

MOTHERHOOD AS MISOGYNY

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INTRODUCTION

I remember the day that I sat in a chair teaching my second class of the day, three days after having a C-section. I could not afford leave without pay, the only leave available. It was my fault anyway; I had not timed this pregnancy well. The others had been “academic babies”—born when I had time to stay at home. I now was on a beeper at work: I was beeped when the baby woke up so that I could run home, breastfeed her, and get back to work in time for office hours. And then there were the times I needed to pump breast milk in my office and worried that the factory-like sounds coming from inside might draw attention. Even evenings were fraught as I would run to my other children’s soccer games, dressed in business clothes and inevitably late, and endure the withering looks of fellow mothers, many balancing boxes of cupcakes in their laps for after games (yikes, when was it my turn again?). And why did I struggle so much to figure out how to get the children to the doctor? Did any of this ever occur to my husband? Why didn’t I ask him? Of course, it never ends. I am now the dean of a law school, having taken that job only once all my children were out of college, and I am worried that I will be missing my son’s graduation from medical school because, on the same day, I preside over this law school’s graduation. How much mental energy do I spend every day thinking about how to be the best mother I can be for my children? Motherhood has profoundly influenced my choices, my success as a law professor, my identity as a woman. Critical to that identity is my responsibility to put my children first no matter the impact on me. Mostly, I fail at that. I am caught in the double bind: expected to perform as a teacher and scholar yet criticized for not being selfless if I do not give appropriate primacy to the care of my children.

Flash forward twenty-five years from the birth of my first child. I am teaching a Motherhood and the Law class at Georgetown University Law Center with twenty-four young women sitting around a table in a seminar

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room.¹ My first question: “How many of you are mothers?” Not one hand went up. Puzzled, I asked each of them why she was taking this class. Every one of them expressed some form of, “How do I be a mother and succeed in my career as a lawyer?” These women were not objecting to the structure that made this question necessary, but rather asking how to manage it. They all appreciated that a mother’s value derives from her capacity to sacrifice. They had come to the course with a hope that I could help them develop a plan for coping with this inevitable challenge. My job was to help them manage their expectations about what they could have for themselves and where to sacrifice. In all my time as a law professor, I have never been asked that type of question by a man.²

I. MOTHERHOOD AS SACRIFICE

Mothering is hard work. It is constant; it is intense; it is exhausting. Mahatma Gandhi said that mothers best demonstrate the quality of *ahimsa*, a Hindi word that means infinite love and, at the same time, infinite capacity for suffering.³ Mothers adjust their lives to accommodate children. Mothering children often requires a mother to choose less remunerative work, lesser chance for advancement, and lower status in order for her to do all the mundane but necessary things required to care for children: breastfeed; arrange for doctors’ appointments, play dates, birthday parties, reading, and homework; buy new shoes; attend parent–teacher meetings; prepare food that children will eat; nurse them when sick; awaken during the night to the slightest irregular sound. No one likes doing all of this work. Mostly, it goes unacknowledged as work; it is merely what we expect from mothers. Nevertheless, this unpaid labor is critical to family function and to our economy.⁴ Parenting, handled primarily by mothers, is a job that is neither compensated nor counted in America’s gross domestic product.⁵ The work that mothers put into raising their children to become successful adults

1. Yes, all women. There was a man near the top of the waitlist, but no one dropped, and he did not get into the class.

2. I think this is the number one question I get asked by women during office hours, no matter the subject of the class.

3. Mahatma Gandhi, *What Is Woman’s Role?*, in GANDHI ON WOMEN: COLLECTION OF MAHATMA GANDHI’S WRITINGS AND SPEECHES ON WOMEN 313, 316 (Pushpa Joshi ed., 1988).

4. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED* 8 (1st ed. 2001).

5. Cf. JOSEPH E. STIGLITZ ET AL., *MISMEASURING OUR LIVES: WHY GDP DOESN’T ADD UP* 49 (2010) (explaining that conventional economic measures fail to account for the monetary value of household production and childcare).

is also not counted in terms of government benefits such as Social Security,⁶ nor is it uniformly considered when determining alimony and the division of assets in a divorce.⁷ Rather, the implied compensation mothers receive is the personal satisfaction of having children. Although having a family certainly provides many women with happiness and fulfillment, society promotes the notion that this is a sacrifice that is expected of “good” mothers whether they want to make the sacrifice or not.⁸ Any behavioral problems with the children or issues of neglect are also automatically blamed on the mother rather than the father.⁹ Given the penalties for not being selfless, it is hardly surprising that mothers put their children’s needs before their own, often at the cost of their own lives.¹⁰ This prioritization of children’s needs may explain why women all over the world are poorer than men despite working longer hours.¹¹ Our construction of motherhood hinges on an expectation of selflessness—an apparent willingness to put the needs of others before the needs of self.

Where once there was an explicit expectation that a woman’s sole role was to bear and care for children while deriving joy and satisfaction through that relationship and subordinating her own needs to the needs of their children, today that expectation has gone underground. It emerges as an

6. See Iulie Aslaksen & Charlotte Koren, *Reflections on Unpaid Household Work, Economic Growth, and Consumption Possibilities*, in COUNTING ON MARILYN WARING: NEW ADVANCES IN FEMINIST ECONOMICS 55, 64 (Margunn Bjørnholt & Ailsa McKay eds., 2d ed. 2014).

7. See generally Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R. 4th 481 § 12 (1985) (observing that courts in only twenty-six states and the District of Columbia recognized one spouse’s performance of homemaking duties as a contribution to the marriage that should be considered when dividing the marital estate).

