

MAPPING CONTESTED TERRAIN:
THE DOCTRINE OF FAILURE TO PROTECT IN CANADIAN CRIMINAL LAW

by

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ABSTRACT

This thesis examines the operation of the doctrine in Canadian criminal law. The doctrine of failure to protect is a rule or principle based on the widely accepted 'common-sense' belief that parents have a responsibility and a duty to protect their children from harm. Under the doctrine of failure to protect a parent who fails to fulfil this responsibility becomes as responsible for the harm to the child as the person who inflicts the harm. Using the concepts of ideology and discourse, this thesis examines the doctrine of failure to protect from a feminist perspective, and is concerned with how the doctrine operates in ways that are oppressive to women and, in particular, to women who are battered.

Failing to protect a child from harm has been codified as an offence in most American criminal statutes but not, to date, in the Canadian *Criminal Code*. This study is based on a review of American literature and Canadian case law, and demonstrates how the doctrine of failure to protect has emerged and now operates in Canadian criminal law, notwithstanding the lack of an express provision in the *Criminal Code*.

This thesis argues that an understanding of women's experiences of violence and of mothering in the context of violence is crucial to just determinations of the guilt or innocence of women who are prosecuted for failing to protect their children. This thesis then demonstrates how legal method and ideology contribute to make women's experiences of mothering in the context of violence irrelevant to legal enquiry and to their being judged against standards of motherhood based on an ideal. The thesis concludes by discussing the implications of the findings of the thesis for criminal law policy and practice.

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Chapter 1 - Introduction

1. *The Case of Donna Roud*

In 1981 Donna Roud, a 37-year-old aboriginal¹ mother of three teenage boys, was convicted by an Ontario court of the attempted murder of her 14-year-old son Gary.² Donna Roud did not fire the shot that wounded her son; her violent, abusive husband Harvey did. Donna's part in the crime was to obey Harvey when he ordered her to fetch his gun. Harvey was convicted and sentenced to 9 years for the crime. Donna Roud was sentenced to 6 years.

Violent episodes were not uncommon in the Roud household. Testimony at trial revealed that Harvey (and sometimes Donna) Roud would often shoot the gun into the ceiling or wall of their home. Harvey Roud, who was not the father of the boys, was often physically and mentally abusive to Donna and her sons. Donna Roud testified that he had started drinking heavily after their marriage and had become increasingly violent over time. There was also evidence that on occasion Donna Roud used violence with her sons "if she was told to do so by her husband".³

Donna Roud testified that she was frightened of her abusive husband. Two weeks prior to the shooting, he had beaten her so badly that she spent four or five days receiving "medical treatment at a residence for women with marital problems."⁴ She testified that Harvey told

¹ The Court of Appeal decision did not mention the fact that Donna Roud was aboriginal. This information was obtained from a court case involving her son. See *R. v. Skedden*, [2000] O.J. No. 3546. (C.J.), online: QL (CJP).

² (1981), 58 C.C.C. (2d) 226 (Ont.C.A.).

³ *Ibid.* at para 9.

⁴ *Ibid.* at para 10.

her he would kill her if she tried to leave him and she believed him. She also testified about an incident the day before the shooting:

She said that she was awakened about 3 o'clock in the morning by her husband who had called her two sons Gary and Duayne. She said that her husband came back to the bedroom where he sat on the bed with the boys standing in the doorway of the bedroom, and that he pointed his rifle at them and accused them of stealing his medication. She told the boys to go back to bed, and they did so. Her husband then started firing the gun approximately four or five inches above her head. She asked him in effect why he did not shoot her and he told her that she wasn't worth it. In cross-examination, she agreed with the Crown that she had sent the children to bed because she felt that he was so angry that there certainly was a danger that he might shoot one of the children. She agreed that her husband "most definitely" would be capable of shooting her.⁵

The Court of Appeal found that this evidence was incriminating rather than exculpatory because it showed that Donna Roud knew about the potential violence of her husband. The Court said:

In my respectful view, there was evidence to support the conviction; perhaps of great significance to the jury were the fact that she handed him the gun and the statements which she made in cross-examination which I have previously set out, which included some to the effect that there was a danger that he might shoot one of the children when he was angry. Without this evidence, I would be inclined to agree with the appellant's submission [that the verdict was unreasonable and not supported by the evidence].⁶

The subtext of this statement is that a 'reasonable' person will avoid or prevent danger s/he knows of. Donna Roud knew Harvey was dangerous, and thus her failure to avoid or prevent the shooting was evidence of her complicity. It was not that the Court of Appeal didn't recognize that Harvey was as much a danger to Donna as to her children. They reduced her sentence to time served (two years) because she "was substantially under the domination of

⁵ *Ibid.* at para. 12.

⁶ *Ibid.* at para. 34.

her husband, and justifiably frightened of him.” However, the extreme violence that was a condition of Donna Roud’s life only mitigated her sentence, not her culpability.

What people ‘know’ depends very much on their material, social and historical location within the world, and the jurors and judges who convicted Donna Roud may have found her actions incomprehensible.⁷ As Wilson J. stated in *R. v. Lavallee*,⁸

The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself?

Although we do not know the social location of the jurors, we can safely assume that the four judges were likely white, educated, upper middle-class, men who never had to negotiate the danger and violence that was a condition of Donna Roud’s life.⁹ From this privileged vantage point, these men were asked to, and presumably did try, to ‘fairly and impartially’ judge the actions of Donna Roud in accordance with accepted legal standards and principles. But, unable to understand how Harvey Roud’s violence shaped Donna’s choices and her actions and reactions, the judges and jury were only able to understand her acts as those of complicity.

⁷ The concept of the ‘knowing subject’ will be discussed in Chapter 2.

⁸ [1990] 1 S.C.R. 852 (1990), 76 C.R. (3d) 329 at 344 [hereinafter cited to C.R.]. This decision will be discussed in more detail in Chapters 1 and 3.

⁹ The Judges’ understanding of severe woman battering as a ‘marital problem’ is probably attributable to the fact that the case was decided in 1981, in the early days of the women’s shelter movement. Of course today it is to be hoped that no judge would refer to woman battering as a ‘marital problem’.

The case of Donna Roud is offered to illustrate the research problem that this thesis will explore - the criminal prosecution of women who are battered for failing to protect their children. Donna Roud's case was decided in 1981. These were early days in the feminist anti-violence against women movement. In the course of this thesis I will discuss the knowledge that has been generated since 1981 about domestic violence, the experience of battering and mothering in the context of battering.¹⁰ One of my aims in this thesis will be to demonstrate that Donna Roud was neither an attempted murderer nor a victim. She was an active agent in negotiating the danger posed to her and her sons by Harvey Roud. Granted, her strategies were not, in the end, successful and Harvey Roud's violence resulted in harm to her son. But she was not, and should not have been held, *responsible* for his violence.

The question remains, of course, whether Donna Roud's experience with the justice system would be any different today? That question will also be taken up in this thesis beginning in the next section with the genesis of this project.

2. *The Genesis of the Project*

The genesis of this thesis was a proposal by the Federal Government to "improve the justice system" by amending the *Criminal Code*¹¹ (the "Code") to, *inter alia*, create "new" child specific offences.¹² These new offences are criminal physical abuse, criminal neglect,

¹⁰ Chapter 3 of this thesis will discuss the contribution of the literature to this knowledge.

¹¹ R.S.C. 1985, c. C-46 as am.

¹² Three areas of the *Code* and the *Canada Evidence Act*, R.S.C. 1985, c. C-5, are actually targeted for possible reform: the offences dealing with child abuse and neglect; the sentencing of offenders; and the provisions dealing with children's testimony.

criminal emotional abuse, and child homicide, and would include failing to protect a child from harm.¹³

The general aim of the Government's initiative¹⁴ may be characterized as follows:

1) To expand the offences. For example, by creating 'child-specific' offences including sections under which a non-abusive parent could be prosecuted for 'failure to protect' or placing the child in a position where they are at risk (Canada 1999b, 16 (abuse), 17 (neglect), 20 (failure to report abuse)). The possibility of abolishing the offence of infanticide (Canada 1999b, 19) and presumably subsuming it under the new offence of Child Homicide is also raised;

2) To ease prosecution. For example it is suggested that the prosecution of emotional abuse could be made easier to prove by "setting out the type of evidence that is indicative of emotional harm; employing definitions that focus on the conduct of the abuser or, in addition to any evidence of actual harm that could be introduced, establishing statutory presumptions that certain types of conduct result in emotional harm" (Canada 1999b, 18); and

3) To increase penalties. For example, the Government suggests that the 2-year maximum penalty under the current neglect provision of the *Code* (s. 215) has been criticized as

¹³ The Government's proposals were contained in a Consultation Paper (Canada 1999a) issued by the Federal Department of Justice in November 1999, entitled "Child Victims and the Criminal Justice System". A more detailed Technical Paper (Canada 1999b) accompanied the Consultation Paper. These Papers introduced and invited public comment on the initiative.

