

# Mothers Who Fail to Protect Their Children from Sexual Abuse: Addressing the Problem of Denial

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Sexual abuse is the fastest growing form of reported child abuse.<sup>1</sup> Most child sexual abuse takes the form of incest<sup>2</sup> committed by fathers and stepfathers.<sup>3</sup> Courts and legislatures have attempted to address this serious societal problem by extending criminal liability beyond the perpetrators to include those family members who fail to intervene to stop the abuse.<sup>4</sup> This Note will explore how the law treats and should treat mothers who allow their children to be sexually abused by the mothers' partners. Specifically, this Note considers two questions. First, should the state impose criminal liability upon mothers who do not intervene to stop the sexual abuse of their children because

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1. The National Center on Child Abuse and Neglect estimates that reports of child sexual abuse have increased by more than 100% since 1976. Karla-Dee Clark, Note, *Innocent Victims and Blind Justice: Children's Rights to Be Free from Child Sexual Abuse*, 7 N.Y.L. SCH. J. HUM. RTS. 214, 216 n.2 (1990).

2. The American Humane Society's Clearinghouse on Child Abuse estimates that 60,000 to 100,000 children are victims of incest annually in the United States, affecting 10 to 14% of all American families. Camille W. Cook & Pamela K. Millsaps, *Redressing Wrongs of the Blamelessly Ignorant Survivor of Incest*, 26 U. RICH. L. REV. 1, 6 (1991). However, these figures do not capture the actual incidence of incestuous abuse because the majority of cases go unreported. The Child Advocate Association of Chicago estimates that only 3% of incestuous abuse cases are reported annually. *Id.*

3. The largest percentage of sexual abuse occurs between fathers and daughters. Clark, *supra* note 1, at 216. In one study of incestuous abuse cases, 97% of the offenders were adult males, and 87% of the child victims were females. SANDRA BUTLER, *CONSPIRACY OF SILENCE: THE TRAUMA OF INCEST* 5 (1978). Another study based on court cases involving incest offenses revealed that 90% of the cases concerned girls and their fathers, stepfathers or grandfathers. Of the remaining 10%, half were sexual relationships between fathers and sons. *Id.* at 5-6. One noted researcher estimates that 1% of American women over 18 have been involved in incestuous relations with their fathers and that another 16,000 new cases are added each year from among the group of girls aged 5 to 17. DAVID FINKELHOR, *SEXUALLY VICTIMIZED CHILDREN* 88 (1979). Because most sexual abuse occurs between an adult male and a female child, I will refer in this paper primarily to father-daughter sexual abuse. I use "father" to refer to the mother's partner, whether he be the child's biological father, stepfather or mother's boyfriend, and use the female pronoun to describe the victim of the incestuous relationship. This is in no way meant to deny that boys, too, may be subject to incest.

4. Most states already have statutes requiring the reporting of suspected child abuse by third parties. Some states require that any person or institution who has cause to suspect or believe that a minor is being abused or neglected shall make a report. *See, e.g.*, CONN. GEN. STAT. ANN. §§ 17A-101 TO -103 (1993); N.C. GEN. STAT. ANN. § 7A-543 (Michie 1994); R.I. GEN. LAWS § 40-11-3 (1990 & Supp. 1993); TENN. CODE ANN. §§ 37-1-403, -605 (1991 & Supp. 1993); WYO. STAT. ANN. § 14-3-205 (1994). Other statutes specify those required to report child abuse or neglect. *See, e.g.*, WIS. STAT. ANN. § 48.981 (West 1987 & Supp. 1993) (specifying, *inter alia*, medical, mental health, education and law enforcement professionals). *See also* ALA. CODE § 26-14-3 (1987 & Supp. 1994); CAL. PENAL CODE § 11166 (West 1992); COLO. REV. STAT. § 19-3-304 (West 1990 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 119, § 51A (West 1993); VA. CODE ANN. § 63.1-248.3 (Michie 1991 & Supp. 1994).

the mothers are in a state of denial about the abuse? And second, if the state should not impose criminal liability, how should it deal with these "mothers in denial"?

Denial is a psychologically incapacitating state that some mothers experience when faced with the possibility that their children are being sexually abused by their partners. Denial can hinder a mother's capacity to acknowledge, or even consciously know, that such abuse is occurring, thereby preventing her from intervening to protect her child or children. Even in the face of clear evidence that her partner is abusing her child, a mother who is in denial may simply stand by and allow the abuse to continue—often for a period of years. The legal dilemma of how to deal with such situations is further complicated by indications that the greatest harm to the child is caused not by the physical abuse itself, but rather by the mother's failure to acknowledge the abuse or to believe her child when the child confronts her with the abuse.<sup>5</sup>

In Part I, I discuss the psychological phenomenon of denial and how it prevents mothers from intervening to protect their children from intrafamily sexual abuse. In Part II, I examine an emerging trend in courts and legislatures to impose criminal liability upon parents who condone<sup>6</sup> child abuse by their partners. I analyze how these statutory and common law regimes apply to mothers in denial.

In Part III, I suggest how the law should deal with mothers in denial. I argue that mothers who are genuinely in denial about the abuse of their children should not be criminally prosecuted in all instances. Rather, they should be offered the choice of participating in psychiatric treatment programs in lieu of prosecution. This approach, I argue, is the most beneficial for the child and the mother.

## I. MOTHERS IN DENIAL

In this section I will describe the causes and manifestations of denial in mothers and its impact upon their children. While an exhaustive discussion of the psychological phenomenon of denial itself is beyond the scope of this Note, it is important to have some basic understanding of the phenomenon in order to analyze its legal and societal implications and effects in the case of mothers confronting the abuse of their children.

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5. See *infra* text accompanying notes 24-29.

6. I use the term "condone" in this context and throughout the paper not to indicate a parent who approves of or forgives the abuse of her child, but rather one who, for whatever reason, fails to intervene to stop the abuse in the face of evidence of abuse sufficient to raise one's reasonable suspicions. "Mother in denial," therefore, is a subset of "condoning parent."

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### A. *Causes and Manifestations of Denial in Mothers*

Denial is a psychological defense mechanism that a person uses to screen out distressing realities and the painful feelings they cause.<sup>7</sup> In the case of a mother who is in denial about the abuse of her child, denial protects her from the pain of knowing about the abuse, from her ensuing feelings of anger and betrayal toward her abusing partner, and from her feeling of guilt for not having protected her child.<sup>8</sup> At some level she may be aware that abuse is occurring, but to ward off these feelings, and perhaps to avoid facing the potential dissolution of her marriage, she denies its occurrence.<sup>9</sup>

A mother's denial regarding her partner's abuse may be compounded by her dependence upon her partner. Roland Summit explains:

As someone substantially dependent on the approval and generosity of the father, the mother in the incestuous triangle is confronted with a mind-splitting dilemma. . . . Either the child . . . or the father is . . . lying and unworthy of trust. The mother's whole security and life adjustment and much of her sense of adult self-worth demand a trust in the reliability of her partner. To accept the alternative means annihilation of the family and a large piece of her own identity.<sup>10</sup>

She may be panicked at the prospect of having to attempt to provide for her family, particularly if she has not had an opportunity to cultivate competencies in materially remunerative fields.<sup>11</sup> Yet even those mothers who support their families in addition to an unemployed partner sometimes refuse to take credit for the tasks they perform and often perceive that their partners somehow protect them from crisis. As a result, they may have little confidence in their ability to cope with life alone and thereby be susceptible to the same proclivities toward denial as those women who are financially dependent upon their partners.<sup>12</sup>

Some mothers' inability to confront the abuse of their children may also arise from their reactions to being victims of incest themselves.<sup>13</sup> Coping

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7. KARIN C. MEISELMAN, *RESOLVING THE TRAUMA OF INCEST* 8 (1990). See also *STEDMAN'S MEDICAL DICTIONARY* 374 (William H. L. Dornette ed., 5th ed. 1982) (defining denial as an "unconscious defense mechanism used to allay anxiety by denying the existence of important conflicts or troublesome impulses"); *TABER'S CYCLOPEDIA MEDICAL DICTIONARY* 472 (Clayton L. Thomas ed., 16th ed. 1989) (defining denial as the "[r]efusal to admit the reality of, or to acknowledge the presence or existence of something; keeping out of conscious awareness anxiety producing realities. A defense mechanism").