8. See, e.g., SUSAN CHIRA, A MOTHER’S PLACE: CHOOSING WORK AND FAMILY WITHOUT GUILT OR BLAME 32 (1998); TWENTY-FIRST-CENTURY MOTHERHOOD: EXPERIENCE, IDENTITY, POLICY, AGENCY (Andrea O’Reilly ed., 2010); see also Isabel S. Wallace, *Being a Good Mother Requires Understanding, Devotion, and Sacrifice*, in BULLETIN NO. 35, TRAINING LITTLE CHILDREN: SUGGESTIONS FOR PARENTS 75, 75 (Bureau of Educ., U.S. Dep’t of Interior ed., 1919).

9. See, e.g., VICKY PHARES, “POPPA” PSYCHOLOGY: THE ROLE OF FATHERS IN CHILDREN’S MENTAL WELL-BEING 39 (1999); Jonathan Metzl, *The New Science of Blaming Moms*, MSNBC (July 21, 2014, 2:24 PM), <http://www.msnbc.com/melissa-harris-perry/the-new-science-blaming-moms>.

10. See, e.g., Rebecca J. Cook, *International Human Rights and Women’s Reproductive Health*, 24 STUD. FAM. PLAN. 73 (1993) (observing that “[t]he cost to women’s health of discharging [the duty of bearing children has historically gone] unrecognized”); Jeremy Shiffman, *Can Poor Countries Surmount High Maternal Mortality?*, 31 STUD. FAM. PLAN. 274 (2000) (discussing the high rates of maternal mortality, particularly in developing countries); L. Lewis Wall, *Dead Mothers and Injured Wives: The Social Context of Maternal Morbidity and Mortality Among the Hausa of Northern Nigeria*, 29 STUD. FAM. PLAN. 341 (1998) (discussing the high rate of maternal mortality among the Hausa); Alicia Ely Yamin & Deborah P. Maine, *Maternal Mortality as a Human Rights Issue: Measuring Compliance with International Treaty Obligations*, 21 HUM. RTS. Q. 563 (1999) (discussing solutions involving the use of potential human rights tools to encourage states to adopt policies and practices dedicated to reducing maternal mortality).

11. See, e.g., CRITTENDEN, *supra* note 4, at 8.

unstated assumption when women deviate from their expected selfless role. Mothers move through this culture with identities that do not include the full range of emotions, severe character faults, or malicious capabilities commonly considered possible in others. Instead, mothers are supposed to be selfless in caring for their children, and anything less risks heavy criticism from the rest of society. This expectation of abnegation is so ingrained in our culture that it often passes without notice.¹²

This Essay draws on my experience as a mother, a lawyer, and an academic handling or analyzing cases where women killed their children, were held responsible for someone else killing their children, or killed someone who threatened their children. Mothers' choices are measured on a continuum of selflessness to selfishness. Paradoxically, both ends of the continuum are implicated in these categories of cases.

These extreme cases offer some insight into the hidden expectation of selflessness incorporated in our consciousness and deeply embraced by our social structures. The social fallout from cases such as these prompted all those students in my Motherhood class to worry, to plan, and to limit themselves.

II. MOTHERS WHO KILL THEIR CHILDREN

To most people, a mother who kills her child is either a selfish monster or mad.¹³ In cases where a mother is charged with killing a child, that mother's motherhood is on trial. Insanity is the only explanation, but in the criminal justice system, a mother's insanity often reflects her own extreme form of selflessness. Under the M'Naghten rule,

to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong.¹⁴

12. It is not at all clear that there is a legal strategy for challenging the ways in which this expectation influences decisions and assessments. This influence may be best understood using a Foucauldian social construction theory. That theory posits an all-encompassing, interlocking network of social regulation that, for mothers, enforces the expectation of selflessness. See generally MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Colin Gordon, ed., Pantheon Books 1980) (providing a collection of essays and interviews that have shaped and discuss Foucauldian social construction theory).

13. See Michelle Oberman, *Mothers Who Kill: Coming to Terms with Modern American Infanticide*, 34 AM. CRIM. L. REV. 1, 43 (1996); Elizabeth Rapaport, *Mad Women and Desperate Girls: Infanticide and Child Murder in Law and Myth*, 33 FORDHAM URB. L.J. 527, 528 & n.5 (2006).

14. M'Naghten's Case (1843) 8 Eng. Rep. 718, 722 (HL).

In these cases, women often fail to meet the rigorous standard for the insanity defense because they are aware that what they are doing will be punished, yet they do it anyway.¹⁵ Looking at prominent insanity claims by women who killed their own children, one sees a striking number of cases in which the mother killed the child under the false belief that it would be better for the child—in other words, out of a deranged sense of caring.¹⁶ Their deranged sense of “selflessness” both inspires the act and defeats the insanity defense. They live out the oxymoron of being both a loving mother of children and the children’s killer.

In October 1994, Susan Smith, distraught over the state of her life, stopped her car on a bridge in Union County, South Carolina, and considered jumping off the bridge to kill herself.¹⁷ As she approached the railing, she stopped, realizing that were she to jump, she would be abandoning her two boys, asleep and strapped in their car seats.¹⁸ Ms. Smith said later, “I felt even more anxiety coming upon me about not wanting to live. . . . I felt I couldn’t be a good mom anymore, but I didn’t want my children to grow up without a mom. . . . I felt I had to end our lives.”¹⁹ She believed that a good mother would not leave her children to grow up without a mom.²⁰ Ms. Smith returned to her car, sobbing and dazed, and drove to John D. Long Lake.²¹ Seeing a boat ramp, she drove the car onto the ramp, allowing it to roll into the water, ready to die with her children.²² As the car entered the water, Ms. Smith panicked, and she jumped out of the car as it continued into the water and sank.²³ With no one to help her save the children, Ms. Smith thought to herself that she should tell no one what had happened because they would hate her.²⁴ Ms. Smith had not wanted to leave her children alone and, planning her own suicide, decided to kill them to ensure they did not grow

15. See CHERYL L. MEYER & MICHELLE OBERMAN, *MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE “PROM MOM”* 95 (2001).