¹⁴ I use the term "initiative" not in the sense that the Government was advocating, at least in the Consultation Paper, the changes it was proposing. The proposals were framed in terms of 'possible' reforms, suggestions and 'possible' considerations. Nevertheless, the terms of the reference were clearly framed by the Government and accordingly I consider them to be the Government's initiative and proposals.

inadequate (Canada 1999b, 16). Specific suggestions offered for consideration include amending the statements of fundamental principle to deem offences against children inherently grave (Canada 1999b, 29), and specifying aggravating factors such as evidence of abuse in the home to be considered in sentencing (Canada 1999b, 30).¹⁵

Additionally, it appears that a primary aim of the initiative is denunciation. The Government suggests that the introduction of these new child-specific offences would “send a clear message” and “signal society’s condemnation” of conduct which is harmful to children (Canada 1999b, 16, 19, 21).

The rationale offered for the initiative is “a virtual revolution in public recognition” of child abuse and neglect in the last two decades (Canada 1999b, 1) and “a number of alarming incidents [that] have given rise to concern about the safety of children” (Canada 1999b, 5). Furthermore, the initiative is a response to suggestions and formal recommendations the Government has received from various groups¹⁶ calling for reforms to both the *Code* and provincial child welfare legislation (Canada 1999b, 5).

¹⁵ Sections 718.2(a)(ii) & (iii) of the *Code* currently provide that the evidence that the offence involved the abuse of the accused’s child or that the accused was in a position of trust vis a vis the victim are to be considered aggravating circumstances for the purpose of sentencing.

¹⁶ These include judges, Crown prosecutors, defence lawyers, police, health care workers, social workers and academics (Canada 1999b, 5). Inter-governmental discussions also concluded that the *Code* “should be used to support provincial and territorial efforts to protect children by targeting extreme behaviours that cause devastating harms and even death to children” (Canada 1999b, 5).

Of course, child abuse and neglect are already crimes that are prosecuted under the *Code*.¹⁷ However, the Government suggests (Canada 1999b, 13) that the existing law 'may' not "provide adequate protection against such extreme conduct as severe emotional and psychological harm, "non-violent" neglect, and "unintentional" homicide." The Government suggests (Canada 1999b, 16) that creating child-specific offences,

would enable the criminal law to more specifically address and define extremes of behaviour and harms, and to develop appropriately serious penalties which would help protect children against those who might re-offend.

It is not my intent to suggest that children are not abused or neglected, that child abuse and neglect is not a serious problem, or even that there are no circumstances under which child abuse and neglect should be prosecuted as crimes. Rather, my concern is that the criminal law is a 'blunt instrument', and an inappropriate choice particularly when the problem is one rooted in social and economic inequality. Indeed, I first became interested in this topic because in all the literature I had read on child abuse and neglect I had never seen the criminal law advocated as a means of resolving the problem.¹⁸ My concern is that if the Government really wanted to protect children from abuse and neglect it would be investing in

¹⁷ Child abuse is currently prosecuted under a variety of sections of the *Code* including assault, criminal negligence, manslaughter, murder or s. 215 (failing to provide the necessities of life). These sections will be the subject of Chapter 4. Also, although not considered in this thesis provincial child welfare statutes create offences of child abuse and/or neglect. For example the *Child and Family Services Act*, R.S.O. 1990 c. C.11 as am. provides:

- 79(2) *Child abuse*. No person having charge of a child shall,
- (a) inflict abuse on the child; or
 - (b) by failing to care and provide for or supervise and protect the child adequately,
 - (i) permit the child to suffer abuse, or
 - (ii) permit the child to suffer from a mental, emotional or developmental condition that, if not remedied, could seriously impair the child's development.

The penalty for this offence is a fine of not more than \$2,000 or imprisonment for not more than two years or both (s. 85(2)).

¹⁸ There is also no mention of a criminal law response in, for example, any of the government reports dealing with child abuse and neglect found in the Bibliography.

its commitment to eliminate child poverty by the year 2000,¹⁹ or in publicly funded day care, or in supporting 'single' mothers with financial, educational and housing options. If the Government really wanted to protect children it would not be pursuing its current economic agenda which is exacerbating the social and economic inequalities that cause children's suffering.²⁰ My concern is that the Government's initiative will not 'save' any children, rather it will simply criminalize more parents.

Many aspects of the proposals concerned me, but I was particularly struck by the Government's suggestion that Canadians consider adopting laws modelled after U.S. laws that criminalize 'failing to protect' a child from harm by a third party. For example, the Government notes (Canada 1999a 16, 17):

Some [U.S.] statutes specifically address the failure of a parent or caretaker to protect a child from physical abuse inflicted by another. In the state of Utah, it is an offence for a parent to knowingly permit another person to inflict injury on a child. Presumably, the parent could discharge his or her responsibilities in the matter by reporting to the proper authorities in a timely way.

It was my sense that this type of law would have great potential to harm women, and in particular women like Donna Roud who have been battered and who mother in the context of

¹⁹ Of course this deadline has been missed and, in fact, child poverty has increased since the Government made this commitment in 1989. The Campaign 2000 report card, (online: , <<http://www.campaign2000.ca>> (date accessed: 15 May 2002)) reports that "twelve years have passed since the House of Commons unanimously resolved to seek to eliminate child poverty in Canada, yet the situation has remained persistently bleak. In 1989 when the resolution was passed, one child out of every seven lived in poverty in Canada. Most recent statistics show that, even in the midst of a full economic recovery, almost one in five children, or 18.5% of all children, still experienced poverty in 1999." This is an increase of 402,000 children since 1989.

²⁰ See the recent studies released by the B.C. Institute Against Family Violence (Research Advisory 2002) that report on the impact of recent cuts to social programs by the government of British Columbia on women who experience violence and children.

domestic violence.²¹ I was therefore interested in exploring the U.S. experience with criminal 'failure to protect' laws especially in the context of women who are battered, in order to develop critical commentary on the Canadian Government's initiative.

With these broad objectives in mind, I began this study by undertaking a review of the current (mainly American) academic literature on 'failure to protect' laws. While the findings of my review of the literature are the subject of Chapter 3, one concept emerged from the review that is central to this thesis and will be discussed by way of introduction. This concept is the 'doctrine of failure to protect'.

3. *The Doctrine of Failure to Protect*

Although I began this project looking for analysis of criminal 'failure to protect' laws, it soon became apparent that in the U.S., women are prosecuted for failing to protect their children under a variety of laws – criminal, tort and child welfare. I was somewhat frustrated to find that, in general, the literature was not particularly attentive to describing the form of the law under discussion.²² I was also puzzled by my developing sense that the particular form of law seemed not to affect the legal issues or concerns of the authors.

²¹ I want to clarify my use of the terms 'battered women' and 'domestic violence'. These terms remain contested and there is no term that can adequately describe all women's experiences of violence. The fact that these terms change over time as our knowledge increases, (for example 'wife beater' and 'marital problems' have been replaced by 'batterer' and 'domestic violence') demonstrates their fluidity. I use the terms 'battered woman' or 'battered women' to describe women who are subject to physical or emotional violence by their intimate partners. In using this term I do not imply that these women are victims, pathological, helpless or otherwise conform to the unfortunate stereotypes of battered women that prevail. I use the term 'domestic violence' to refer to woman battering in the home. I recognize there are many types of violence between intimate family members, including child abuse, but do not include these in my use of 'domestic violence'.

²² In the U.S. the states not the federal government have jurisdiction to pass criminal laws although there is a Model Penal Code by the American Law Institute, which was promulgated in 1962. This has contributed somewhat to the uniformity of state criminal laws. See Robinson (2002, 1).

Fortunately, one author, Pualani Enos (1995), made a significant contribution to accounting for these questions by characterizing 'failure to protect' as a legal *doctrine*. Doctrine is defined by Blacks Law Dictionary as: "a principle esp. a legal principle, that is widely adhered to." No definition of the doctrine of failure to protect is likely to be found in any law text or legal dictionary. It is, nevertheless, a rule or principle based on the widely accepted 'common-sense' belief that parents have a responsibility and a duty to protect their children from harm. Thus, under the doctrine of failure to protect, a parent who fails to protect a child from harm becomes responsible for the harm that has befallen the child as if she had directly inflicted the harm.