8. Carol A. Howard, *Factors Influencing a Mother's Response to Her Child's Disclosure of Incest*, *PROF. PSYCHOL. RES. & PRAC.*, May 1993, at 176, 179-80; ADELE MAYER, *INCEST: A TREATMENT MANUAL FOR THERAPY WITH VICTIMS, SPOUSES AND OFFENDERS* 80 (1983).

9. MAYER, *supra* note 8, at 30.

10. Roland C. Summit, *The Child Sexual Abuse Accommodation Syndrome*, 7 *CHILD ABUSE & NEGLECT* 177, 187 (1983).

11. BRENDA J. VANDER MEY & RONALD L. NEFF, *INCEST AS CHILD ABUSE: RESEARCH AND APPLICATIONS* 163 (1986).

12. Kathleen Koch & Carolynne Jarvis, *Symbiotic Mother-Daughter Relationships in Incest Families*, *J. CONTEMP. SOC. WORK*, Feb. 1987, at 94.

13. Howard, *supra* note 8, at 180.

strategies that they developed to contend with their own abuse may inhibit their ability to confront their children's abuse.<sup>14</sup> It may also be difficult for these women to accept the fact that they permitted their daughters to be victims of the same abuse to which they had been subjected.<sup>15</sup>

Some mothers maintain their state of denial in the face of the most overt signs of incestuous abuse. Clues are often present long before the incest actually begins. Pre-incest paternal behavior includes a father's insistence on sleeping near the daughter, efforts to see her naked, attempts to exhibit himself to her, and engaging in an unusual amount of physical contact with her.<sup>16</sup> Once sexual activity has occurred, the victims often exhibit clear physical and behavioral symptoms.<sup>17</sup> Yet even faced with these plain signs, some mothers continue to refuse to believe that the abuse is occurring.<sup>18</sup> In some cases, she may even blame her daughter for the incest.<sup>19</sup>

For example, one girl who was continually sexually assaulted by her father tried to tell her mother on several occasions, but was cut off each time. Finally, when her father was out of town, she showed her mother pornographic photographs of herself taken by her father. The pictures momentarily shocked the mother into belief, but nonetheless, she eventually accepted the father's subsequent denial of incest. Both the mother and father hostilely rejected their daughter, calling her a "traitor to the family." Because the daughter adamantly insisted that the incestuous assaults had occurred, she was placed with a foster family.<sup>20</sup>

Another example of the high degree of denial a mother can sustain was reflected in the following dialogue in a therapy session recorded by researcher Karin Meiselman:

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14. *Id.*

15. VANDER MEY & NEFF, *supra* note 11, at 163.

16. KARIN C. MEISELMAN, *INCEST: A PSYCHOLOGICAL STUDY OF CAUSES AND EFFECTS WITH TREATMENT RECOMMENDATIONS* 112 (1978).

17. Physical symptoms of sexual abuse may include one or more of the following: hematomas in the genital area; lacerations of the labia, vagina or perineum; irritation of or pain in genital area; vaginal discharge; and dysuria. Behavioral signs may include one or more of the following: nightmares; vomiting; arriving early to school and leaving late; poor academic performance; refusing to stay alone with father; acting nervously, or aggressively; behaving disruptively toward adults, especially toward parents; lying; running away; using alcohol or drugs; showing sexual self-consciousness, provocative-ness, or vulnerability to sexual approaches; behaving promiscuously sexually; withdrawing from social relationships; appearing mentally disabled; and demonstrating regressive behavior. Darlene E. McCown, *Father/Daughter Incest: A Family Problem*, *PEDIATRIC NURSING*, July-Aug. 1981, at 25-26.

18. See MEISELMAN, *supra* note 16, at 172 (reporting psychotherapy sample where 75% of mothers who had discovered the occurrence of incest did not act effectively to end it. In some cases, mother continued her pattern of denial and simply refused to believe that incest was occurring; in others, she believed the daughter but failed to take any action; and in extreme cases, she punished the daughter for her disclosure).

19. McCown, *supra* note 17, at 23.

20. MEISELMAN, *supra* note 16, at 174 (1978). Another mother, upon being told by her five-year-old that the child's father was sexually abusing her, responded, "Shut up—you liar—you know he (father) wouldn't do such a thing . . ." Margot B. Zuelzer & Richard E. Reposa, *Mothers in Incestuous Families*, *INT'L J. FAM. THERAPY*, Summer 1983, at 98, 104-05.

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Daughter: You don't see how we could have done it . . . .

Mother: No, un-unh. No.

Daughter: We went to the dump! We went out into the sticks! Right out in the cow pasture! Okay, you went away! Everybody was away from the house! We've had it in your bed! We've had it in my bed! We've had it in the bathroom on the floor! . . . We've had it down in the basement! In my bedroom down there, and also in the furnace room! . . .

Mother: I just can't believe it, I just can't . . . .

Daughter: Mom . . . .

Mother: Just can't see how anything like this could possibly happen and how you could treat me this way.

Daughter: Because . . . .

Mother: After all I've done for you! I've tried to be a mother to you, I've tried to be a respectable mother, and you accuse your father of something that's so horrible, that's . . . .

Daughter: Mother, it's true! You've got to believe it . . . .

Mother: [To therapist] She's my daughter, and I love her, but I cannot believe this!<sup>21</sup>

Upon reflection, many mothers who progress from denial to acceptance of the trauma of incestuous abuse realize that their daughters had tried to tell them of the abuse in some way.<sup>22</sup> Often mothers are able to think back and isolate behaviors that started when the sexual abuse began but which did not raise their suspicions at the time.<sup>23</sup>

### B. *The Effects of a Mother's Denial on the Victim*

The mother's state of denial has repercussions on the victim beyond the victim's continued abuse. Indeed, studies indicate that a mother's denial of the fact of incestuous abuse may, in addition to aggravating the trauma of the abuse,<sup>24</sup> have more damaging psychological effects than the abuse itself.<sup>25</sup> One victim of long-term incest was hospitalized for severe depression with psychotic features. Therapy later revealed that the most troublesome issue for her was not the psychological consequences of the incestuous abuse, but rather the anger she harbored toward her mother for repeatedly witnessing the incestuous abuse and subsequently denying all knowledge of its occurrence during court hearings.<sup>26</sup>

Studies that have attempted to relate the degree of maternal support of sexually abused children to child outcomes have found that children who

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21. MEISELMAN, *supra* note 16, at 172-73.

22. *Id.* at 136.

23. *Id.*

24. DAVID FINKELHOR, *A SOURCEBOOK ON CHILD SEXUAL ABUSE* 174 (1986).

25. One study found that the level of maternal support was more strongly predictive of the child's initial psychological performance than the type or length of the abuse or the perpetrator's relationship to the child. Mark Everson et al., *Maternal Support Following Disclosure of Incest*, *AMER. J. ORTHOPSYCHIAT.*, Apr. 1989, at 197.

26. MEISELMAN, *supra* note 7, at 139 (1990).

received no parental support were diagnosed with far more emotional disturbance than children who had some level of support.<sup>27</sup> One study found that children exhibited more behavioral disturbances when their mothers reacted to disclosure with anger and punishment.<sup>28</sup> Another study noted two-and-a-half times the number of symptoms in children who had encountered negative reactions from their parents.<sup>29</sup> These direct deleterious effects of a mother's denial upon her child, coupled with the indirect effect of allowing the abuse to continue, may suggest that mothers in denial should be held criminally liable for their partners' abuse. Many states have moved in this direction, as described in Part II. However, I will argue in Part III that treatment, rather than incarceration, is the best approach to the problem, both for the child and for the mother.