16. See, e.g., Josephine Stanton et al., *A Qualitative Study of Filicide by Mentally Ill Mothers*, 24 *CHILD ABUSE & NEGLECT* 1451 (2000) (providing a survey of various instances of filicide by mothers); Susan Ayres, “[N]ot a Story to Pass On”: *Constructing Mothers Who Kill*, 15 *HASTINGS WOMEN’S L.J.* 39, 86–88, 97, 100–01 (2004).

17. GEOFFREY R. MCKEE, *WHY MOTHERS KILL: A FORENSIC PSYCHOLOGIST’S CASEBOOK* 156, 158 (2006).

18. *Id.* at 156.

19. ANDREA PEYSER, *MOTHER LOVE, DEADLY LOVE: THE SUSAN SMITH MURDERS* 3 (1995).

20. MCKEE, *supra* note 17, at 156.

21. *Id.* at 157.

22. *Id.*

23. *Id.*

24. *Id.* Ms. Smith then dissembled the facts and made a claim easily believed in her small Southern town: that her children had been taken by a black man. *See id.* That assertion prompted a manhunt and a national story. *See id.*

up without a mother.²⁵ No one would understand that she, too, wanted to die and save her children from abandonment by taking them with her, but that she ultimately did not have the courage to follow through with her suicide. She was charged with capital murder and the prosecution sought the death penalty.²⁶ I assisted the defense with pretrial surveys of potential jurors. The survey results indicated two possible responses of jurors: that something must have been terribly wrong with Ms. Smith, rendering her insane, or that the killing was the result of Ms. Smith's uncontrolled sexual desires and rejection of the sacred maternal role. As the evidence unfolded, it was clear that Ms. Smith had been victimized by her stepfather and suffered considerable trauma.²⁷ That evidence did not result in a finding of insanity,²⁸ but it did help Ms. Smith avoid the death penalty.²⁹

In a similar case, defendant Andrea Yates told her doctor that she had killed her children because she felt she was such a bad mother that she had doomed her children to hell.³⁰ The only way she could save them, she believed, was to kill them.³¹ Her attorney, George Parnham, noted that Ms. Yates believed that “[t]hese children of hers needed to die in order to be saved . . . because [she] was such a bad mother that she was causing these children to deteriorate and be doomed to the fires of eternal damnation.”³² This case shows the tragic meta-recursive layers to this thought process: A woman is so consumed with shame about being a bad mother that she believes she is embodying the archetypal “good” mother qualities in committing the most heinous crime a mother can commit against her children.

Contrast the women in these cases with fathers who kill their children, who rarely manifest this selfless, yet deranged, motivation.³³ Instead fathers

25. PEYSER, *supra* note 19, at 3.

26. See Rick Bragg, *Carolina Jury Rejects Execution for Woman Who Drowned Sons*, N.Y. TIMES (July 29, 1995), <https://www.nytimes.com/1995/07/29/us/carolina-jury-rejects-execution-for-woman-who-drowned-sons.html>.

27. See Rick Bragg, *Susan Smith Verdict Brings Relief to Small Town*, N.Y. TIMES (July 30, 1995), <https://www.nytimes.com/1995/07/30/us/susan-smith-verdict-brings-relief-to-town.html>.

28. See Rick Bragg, *Judge Rules Susan Smith Is Fit for Trial on Murder Charges*, N.Y. TIMES (July 12, 1995), <https://www.nytimes.com/1995/07/12/us/judge-rules-susan-smith-is-fit-for-trial-on-murder-charges.html>.

29. See Bragg, *supra* note 27.

30. See Lisa Sweetingham, *Defense: Yates Killed Kids to Save Them*, CNN (June 27, 2006, 11:31 AM), <https://www.cnn.com/2006/LAW/06/26/yates.trial/index.html>.

31. *Id.*

32. *Id.*

33. See Elizabeth Yardley et al., *A Taxonomy of Male British Family Annihilators, 1980–2012*, 53 HOW. J. CRIM. JUST. 117, 132 tbl.14 (2014) (finding that only 14% of male family annihilators kill their children as “a way of protecting them from [a] threat”).

predominately act out of anger, jealousy, and marital and life discord.³⁴ The majority of men who kill their own children engage in family annihilation, usually after a threat of divorce.³⁵ They kill not only their children but oftentimes also their spouse or partner.³⁶ Studies of fathers who kill their children note that the primary motivation for such acts can be characterized as self-righteousness.³⁷ Researchers explain family annihilators classified as self-righteous:

For these men, [the idea of a traditional nuclear] family is central to their masculinity. Their role as the ‘breadwinner’ affords them a significant degree of control. Thus the threat of family breakdown results in efforts to keep the family together—through an escalation of controlling behaviour that may involve threats and violence towards their partners. Where their partners show signs of thriving without them, the family is perceived as having failed. . . . The self-righteous family annihilator, therefore, engages in a dramatic performance of his domineering, masculine identity. By removing his children, he effectively prevents them from becoming the stepchildren of another man. For the self-righteous family annihilator, the family has failed in its function as a forum for the performance of masculinity through dominance and control.

Here we should note that the threat has come from *within* the family—specifically the non-compliance of his partner, who has wrested back a degree of power and independence.³⁸

Had she not acted so selfishly, he would not have needed to annihilate the family.

In other cases where mothers, particularly young mothers, kill their children, the failure to engage in selfless behavior heightens the probability of being found guilty. Young mothers who kill their children are often criticized as having engaged in selfish behavior by ridding themselves of an unwanted “problem.” The prosecution often makes considerable use of the trope of selfishness. The trial of Casey Anthony is illustrative.

Ms. Anthony was charged with first-degree murder, aggravated manslaughter, and aggravated child abuse of Caylee Anthony, her daughter, who after having been missing for several weeks was found dead, buried,

34. Fathers tend to use more violent means than mothers when they kill their children; for example, by using firearms, stabbing, inflicting head injuries, hitting, or kicking. Timothy Y. Mariano et al., *Toward a More Holistic Understanding of Filicide: A Multidisciplinary Analysis of 32 Years of U.S. Arrest Data*, 236 *FORENSIC SCI. INT’L* 46, 47 (2014).