While 'failure to protect' may be conceptualized (neutrally) in law as the failure of a person or parent to fulfil a legal duty to protect a child from harm, the U.S. literature identifies it as a clearly gendered doctrine since women are overwhelmingly the subjects of 'failure to protect' proceedings (Panko 1995, 68; Zahniser 1997, 1231). This is remarkable in light of the unfortunate reality that both women and men abuse and neglect children.²³ In Canada, a recent study of child maltreatment (Trocmé et al 2001, 48) found that:

Cases of physical abuse were evenly split between mothers and fathers, with female parents being investigated in 50% of cases (47% biological mothers and 3% step-mothers) and male parents in 52% of cases (42% biological fathers and 10% step-fathers). This distribution is somewhat biased by the fact that 40% of investigated families were female-parent families. The alleged roles of mothers and fathers in two-parent families is somewhat different, with fathers being investigated in 71% of the physical abuse cases, and mothers in 43% (Trocmé 2001, 48).²⁴

²³ See Ashe & Cahn (1994), Dougherty (1993) and Gordon (1988) for discussions of women's violence against their children.

²⁴ Numbers do not equal 100% because of investigations where both parents were alleged to have abused the child.

These findings are similar to those in the U.S., and one would therefore expect prosecutions to somewhat reflect rates of abuse.²⁵ The fact that women are disproportionately affected by failure to protect laws is attributed in the literature in part to the fact that women are primarily both the caretakers of children (Murphy 1998, 708, 718; Turnbull 2001, 22) and the survivors of domestic violence (Miccio 1999, 115). However, something deeper than demographics would be required to account for what "one attorney reported is clearly a reality throughout the country: In sixteen years of working in the courts, she had never seen a father even charged with 'failure to protect' when the child abuser was the mother" (Davidson 1995, 364).

One 'something' that would account for the apparently gendered nature of the doctrine of failure to protect is ideology. The ideological dimensions of law, particularly those that (re)produce the ideology of motherhood, and construct binary categories of 'good' and 'bad' mothers, have been the focus of much feminist scholarship (Boyd 1989; Kline 1993; Mosoff 1994; Murphy 1998, 690; Roberts 1993, 98). As Miccio (1995, 1088) notes:

In law, as in the literary canon, the split image of the good/bad mother exists. Through the convergence of ideology (beliefs) and methodology (law), there exists a prescribed set of behaviours that distinguish the good mother from the bad mother, the neglectful mother from the concerned mother.

The ideology of motherhood informs dominant social expectations of what constitutes a 'good' mother, and several of these expectations are reflected in the doctrine of failure to

²⁵ See Murphy (1998, 718, fn 145) and Roberts (1993, 111, fn 80). Roberts (1993, 111, fn 80) notes that U.S. studies show that men are the abusers in 25% to 55% of reported cases of child abuse but that "in families where a man is present, he is many times more likely than the mothers to abuse the child."

protect. For example, a 'good' mother is expected to be primarily and ultimately responsible for the care of her children and she embraces this role (Grace 1994, 192; Kline 1993, 310; Roberts 1993, 111). A 'good' mother puts her children's needs above all others, particularly her own. She is selfless and self-sacrificing to the point where she not only subordinates her own interests but would also sacrifice her life for her children (Grace 1994, 192; Miccio 1995, 1088; Murphy 1998, 690; Panko 1995, 75; Roberts 1993, 102). Finally, a 'good' mother is always able to protect her children from harm (Grace 1994, 192; Murphy 1998, 721; Panko 1995, 74). In short, a 'good' mother is all-loving, all-knowing and all-powerful.

The ideology of motherhood not only informs dominant social expectations of 'good' mothers, it also constructs this 'good' mother's ideological opposite – the 'bad' mother (Kline 1993, 312). A mother who has failed to protect her children is a 'bad' mother because she has failed to live up to the expectations of her maternal role. As Judith Martin observes:

The mother is not only expected to be most deeply and intimately concerned with child-rearing; she is also at fault should any mischance occur in that process. No matter who actually harms the child, the mother has failed in her duty to create a safe environment for her young.

Kline (1993, 312) describes the consequences of a mother's failure to live up to the social expectations of good motherhood:

Mothers who deviate from the ideals of motherhood are constructed as bad mothers, thereby justifying their social and legal regulation, including regulation by child welfare law.²⁶

The ideological constructions of the 'good' mother inform both 'failure to protect' laws, and the decisions of prosecutors and judges who exercise their discretion "against a backdrop of

²⁶ I would add to this their regulation by criminal law.

stereotypical good and bad mothers” (Murphy 1998, 719, 711). The doctrine of failure to protect creates a paradigm that defines the problem in terms of *maternal* failure. This paradigm results in a classic ‘blame the victim’ formulation of the problem when the mother is herself abused. Randy Magen (1999, 129) argues:

In failure to protect cases, the onus to control and predict the abuse is placed on the victim – the battered woman – rather than the perpetrator – the batterer. The problem becomes defined in terms of what the mother failed to do rather than in terms of the father’s actions.

The problem with defining the problem in terms of maternal failure is that this shifts the responsibility for the abuse onto women and disregards the root cause of the problem – the batterer’s abuse (Grace 1994, 185; Miccio 1995, 1094, Working Group 2000, 849). As Miccio (1995, 1094) argues, this construction is harmful because it “renders accountability [for the violence] moot.”

These ideas will be discussed in detail in Chapter 3. The important point for now is that conceptualizing ‘failure to protect’ as a gender-based doctrine makes it possible to negotiate through the plethora of laws, criminal, tort and child welfare, that hold women accountable for the violence of others in ways which this thesis will argue are unfair both to women who are battered and to their children.

Few commentators dispute that mothers (and fathers) do and should have the responsibility to protect their children. The problem, as Enos (1995, 229) suggests, is that “an overly broad application of the doctrine by the courts results in grave inequities for women who are battered.” This overly broad application results from the powerful (and oppressive) social

inscriptions of mothering and mother love that inform the doctrine of failure to protect that do not allow for 'obstacles' that may impede a mother's ability to protect her child (Panko 1995, 74). A mother's love is unconditional, and so is her responsibility to protect her child. Understanding the ideological content of the doctrine helps to explain why, as will be discussed in detail in later chapters, the courts have liberally interpreted a wide variety of laws to resolve simply into questions of whether the mother knew of the abuse and failed to prevent it, and to exclude evidence that would situate mothers and their actions in the context of violence. It also helps to explain, for example, not only why more women than men are prosecuted for failing to protect their children, but also why some U.S. authors suggest that the punishment they receive for this transgression is equal to or harsher than male perpetrators of the abuse (Enos 1996, 260; Grace 1994, 190; Miccio 1999, 117; Panko 1995, 76; Roberts 1993, 107).

Gender-based doctrines are not uncommon in law, but neither are they unassailable. The doctrine of failure to protect may be likened to the tender years doctrine, which created the legal presumption that, all other things being equal, children of tender years should be with their mothers. Both are ideological constructs rooted in conventional, "common sense" thinking about motherhood and mothers. In *R. v. R.*,²⁷ the Court of Appeal for Alberta offered these insightful comments about the tender years doctrine:

Should a pre-school child be with the mother? Spence J. (dissenting in *Talsky*) describes the answer as "yes" as "common sense". Often, when we invoke common sense, we intend to invoke unstated conventional assumptions. As Einstein rather provocatively said, "common sense is the collection of prejudices acquired by age 18". I suppose that there is no harm in this unless the unstated conventions come to be doubted. That the female human has some intrinsic capacity, not shared by the

²⁷ *R. v. R* (1983), 34 R.F.L. (2d) 277.

male, to deal effectively with infant children is an assumption that was once conventionally accepted but is now not only doubted but widely rejected.

In the same way, the doctrine of failure to protect assumes that women have some 'intrinsic capacity' to protect their children from any harm that may befall them, regardless of material conditions such as domestic violence which they face. As noted by the Court of Appeal, the tender years doctrine has now been rejected in Canadian law, demonstrating that such doctrines are not unassailable. The doctrine of failure to protect has not yet been displaced, indeed it may never be. But work is underway to challenge those aspects of the doctrine that are oppressive to women and in particular women who are battered, and is the project taken up in this thesis.

4. *The Research Problem*

Informed by my research into the U.S. experience with failure to protect laws, I returned to the problem of the Federal Government's proposal to make failing to protect a child an offence under Canadian criminal law. It seemed to me that an unstated premise of the Government's proposal was that failing to protect a child from harm was not currently an criminal offence in Canada. While it is true that there is no 'failure to protect' offence *per se* in the *Code*, I wondered whether women were being prosecuted for failing to protect their children under some other provisions of the *Code*?

The prosecution of women for failing to protect their children has received considerable academic attention in the U.S., but not in Canada,²⁸ and this represents a serious gap in the state of our knowledge. My research will address one aspect of this gap in knowledge by exploring the criminal prosecution of women for failing to protect their children from harm. The research will identify the ways in which women are currently prosecuted under Canadian criminal law for failing to protect their children and will also investigate the ways that these laws are oppressive to women in general and women who are battered in particular.