## II. LEGAL TRENDS TOWARD HOLDING CONDONING PARENTS CRIMINALLY LIABLE

Courts and legislatures have increasingly extended criminal liability for child abuse to include those parents who condone the abuse of their children. Courts have held condoning parents criminally liable through a combination of several doctrinal approaches: (1) holding that a parent has a legal duty to protect her child; (2) holding condoning parents to a reasonable person standard; (3) liberally interpreting existing child abuse statutes to include condoning parents; (4) broadly construing the notion of proximate cause to include failure to seek medical attention for one's child; and (5) construing child abuse as a general intent crime. In addition, legislatures in several states have enacted statutes that specifically criminalize the failure to protect a child from abuse.<sup>30</sup> Mothers in denial could potentially be reached by all of these

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27. Everson et al., *supra* note 25, at 198. See Elizabeth A. Sirles & Pamela J. Franke, *Factors Influencing Mothers' Reactions to Intrafamily Sexual Abuse*, 13 CHILD ABUSE & NEGLECT 131, 138 (1989) (citing study by Christine Adams-Tucker confirming this finding). See also Henry Giarretto, *A Comprehensive Child Sexual Abuse Treatment Program*, in SEXUALLY ABUSED CHILDREN AND THEIR FAMILIES 179, 187 (Patricia B. Mrazek & C. Henry Kempe eds., 1981).

28. FINKELHOR, *supra* note 24, at 174 (citing DIVISION OF CHILD PSYCHIATRY, TUFTS' NEW ENGLAND MEDICAL CENTER, SEXUALLY EXPLOITED CHILDREN: SERVICE AND RESEARCH PROJECT (1984)).

29. *Id.* at 174. Nevertheless, neither study found a systematic relationship between a supportive parental reaction and reduced trauma to the child victim.

30. See, e.g., ARK. CODE ANN. §§ 5-27-203 to -204, 5-27-221 (Michie 1993 & Supp. 1993); ILL. ANN. STAT. ch. 720, para. 150/5.1 (Smith-Hurd 1993 & Supp. 1994); MISS. CODE ANN. § 97-5-40 (1973 & Supp. 1993); NEV. REV. STAT. ANN. §§ 200.508(1)(b), 200.508(3) (Michie 1992 & Supp. 1993); OKLA. STAT. ANN. tit. 21, § 852.1 (West 1983 & Supp. 1994); WIS. STAT. ANN. § 948.02(3) (West 1982 & Supp. 1993).

In addition, most states provide that the husband-wife privilege does not apply in cases of child abuse. See, e.g., ALA. CODE § 26-14-10 (1992 & Supp. 1994); ALASKA STAT. § 47.17.060 (1991 & Supp. 1993); ARK. CODE ANN. § 12-518 (Michie Supp. 1993); COLO. REV. STAT. §§ 3-311(2), 6-401.1(5) (1986 & Supp. 1994); DEL. CODE ANN. tit. 16, § 908 (1983 & Supp. 1992); HAW. REV. STAT. § 350-5 (1985 & Supp. 1992); ILL. ANN. STAT. ch. 735, para. 5/8-801 (Smith-Hurd 1992 & Supp. 1994); IND. CODE ANN. § 31-6-11-8 (Burns 1987 & Supp. 1994); IOWA CODE ANN. § 726.4

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common law and statutory approaches.

### A. Common Law Approaches

#### 1. A Parent's Duty to Protect His or Her Child

Some courts have held that a parent has a legal duty to act to protect her child; therefore, a parent who fails to attempt to stop the abuse of his or her child by her partner may be criminally liable. It is well established that a parent has several legal duties to his or her child.<sup>31</sup> Several courts have extended this parental duty to include the duty to protect one's child from the abuse of a third party.

*State v. Zobel*<sup>32</sup> is one of the earliest cases to find a condoning parent liable for the abuse of his children based on his legal duty to protect them.<sup>33</sup> In this case, the South Dakota Supreme Court upheld a father's manslaughter conviction for failing to protect his children from an abusive mother and for

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(West 1993 & Supp. 1994); LA. REV. STAT. ANN. § 14:403(F) (West 1986 & Supp. 1994); MD. CODE ANN., CTS. & JUD. PROC. § 9-106 (1989 & Supp. 1993); MINN. STAT. ANN. § 595.02 (West 1988 & Supp. 1994); MISS. CODE ANN. § 13-1-5 (1972 & Supp. 1993); NEB. REV. STAT. § 28-714 (1989); N.C. GEN. STAT. ANN. § 7A-551 (1989 & Supp. 1993); N.D. CENT. CODE § 50-25.1-10 (1989 & Supp. 1993); R.I. GEN. LAWS §§ 12-17-10.1, 40-11-11 (1981 & Supp. 1993); S.C. CODE ANN. § 19-11-30 (Law. Co-op. 1985 & Supp. 1993); S.D. CODIFIED LAWS ANN. § 26-8A-15 (1994 & Supp. 1994); TENN. CODE ANN. § 37-1-411 (1991 & Supp. 1993); VA. CODE ANN. § 63.1-248.11 (Michie 1991 & Supp. 1994); W. VA. CODE ANN. § 61-8D-8 (1992 & Supp. 1994); WYO. STAT. ANN. § 14-3-210 (1994).

31. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 203 (2d ed. 1986). Among those duties is the duty to provide one's child with proper medical attention. See, e.g., *United States v. Webb*, 747 F.2d 278 (5th Cir. 1984), cert. denied, 468 U.S. 1226 (1985) (upholding father's conviction for failure to seek medical attention for his child); *Robey v. State*, 456 A.2d 953 (Md. 1983) (holding that parent who was insane when she beat child could nonetheless be held criminally responsible for failing to seek necessary medical care for child during subsequent periods of lucidity during which child's need for medical care was apparent); *Commonwealth v. Konz*, 450 A.2d 638 (Pa. 1982) (supporting parental legal duty to provide proper care and medical attention to sick child); *Williams v. State*, 680 S.W.2d 570 (Tex. 1984) (upholding mother's criminal negligence conviction for failure to provide child with medical care).

32. 134 N.W.2d 101 (S.D. 1965).

33. See also *Smith v. State*, 408 N.E.2d 614 (Ind. 1980) (upholding conviction of mother for involuntary manslaughter and neglect of a dependent for her failure to protect her son from the abuse of her live-in boyfriend, noting that defendant's position as a parent was "not one of benign neutrality," but imposed "an affirmative duty to care for and protect her child . . . [including] a duty to not place the child in a situation that may endanger its life or health and . . . a duty to remove the child from any situation of danger"); *Phelps v. State*, 439 So.2d 727 (Ala. 1983) (upholding defendant's conviction of child abuse for failure to protect child from stepfather's abuse of which she was aware); *Jukubczak v. State*, 425 So.2d 187, 188-89 (Fl. 1983) (upholding defendant's conviction for child abuse by an act of omission or culpable negligence based on evidence that she left the nine-week-old child with her husband knowing that his drug and alcohol abuse often left him without control of his mental faculties and that the infant had previously suffered serious injuries while in her husband's exclusive care); *State v. Kamel*, 466 N.E.2d 860 (Ohio 1984) (upholding father's manslaughter and child endangerment convictions based on his duty to protect his child, though evidence was insufficient to establish that the father had personally inflicted the injuries upon his child).

permitting her to starve the children.<sup>34</sup> Several witnesses testified that the defendant was present on occasions when his wife beat their children and that he did nothing to intervene.<sup>35</sup> Based on its findings that the defendant was aware of and attempted to conceal the fact that his wife starved and abused their children, the court held that his failure to act was willful neglect of his duty to support and protect his children, and affirmed his conviction for manslaughter.<sup>36</sup>

A more recent example of the courts' willingness to find a condoning parent liable based on his or her legal duty is *State v. Walden*.<sup>37</sup> In that case, the Supreme Court of North Carolina 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>38</sup> On this basis the court sustained the conviction of a mother who simply looked on while a male acquaintance beat her son so severely that the child required a blood transfusion.<sup>39</sup>