35. *See id.*; *see also* Yardley et al., *supra* note 33, at 130 (finding family breakdown to be the primary cause of male family annihilation).

36. *Id.* at 129.

37. *Id.* at 131–32.

38. *Id.*

and gagged with duct tape.³⁹ A significant part of the prosecution's theory of the case was the suggestion that selfishness was the motive for murder, and the prosecution painted Ms. Anthony as a party girl who had a much better life now that Caylee was out of her way.⁴⁰ The prosecution's theory of Ms. Anthony's selfishness, though intended to smear her character in the courtroom, spoke most strongly to the throngs of people following the case throughout America.⁴¹ Ms. Anthony went against the prototypical mother—from her reaction at her trial (Nancy Grace called Ms. Anthony stone-faced and said that she would like to slap the expression off Ms. Anthony's face⁴²) to her actions the day after Caylee disappeared (running errands to Blockbuster and Target and staying inside her room with boyfriend Tony Lazzaro all day⁴³). The prosecution took this idea even further and posited that Ms. Anthony wanted Caylee out of the way so that she could party.⁴⁴ It presented testimony that Ms. Anthony gave Caylee a sedative so that Caylee would sleep through the night and Ms. Anthony could go out.⁴⁵ It showed pictures of Ms. Anthony partying with her boyfriend several days after Caylee first disappeared.⁴⁶ And finally, it ended by presenting a picture of Ms. Anthony's tattoo, which reads "Bella Vita," a phrase that means "beautiful life," that she got several days after Caylee's disappearance.⁴⁷ Impugning a woman's mothering practices as selfish or suggesting that she has not engaged in the requisite selfless behavior appears to be a strategy of

39. See Lizette Alvarez & Timothy Williams, *Anthony Is Sentenced to 4-Year Term for Lying*, N.Y. TIMES (July 7, 2011), <https://www.nytimes.com/2011/07/08/us/08anthony.html>; Breeanna Hare, 'What Really Happened?': The Casey Anthony Case 10 Years Later, CNN (June 30, 2018, 12:54 AM), <https://www.cnn.com/2018/06/29/us/casey-anthony-10-years-later/index.html>.

40. Cara Hutt, *Week 1: As Casey Anthony Murder Trial Begins, Mysteries Remain*, CNN (May 29, 2011, 3:27 PM), <http://www.cnn.com/2011/CRIME/05/28/casey.anthony.trial.wrap/index.html>.

41. See Alvarez & Williams, *supra* note 39.

42. *Nancy Grace: Cindy Anthony Breaks Down in Court at 911 Tapes* (HLN television broadcast May 31, 2011), <http://transcripts.cnn.com/TRANSCRIPTS/1105/31/ng.01.html>.

43. See Barbara Liston, *Casey Anthony "Normal," "Happy" After Tot's Death*, REUTERS (May 25, 2011, 8:42 PM), <https://www.reuters.com/article/us-crime-anthony/casey-anthony-normal-happy-after-tots-death-idUSTRE74O7HQ20110526>; *Timeline in the Casey Anthony Case*, SAN DIEGO UNION-TRIB. (July 17, 2011, 6:41 AM), <https://www.sandiegouniontribune.com/sdut-timeline-in-the-casey-anthony-case-2011jul17-story.html>.

44. Frank Farley, *Infanticide in Order to Party: A Nonsense Motive*, CNN (July 6, 2011, 10:38 AM), <http://www.cnn.com/2011/OPINION/07/05/farley.anthony.trial/index.html>.

45. See Lee Ferran, *Witness Reports: Casey Anthony Used to 'Knock Out' Caylee*, ABC NEWS (Apr. 6, 2010, 12:14 PM), <https://abcnews.go.com/GMA/TheLaw/witness-reports-casey-anthony-knock-caylee/story?id=10301719>.

46. See Ashleigh Banfield & Jessica Hopper, *Casey Anthony Trial: Former Boyfriend Describes Casey Anthony Romance*, ABC NEWS (May 25, 2011, 8:36 AM), <https://abcnews.go.com/US/casey-anthony-trial-tony-lazzaro-describes-romance-caylee/story?id=13682814>.

47. See Alvarez & Williams, *supra* note 39; Farley, *supra* note 44.

choice in painting a defendant as worthy of punishment no matter the limitations of the proof.⁴⁸

III. MOTHERS OF MURDERED CHILDREN

A woman is also blamed when her child is killed by another. She has either acted selfishly by staying with the killer despite his violent tendencies toward the child, or she has failed as a selfless mother due to her inability to recognize the risk of harm to her child.

Legislators ostensibly design failure-to-protect statutes to protect children, and these statutes appear to be a logical way to reduce instances of child abuse.⁴⁹ Child abuse statutes typically appear in two forms: commission statutes aimed at active abusers and omission statutes criminalizing the passive conduct of those who expose a child to a risk of abuse or fail to care for or protect a child in violation of a legal duty.⁵⁰ Omission statutes aim “to protect children’s ‘best interests’ by compelling parents to remove their children from abusive environments.”⁵¹ Typically, the passive parent’s liability for child abuse or homicide is predicated upon (1) the parent’s legal duty to protect the child, (2) the parent’s actual or constructive notice of the foreseeability of abuse, (3) the child’s exposure to the abuse, and (4) the parent’s failure to prevent such abuse.⁵² Every state imposes some form of criminal liability for passive child abuse.⁵³ Usually, the prosecutor must show that (1) the defendant had a legal duty to protect the child, (2) the defendant had notice of the foreseeability of abuse, (3) the child was abused, and (4) the defendant failed to prevent the abuse.⁵⁴ Mothers who fail to protect their children from third-party abuse can be charged not