5. *The Importance of the Research*

Knowledge about the size and scope of the problem of woman abuse in Canada has been created because of feminists' efforts over the last 20 years to achieve recognition of the problem as a serious social issue. Approximately 200,000 Canadian women experience violence by their intimate partner every year (Duffy & Momirov 1997, 33). Karen Rogers (1994, 1, 4, 12) reports that almost three in ten Canadian women who have been married or in a common law relationship have been physically or sexually assaulted by their partner. For one-third of these women, the abuse was so severe that they feared for their lives at some point in the relationship (Rogers 1994). Statistics Canada (1999b, 6) reports that in the one-year period between April 1, 1999 and March 31, 2000, 57,182 women together with 39,177 children sought refuge in women's shelters. The statistics are even

²⁸ I came across only one Canadian article (Grace, 1994) in my research that dealt specifically with the issue. That article dealt with the tort liability of mothers for sexual abuse of their children by their husbands. Another Canadian article (Neilson, 2000) refers to the practice of apprehending children on the basis of violence against the mother in the context of admitting evidence of battering in child custody hearings.

more startling for First Nations women. Anne McGillivray and Brenda Comaskey note (1998, 131) that:

Aboriginal women in Canada experience consistently higher rates of reported intimate violence. At least one in three is abused by a partner, compared with one in ten women overall,²⁹ and some estimates are as high as nine in ten.³⁰

Although there continues to be serious debate over the measurement of domestic violence in Canada and elsewhere,³¹ these statistics underscore the magnitude of the problem of domestic violence and the numbers of women and children affected by it.

Needless to say, many women who are battered are, like Donna Roud, also mothers, and Canadian statistics (Statistics Canada 1999c, 1) suggest that over a 5-year period "children heard or saw one parent assaulting the other in an estimated 461,000 households, which represents 37% of all households with spousal violence." Moreover, it is possible that many of these children may have themselves been victims of abuse. Researchers in the U.S. have begun to explore the links between woman abuse and child abuse (Magen 1999, 128; Mullender 1994, 28, 46). U.S. studies have indicated that between 37% and 63% of abused women will have children who are also being abused or neglected (Magen 1999, 128).³²

²⁹ Citing Thompson Crisis Centre, "Aboriginal Justice Inquiry Hearings", Thompson, Manitoba, September 21, 1988. See also McIvor & Nahanee (1998) for a discussion of First Nations women's experiences of violence and the pressing need for research with accounts for these experiences. See also McIvor & Nahanee (1998, 63) for a discussion of First Nations women as "invisible victims of violence" and references to further research on violence against First Nations women.

³⁰ Citing McGillivray, Anne, "Therapies of Freedom: The Colonization of Aboriginal Childhood", in Anne McGillivray, ed., *Governing Childhood* (Nova Scotia: Dartmouth Press, 1987). Statistics Canada (2001, 35) reported that 25% of First Nations women "were assaulted by a current or former spouse in the five-year period."

³¹ See Bonnycastle & Rigakos (1998) for a discussion of the methodological issues in measuring domestic violence and, in particular the Conflict Tactic Scale. See also Duffy & Momirov, (1997, 31) for a discussion of a number of Canadian efforts to measure domestic violence and the problems inherent therein.

³² Mullender (1994, 29) suggests that the "most methodologically sophisticated and informative research on the links between child abuse and domestic violence" is the work of Stark and Flitcraft. See: Stark, E. &

Another U.S. study found that in 77% of situations where the wife was severely abused the children were also abused (Bowker 1988, 162; Davidson 1995, 357). Studies of this nature have lead the U.S. Advisory Board on Child Abuse and Neglect to state that “domestic violence is the *‘single major precursor’* to child abuse and neglect fatalities in the United States” (Davidson 1995, 373). If this research is correct, then we can assume that the Federal Government’s proposal to criminalize failure to protect is going to have serious implications for women who are battered and their children.

Other research has explored the potential harm that witnessing domestic violence may cause to children, even children who are not themselves physically abused. Numerous studies, both Canadian and American, seek to document the psychological and emotional damage caused to children from witnessing domestic violence (Cooper 1992). Other research has lead to the development of the ‘cycle of violence’ theory, which suggests that domestic violence is intergenerational, and that children who witness domestic abuse are likely to become abused or abusers themselves (Mullender 1994, 34; Trepiccione 2001, 1500).³³ These research efforts and theories are controversial (Cooper 1992, 130; Mullender 1994, 35; Trepiccione 2001, 1501) and, notwithstanding cautions against unqualified reliance on or acceptance of this research, these theories appear to have been integrated into dominant child welfare discourse and practice, and into law.

Flitcraft, A., “Woman-battering, child abuse and social heredity: what is the relationship?” in Johnson, N., ed., *Marital Violence* (London: Routledge, 1985); and “Women and children at risk: a feminist perspective on child abuse”, (1988) 18 Int’l J. of Health Services 97.

³³ See Trepiccione (2001) for a review of current research on harm to children witnessing domestic violence including its methodological flaws. She notes that studies indicate that “long-term effects are explainable by social learning theory, or the idea that children learn aggression from their parents, and therefore are more likely to become perpetrators of violence as adults. While male children may be more likely to become abusers, female children may learn to accept victimization, and both sexes learn that violence is an acceptable response to interpersonal problems” (2001, 1500).

Research of this nature may be characterized as a double-edged sword. On the one hand, it underscores the seriousness of the problem of domestic violence and has lead and may lead to progressive legislation to combat domestic violence. For example, in the U.S. it has lead to amendments in child custody law to allow evidence of violence toward the mother in custody decisions and these efforts are now underway in Canada (Working Group 2000, 851; Neilson 2000).³⁴ However, legal scholars in the U.S. have also linked knowledge that domestic violence is harmful to children with some apparent and disturbing trends in the use and application of failure to protect laws. First, they suggest that there is an increasing propensity to use these laws to prosecute women who are battered under all types of laws: child welfare, tort and criminal (Davidson 1995, 367; Working Group 2000, 849). Secondly, they suggest that the scope of these laws is expanding as evidenced by the recent trend to apprehend children solely because the mother is being battered (Working Group 2000, 852).³⁵ Of course the situation in Canada is less clear but the Federal Government's initiative certainly evidences the possibility that these trends may be occurring in Canada as well.

³⁴ See Neilson (2001). Neilson cautions (2001, 152) that "in the absence of fundamental changes in the nature of "fact" and in legal conceptualizations of abuse" these changes "could make matters worse" for women in child custody cases.

³⁵ This practice has become so prevalent in the state of New York that a class action law suit has been launched on behalf of mothers who are battered against the Administration for Children's Services on the basis that this practice violates the mothers' constitutional rights. See: *Re Sharwline Nicholson, et al.*, United States District Court, Eastern District of New York, Action Nos. CV 00-2229, CV 00-5155, and CV 00-6885. On December 21, 2001, a preliminary injunction was granted in favour of the Plaintiffs. The Court stated: "The preliminary injunction can be summed up in plain language: the government may not penalize a mother, not otherwise unfit, who is battered by her partner, by separating her from her children; nor may children be separated from the mother, in effect visiting upon them the sins of their mother's batterer." Research on this phenomenon in Canada is urgently needed. The most recent Family Violence in Canada Survey (Statistics Canada 2001, 13) reported: "Children's exposure to family violence was the most common form of emotional maltreatment, accounting for 58% of substantiated cases." This suggests that this phenomenon is also operating in Canada and that Canadian children are also being apprehended on the basis of their mother's experience of battering.

This research is important because the feminist community and battered women's advocates need to know how failure to protect laws operate so that we can begin to formulate theory to account for the phenomenon in the Canadian context, and to develop strategies to resist the oppressive aspects of the existing law and any new legislation that might exacerbate the problem. Without knowing the scope and contours of the problem we are constrained in our ability to advocate effectively for progressive change. Feminist strategies must acknowledge and account for the disturbing trends developing in the U.S. and Canada, and the aim of this thesis is to lay the foundation for this kind of work by mapping the contours of the problem under current Canadian criminal law.

Furthermore, the Government has an obligation to analyse the gender implications of its proposed policies.³⁶ It is my hope and expectation that the knowledge generated in this thesis will provide some insight into the regressive potential of these laws in respect of women who are battered and their children, and I will revisit this question in my concluding chapter.

I do not mean to suggest that domestic violence is not harmful to children. Clearly woman abuse is a problem not only for women, but also for their children. What I do suggest, as do many of the U.S. commentators (Davidson 1995; Enos 1996; Miccio 1999) is that the current response of legislators, child welfare agencies and courts is both punitive and paternalistic, and reflects serious misunderstandings about the nature and causes of domestic violence.