The court also noted the trend in American jurisprudence to broaden the scope of liability to include parents' acts of omission:

Although our research has revealed no controlling case in this jurisdiction on the question of a parent's criminal liability for failure to act to save his or her child from harm, the trend of Anglo-American law has been toward enlarging the scope of criminal liability for failure to act in those situations in which the common law or statutes impose a responsibility for the safety and well-being of others. Thus, it has generally been thought that it is the duty of a parent who has knowledge that his or her child of tender years is in danger to act affirmatively to aid the child if reasonably possible to do so.<sup>40</sup>

This trend in American jurisprudence to hold parents liable for their failure to act to prevent the abuse of their children based on their legal duty extends to mothers in denial. Yet a more difficult issue is whether a mother in denial could be found to have had "knowledge that . . . her child of tender years is in danger."<sup>41</sup> On the one hand, because the state of denial is necessarily triggered by some degree of awareness of the possibility of abuse, a court could conceivably make a finding of knowledge and thereby hold her liable. On the other, a court could find that denial precludes such knowledge, at least

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34. The court's willingness to find the father liable was probably due, in part, to the extremity of the facts: two of the defendant's children died from starvation and severe abuse. Zobel, 134 N.W.2d at 104-05.

35. *Id.* at 105.

36. *Id.* at 106.

37. 293 S.E.2d 780 (N.C. 1982).

38. *Id.* at 787.

39. *Id.* at 783.

40. *Id.* at 785 (citations omitted).

41. *Id.*



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to the extent that such knowledge is unconscious and that the person is unable to act on that knowledge. This “psychological” standard for knowledge could shield the mother from liability.

### 2. *The Reasonable Person Standard*

A court could alternatively find a mother in denial liable by holding her to a reasonable person standard. The court could find that a reasonable person who encountered the same facts would have recognized her duty to act to protect her child; therefore, her omission to act constitutes a criminal offense. Under this objective standard, actual knowledge would not be a prerequisite. A New York County family court employed such a reasonable person standard to find a mother guilty of child abuse, even though the mother had no actual knowledge that her daughter was being abused by the child’s stepfather.<sup>42</sup> The court held that “[w]here a child is sexually abused by her stepfather in her home, the natural mother, who had no knowledge of the abuse, will be held to have allowed the abuse if the objective evidence available to her should have prompted adequate protective measures from a responsible parent similarly situated.”<sup>43</sup>

The mother was not present in the home when the abuse occurred, and her daughter Katherine never told her that she was being abused.<sup>44</sup> However, the court found certain facts that should have provoked the mother to take investigative steps. First, the mother knew that her husband was extremely violent.<sup>45</sup> And second, Katherine had seen her stepfather sexually abuse her girlfriend and had informed her mother.<sup>46</sup> The defendant had reacted by telling Katherine that she did not believe her and telling Katherine’s girlfriend not to come over anymore.<sup>47</sup> The defendant had nevertheless told Katherine’s older brother to stay at home whenever the defendant had to leave the house. This, the court found, “evidenc[ed] a perceived risk.”<sup>48</sup> A similar standard could be applied to a mother in denial.

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42. In the matter of Katherine C., 471 N.Y.S.2d 216 (N.Y. Fam. Ct. 1984). This decision arose out of a child protection proceeding, not a criminal proceeding.

43. *Id.* at 218. Note that rather than “reasonable person,” the court uses the phrase “responsible parent similarly situated.”

44. *Id.* at 219.

45. *Id.* He had threatened more than once to kill the entire family and had, on another occasion, held a knife to the defendant’s throat. Also, when defendant realized that sexual abuse charges were going to be filed against her husband, she hid all the knives and razors in the home. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

B. *Statutory Approaches*

Although child abuse statutes are in place in every state,<sup>49</sup> some of these

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49. See ALA. CODE §§ 13A-13-6, 26-15-1 to -3 (1992 & Supp. 1994); ALASKA STAT. § 11.51.100. (1989); ARIZ. REV. STAT. ANN. §§ 13-604.01, 13-1105(A)(2), 13-3619, 13-3623 (1989 & Supp. 1993); ARK. CODE ANN. §§ 5-27-203 to -204, 5-27-221 (Michie 1993); CAL. PENAL CODE § 273A (West 1988 & Supp. 1994); COLO. REV. STAT. §§ 18-6-401 to -401.2 (West 1990 & Supp. 1994); CONN. GEN. STAT. ANN. §§ 53-20, -21, -23 (West 1985 & Supp. 1994); DEL. CODE ANN. tit. 11, §§ 1101 to -1103 (1987 & Supp. 1992); D.C. CODE ANN. §§ 22-901 to -902 (1989 & Supp. 1994); FLA. STAT. ANN. ch. 827.03-.071 (Harrison 1991 & Supp. 1993); GA. CODE ANN. §§ 16-5-70, 16-5-72 (1992 & Supp. 1994); HAW. REV. STAT. §§ 707-750 to -751 (1994); IDAHO CODE §§ 18-1501, -1506, -1506A (1987 & Supp. 1994); ILL. ANN. STAT. ch. 720, para. 5/12-4.3, 115/53, 150/4 (Smith-Hurd 1993 & Supp. 1994); IND. CODE ANN. §§ 35-46-1, -3 to -4 (Burns 1994 & Supp. 1994); IOWA CODE ANN. § 232.68 (West 1994); IOWA CODE ANN. § 726.6 (West 1993 & Supp. 1994); KAN. STAT. ANN. §§ 21-3604 to -3604a, 21-3608 to -3609 (1988 & Supp. 1993); KY. REV. STAT. ANN. §§ 508.090-.120, 530.040, 530.060 (Michie/Bobbs-Merrill 1990 & Supp. 1994); LA. REV. STAT. ANN. §§ 14:92.1, :93, :93.2.1 (West 1986 & Supp. 1994); ME. REV. STAT. ANN. tit. 17-A, §§ 553-54 (West 1983 & Supp. 1994); MD. ANN. CODE art. 27, § 27-35A (1992 & Supp. 1993); MASS. GEN. LAWS ANN. ch. 265, § 13J (West 1990 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 750.135, 750.136b (West 1991 & Supp. 1994); MINN. STAT. ANN. §§ 609.376-.378 (West 1987 & Supp. 1994); MISS. CODE ANN. §§ 97-5-1 to -3, 97-5-39 to -40 (1994); MO. ANN. STAT. §§ 568.030-.060 (Vernon 1979 & Supp. 1994); MONT. CODE ANN. §§ 45-5-622, -627 (1993); NEB. REV. STAT. § 28-707 (1989); NEV. REV. STAT. § 200.508 (1992); N.H. REV. STAT. ANN. §§ 631-2, 632-A:2, 639-3 (1986 & Supp. 1993); N.J. STAT. ANN. § 9:6-3 (West 1993 & Supp. 1994); N.M. STAT. ANN. § 30-6-1 (Michie 1994); N.Y. PENAL LAW § 260.10 (McKinney 1989 & Supp. 1994); N.C. GEN. STAT. §§ 14-318.2, .4 (1993); N.D. CENT. CODE §§ 14-07-15, 14-09-22 (1991); OHIO REV. CODE ANN. § 2919.22 (Anderson 1993); OKLA. STAT. ANN. tit. 21, §§ 843, 851-53 (West 1983 & Supp. 1994); OR. REV. STAT. §§ 163.545-.547, 163.575 (1993); 18 PA. CONS. STAT. ANN. § 4304 (1983 & Supp. 1994); R.I. GEN. LAWS §§ 11-9-5, 11-9-5.3 (1994); S.C. CODE ANN. § 20-7-50 to -80 (Law. Co-op. 1985 & Supp. 1993); S.D. CODIFIED LAWS ANN. §§ 26-9-1, 26-10-1 (1992 & Supp. 1994); TENN. CODE ANN. §§ 39-13-202(a)(4), 39-15-401 to -402 (1991 & Supp. 1994); TEX. PENAL CODE ANN. §§ 22.04-.041 (West 1994); UTAH CODE ANN. § 76-5-109 (1990 & Supp. 1994); VT. STAT. ANN. tit. 13, § 1304 (1974 & Supp. 1994); VA. CODE ANN. §§ 63.1-248.1 to -248.17 (Michie 1991 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.16.100, 9A.42.010-030 (West 1988 & Supp. 1994); W. VA. CODE §§ 61-8D-1 to -9 (1992 & Supp. 1994); WIS. STAT. ANN. §§ 48.981, 940.201 (West 1985 & Supp. 1993); WYO. STAT. § 6-2-503 (1977 & Supp. 1994).