48. In a case with which I am involved, our client, a mother of five children, was charged and convicted of killing her husband. Transcript of Trial Proceedings at 707, *State v. Prewitt*, No. CR484-5F (Mo. Ct. App. Apr. 19, 1985). Faced with little evidence of her connection to the crime, the prosecution suggested that the motive for the killing was our client’s engagement in extramarital affairs. *Id.* at 659. The affairs in question had occurred six years prior during a period of separation from her husband, the victim. *Id.* at 584, 682–83. Apparently seeking to bolster the power of the evidence, on cross-examination, and without objection, the prosecutor asked: “Where were the children when you engaged in intercourse with him?” *Id.* at 639. In a memoir later written by the prosecutor, he described questions like this as “a few parting shots” that relied on “the old favorite, motherhood.” TOM R. WILLIAMS & NAN COCKE, *PRACTICE TO DECEIVE* 467 (2016).

49. See Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner’s Abuse*, 6 *HASTINGS WOMEN’S L.J.* 67, 67–68 (1995).

50. *Id.*

51. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 *J. CRIM. L. & CRIMINOLOGY* 579, 615 (1998).

52. *Id.*; Panko, *supra* note 49, at 68.

53. Jeanne A. Fugate, Note, *Who’s Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 *N.Y.U. L. REV.* 272, 278 (2001).

54. *Id.* at 279.

only with failure to protect, but also with child abuse, reckless endangerment, accessory to murder, and even felony murder.⁵⁵ These failure-to-protect statutes can inflict devastating prison sentences and felony convictions.⁵⁶ When combined with felony murder, failure-to-protect convictions can even carry life sentences.⁵⁷ Under this framework, evidence of prior abuse of the mother can actually work against her: Instead of being used to potentially explain why a mother was afraid to come between her batterer and her child, evidence of prior abuse can show the mother should have known that her child was in danger.⁵⁸ Only a few states provide statutory affirmative defenses that allow the accused to argue that she believed interfering in the abuse would cause physical harm to herself or further injury to her child.⁵⁹

Society's conception of motherhood plays a role in the decision to prosecute for failure to protect. The justice system will often ascribe a preternatural instinct to a mother to see that her child might be at risk of harm. One writer observes that "[s]ociety believes that the maternal instinct bestows upon a woman a superior ability to protect."⁶⁰ Another researcher echoes the sentiment: "While courts have determined that the primary responsibility of the child falls upon both parents, mothers are singled out as the primary care takers, and take primary blame when tragedy strikes."⁶¹ One client of mine, whose abusive housemate killed her baby as she walked her six-year-old to the bus stop, could not fathom that this could have happened. She felt that surely it must be her fault. Her all-consuming guilt—and insistence that she had failed as a mother—made defending her against a charge of child endangerment and failure to protect all but impossible. When I met her, she had been in prison for several years, always on suicide watch. I learned her story when I advised her that the paper she asked me to interpret was a voluntary relinquishment of her parental rights—she had signed it earlier, not appreciating its significance. The state had terminated her parental rights to her six-year-old. Although there was not much I could do about this termination after the fact, I determined that we had several grounds to challenge her criminal conviction. She refused to move forward, convinced that she should have known: "After all, I was their mother." I am haunted by this case. The client remains in prison under suicide watch.

55. *See id.* at 277 n.19, 279 n.26.

56. *Id.* at 277 n.19, 278–79 & n.26.

57. *See, e.g.,* Jacobs, *supra* note 51, at 582–83.

58. Fugate, *supra* note 53, at 291–92.

59. *Id.* at 279.

60. Rebecca Ann Schernitzki, *What Kind of Mother Are You? The Relationship Between Motherhood, Battered Woman Syndrome and Missouri Law*, 56 J. MO. B. 50, 50 (2000).

61. Geneva Brown, *When the Bough Breaks: Traumatic Paralysis—An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 224 (2005).

Even though failure-to-protect statutes are written in gender-neutral terms, prosecutors use them against mothers far more often than against fathers.⁶² One advocate stated: “In the 16 years I’ve worked in the courts, I have never seen a father charged with failure to protect when the mom is the abuser. Yet, in virtually every case where Dad is the abuser, we charge Mom with failure to protect.”⁶³ Thus, common beliefs concerning motherhood have created a bias in the justice system.⁶⁴ “[T]hat a mother is charged at all in the failure-to-protect scenario is a powerful example of the ‘mother-blaming’ bias that permeates not only our legal institutions, but also our cultural norms,” writes Professor Jennifer M. Collins.⁶⁵

Perhaps the most poignant example of the lopsided nature of failure-to-protect statutes can be seen in the aforementioned Andrea Yates case. The nation was consumed with the sad story of Ms. Yates, the suburban mother who in 2001 killed all of her children by drowning them and then called the police to report what she had done.⁶⁶ Ms. Yates had suffered from intense postpartum depression that transformed into psychosis after her fourth baby was born.⁶⁷ She spent considerable time in a mental hospital to recover.⁶⁸ Although warned by her physician that she was likely to have the same or worse experience should she give birth again, after pressure from her husband, Rusty Yates, Ms. Yates decided to have another child and risk her descent into psychosis.⁶⁹ Indeed, when that baby was born, Ms. Yates did experience postpartum depression.⁷⁰ According to the trial testimony, Mr. Yates was told by the psychiatrist that Ms. Yates was not capable of caring for the children and should not be left alone with them.⁷¹ However, without

62. See Gregory L. Lecklitner et al., *Promoting Safety for Abused Children and Battered Mothers: Miami-Dade County’s Model Dependency Court Intervention Program*, 4 CHILD MALTREATMENT 175 (1999) (quoting a longtime advocate discussing the prevalence of female defendants in failure-to-protect cases).

63. *Id.* at 176.

64. See Fugate, *supra* note 53, at 274 (“Defendants charged and convicted with failure to protect are almost exclusively female. . . . The overwhelming prevalence of female defendants can be explained best by the higher expectations that women face in the realm of parenting and child care.”).

65. Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent–Child Relationship*, 93 IOWA L. REV. 131, 180 (2007).

66. Melissa Chan, *Revisiting Andrea Yates 15 Years After She Drowned Her Children*, TIME (June 20, 2016), <https://time.com/4375398/andrea-yates-15-years-drown-children>; Sweetingham, *supra* note 30.

67. See Terri Langford, *Yates Recounts Wife’s Descent: Tearful Husband Details Frustrating Search for Medical Help*, NEWSROOM, Feb. 28, 2002, at A1.

68. See *id.*

69. Timothy Roche, *The Yates Odyssey*, TIME, Jan. 28, 2002, at 42, 48.

70. See Langford, *supra* note 67.

71. Dale Lezon, *Yates Not Grossly Psychotic Before the Drownings, Dietz Testifies*, HOUSTON CHRONICLE, July 13, 2006, at 1.

consulting the doctor about his plans, Mr. Yates began leaving his wife alone with the children for an hour in the morning and an hour in the afternoon in the weeks leading up to the drownings to ensure that she did not become totally dependent on him and his mother, who had been helping care for the children, for her maternal responsibilities.⁷² Mr. Yates decided that Ms. Yates needed to start caring for the children again and decided to leave her, despite the warning of the psychiatrist that Ms. Yates was a danger to the children.⁷³ On June 21, 2001, Andrea Yates killed all five of her children.⁷⁴ She was charged with, tried for, and convicted of their murders.⁷⁵ After retrial, she was determined to have been insane at the time of the killing.⁷⁶ Mr. Yates, on notice of the physical risk to his children, was never charged with anything.

Men who batter children often also batter the children's mothers.⁷⁷ Failure-to-protect cases implicate not only norms of selfishness when a mother does not intervene, but also norms of selflessness when she is expected to incur great harm to herself to intervene. The battered mother charged with failure to protect finds herself in a particularly precarious position. Selflessness is readily apparent in this line of cases because our expectation of mothers is so different from our expectation of fathers. In cases in which the mother is the victim of domestic violence, she is expected to put her own risk aside and act on behalf of her children. A battered woman is still held to the heightened expectation placed on all mothers even though it is hardest for her to intervene. "The battered mother is placed in the dichotomous sphere where her survival is opposed to that of her children."⁷⁸ Knowing that she may be prosecuted for failing to protect her children, "[s]he must place herself in harm's way to protect her children and have no regard for her safety and wellbeing."⁷⁹

After leaving her four-year-old daughter, H.C., home alone with her live-in boyfriend, Floyd Boyer, Casey Campbell returned from work shortly after 7:00 PM to find her daughter severely burned.⁸⁰ Mr. Boyer claimed the burns were from spilled coffee.⁸¹ Instead of taking H.C. directly to the

72. See SUZY SPENCER, *BREAKING POINT 300* (St. Martin's Paperbacks ed. 2002).

73. *Id.* at 300.

74. *Id.* at 4.

75. See Chan, *supra* note 66.

76. See *id.*

77. See Fugate, *supra* note 53, at 279–80 (noting that women charged under failure-to-protect statutes are often themselves abused).

78. Brown, *supra* note 61, at 231.

79. *Id.*

80. *Campbell v. State*, 999 P.2d 649, 654 (Wyo. 2000).

81. *Id.*

hospital, Ms. Campbell went to play darts with Mr. Boyer, afraid to provoke the man who “had been physically abusive to [her] for years.”⁸² Ms. Campbell and Mr. Boyer did not take H.C. to the hospital until 2:00 AM—after they had returned from darts and H.C.’s pain had intensified.⁸³ The examining physician did not believe the burns were from hot liquid, and contacted the police.⁸⁴ Mr. Boyer pleaded guilty to misdemeanor child endangerment.⁸⁵ Ms. Campbell, who had also been charged with child endangerment, went to trial.⁸⁶ Her attorney requested a continuance to explore a battered woman’s syndrome defense, but the court denied it.⁸⁷ At Ms. Campbell’s trial, Mr. Boyer confirmed that he had abused Ms. Campbell in the past.⁸⁸ He testified that he believed Ms. Campbell did not seek medical care for H.C. that night and left her to play darts to avoid angering him and risking further abuse.⁸⁹ At the jury instruction stage, Ms. Campbell’s attorney requested an instruction on the defense of duress and coercion, but the instruction was denied.⁹⁰ Ms. Campbell was convicted of felony child endangerment, a far more serious crime than the one to which Mr. Boyer pleaded guilty, and she was sentenced to prison.⁹¹

Ms. Campbell was not at home when her child was injured, and she only failed to get appropriate medical care out of fear of her batterer, Mr. Boyer. Because of the prior abuse by Mr. Boyer that she had endured, Ms. Campbell could not have reasonably been expected to defy the wishes of her batterer, yet she was denied an opportunity to explore a battered woman’s syndrome defense. Ms. Campbell was allowed to testify that she “had been abused by her brother since she was seven years old, by her stepfather since a teenager, and by Boyer since she was sixteen years old, and Boyer had violently assaulted her with knives and guns on past occasions.”⁹² She also testified that “[a]t the time of HC’s injuries, she feared for herself and HC if she defied Boyer that night by refusing to play darts.”⁹³ However, the court’s refusal to instruct the jury on the defense of duress and coercion nullified the

82. *Id.* at 655.

83. *Id.* at 654.

84. *Id.*

85. *Id.* at 655.

86. *Id.* at 654–55.

87. *Id.* at 655.

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*; see also Fugate, *supra* note 53, at 272 n.2.