³⁶ Status of Women Canada, *Gender-Based Analysis: A Guide for Policy-making* (Ottawa: Status of Women Canada, 1996). See also *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 15 and 28.

Moreover, it is a response that is dangerous for women and children, and the U.S. experience with these laws has shown that they have a chilling effect on battered women seeking the services they need to support them in their struggles to resist the abuse (Rabin 1995, 1111; Working Group 2000, 857). Finally, prosecuting non-abusive battered women for failing to protect their children perpetuates mother blaming by holding mothers accountable for the abuser's violence and, in doing so puts the responsibility for the abuse on the wrong person.

6. *Outline of the Thesis*

Chapter 2 of the thesis introduces the theoretical framework that I will use to explore the research questions. Chapter 3 reviews the U.S. literature on the doctrine of failure to protect. I draw upon this literature to situate the prosecution of women within the context of battering and to describe the U.S. failure to protect laws. My aim in this Chapter is provide a background for my analysis of the Canadian criminal law in Chapters 4 and 5. Chapter 4 is an analysis of the development of the current Canadian criminal law. The aim of this Chapter is to describe the various ways that women are criminally prosecuted for failing to protect their children and how the law has evolved in ways that are problematic for women and especially women who are battered. Chapter 5 addresses more specifically the 'woman question'. My aim in this chapter is to make visible the ideologically informed discourse that constructs mothers charged with failing to protect their children, and to show how the criminal prosecution of women for failing to protect their children is oppressive to women generally, and women who are battered in particular. Finally, in the Chapter 6 I will conclude by revisiting the federal government's proposal and discussing the implications of the

findings in this thesis on the proposal and on criminal law practice. I will also identify some directions for further research.

Chapter 2 - Theoretical Framework: Ideology, Discourse and Legal Method

The official version of law – what the legal world would have us believe about itself – is that it is an impartial, neutral and objective system for resolving social conflict (Naffine 1990, 24).

My aim in this Chapter is threefold. Part 1 describes the theoretical and political commitments I bring to this work. My aim in this section is to describe some of the important features of feminist analysis of law and how this perspective informs the analysis in this thesis. Part 2 describes the analytical concepts that I will use in my analysis of failure to protect laws and in particular ideology and discourse. Finally, Part 3 considers the 'problem of legal method'. My aim in this section is to lay the foundation for some of the central themes that will run through this thesis and to introduce some of the important work that has been done by Canadian feminist legal scholars on and for women who are battered.

1. Feminist Analysis of Law

This work is feminist, because it emanates from a commitment to enhancing women's substantive equality, a belief that women's oppression is systemic and widespread, and is critical of existing power structures and the unequal social relations that they have produced and support (Reaume 1996, 271). I place women in the centre of my analysis of failure to protect laws, and am concerned about the impact these laws have on women. In particular, I want to know if failure to protect laws (re)produce (some) women's subordination and inequality.

Analysing law from women's perspective does not mean that the research can or should purport to speak for all women or even, in the case of this thesis, for all *women who are battered*. An increasingly important feature of feminist scholarship is the recognition that feminist work needs to be attentive to how women may experience oppression differently as a result of their varied social locations (Currie & Kline 1991, 18, 22).³⁷ In particular, feminist legal theory needs to be attentive to the fact that race, class, sexual orientation and (dis)ability will complicate the ways in which women may experience oppression (Kline 1993, 307; Mosoff 1994).

My social location as researcher is relevant to this aspect of the creation of knowledge. I have no personal experience of battering. Nor am I poor, disabled, lesbian, racialized, First Nations or an immigrant to Canada, all conditions that may impact on one's experiences of battering and, for that matter, with law. However, the fact that I have not experienced the oppression of battering, poverty, racism, and/or homophobia, does not disqualify me from exploring my subject or from creating knowledge about it (Fineman 1992, 19).³⁸ It does mean that I will have to be more self-conscious in my analysis and accept that, because of my own subjectivity, the knowledge created will be partial, incomplete and contingent. But that is true of all research, whether it is acknowledged or not, and does not make knowledge less valuable (McCalla Vickers 1982, 40). My goal in writing a legal thesis is to generate critical knowledge of the ways in which the doctrine of failure to protect is oppressive to women and

³⁷ For example, the work of Marlee Kline (1992, 1993) is concerned with the way racism complicates First Nations women's experiences with child welfare law. Judith Mosoff (1994) explores the experiences of mothers with mental health histories with child welfare law.

³⁸ As one feminist scholar, Renata Klein, suggests: feminist researchers "cannot speak for others but...can, and must speak *out* for others." Cited in Rogers (1998, 71) no original citation provided.

most especially to women who are battered. My project is designed to lay the groundwork, to arrive at tentative and contingent conclusions, and to invite the way forward.

This work is a feminist analysis of *law*, and proceeds from the premise that law is not impartial, neutral or objective, but rather is deeply implicated in the “construction and perpetuation of a gendered social existence” (Fineman 1992, 5) and in the continued subordination of women. Feminists bring a variety of theoretical and political perspectives to their analyses of law, but all challenge the “Official Version” of the law (Naffine 1990) and seek to expose the ways in which law is complicit in and actively (re)produces the subordination and oppression of women in patriarchal society. Feminist analysis of law examines law from *women’s* perspectives, and has been broadly described as:

... an analysis of the exclusion of (some) women’s needs, interests, aspirations or attributes from the design and application of law. (Reaume 1996, 271)

There is nothing natural or inevitable about law or legal doctrine. Law is not merely “out there” (Fineman 1992, 11). It is a social construction, a discourse,³⁹ and reflects dominant social and economic beliefs, values, norms and conventions. Law governs most aspects of our life from birth to childhood, to marriage and death. It governs our social actions (drinking, sexual relations), our political actions (voting, speech, demonstrations), and our economic actions (holding property, contract, employment). Law also constitutes and governs many of our basic social institutions including childhood, motherhood and family.

³⁹ Law as a discourse will be discussed in more detail below.

This thesis concerns criminal law as a disciplinary force in regulating the conduct of women and families. In this regard, it is important to appreciate the importance of criminal law in reinforcing society's expectations of 'good' mothering (Murphy 1998, 712; Panko 1995, 75).

As Dorothy Roberts (1995, 97) notes:

The law compels and legitimates prevailing relationships of power. Criminal law not only defines and mandates socially acceptable behaviour; it also shapes the way we perceive ourselves and our relationships to others. Legal rules reward conduct that fulfils a woman's maternal role and punish conduct that conflicts with mothering.

In this regard, the doctrine of failure to protect may be viewed as simply part of the larger project of law in regulating social conduct including the conduct of mothers (Roberts 1993, 97). But this thesis is also centrally concerned with law's role in constructing the category of 'motherhood'. This presupposes, of course, that law is not something that is merely acted *on*. Law is informed by, but in turn also helps to form our dominant social, cultural and economic beliefs, values and norms. It does not do so in a vacuum (Boyd 1989, 114), and along with the other significant institutions in society such as the state, education and religion, is organized to reflect and sustain systems and relations of power (Weedon, 1997, 1). Thus, although law claims to be a neutral impartial arbiter of truth, feminist and other critical analyses of law demonstrate that it is not. Law has a tendency to reinforce and reproduce existing relations of power although, as will be discussed below, not inevitably so. When we interrogate law we learn something about these relations of power. In the next section I examine the analytical concepts I will use in my analysis of the doctrine of failure to protect in Canadian criminal law.

2. Analytical Concepts

The concepts of ideology and discourse are useful conceptual tools for interrogating power structures and will be central to my analysis in this thesis. As I will demonstrate, ideology and discourse derive from different theoretical traditions but they can and are used in complementary ways in much feminist work including this thesis. I will discuss these concepts in turn and conclude with a discussion of the relationship between them.

a) Ideology

Cotterell (1984, 114) describes ideologies as:

systems or currents of generally accepted ideas about society and its character, about rights and responsibilities, law, morality, religion and politics and numerous other matters [which] provide certainty and security, the basis of beliefs and guides for conduct.⁴⁰

Ideologies do not reflect or constitute reality but rather are socially constructed representations about society and social norms and conventions that are desirable to certain interests. These representations are sufficiently connected to reality, and contain a "kernel of truth" (Boyd 1991, 97) for sufficient numbers of people that this representation is accepted as representing a material reality (Boyd 1991, 97; Gavigan 1988). However, as Boyd (1991, 97) notes:

...it does not necessarily mean that ideologies either reflect or distort "true" experience. Rather, it means that ideologies, such as the ideology of white motherhood, take an idea that may ring true to most people, such as that infants need their mothers, and elevate it to a more generalized common sense "truth" that women should be responsibly for childrearing on a more or less fulltime basis.⁴¹

⁴⁰ As Gavigan (1988, 285) notes: "the concept of ideology has no fixed, universally accepted definition."