Some states also have statutes that specifically criminalize child sexual abuse. See ALASKA STAT. §§ 11.41.434-.440 (1989 & Supp. 1994); ARIZ. REV. STAT. ANN. §§ 13-1404 to -1405, 13-1410, 13-1417 (1989 & Supp. 1994); ARK. CODE ANN. §§ 5-14-104 to -110, 5-14-120 to -121 (Michie 1993); COLO. REV. STAT. §§ 18-6-403 to -404 (West 1990); DEL. CODE ANN. tit. 11, §§ 761(h), 768, 770-75 (1987 & Supp. 1992); D.C. CODE ANN. § 22-350 (1989 & Supp. 1994); HAW. REV. STAT. §§ 707-730(1)(b), -731(1)(b), -732(1)(b) (1994); IDAHO CODE §§ 18-1508 to -1508A (1987 & Supp. 1994); ILL. ANN. STAT. ch. 325, para. 15/0.01, ch. 720, para. 5/11-20.1 (Smith-Hurd 1993); IND. CODE ANN. §§ 35-42-4-3 to -4 (Burns 1994); IOWA CODE ANN. §§ 709.1-.4, 709.8 (West 1993 & Supp. 1994); KAN. STAT. ANN. §§ 21-3503, -3566 (1988 & Supp. 1993); KY. REV. STAT. ANN. §§ 510.110-.130 (Michie/Bobbs-Merrill 1990 & Supp. 1994); LA. REV. STAT. ANN. §§ 14:81-.81.2 (West 1985 & Supp. 1994); ME. REV. STAT. ANN. tit. 17-A, §§ 253-55 (West 1964 & Supp. 1994); MASS. GEN. LAWS ANN. ch. 265, §§ 13B, 22A, 23, 24B (West 1990 & Supp. 1994); MICH. COMP. LAWS ANN. §§ 750.520a-.520e (West 1991 & Supp. 1994); MINN. STAT. ANN. §§ 609.341-.346, 609.352 (West 1987 & Supp. 1994); MISS. CODE ANN. §§ 97-5-23 to -41 (1973 & Supp. 1993); MO. ANN. STAT. §§ 566.110-.120 (Vernon 1979 & Supp. 1994); NEB. REV. STAT. §§ 28-319 to -320.01 (1989 & Supp. 1992); NEV. REV. STAT. ANN. § 432B.100 (Michie 1991); N.H. REV. STAT. ANN. § 632-A:2 to -A:4 (1986 & Supp. 1993); N.J. STAT. ANN. § 9:6-8.9 (West 1993); N.Y. PENAL LAW §§ 130.20-.70, 260.10 (McKinney 1987 & Supp. 1994); N.C. GEN. STAT. § 14-27.7 (1993 & Supp. 1994); OHIO REV. CODE ANN. § 2907.05 (Page 1993) (prohibiting sex with a person under age of 13); OKLA. STAT. ANN. tit. 21, § 1123 (West 1983 & Supp. 1994); 18 PA. CONS. STAT. ANN. § 6312 (Purdon 1983 & Supp. 1995); R.I. GEN. LAWS §§ 11-27-8.1 to -8.5 (1994); S.D. CODIFIED LAWS ANN. § 26-10-29 (1992);

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statutes do not define the scope of liability specifically enough to include condoning parents. Courts have nevertheless expanded statutory liability to include the conduct of condoning parents through liberal statutory interpretation, broad interpretation of proximate cause, and classification of child abuse as a general intent crime. All three approaches could effectively impose criminal liability upon mothers in denial.

### 1. *Liberal Statutory Interpretation*

One well known case in which a court found a condoning parent liable as a direct participant in the crime of child abuse through a liberal construction of the terms of a state statute is *State v. Williquette*.<sup>50</sup> The defendant, Terri Williquette, was never present in the home when her husband physically and sexually abused their seven-year-old son and eight-year-old daughter, but the victims told her repeatedly about the abuse and she did nothing to stop her husband.<sup>51</sup> Both children told their mother on several occasions that their father had beaten them with a metal stick and forced them to eat defecation from a toilet and participate in oral and anal intercourse.<sup>52</sup> The mother advised each of her children “not to worry about it” and promised them that she would talk to their father, though she never did.<sup>53</sup>

The Wisconsin Supreme Court determined that the defendant’s liability hinged on whether the statutory language, “subjects a child to cruel maltreat-

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TENN. CODE ANN. § 37-1-602 (1991); TEX. PENAL CODE ANN. § 22.021 (West 1994); UTAH CODE ANN. §§ 76-5-402.1 to -.3, 76-5-403.1 to -404.1 (1990 & Supp. 1994); VT. STAT. ANN. tit. 33, § 4912 (1991 & Supp. 1994); VA. CODE ANN. §§ 18.2-370 to -370.1 (1988 & Supp. 1994); WASH. REV. CODE ANN. §§ 9A.44.073-.079, .083-.089, .093-.096 (West 1988 & Supp. 1994); WIS. STAT. ANN. § 948.02 (West 1985 & Supp. 1993); WYO. STAT. § 14-3-105 (1994).

50. 385 N.W.2d 145 (Wis. 1986). Another example of this approach is provided by an Alabama court. Neither of Alabama’s statutes prohibiting child abuse or child endangerment use language which appears susceptible to an interpretation that would include a condoning parents’s conduct. Alabama’s child endangerment statute provides:

A man or woman commits the crime of endangering the welfare of a child when . . . [h]e or she, as a parent, guardian or other person legally charged with the care or custody of a child less than 18 years of age, fails to exercise reasonable diligence in the control of such child to prevent him or her from becoming a “dependent child” or a “delinquent child,” as defined in section 12-15-1.

ALA. CODE § 13A-13-6 (1975 & Supp. 1993). Alabama’s child abuse statute provides:

A responsible person [any person who has the permanent or temporary care, custody or responsibility for supervising the child (§ 26-15-2)] . . . who shall torture, willfully abuse, cruelly beat or otherwise willfully maltreat any child under the age of 18 years shall, on conviction be punished by imprisonment in the penitentiary for not less than one year nor more than ten years.

ALA. CODE § 26-15-4 (1975 & Supp. 1993). Nevertheless, in *P.S. v. State*, 565 So. 2d 1209 (Ala. Crim. App. 1990), the Alabama supreme court upheld the conviction of a condoning parent based on a finding of sufficient evidence from which the jury could lawfully infer that the defendant knew that her child was being abused by her live-in boyfriend, and that she was also trying to conceal this fact from others.

51. 385 N.W. 2d at 147-48.

52. *Id.*

53. *Id.* at 148.

ment," included situations where a parent knowingly exposes a child to the risk of continuing and further abuse by another.<sup>54</sup> The court interpreted "subjects" broadly, holding that it did not limit application of the statute only to persons who actively participated in abusing children. The court reasoned that such a broad interpretation of the term was consistent with the purpose of the statute.<sup>55</sup>

The *Williquette* case illustrates how a liberal statutory interpretation of a state child abuse statute, combined with a reasonable person standard, could reach the conduct of mothers in denial. Courts can liberally interpret "knowingly" to include mothers who should have known their children were being abused but "refused" to acknowledge this fact. As a result, these mothers may be held to "knowingly subject" their children to abuse. This application seems particularly likely with respect to mothers who have been confronted by their children and yet refused to believe them.