93. *Campbell*, 999 P.2d at 655.

relevance of this testimony.⁹⁴ The justice system failed to recognize that Ms. Campbell might have reasonably failed to protect her child due to her experience of prior abuse and the rational fear that any intervention would further endanger herself or her child. Although the actual abuser received only a misdemeanor conviction, Ms. Campbell was convicted of a devastating felony and sentenced to jail time.⁹⁵

Casey Campbell's story is indicative of a recurring problem. As it currently stands, the legal system punishes women for failing to protect their children regardless of whether they could have reasonably halted the abuse. Battered women, victims themselves, appear to have a reason to hesitate to intervene in their partners' abuse of their children. Research suggests that battered women are six times more likely to be accused of child abuse than women who have not been battered.⁹⁶ Nevertheless, the current state of the law has trouble recognizing the effects of domestic violence on a mother's capacity to protect. The expectation that women put their children first overlooks evidence suggesting that doing so can be virtually impossible.

A court might better appreciate the reasonableness of a mother's actions if it considered a woman's decision to stay in the home of her batterer in light of the real threat that her batterer will retaliate if she leaves. Separation assault is well documented, and women often find themselves in a "no-win situation": "You're in danger when you're with him and you're in danger when you're not That's what leads to a lot of behavior by abused women that those of us on the outside can't understand."⁹⁷ The expectation of selflessness is so strong that unless a woman risks her own life to protect a child, and many often will, she has failed and is punishable.

IV. MOTHERS WHO KILL TO PROTECT THEIR CHILDREN

Ironically, despite the expectation that women protect their children before themselves, when women kill to protect their children, that protectiveness is not used to mitigate the crime. Instead, it is often recast as a selfish act. Self-defense is justified when there is an imminent threat of death or serious bodily harm.⁹⁸ Without imminence, the defense is virtually unavailable.⁹⁹ Often when there are children involved, the batterer threatens

94. *See id.*

95. *See id.*

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

97. Louise Kiernan, *Complex Issues Trap Women in Abuse*, CHI. TRIB. (Mar. 16, 1993), <https://www.chicagotribune.com/news/ct-xpm-1993-03-16-9303160061-story.html>.

98. *See, e.g.*, Brown, *supra* note 61, at 207.

99. *See id.*

to take the children if the woman leaves.¹⁰⁰ Battered women may choose to stay with their batterers, managing the abuse to ensure that their children remain safe and in their custody. I represented twelve women convicted of murder as a part of the Missouri Battered Women's Clemency Coalition.¹⁰¹ Several of the women had attempted to leave their batterer, but returned out of fear—and in some cases, financial necessity—after their batterer stalked them.¹⁰² Many of the women did not kill their batterer until they learned that their batterer was physically abusing their children, sexually abusing their children, or both.¹⁰³ As one client told me,

I tried to leave, but he hunted me down. I thought I had found a way to live with the beatings, but then he turned on the kids. I guess that was when I snapped. It is one thing when it is him or me . . . it is really another when it was him or the kids.

Unable to see any way to escape the abuse, facing prison was a sacrifice these women were willing to make to protect their children.

I heard story after story of women negotiating ways to protect their children. There was one woman who set up entirely self-sufficient rooms for her three children, with refrigerators and TV sets, to ensure that they did not have to come into the family area and risk the physical wrath of their father. When the woman's husband physically threw her son out of the house into the snow without shoes or proper clothing for the cold, she felt that her attempts to protect the children were not sufficiently effective. She turned to murder. Another client was charged as an accomplice in the murder of her husband. Her son was charged as the killer. The prosecutor approached her and offered a deal: "If you agree to plead guilty to murder with a life sentence without parole for 50 years, I will not charge your son with capital murder and not seek the death penalty." The client accepted. Thirty-two years later, she was freed from prison.

Another mother filed for divorce alleging that her husband abused her and the children. The guardian *ad litem*, influenced by the husband, discounted the abuse and alleged that the mother was engaging in parental alienation. Fearing that she would lose custody, the mother withdrew her

100. Jessica Klein, *How Domestic Abusers Weaponize the Courts*, ATLANTIC (July 18, 2019), <https://www.theatlantic.com/family/archive/2019/07/how-abusers-use-courts-against-their-victims/593086/>.

101. These stories are representations of clients' stories and the names reflected are pseudonyms to protect client confidentiality. Notes are on file with the author.

102. See Bridget B. Romero et al., *The Missouri Battered Women's Clemency Coalition: A Collaborative Effort in Justice for Eleven Missouri Women*, 23 ST. LOUIS U. PUB. L. REV. 193, 197–98, 200 (2004).

103. See *id.* at 197, 199–202, 207.

petition for divorce and returned to the family home with the children where the abuse escalated. After her teenage daughter reported that her father was coming into the bathroom when she was showering and touching her, this client killed her batterer. She called the police and confessed to the murder, minimizing the violence she experienced and not mentioning his abuse of her daughter. She had internalized the message she had learned well during her attempt to gain custody in her failed divorce proceeding: mentioning abuse could result in being accused of lying.

V. MATERNAL SACRIFICE IN THE FACE OF INCARCERATION

These cases help to shed light on this expectation of selflessness. The power and control inherent in the expectation serve as an unstated limit on women's ability to thrive. There is no data on how many mothers sacrifice for their children and go to prison to protect them or how many go in their children's place. Sentences may be enhanced because mothers fail to accept a plea deal and get punished for their failure to cooperate. Sentencing guidelines do not take into account family ties or even the duress that may arise due to the presence of children in abusive relationships when determining appropriate departures. The plea bargaining system is roughly based on a contract model: the prosecutor offers the defendant a deal that is calculated to be somewhat better than what might result from a sentence after trial.¹⁰⁴ The prosecutor's incentive is not only to quickly dispose of a case, but often—especially in cases where there are multiple defendants—to garner evidence against other, perhaps more serious participants in the alleged crime.¹⁰⁵ This incentive is time-sensitive. In other words, the first to “flip” on his or her fellow defendants is most likely to receive the deal.¹⁰⁶ This incentive structure results in significant disadvantages to a woman defendant who may be involved in a crime due to her relationship with another potential defendant. She may not have access to “dealable” information because she is insulated from the higher-ups involved in the crime. She may be “in love” or a victim of domestic abuse, making the calculation of whether to deal a more difficult question and thus not something that can be done quickly. Meanwhile, the prosecutor moves to the next defendant and the offer lapses. For mothers, plea bargaining can be even more difficult. The selflessness often expected of and reinforced in mothers corrupts the plea-bargaining process and systematically disadvantages