⁴¹ Boyd (1991, 94) also notes that it is important to consider the possibility of multiple ideologies, for example the ideology of black motherhood or, I would add drawing upon Marlee Kline's work, ideologies of First Nations motherhood.

As a socialist feminist⁴² I locate the continued oppression of women in the dominant systems of patriarchy and capitalism⁴³ (Comack 1990, 6), and in the ideologies of motherhood⁴⁴ and family that have been constituted and maintained within these systems. The ideology of 'family' is a powerful and necessary force in maintaining existing social relations under patriarchal capitalism. The family is the basic social unit in western society, and its primary role is the production and care of children who will grow to become, productive, law-abiding citizens and workers (Gavigan 1988, 291; Weedon 1997, 37). The 'family' in its dominant ideological form consists of a heterosexual, married, woman and man who live together with biological or adopted children (Gavigan 1988, 291). The ideology of family connotes a 'natural' division of labour - the man is the primary economic provider for the family and the woman is economically dependent and responsible for the reproductive labour.⁴⁵ Moreover, in its dominant ideological form the family is a private, self-sufficient, and autonomous social and economic unit. The 'family' is a historically and culturally specific social construction rooted in the material relations of capitalism (Chunn 1999, 236; Cossman & Kapur 1996, 90) but is constructed in dominant discourse as a 'natural' ordering of relations (Gavigan, 1998, 291). Shelley Gavigan (1988, 291) suggests that,

⁴² While I am not unmindful that assigning such labels is apparently no longer as useful as in earlier days of feminist scholarship, I agree with Bouchard, Boyd & Sheehy (1999, xx) who suggest that they are useful to describe the general theoretical perspectives adopted in legal analysis and strategy.

⁴³ Socialist feminism is attentive to both patriarchal power and capitalist power and the complex, often mutually reinforcing ways in which these systems of power subordinate women (Currie & Kline 1991, 12).

⁴⁴ Not all feminists agree that motherhood is oppressive to women. Cultural feminists in particular, celebrate motherhood and the "ethic of care" inherent in mothers' role as nurturer (Ashe & Cahn 1994, 187). Even I do not argue that motherhood *per se* is oppressive. It is motherhood as it is currently defined and constructed that is problematic for women.

⁴⁵ Of course the ideology of family has shifted over time and now makes some accommodation for the fact that many women engage in paid employment. Boyd (1991, 93) notes that the ideology of motherhood has also shifted since the late 1950s & 60s especially in terms of the relevance of a mother's sexual (mis)conduct and, of course, her employment outside the home. Indeed, as we will discuss, some argue that there is a new ideology of 'superwoman' (Weedon 1999; Turnbull 2000).

[t]he family is presented both in law and in popular culture as the basic unit in society, a sacred, timeless and so natural an institution that its definition is self-evident. Its privacy is sought to be protected and its sanctity proclaimed. That it is the fittest place to raise children is again so self-evident as to not merit question, and the hold of the family is strong despite the knowledge that large numbers of individuals live in households which bear no resemblance to the ideal family.

Many feminists (although not all feminists)⁴⁶ see the family in its traditional patriarchal (ideological) form as a significant site of women's oppression (Boyd 1989, 115; Gavigan 1993, 602; Weedon 1997, 39).⁴⁷ One of the key theoretical insights of socialist feminism is the distinction between 'productive' and 'reproductive' labour under patriarchal capitalism (Comack 1990, 7). Productive labour is that which is done (historically by men) in the public sphere for wages. Reproductive labour is that which is done (by women) in the private sphere without remuneration.⁴⁸ Reproductive labour includes childbearing, child caring and all of the other domestic labour (such as 'housework') which underpins and facilitates productive labour. Women's reproductive labour has historically facilitated productive labour and the production of profit by enabling the (male) wage earner to freely participate in the paid work force without reproductive responsibilities (Boyd 1997, 13; Comack 1999, 51; Eisenstein 1994, 106). The phenomenon of the 'double-day' reflects the fact that women, who now participate in the paid work force in great numbers, continue to assume most of

⁴⁶ Black feminists argue, for example, that for black women the family has often been a site of resistance and safety (Gavigan 1993, 602 and footnotes; Roberts 1993, 130).

⁴⁷ But Boyd (1991, 84) cautions that "[w]e have tended too often to state or imply that all aspects of women's oppression can be traced back to the "the family" and its place within capitalist societies. To the extent that this type of analysis has blinkered and hindered our ability to understand or even to see the ways and processes through with different groups of women are oppressed, it has been highly problematic."

⁴⁸ Reproductive labour, because it has been historically constructed as "women's work" is devalued and under compensated not only in private but in public. For example, the "caring" professions such as nursing and child-care are usually occupied by women and have traditionally been under paid relative to male occupied jobs (Armstrong 1997, 46). While feminists have experienced some success in achieving recognition for women's reproduction labour, for example through maternity benefits, initiatives that would go further such as publicly funded childcare have been largely unsuccessful. But see Iyer (1997) for an analysis of the regressive and oppressive aspects of maternity benefits.

these responsibilities (Turnbull 2001, 22).⁴⁹ Thus, it is through the 'family' that men exercise control over women and their bodies, and over children. It is through the 'family' that capital appropriates both the reproductive and the productive labour of women.⁵⁰ It is also within the family that women occupy the category of wife and mother⁵¹ which has been socially constructed as being "women's primary role and the source of full self-realization (Weedon 1997, 37).

The importance of these concepts to this thesis lies in the material relationships between the institutions of motherhood and family on the one hand, and the institutions of government⁵² and capital on the other. As Susan Boyd notes (1989, 114), law does not operate in a vacuum and "[o]ne must also be alert to the connections between the ideological functions of the legal system and those of other social institutions whether they be economic, political, or cultural." Motherhood as it is currently constructed serves the interests of government and capital very well. In fact the critical importance of women's (free) reproductive labor to the

⁴⁹ Consequently women require much greater flexibility in their work, a fact that economically disadvantages many women who can only find this flexibility in lower paying and/or part-time jobs. See Turnbull (2001, 15, 23) concerning the economic cost of mothering.

⁵⁰ Capital benefits because reproductive work is work that has to be done. If women didn't assume responsibility for this work then either capital would have to pay for it directly (for example by providing child care for its workers or reorganizing the nature of work to give parents more flexibility generally) or indirectly (through taxes funding state supported child care facilities).

⁵¹ Martha Fineman (1992, 12) calls the institution of motherhood a "colonized category" because it is occupied by women but "defined, controlled, and given legal content by men." The ideological construction of mother has been discussed earlier in the Introduction to this thesis.

⁵² The state has historically assumed a central role in socialist feminist analysis of women's oppression because of its role in "organizing" and "mediating" both productive and reproductive relations through law and other social institutions (Comack 1999, 53; Ursel, 1992). While the state is not a monolithic source of power that always acts as an instrument of patriarchy and capitalism, neither is it a neutral institution (Boyd 1997, 16). As Boyd (1997, 9) notes: "despite the rhetoric of neutrality and non-intervention in the market, capitalist states regularly promote the interests of entrepreneurs and big business at the expense of workers." See also Boyd (1994) for a theoretical analysis of the state and its relationship to legal developments in family law.

Government's economic agenda cannot be overstated.⁵³ Thus, while not a central topic of discussion in this thesis, it is important to bear the important linkages between the dominant political, economic and social forces which exist in Canada today and the subordination and control of women through laws and legal doctrines like the doctrine of failure to protect, which (re)produce and (re)enforce these dominant belief and value systems.

The power of ideology and its resistance to change is demonstrated by the fact that despite successive waves of attempted reform of law and state policy by feminist reformers beginning 120 years ago, women have not achieved substantive equality with men. Law has been a central focus of feminist reform efforts since feminist activism began in Canada in the 1880s (Chunn 1999, 239).⁵⁴ Yet these reforms did not succeed in eliminating women's subordination. Indeed, it has become clear that not only have women not achieve equality,

⁵³ These ideas can be illustrated in the context of the neo-liberal policies that have been adopted by all current Canadian governments. Neo-liberal discourse valorizes the "market as the best regulator of all needs, including social ones" (Cohen 1997, 29). Neo-liberalism considers any form of government intervention in the free market inherently problematic and thus the goal of neo-liberalism is to minimize government intervention and to 'restore' a free market economy. Policies that flow from this discourse include the reprivatization of social costs, notably, health care costs. Resulting cut backs in health care spending have resulted in shorter hospital stays for the seriously ill, and an increase in outpatient and day-hospital practices. What becomes immediately apparent is that the burden of reprivatization has and will continue to fall largely to women who continue to assume the bulk of reproductive labour despite increased participation in the (paid) work force. This is simply an off-loading of the State's social and financial responsibility onto women who, of provide this labour for free (Phillipps 1996, 726). These policies result in the appropriation of women's reproductive labour by the state, and rely on and reinforce the gendered division between productive/reproductive labour. Reprivatization discourse has also (re)characterized as 'family responsibility' the social costs previously provided and paid for by the state. This reinforces/reaffirms the ideology of family that constructs the family as and independent, self-sufficient, economic unit. Finally, because women comprise most of the low-end health care jobs, they will also be most impacted by the loss of jobs resulting from the cutbacks.