## 2. Broad Interpretation of Proximate Cause

A Maryland case, *Fabritz v. State*<sup>56</sup>, shows how a broad interpretation of proximate cause can be used to hold condoning parents liable for child abuse. The child abuse statute at issue in *Fabritz v. State* defined the term "abuse" as "any physical injury sustained by a child as a result of cruel and inhumane treatment or as a result of malicious act or acts."<sup>57</sup> Here, the Maryland court of appeals broadly interpreted proximate cause of abuse to include a parent's

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54. *Id.* at 149-150. The statute at issue provided:

Whoever 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 under § 939.22(14) is guilty of a Class E felony. In this section 'child' means a person under 16 years of age.

WIS. STAT. ANN. § 940.201 (West 1985 & Supp. 1993).

55. *Id.* at 150. The court noted, "The statute operates to protect children from the consequences of conduct, without regard for any culpable *mens rea* on the part of the persons causing the consequences." *Id.* See also *State v. Killory*, 243 N.W.2d 475 (Wis. 1976), where the Wisconsin supreme court, in an earlier decision dealing with the same statute, used a dictionary definition of the term "cruel" to hold that the statute did not require a showing of malice.

56. 348 A.2d 275 (Md. 1975), *rev'g* 332 A.2d 324 (1975), *cert. denied*, 425 U.S. 942 (1976), *rev'd sub nom.*, *Fabritz v. Traurig*, 583 F.2d 697 (4th Cir. 1978), *cert. denied sub nom.*, *Hopkins v. Fabritz*, 443 U.S. 915 (1979). The conviction was later overturned in a habeas corpus action for failure to show that defendant was aware of either the seriousness of her child's injuries or the foreseeable consequences of a failure to seek timely medical assistance. *Fabritz v. Traurig*, 583 F.2d 697, 700 (4th Cir. 1978). See also *Palmer v. State*, 164 A.2d 467 (Md. 1960) (affirming mother's involuntary manslaughter conviction for failing to protect daughter from fatal beatings by mother's boyfriend on grounds that her gross and criminal negligence was a contributing cause of daughter's death).

Maryland has not been the only state to use proximate cause to hold condoning parents liable in abuse cases. The *Williquette* court similarly applied a broad conception of proximate cause. There, although the defendant's husband was obviously a direct cause of the abuse the children suffered, the court reasoned that the mother's conduct was a substantial factor which sufficiently increased the risk of further abuse so that it fell within the terms of the statute. 385 N.W.2d at 150.

57. *Fabritz v. State*, 348 A.2d 275, 276 (Md. 1975) (citing MD. CODE ANN. § 35A(a) (1975 Cum. Supp.)).

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failure to seek medical treatment for a child who has been abused, thereby causing further injury.

The defendant in this case had left her three-year-old daughter, Windy, in the care of an acquaintance and his wife for a few days. When the defendant returned at one o'clock in the afternoon, she found her daughter covered with bruises, listless, and feverish. The child's caretaker claimed that Windy had become ill after a bumpy motorcycle ride. Throughout the day the victim's condition worsened, but her mother did not take her to the hospital. Windy complained of stomach cramps, vomited and finally lapsed into a coma. At 10:35 p.m., the defendant brought her to the hospital where she was pronounced dead as a result of a perforated or ruptured duodenum.<sup>58</sup>

The evidence at trial showed that Windy might have survived if she had received surgery up to one hour before her death.<sup>59</sup> The State contended that defendant's failure to seek medical attention for her daughter was, as contemplated by the state's child abuse statute, cruel and inhumane treatment which caused her daughter to sustain further physical injuries that led to her death.<sup>60</sup> In other words, defendant's failure to act constituted child abuse because the omission exacerbated the original injury. Defendant argued that she was not at home when the abuse occurred, that she did nothing to cause it, and that her delay in seeking medical treatment for her child did not constitute abuse.<sup>61</sup>

Based chiefly on the statute's declared purpose as well as its legislative history, the court sustained a broad interpretation of Maryland's child abuse statute and upheld defendant's conviction.<sup>62</sup> The statute's declared legislative purpose was "the protection of children who have been the subject of abuse."<sup>63</sup> In 1973, the Maryland legislature repealed language in its child abuse statute which provided that any person having custody of a minor child under fourteen years of age "who maliciously beats, strikes or otherwise mistreats such minor child to such degree as to require medical treatment" would be guilty of a felony, and replaced it with language that defined "abuse" to encompass any "physical injury or injuries sustained by a child as a result of cruel or inhumane treatment or as a result of malicious act or acts."<sup>64</sup> Based on this amendment the court reasoned that the legislature intended the scope of the statute to reach defendant's conduct: in this case, a failure to

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58. 48 A.2d at 276-77.

59. *Id.*

60. *Id.* at 278.

61. *Id.*

62. *Id.* at 279-80.

63. *Id.* at 279.

64. *Id.* at 279-80.

act.<sup>65</sup>

The principle in *Fabritz* could be applied to hold mothers in denial liable for abuse. These mothers often encounter clues that would lead a reasonable parent to seek medical attention for her child. If, for example, a sexually abused child exhibits symptoms of abuse, such as pain or trauma in the anal and/or genital area, vomiting, nightmares or sexually acting out, and a mother fails to seek medical attention for the child, her conduct may be considered cruel and inhumane treatment which caused her child to sustain further injuries and further exposure to abuse. The *Fabritz* principle becomes all the more persuasive and applicable if the mother is told of the abuse by her child and she refuses to believe it or act to stop it.

### 3. *Child Abuse as a General Intent Crime*

Finally, courts have expanded liability for child abuse to condoning parents in a way that may include mothers in denial by interpreting state general intent crime statutes as encompassing child abuse.<sup>66</sup> For example, in *Childers v. State*,<sup>67</sup> the Nevada Supreme Court upheld a mother's conviction for abuse and neglect of a minor child. In that case, the mother failed to protect her child from her boyfriend's abuse and, moreover, failed to seek medical attention for her daughter's injuries from the abuse. The state child abuse statute provides generally:

Any adult person who *willfully* causes or permits a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or who willfully causes or permits a child to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect is guilty of a gross misdemeanor unless a more severe penalty is prescribed by law for an act or omission which brings about the abuse, neglect or danger.<sup>68</sup>

In upholding the defendant's conviction, the court affirmed the lower court's interpretation of "willfully" as it was used in the statute as "simply a

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65. *Id.* The reversal of the defendant mother's conviction may have prompted the legislature to reword the statute to address acts of omission as well as commission. *See supra* note 56 for an explanation of the final disposition of the case.

66. The following courts have construed child abuse offenses to be general intent crimes: *People v. Alderete*, 347 N.W.2d 229, 233 (Mich. Ct. App. 1984) (finding malice is not necessary element of child abuse statute); *People v. Noble*, 635 P.2d 203, 210 (Colo. 1981) (holding defendant must know nature of conduct only and not result); *State v. Lumler*, 395 So.2d 766, 769 (La. 1981) (interpreting "intent" in child abuse statute to refer to general criminal intent); *State v. Hofford*, 404 A.2d 1231, 1234 (N.J. Super. Ct. App. Div. 1979) (finding evil intent is not necessary element of child abuse statute); *State v. Fuentes*, 577 P.2d 452, 455 (N.M. Ct. App. 1978) (finding criminal intent is not necessary element of child abuse statute); *State v. Killory*, 243 N.W.2d 475, 483 (Wis. 1976) (finding malice is not necessary element of child abuse statute); *People v. Atkins*, 125 Cal. Rptr. 855, 861 (Cal. Ct. App. 1975) (finding specific intent not required under child abuse statute).

67. 680 P.2d 598 (Nev. 1984).

68. *Id.* at 599 (citing NEV. REV. STAT. ANN. § 200.508 (Michie 1992) (emphasis added)).