104. See Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 (1992).

105. See Miriam Hechler Baer, *Cooperation's Cost*, 88 WASH. U. L. REV. 903, 920 (2011).

106. See Ellen Yaroshesky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 929 (1999).

mothers. A mother faces many additional barriers to quick action on a plea deal. She may not have a plan for caring for her children, so prison time seems impossible. Her children may be at physical risk should she turn on her partner, and therefore she is, in essence, held hostage. Finally, her children may face enhanced charges if she fails to take an offered plea bargain. In short, mothers face once again the societal need to be “selfless” in the face of criminal liability, sacrificing themselves to protect their children.

Even if a woman goes to trial, she may find that any assertion that her decisions to assist in crimes were made to protect herself or her children has no place in assessing the appropriate sentence. Although the Federal Sentencing Guidelines consider “serious coercion” relevant at sentencing, courts may limit this departure to physical coercion and ignore the “endemic sociological and psychological realities of male dominance, female victimization, and emotional abuse.”¹⁰⁷ Furthermore, post-*Booker*, courts are still uncomfortable exercising their newfound discretion to deviate from the guidelines unless given explicit permission with a recognized departure.¹⁰⁸ Specifically, courts are reluctant to use their discretion in considering the effects of coercion exerted upon battered offenders; “many courts appear no more able than jurors to shirk the ‘myths’ and ‘misconceptions’ surrounding domestic violence, even in connection with sentencing.”¹⁰⁹ Finally, even if courts find these battered offenders who act to ensure their safety and the safety of their children less culpable or outside the scope of the congressional purposes of punishment and wish to exercise their discretion to account for these factors, their discretion is limited by legislative mandatory minimum sentences.¹¹⁰

VI. REJECTING MATERNAL SACRIFICE

In all of the cases I handled, the expectation of maternal sacrifice lurked in the background, sometimes asserting itself as a justification for rules and policies by conflating self-interest with selfishness, sometimes motivating insane acts, and sometimes resulting in the imposition of sanctions without ever revealing itself. I identified with all of the women I represented. We shared the expectation that being a mother required sacrifice. The biggest challenge I faced representing the women was stepping out of that frame. I

107. Laurie Kratyk Doré, *Downward Adjustment and the Slippery Slope: The Use of Duress in Defense of Battered Offenders*, 56 OHIO ST. L.J. 665, 735 (1995) (internal quotation marks omitted).

108. See Myrna S. Raeder, *Gender-Related Issues in a Post-Booker Federal Guidelines World*, 37 MCGEORGE L. REV. 691, 705, 709 (2006).

109. Doré, *supra* note 107, at 736.

110. See *id.* at 735.

encountered this challenge again while teaching my Motherhood and the Law class. There were many times when I wondered how the class would have proceeded had it included some men. Were we being fair? Were we too harsh in our analysis? Was it okay to look at this only with a woman's perspective? Ironically, the real question I was asking myself was, "Are we being selfish?" Reinforcing selfless behavior as appropriate, inevitable, objective, and rational obfuscates the exercise of power and control. Often, when we see shared social norms operating on others, we can finally see the flawed misogynistic structure in which we operate. Only then do we gain the power to name the harm and to resist it.

We must squarely analyze society's embrace of the belief that mothers should put children ahead of their own needs and appreciate how that belief controls women and limits their lives. This persistent sexist belief reinforces women's primary role as one of service, support, and care. Kate Manne identifies the manifestation of this belief as an essential component of misogyny:

Women may not be simply human *beings* but positioned as human *givers* when it comes to the dominant men who look to them for various kinds of moral support, admiration, attention, and so on. She is not allowed to *be* in the same way as he is. She will tend to be in trouble when she does not give enough, or to the right people, in the right way, or in the right spirit. And, if she errs on this score, or asks for something of the same support or attention on her own behalf, there is a risk of misogynistic resentment, punishment, and indignation.¹¹¹

Perhaps mothering is the pinnacle of being a human giver.¹¹² Mothering is reflected in the mutually constitutive nature of social institutions and discourse, and it makes change in this area difficult. Selfless identity is merely a construction. Uncovering the rhetoric that normalizes the repression and unmasking the power that reinforces it is a critical feminist project. That is why I teach Motherhood and the Law. We must deconstruct that question my students were so eager to engage: "How do I be a mother and succeed . . . ?" Someday I will teach a Parenthood and the Law course,

111. KATE MANNE, *DOWN GIRL: THE LOGIC OF MISOGYNY*, at xix (2017).

112. Consider:

Human *beings* have a moral obligation to *be* and express their full humanity, to do whatever it takes to that end, and they can be blamed for failing at that task. Human *givers*, by contrast, have a moral obligation to *give* their full humanity, everything they have—time, attention, affection, even their own bodies. . . . [T]hey are the rightful resource of the human beings, and they are obliged to give their bodies willingly, cheerfully, without imposing any inconvenient needs of their own. Human givers don't get to have needs; only human beings have needs.

Emily Nagoski, *I'm Sorry You're Lonely but It's Not My Job to Help You: The Science of Incels*, MEDIUM (May 5, 2018), <https://medium.com/@enagoski/im-sorry-you-re-lonely-but-it-s-not-my-job-to-help-you-the-science-of-incels-25bf83e2aaa0>.

populated by students of any gender identity. The project will not be to negotiate the inherent limits associated with parenting, but to create a world that promotes all people to express their full personhood.