⁵⁴ Of course historically, women's rights to vote, hold property, divorce their husbands or obtain custody of their children were limited if they existed at all. These legal rights were afforded only to (white) men, and early (or 'first wave') feminists achieved these legal rights for women. 'Second wave' feminism in the 1960s and 70s was characterized by the liberal ideas of equality of opportunity and treatment "within existing social relations" (Weedon 1999, 15). These women were also called 'liberal' feminists because they accepted, for the most part, the traditional liberal conception of the state and law as neutral 'mediators' of the public interest (Chunn 1999, 246).

but in fact formal equality operates in many ways to their disadvantage (Fineman 1992, 12).⁵⁵ For example, Susan Boyd (1989, 1991) has shown in her work how the ideology of equality, that is the notion that parents are equally capable of parenting and of earning a living, has materially disadvantaged women in custody disputes. Despite the ideology of equality, women continue to assume the bulk of the childcare and household responsibilities as well as, for many women, holding paying jobs (Boyd 1989, 117). Equality discourse holds that men and women privately negotiate these responsibilities, and thus attribute this ordering of relations to 'choice' (Boyd 1989, 123). However, this obscures the fact that strong social and cultural proscriptions that reflect the ideologies of motherhood and family continue to influence both the expectations of men and women and their 'choices' (Boyd 1989, 123). As Weedon (1997, 3) notes:

As women we have a range of possibilities. In theory almost every walk of life is open to us, but all the possibilities which we share with men involve accepting, negotiating or rejecting what is constantly being offered to us as our primary role – that of wife and mother.⁵⁶

Weedon (1999, 15) suggests that equality discourse has resulted in what she terms the "ideology of superwoman".

A superwoman was expected to participate fully in all spheres – the domestic, the workplace and public life – while raising a family, looking good and engaging in a mutually satisfying sex life, without any fundamental structural changes to society.⁵⁷

⁵⁵ The political and legal initiatives of 'second-wave' feminists were aimed at eliminating different treatment based on sex in favour of equal treatment. As Chunn (1999, 246) notes, they believed that "the implementation of gender neutrality and formal equality in law and policy ... would collectively make women's equality with men a reality." Importantly, for liberal feminists, equality of treatment was equated with 'sameness' of treatment, and they had considerable success in achieving these aims. In family law, for example, 'the best interest of the child' replaced the 'tender years doctrine' and reciprocal, gender neutral support obligations were introduced between spouses in lieu of alimony owed by husbands to wives. (Chunn 1999, 247). See Chunn (1999) and Currie & Kline (1991, 4-9) for further discussion of the achievements of second wave liberal feminists and some of the problematic results of these achievements.

⁵⁶ See also Turnbull (2001).

⁵⁷ See also Weedon (1999, 15), Turnbull (2001, 14) and Boyd (1997, 511) for a discussion of the ideology of 'superwoman' who fulfils both her maternal role and that of economic provider.

Moreover, as Boyd (1987, 116, 125) has demonstrated, the ideology of mother and family still operate to set the judicial standards of 'good' mothers and fathers. Boyd (1987, 116) notes:

...the legal system may be caught between two somewhat contradictory ideologies, one based on traditional familial roles and the other based on assumptions of equality and androgyny. Judges may be applying traditional expectations regarding gender roles on the one hand, and on the other hand may assume that men and women are equally situated and comparable to one another. Furthermore, the contradictions between the two ideologies may work to the disadvantage of women who meet neither sets of expectations in their entirety.

Thus, the form of law has changed to accommodate demands of formal equality. However, substantive equality for women has not been achieved because the systemic and structural⁵⁸ barriers to women's inequality, informed by the ideologies of motherhood and family, have not changed in any significant measure (Boyd 1989, 114, Chunn 1999, Weedon 1999, 15).⁵⁹ As I will demonstrate, these ideologies, and most especially the ideology of motherhood, continue to inform law, including the doctrine of failure to protect and judicial adjudications of mothers charged with failing to protect their children.

b) *Postmodernism and Discourse*

As feminist theorizing about law and the state became more complex, new theoretical ideas began to emerge in feminist scholarship. Postmodern theory,⁶⁰ in particular, has enabled

⁵⁸ As Weedon (1997, 3) observes. "[t]o say that patriarchal relations are *structural* is to suggest that they exist in the institutions and social practices of our society and cannot be explained by the intentions, good or bad, of individual women or men."

⁵⁹ See Ursel (1992, 39) who argues, "as some of the patriarchal relations of the family are undermined by social and economic developments, the state, through the system of social patriarchy, attempts to reinforce familial patriarchy."

⁶⁰ Weedon (1997, 170) notes that the "term 'postmodernism' is itself complex and contested" and is often confused with poststructuralism. See Barrett (1992) for a discussion of poststructuralism and postmodernism and the distinctions between. I will use the term postmodernism in my discussion, recognizing that, as Weedon

significant theoretical advances to be made in accounting for power, the existence and the (sometimes) success of resistance movements, subjectivity and agency. Postmodernism is often described in relation to 'modernism' and, in particular, by contrasting the way these two approaches theoretically account for 'truth', 'power' and the 'subject'.

'Truth' and the discovery of 'truth' is the central goal of modernism, which is characterized by science and scientific method. In contrast, within the postmodernism framework there is no 'truth', but rather "many often competing truths" (Comack, 1999, 62; Weedon, 1999, 108). Accordingly, postmodernism rejects 'grand theories' such as patriarchy and capitalism, which claim to be able reveal the 'truth' about social relations and conditions (Comack, 1999, 62; Weedon, 1999, 108).

These radically different concepts of 'truth' have implications for the conceptual tools used by modernists and postmodernists. Postmodernism, for example, rejects ideology as a conceptual tool because it arguably posits an alternative 'truth'.⁶¹ Instead, postmodernism uses the concept of 'discourse'.⁶² Postmodernist theories about power and language are central to the concept of discourse, which Elizabeth Comack (1999, 62) defines as:

the meanings and assumptions embedded in different forms of language use, ways of making sense of the world, and their corresponding practices.⁶³

suggests, I may from time to time, be guilty of 'conflating' poststructuralist ideas into postmodernism (1997, 170).

⁶¹ Boyd (1991, 98) acknowledges that instrumentalist theories of ideology do posit alternative truths that are masked by ideology but argues that her work uses a concept of ideology in a more nuanced way. I will discuss the relationship between ideology and discourse below.

⁶² The concept of discourse originated in postmodernism and, in particular, the work of Michel Foucault. See *Discipline and Punish* (Harmondsworth: Penguin, 1979).

⁶³ Boyd (1991, 82 & footnotes, 1994, 55) argues that socialist feminists in their analysis were already using many of the insights of postmodernism. For example, the notion of discourse is in many ways similar to

Where modernists had tended to conceptualize power as something held or owned and as being used oppressively, Foucault theorized that power is widely dispersed throughout society, and that it is not possible to locate power within any one structure or institution (Smart 1991, 196).⁶⁴ Moreover, power, rather than being repressive, is creative and productive. Indeed, “power is productive of knowledge” (Smart 1991, 196, Weedon 1999, 116, 119). Similarly, language does not reflect social reality, but in fact produces it (Weedon 1997, 22).

Thus to locate power one must focus on discourses and their claims to truth because “the claim to truth is a claim to deploy power” (Smart 1991, 196). One must also be attentive to hierarchies of discourses, because truth claims do not “enjoy equal status” (Weedon 1999, 108) and in our society a very high premium is put on discourses that claim “scientific” truth. Weedon (1999, 108) notes:

[Discourses] are hierarchized by the relations of power which inhere within discursive fields, privileging some versions and voices over others. Who and what is privileged is an ongoing site of political struggle.

Carol Smart has argued that law is a discourse that ranks high in the hierarchies of knowledges.⁶⁵ Although it is not ‘scientific’, Smart argues that law has its own language, its own method, and makes its own claim to truth (Smart 1991, 197). Moreover, law has a particular ability to subjugate and marginalize other knowledges (Boyd 1991, 98; Smart

ideology and standpoint feminism revealed that knowledge is partial and relative. How discourse differs from ideology will be discussed below.

⁶⁴ See Weedon (1999, 119) for a discussion of Foucault’s “guiding principles” to identifying the nature of power.