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purpose to commit the act or to make the omission in question.”<sup>69</sup> It also affirmed the lower court’s determination that the word “willfully” did “not require in its meaning any intent to violate law, or to injure another, or to acquire any advantage.”<sup>70</sup> *Childers* may be applied to mothers in denial because it does not require that the mother have an intent to injure her child for her to be guilty of child abuse. She must simply intend “to commit the act or make the omission in question” by permitting her child to be placed in a situation where the child may suffer physical pain or mental suffering.

In another example, an Indiana court liberally interpreted the phrase “knowingly or intentionally” to reach the state of mind of a condoning partner. In *Smith v. State*,<sup>71</sup> the court upheld the conviction of a mother for involuntary manslaughter and neglect of a dependent for her failure to protect her son from the abuse of her live-in boyfriend. The statutes at issue defined the neglect of a dependent as a class D felony, where “a person having the care, custody, or control of a dependent . . . knowingly or intentionally places the dependent in a situation that may endanger his life or health.”<sup>72</sup> They defined involuntary manslaughter as “a person who kills another human being while committing or attempting to commit a Class D felony.”<sup>73</sup> The court held that the insertion in the statute of the words “knowingly” or “intentionally” required the State to prove only that the defendant parent was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child.<sup>74</sup> Mothers in denial may be held liable under *Smith* because it relies on the reasonable person standard. As discussed earlier,<sup>75</sup> a reasonable person would be alerted to take affirmative action to protect the child under circumstances in which mothers in denial fail to do so.

Passive mothers may therefore be held liable for child abuse under general intent statutes because such statutes do not require that the mothers intend the result of their acts. No finding is required that the mothers intended to permit their spouses to abuse their children. Courts need only find that passive mothers failed to protect their children.

### III. EXTENDING THE CRIMINAL LIABILITY OF CONDONING PARENTS TO MOTHERS IN DENIAL

Legislatures and the courts have expanded criminal liability for child abuse to include nonoffending parents who are aware of, but do nothing to stop, the

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69. *Id.*

70. *Id.*

71. 408 N.E.2d 614 (Ind. Ct. App. 1980).

72. *Id.* at 619.

73. *Id.*

74. *Id.* at 621.

75. *See supra* text accompanying notes 42-48.

abuse of their children by their partners. However, there has been little discussion about the issue of criminal liability of mothers who should be aware that their partners are sexually abusing their children, but are not in fact aware because they are in a state of denial about the abuse. I will argue that imposing criminal liability on these mothers in denial is counterproductive and that deferred prosecution and mandatory treatment would be more effective.

A. *Arguments in Favor of Deferred Prosecution and Treatment*

In order to improve the likelihood that a mother in denial will be able to provide a safe environment for the children she has now and those she may have in the future, prosecutors should be willing to suspend prosecution of a mother in denial if she agrees to undergo psychiatric treatment and enroll in educational courses about child sexual abuse.<sup>76</sup> Requiring a mother in denial to participate in psychiatric treatment is preferable to prosecuting and subsequently incarcerating her for several reasons. First, there is little sense in punishing a mother for not acting when her failure to act is caused by a mentally incapacitating state. Because a mother in denial is unable to acknowledge the occurrence of sexual abuse, she lacks the requisite mens rea for finding a criminal intent or willfulness to cause her children to be sexually abused.

Second, research indicates that denial is a treatable condition;<sup>77</sup> therefore, treatment would be a far more productive remedy than incarceration. Untreated mothers faced with the trauma of incest often lack the emotional and psychological resources to deal effectively with the situation and they may subsequently engage in counterproductive remedial strategies. Some will resort to the use of punishment or shame to stop the abuse. For example, one mother tried to protect her daughter by telling her, "It is ugly for you to sit in people's laps. You aren't supposed to."<sup>78</sup> Treatment could enable such a mother to develop the skills to become an adequately protective and responsive mother. Advocates of criminal punishment may concede the point but argue that

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76. Wisconsin has a similar deferred prosecution program for incestuous offenders. The relevant statute provides:

If the victim is a minor and the person accused of child sexual abuse lives with or has lived with the minor, is closer in relation to the victim than the cousin, is a guardian or legal custodian of the minor, or is or appears to be in a position of power or control over the minor, then the district attorney may enter into a deferred prosecution agreement with the offender. The agreement shall provide that the prosecution will be suspended for a specified period if the person complies with conditions specified in the agreement (participating in therapy and community programs). The agreement will toll any applicable statute of limitations.

WIS. STAT. ANN. § 971.37 (West 1985 & Supp. 1993).

77. See generally JANIS T. JOHNSON, *MOTHERS OF INCEST SURVIVORS: ANOTHER SIDE OF THE STORY* (1992); JUDITH HERMAN, *FATHER-DAUGHTER INCEST* (1981); VANDER MEY & NEFF, *supra* note 11.

78. Howard, *supra* note 8, at 180.



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imprisonment does not preclude treatment. However, treatment in prison could arguably be less effective because subjecting the mother to the social stigma and public shame of criminality and incarceration might only exacerbate her trauma and undermine her coping abilities.

Third, if a mother in denial is incarcerated, her child will probably be removed from the home and placed with relatives, in an institution, or in foster care. There, the child may be subjected to further victimization by males who find her attractive or vulnerable because she has been abused.<sup>79</sup> The removal process also often requires the child to change schools and churches, and lose contact with familiar friends and activities,<sup>80</sup> thereby undermining any support the victim may have had outside of the home.<sup>81</sup>

Fourth, without adequate long-term treatment, mothers may reunite with the incestuous offender.<sup>82</sup> A mother who is sentenced to prison incarceration will eventually be released and may be eligible to receive custody of her children. Under these circumstances, without treatment, the mother may reunite with the offender even if conditions in her custody arrangement prohibit his presence in the household. Psychiatric treatment may either decrease the likelihood that the mother will continue to live with the offender or, if she does, it will equip her to better protect her children.

### B. *Specific Salutary Effects of Treatment on Mothers in Denial*

Mandatory psychiatric treatment will help in several ways to make the mother's future more hopeful for herself and her children. First, a mother who is treated will be better equipped to establish a healthy relationship with those children who were victimized. A stronger relationship with her children will better enable a mother to protect them. Mothers who have undergone treatment will be better equipped to recognize behavioral clues and other signs of abuse at an early stage. Further, even if she is unable to prevent the abuse, she will at least be better equipped, through her treatment, to acknowledge and appropriately deal with the abuse once she learns of it.

Second, enabling mothers to be more supportive of their children will increase the likelihood of the children's emotional recovery. Children who are victims of incest are likely to fare better in therapy and are less likely to

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79. HERMAN, *supra* note 77, at 138. "Once a girl has been branded as an incest victim, many men will find her sexually interesting and treat her like public property. As a result, it is not unusual for the daughter to be subjected to sexual attentions from foster fathers and other members of the foster families." *Id.*

80. See Sirls & Franke, *supra* note 27, at 131.

81. Everson et al., *supra* note 27, at 198.

82. Carolyn J. Levitt et al., *Families After Sexual Abuse: What Helps? What is Needed?*, in FAMILY SEXUAL ABUSE: FRONTLINE RESEARCH AND EVALUATION 39, 54 (Michael Q. Patton ed., 1991) (finding that 32% of the abuse victims in one study continued to have contact with the perpetrator up to two years after disclosure and county intervention).

develop mental illnesses from their abuse if they are supported by their mothers.<sup>83</sup> Further, mothers who are adequately treated are more likely to support and participate in their children's treatment.<sup>84</sup>

Third, because studies show that mothers are often the link in generational cycles of incest,<sup>85</sup> treating the mother may help break this link. Treatment will help mothers in denial learn how to avoid victimization and, thus, serve as healthier role models for their daughters. Mothers who have recovered or finally developed a healthy emotional state will be better able to teach their children that no form of abuse should be tolerated. Sexually abused daughters who have assumed maternal roles in their families may, as a result of their mothers' psychiatric treatment, learn how to be nurturing parents and, thus, how emotionally healthy families function. These daughters may, as a result, be less likely to seek out dysfunctional mates or form dysfunctional relationships when they are adults.

