158 (1973).

177. *Id.*

178. See, e.g., *Williquette II*, 129 Wis. 2d 239, 262, 385 N.W.2d 145, 155 (1986) ("This construction of sec. 940.201 gives the defendant notice that she has an affirmative duty to protect her children from a foreseeable risk of cruel maltreatment").

179. Wilson, *supra* note 169, at 78.

to seek intervention or to leave the abuser is more easily justified to herself and others when she effectively "has no choice" if she wants to avoid liability herself.

On the other hand, fear of criminal liability still may not be enough to change the dynamics of the abusive family and encourage reporting of abuse. Fear of punishment is most likely to factor into a person's decision whether or not to commit a crime when there are obvious advantages to be gained by the crime.<sup>180</sup> A mother who allows someone to hurt her child is probably not thinking about the advantages of her passive behavior. She is not likely to be thinking of what the repercussions of her non-action will be beyond her immediate situation. Her behavior is more likely the result of a passive acceptance of what society has "dealt" her than a conscious consideration of the advantages of her behavior.

By criminalizing the failure to protect, our society seeks to deter parents from ignoring their duty to protect their children. The hope is that criminal sanctions will motivate these parents to actively stop the abuse through whatever means are available to them. Without increased public awareness of the existing duty and possible sanctions, however, the deterrent effect of the laws will be minimal.

Even with increased public awareness, deterrence is not guaranteed. There is still significant controversy over the effects of punishment as a deterrent generally. If the effectiveness of criminal sanctions as a deterrent for the average criminal lawbreaker is still in question, it seems reasonable to question strongly its effectiveness with a parent caught in an abusive family situation.

### C. Rehabilitation

The third rationale behind imposing criminal sanctions for the failure to protect is that rehabilitation of the offender can begin.<sup>181</sup> Upon conviction, the parent is made aware of societal expectations, and can change to become a better provider for her children. Ideally, rehabilitation allows for the needs of all the interested parties—the child, the parent, and society—to be met. The child is protected while remaining in the parent-child relationship, and the parent is not further victimized by society. Rehabilitation allows the parent to step out of the role society has helped to create and to learn to be a better parent. Finally, reha-

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180. *Id.* at 79.

181. For a general discussion of rehabilitation's role as an alternative to punishment, see generally Punishment and Rehabilitation (Jeffrie G. Murphy, ed. 1985).

bilitation appeases somewhat the public cry for punishment of child abusers as the abuser "pays" for the crime through rehabilitation.

Criminal sanctions on parents who fail to protect ideally could ensure that these parents get the treatment they need. The threat of liability alone may make parents more amenable to cooperating with treatment alternatives.<sup>182</sup> Another advantage of criminal sanctions is that outside agencies become aware of the problem, ending the isolation which allows the dysfunction in the family to continue.

The abusing family needs strengthening. Children need therapy to overcome the effects of the abuse and learn to trust their parents again; and parents need to learn how to provide for and protect their children. As long as the sanctions imposed on parents who fail to protect consist of incarceration, probation, or fines without mandated treatment, however, rehabilitation will not necessarily occur. Incarceration will not turn an ineffective parent into an effective one. The prison environment is not equipped to teach mothers how to protect their children.<sup>183</sup> Indeed, separating parents from their children in a coercive, dehumanizing prison environment may disable a parent further rather than help.<sup>184</sup> When the abusing parent is jailed, the abuse will stop, which may justify the imprisonment. With non-abusing parents, however, incapacitation is not required to stop the harm to the child, since this ends with the removal of the abusing partner. Therefore, incarceration can only be justified for its punishment value or for rehabilitation.

Incarceration almost universally requires disruption of the family, since few prisons allow families to remain together.<sup>185</sup> Separation of children from parents, however "bad", may be more harmful than keeping the family intact.<sup>186</sup> If the family has already suffered the loss of the abusing parent, it is not often in the best interest of the children to lose the other parent as well.<sup>187</sup> As long as a family is separated by the incarceration of a parent, treat-

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182. See Donald N. Duquette, *Liberty and Lawyers in Child Protection*, in *The Battered Child*, *supra* note 15, at 316, 317.

183. See Dickens, *supra* note 112, at 86. The author further states, "[i]t is evident that no education or sensitization in the needs and capacities of children is achieved in prisons. . . ." *Id.*

184. *Id.* at 86-87.

185. See Note, *On Prisoners and Parenting: Preserving the Tie that Binds*, 87 *Yale L.J.* 1408, 1409 (1978) [hereinafter *On Prisoners and Parenting*]. See also Laura Schoenbauer, *Incarcerated Parents and Their Children — Forgotten Families*, 4 *Law & Inequality* 579 (1986).

186. See *supra* notes 150-154 and accompanying text.

187. For more information about the effects on children of the incarceration of parents, see *On Prisoners and Parenting*, *supra* note 185, at 1408.

ment of that family unit and strengthening of the parent-child relationship cannot occur.

Our system should concentrate on rehabilitating the parent within the family. We should teach her the skills she needs to fulfill her parental duty. Those skills cannot be learned in a vacuum. They should be taught within the environment in which they will be utilized—the family.

If criminal liability for the failure to protect is going to be effective and rehabilitation is truly going to occur, the neglecting parent must be required to enter treatment. Simply imposing a fine or placing the parent on probation will not begin the rehabilitation process for the family. The conviction for failing to meet societal expectations is useless unless the offender is required to work to meet those expectations. A figurative slap on the wrist is not enough. We must show the parent where she failed in her duty and what she must do to correct the situation. Rehabilitation must actually occur.

### III. An Ideal Program

There is no question that we must do everything we can to protect children. Therefore, states have decided they will intervene in the interests of children when parents do not fulfill their responsibilities. Criminal prosecution of adults who abuse children, and of those who allow them to be abused, is one way states try to protect children.

Theoretically, criminal liability should protect children in three ways. It punishes the offender for committing an act proscribed by society. It rehabilitates the offender so that the behavior is stopped permanently. Finally, it deters others from committing the same offense against innocent children.

Realistically, however, in the context of the failure by a parent to protect, criminal sanctions effectively protect children only to the extent they put parents on notice of their duty to protect, and provide leverage to get offenders into treatment programs. The punishment of a parent for failing to prevent harm to her children may cause further emotional and developmental harm to the child, rather than meeting the state goal of protecting the child. These families need treatment, not punishment. Criminal sanctions are not effective deterrents to others who might allow abuse to occur, unless the public is made aware of their duty to protect and of the consequences of not protecting. Finally, criminal liability does not guarantee rehabilitation. There may be parents who are not amenable to treatment, and who cannot or will

not learn the skills needed to protect their children. Criminal liability can, however, be the leverage needed to get offenders into treatment programs—the necessary first step that many people are unable to take alone.

Parents who fail to protect should be charged with the crime of child abuse. Once charges are filed, however, pre-trial diversion should be used for all first-time offenders who allow another adult to injure their children. This would incorporate criminal sanctions to the extent they can be used for leverage and deterrence.

Pre-trial diversion is not new. It is being used in some jurisdictions for sexual abuse offenders.<sup>188</sup> The program is justified in part because of the “determination that punishment for certain offenders is unlikely to deter future criminal behavior, whereas counseling or treatment can change behavior patterns which have led to and may in the future again result in criminal activity.”<sup>189</sup> While there are variations, pre-trial diversion programs generally offer persons charged with crimes alternatives to traditional criminal proceedings by allowing defendants to fulfill certain specified obligations on a voluntary basis.<sup>190</sup> Often these obligations include participation in a treatment program.<sup>191</sup> Charges will be dismissed or lowered substantially if the defendant successfully completes the conditions of the diversion process.<sup>192</sup>

Under the pre-trial diversion program, the parent would be charged under the state child abuse statute, regardless of whether it is a “commission” or an “omission” statute. At that point, however, the family would be diverted into a treatment program that would include therapy for the abused children and for the parent. The therapy for the children would help the children overcome the effects both of the abuse itself and of being let down by the parent who did not act to prevent the abuse. The goal of therapy would be to improve the children’s self-esteem and renew their trust in adults. At the same time, it is hoped that therapy would

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188. Olathe, Kansas is one such jurisdiction using pretrial diversion for child sexual abuse offenders. See Helen Swann, Debi Coffey, Roger Courtney, Dennis Moore & Kevin Moriarity, *Johnson County Child Sexual Abuse Treatment Program, A Pre-trial Diversion Model, Olathe, Kansas*, in *Innovations in the Prosecution of Child Sexual Abuse Cases 43* (Josephine Bulkley ed. 1983).