Finally, treatment often involves education about the nature and pervasiveness of child sexual abuse. Through treatment, mothers will learn not only how to detect and prevent sexual child abuse but also to become familiar with the services and agencies that are designed to assist them. As Janis Tyler Johnson observed:

Just as abused women began to leave battering spouses as more social and legal resources became available, more incest-family mothers may see and consciously acknowledge that the incest is going on as they gain more knowledge about the behavioral signs of incest and as they perceive community social and legal services to be more sensitively responsive to their needs. Marital therapy may also need to be encompassed in the mother's treatment scheme.<sup>86</sup>

### C. *The Benefits of Mandatory Treatment*

Although mandatory treatment of an unwilling patient may seem of little use, studies indicate that court-ordered treatment can be just as effective as voluntary treatment.<sup>87</sup> Findings show that parents ordered by a court into treatment are more likely than voluntary participants to complete the treatment program,<sup>88</sup> and these court-ordered parents experience levels of improvement

83. Sirles & Franke, *supra* note 27, at 131. See also *supra* text accompanying notes 24-29.

84. *Id.*

85. Zuelzer & Reposa, *supra* note 20, at 103-04.

86. JOHNSON, *supra* note 77, at 108.

87. Ana Maria Irueste-Montes et al., *Court-Ordered vs. Voluntary Treatment of Abusive and Neglectful Parents*, 12 CHILD ABUSE AND NEGLECT 33 (1988).

88. *Id.* at 34. For reasons that appear applicable to mothers in denial, many therapists who work with sex offenders insist that treatment must be mandated and supervised by the courts. Herman, *supra* note 77, at 152. See also Henry Giarretto et al., *Coordinated Community Treatment of Incest*, in *SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS* 234 (Burgess et al. eds., 1978) ("The authority of the criminal justice system has proved to be absolutely essential in treating incest. Most of the small number of 'drop-outs' from the [Child Sexual Abuse Treatment Program] have been families who were not involved with the police.").

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comparable to those engaging in voluntary treatment.<sup>89</sup> The court-ordered families tend to benefit particularly when the court spells out the nature of the counseling or therapy, names the therapist or counselor, and specifies frequency and duration of treatment. These families also benefit when the therapeutic program articulates for the parents the kinds of behavior changes that are expected from them as well as the conditions under which treatment can be successfully terminated.<sup>90</sup> Thus, mothers in denial who are forced to participate in therapy that they would otherwise be unwilling to undergo do in fact stand a fair chance of receiving therapy's positive effects.<sup>91</sup> Additionally, court-ordered treatment is still more likely than no treatment at all to improve a mother's chances for developing the coping tools necessary to overcome her denial and provide support for her daughter.

### D. *Designing Treatment Programs for Mothers in Denial*

Treatment programs must immediately address the mother's emotional needs and be multifaceted in their approaches. Programs may include a combination of individual therapy, group therapy, and marital therapy.<sup>92</sup> Foremost for the mother is the need to strengthen and nourish her power in the family and to restore the relationship between her and her daughter.<sup>93</sup> Mothers who are forced to face the fact of incestuous abuse need intensive support at the outset.<sup>94</sup> Herman explains why the mother's emotional state makes the need for immediate support so crucial:

Torn between her husband and her daughter, and terrified of the consequences of disrupting her marriage, the mother may be virtually paralyzed and incapable of

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89. Irueste-Montes et al., *supra* note 87, at 36-37.

90. *Id.* at 38.

91. The effectiveness of court-ordered therapy is not well settled, however. Opponents of this form of treatment argue that a court order may encourage a client to feign improvement in mental health in order to satisfy therapists and the legal system. MEISELMAN, *supra* note 16, at 85.

92. Many treatment programs do not place importance on marital therapy. As a result, patients often engage in counterproductive behavior, such as refusing to participate further, participating in therapy only for the sake of eventually being permitted to live with the offender, or surreptitiously living with the offender. On the other hand, however, therapists who do encourage marital therapy find that clients are unwilling to participate because other aspects of the treatment take too much of their time, money, and energy. Deborah L. Woodworth, *Evaluation of a Multiple-Family Incest Treatment Program*, in FAMILY SEXUAL ABUSE: FRONTLINE RESEARCH AND EVALUATION, *supra* note 85, at 121, 142.

93. HERMAN, *supra* note 77, at 131.

Whatever their background or theoretical orientation, professionals who have extensive experience in treating incestuous families seem to agree on three basic points: the need to curb the power of incestuous fathers, the need to nourish and strengthen the power of the mothers, and the need to restore the relationship between mother and daughter.

*Id.*

94. *Id.* at 139; see also Levitt et al., *supra* note 82, at 54 ("The emotional health of victims and families appears to be strengthened and supported when there is continued involvement by at least one outside party available to talk with and advise the child's primary caregiver. Intervention services that received the highest ratings from incestuous families include the evaluating physician, victim and witness assistance services, guardians *ad litem*, and professional counseling services.")

taking action alone. Unless she finds a sympathetic and helpful ally outside the family, she is likely to submit to her husband's direction and influence and to withdraw from her daughter. The mothers don't know what to do. They're in shock. They will tend to drift toward their husbands because they see themselves as not being able to make it on their own.<sup>95</sup>

Support groups made up of mothers who have also dealt with the disclosure of incestuous abuse can play a key role in providing immediate as well as long-term support for these women.<sup>96</sup> First, comfort and support from people with first-hand perspectives on the mother's trauma is extremely valuable.<sup>97</sup> Mothers in support groups can also teach newcomers about what to expect in the treatment process and the toll the process may take.<sup>98</sup> Second, support groups are often equipped to provide financial assistance, legal and medical referrals, babysitting and employment resources, as well as twenty-four-hour availability for emotional support.<sup>99</sup> Third, parent support groups can bring mothers out of isolation in their homes by providing constructive social networks that improve their self-esteems and alleviate their senses of shame. In these networks, mothers will have opportunities to help others by offering their support and sharing their experiences.<sup>100</sup> Finally, these support groups can provide the long-term support that mothers in denial will need to sustain a healthy environment for their children and themselves.<sup>101</sup>

#### IV. CONCLUSION

The efforts of courts and legislatures to combat the pervasiveness of child abuse has resulted in a trend in the United States to find parents liable for their failure to prevent the abuse of their children by their partners. This trend, however, should be limited in its applicability to mothers in denial in that such mothers should be permitted the choice between participating in treatment programs or being criminally prosecuted. Mandatory participation in psychiatric treatment and child sexual abuse education comprises a more constructive response to the situations experienced by mothers in denial and their children.

This response acknowledges pragmatically that the best way to help sexually abused children and their mothers is usually to maintain the mother-child relationships and to attempt to mentally equip the mothers to protect their

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95. HERMAN, *supra* note 77, at 137-38.

96. *Id.* at 146. See also VANDER MEY & NEFF, *supra* note 15, at 164.

97. HERMAN, *supra* note 77, at 146.

98. Almost every mother in treatment must struggle with long working hours, heavy child-care demands, and the scheduling demands and emotional work of family sexual abuse treatment. See Woodworth, *supra* note 92, at 146.

99. HERMAN, *supra* note 77, at 146.

100. *Id.*

101. The importance of adequate long-term services is underscored by the finding that 32% of the abuse victims in one study continued to have contact with the perpetrator up to two years after disclosure and county intervention. Levitt et al., *supra* note 82, at 54.

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children. Mothers in denial, however, must still be held accountable to some extent for failing to protect their children from such heinous crimes. This approach tries to strike a balance among the interests of the mothers, the children, and society, by permitting the mothers to choose between psychiatric treatment and criminal prosecution. The success of this approach depends upon the effectiveness of the psychiatric programs and the rigorousness of their requirements for the mothers' participation.