189. Josephine Bulkley & Donna Wulkan, *Pre-Trial Diversion, Juvenile/Criminal Court Coordination and Other Innovative Approaches in Legal Interventions*, in *Innovations in the Prosecution of Child Sexual Abuse Cases*, *supra* note 188, at 9.

190. *Id.* at 9-10. See also Nat’l Ass’n of Pretrial Services Agencies, *Performance Standards and Goals for Pretrial Release and Diversion: Pretrial Diversion 5* (1978).

191. Bulkley & Wulkan, *supra* note 189, at 9-10.

192. *Id.*

interrupt the possible cycle of violence by teaching skills that would enable the child eventually to become an effective parent.

The program for the parent would be designed to teach the skills needed to meet societal expectations. A parent who has failed to protect her children has done so in part in response to her environment. Changing that environment is the first step to rehabilitation. The parent must learn she does have some control over her environment. She must be taught the skills required to be independent—both emotionally and economically. The treatment program should incorporate self-esteem, job skills, and awareness of available resources. The parent must also learn appropriate parenting skills so she will be able to provide for her children's physical and emotional needs.

If the parent successfully completed the program, she would be placed on probation for six months during which time there would be continuing supervision of the family.<sup>193</sup> If no further reports of abuse were filed during this time, the charges would be dropped completely, though a record of the arrest would be retained. If, however, the parent did not complete the treatment program or there was evidence that she abused her children or knowingly allowed another adult to abuse them, the full force of the criminal system could be invoked to fully prosecute the parent for child abuse. A second offense by the parent at any later date would also trigger prosecution under the child abuse statute.

Pre-trial diversion would allow the criminal system to be more sensitive to the interests of the child victims and the needs of the non-abusing parent, while still responding to society's desire to make parents responsible for their children's protection. It would enable families to stay intact and participate in the healing process

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193. Illinois presently has a similar provision in its statute concerning aggravated battery of a child. Ill. Ann. Stat. ch. 38 para. 12-4.3(b)(1)&(2) (Smith-Hurd Supp. 1987) reads:

(1) When a person engaged in the actual care of the victim child . . . pleads guilty to, or is found guilty of the offense of aggravated battery of a child, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place such person upon probation upon such reasonable terms and conditions as it may require. At least one such term of probation shall be that the person report to and cooperate with the Department of Children and Family Services at such times and in such programs as the Department . . . may require.

(2) Upon fulfillment of the terms and conditions imposed, the court shall discharge such person and dismiss the proceedings. Discharge and dismissal under this Section shall be without court adjudication of guilt. . . . However, a record of the disposition shall be maintained and provided to any civil authority in connection with a determination of whether the person is an acceptable candidate for the care, custody, and supervision of children.



together. Deterrence of future crimes at the individual level would occur since the parent would understand that if she should fail in her parental duty a second time, full criminal prosecution would be pursued without the benefit of diversion.

On a general level, deterrence could be effected by publicity of the offense and the resulting charges. Parents who hear about the offense and resulting sanctions through media coverage might be less inclined to allow their children to suffer. Finally, pre-trial diversion allows for the protection of children in that it provides for supervision of the family during the healing process without the disruptive effect of separation.

### **Conclusion**

The two Williquette children suffered tragically at the hands of their abusive father and passive mother. They suffered through the trials of their father and of their mother. Their victimization must stop and the healing process must begin.

Terri Williquette was guilty of failing to protect her children from the horrors their father inflicted on them. Society demands that she accept responsibility for the consequences of her inaction. Terri Williquette's healing process should begin now as well. She must learn to overcome her own victimization and to be the parent her children deserve. She cannot do that alone or in prison. She needs rehabilitation within the family we expect her to protect.

A pre-trial diversion program for an offender like Terri Williquette would combine the benefits to be gained from criminal liability for the failure of a parent to protect, with the necessary treatment so that families can continue with their lives. Such a program would further the state and national goals of increased protection for our children while ensuring that the process itself does not inflict further abuse.