⁶⁵ Foucault himself did not discuss law in these terms (Smart 91, 197).

1991, 195) and, I would add, also to validate and elevate other knowledges. For example, law has a tendency to privilege scientific discourses over non-scientific or 'experiential' discourses and the result is that women's knowledges⁶⁶ tend to be marginalized and suppressed.⁶⁷

'Battered Women's Syndrome' (hereafter "BWS") is an example of 'scientific discourse' that has been deployed by feminists.⁶⁸ BWS was identified by Lenore Walker⁶⁹ and has been used in criminal law, most commonly and with some success, to defend women charged with killing their abusive husbands.⁷⁰ BWS describes both the battering relationship and women's response to it. As Patricia Kazan (1997, 557) suggests,

The battered woman syndrome consists of both *interpersonal* and *intrapersonal* components. The interpersonal component refers to the cycle of violence which is said to be common to all cases of repetitive battering. The intrapersonal component refers to a set of psychological responses alleged to occur in women who have been battered. According to Walker, these responses may include depression, anxiety, low self-esteem, heightened sensitivity, and learned helplessness. In her view, there is a direct relationship between battering and the development of these psychological symptoms.⁷¹

⁶⁶ I refer to women's 'knowledges' because women have created knowledge in many different fields (for example art and science) and in many different ways (for example empirically and qualitatively). Moreover, there is no one feminist knowledge on any subject and the use of the term 'knowledges' recognizes that fact.

⁶⁷ See Mosoff (1994) for a discussion of the privileging of psychiatric discourses in child welfare proceedings involving mothers with mental health histories.

⁶⁸ I characterize BWS as a 'scientific' discourse because of its reliance on psychological explanations of the effect of battering on women's mental states and their responses.

⁶⁹ See *The Battered Woman* (New York: Harper and Row, 1979), *The Battered Woman Syndrome* (New York: Springer Pub. Co., 1984), *Terrifying Love* (New York: Harper and Row, 1989).

⁷⁰ In *R. v. Lavallee* (1990), 76 C.R. (3d) 329 the Supreme Court of Canada considered and accepted evidence of BWS in support of Ms. Lavallee's claim of self-defence. *Lavallee* will be discussed in more detail below. Evidence of BWS was also accepted in *R. v. Lalonde* (1995), 37 C.R. (4th) 97 (Ont. C.J. in a fraud prosecution, where the defence was one of necessity. It was also been raised (unsuccessfully) in the context of the defence of duress in *R. v. Fournier*, [1991] N.W.T.R. 367 (S.C.). See Grant (1997, 354) for a discussion of the case as an example of the stereotyping of women who are battered.

⁷¹ Citations omitted.

As I will discuss later in this chapter, the use of BWS to defend women is not without controversy. The point is, however, that courts have allowed evidence of BWS because it has 'scientific' credentials and is thus capable of moving through the legal filter of 'reliability'.⁷² A further point, however, is that BWS has been deployed by feminists as a discourse of *resistance* on behalf of women who are battered and has had some success in disrupting the power of dominant discourses by doing so.⁷³ Thus, while law is a discourse, it is also a *site* of discursive practices. It is for this reason that feminist legal analysis conceptualizes the state and law as *sites* of struggle where the interests of less powerful groups may be advanced (sometimes successfully) but which nevertheless tend to privilege dominant discourses which are (re)productive of dominant systems of power such as patriarchy and capitalism (Boyd 1991, 109; Comack 1999, 52).⁷⁴

The postmodern concept of the 'subject' is also quite radically at odds with traditional humanist ideas. In contrast to humanist discourses that assume individuals have a true 'essence' of being, the postmodern subject is a product of discourse (Weedon 1997, 77).

Weedon (1999, 104) explains:

In poststructuralism, the individual is never a fully coherent intentional subject as in the liberal tradition. The individual is the site for competing and often contradictory

⁷² See Boyle (1991, 280) for a discussion of the legal requirements of expert testimony.

⁷³ A further point which is demonstrated is that dominant discourse 'shapes' discourses of resistance. While BWS may be viewed as a discourse of resistance it is nevertheless deployed on law's terms. For example the evidence is presented by an 'expert' and admitted as 'expert' evidence. As Boyle notes: "the goal is that someday women will be able to tell their stories themselves." See also Grant (1991, 59) who laments that "the experience of Ms. Lavalley was heard through a member of the psychiatric profession as if her experience reflected some weakness or abnormality in the woman herself." She suggests (1991, 59, fn 164) that BWS still has the potential to "silence women themselves and to render individual women "invisible" in the adjudicative process." Relatedly, Boyd (1999, 381) discusses how 'assimilationist' arguments deployed by LEAF in *M v. H* meant that the "potentially disruptive lesbian subject was absorbed back into familiar roles and, to a large extent, her disruptive potential was displaced."

⁷⁴ Smart (1992, 37) also characterizes law as a significant site of social struggle, but as a postmodernist, does not subscribe to the importance of patriarchy and capitalism as systems of oppression.

modes of subjectivity which together constitute a particular person. Modes of subjectivity are constituted within discursive practices and lived by the individual as if she or he were a fully coherent intentional subject.

Thus subjectivity is never fixed or predetermined and individuals constantly negotiate, accept and resist the various discourses that they encounter. Importantly however, because subjectivity is contested, it is always open to change and to resistance.⁷⁵ In this way, postmodernism has opened up new ways to theorize women's agency and resistance, and also the puzzling question of women's apparent complicity in their own subordination through institutions such as motherhood and the family (Currie & Kline 1991, 18; Weedon 1997, 19).

The postmodern ideas of truth, power, discourse and the subject have been liberating because they allow relations between individuals, groups and institutions to be theorized as being much more dynamic and dialectic than perhaps traditional modernist theory would permit.⁷⁶ However, many feminist and other scholars, while recognizing the possibilities opened up by postmodern theories including discourse, are not convinced that ideology no longer has a place in theory. To the contrary, they argue that ideology and discourse can be used in a complementary way to produce better analysis than either is capable of on its own (Boyd 1991, 103; Boyd 1994, 54; Fineman 1995, 219).

⁷⁵ This notion of subjectivity is the subject of intense debate among feminists many of whom question the implications of this formulation of subjecthood for feminism and a feminist politics (Weedon 1999, 107). If the category woman has no essential nature, what then is the organizing principle of feminism? Weedon argues that a feminist politics can be maintained, but that in a postmodern politics the organizing principle must become one of "shared forms of oppression rather than shared identities" (Weedon 1999, 107). See also Currie & Kline (1991) for a discussion of the issue.

⁷⁶ As Currie & Kline (1991, 18) note: "Liberated from the notion of truth, we are provided with the opportunity to unravel the secrets of its production."

Martha Fineman, for example, suggests that ideology may be conceptualized as “providing the link or nexus between power and discourse”.⁷⁷ Ideologies, Fineman (1995, 219) argues, “rationalize and give meaning to discourses in the context of power.” Thus, ideologies are much more powerful than discourses in that they shape not only the contours of dominant discourses but also those of resistance discourses.⁷⁸ Conflict in society is “relegated to the level of discourse” (Fineman 1995, 219) leaving the dominant ideology more or less unchallenged. Susan Boyd takes a slightly different, though I would argue not inconsistent approach. Boyd (1991, 98) argues:

Ideology cannot be reduced to discourse because one loses a sense of how discourses have wider ramifications and connections with material relations. Nor can discourse be reduced to ideology, as the concept of discourse allows us to focus on sites in which particular knowledges, including counter discourses, are produced, and is a more particularistic concept in this regard.

Thus Boyd (1991, 98) suggests that ideology should be seen, not as something that masks ‘true’ experience but rather as a “particular set of effects within discourses”.⁷⁹ What I think this means is that dominant discourses reflecting more powerful ‘voices’ tend to influence the creation of knowledge. Over time, these knowledges become entrenched and begin to inform our ‘common-sense’ view of the world. At this point they become ideology, and much more difficult to contest and dislodge but they are, nevertheless, merely the *effects* of dominant discourse as opposed to reflections of ‘true’ experience.

⁷⁷ Fineman credits Terry Eagleton with this suggestion. See T. Eagleton, *Literary Theory: An Introduction* (Minneapolis: University of Minnesota Press, 1983).

⁷⁸ Susan Boyd (1991, 104) illustrates this point by showing that lesbian mothers in custody disputes are more likely to emphasize their similarities to heterosexual mothers than to mount more significant challenges to the dominant ideology of motherhood. This recognizes that a strategy that appeals to the “dominant ideology inherent in judicial discourses” is more likely to achieve a successful trial result than one that more directly challenges the ideology.

⁷⁹ Citing Terry Eagleton, *Ideology* (London & New York: Verso, 1991) at 194.

The central task of much feminist scholarship is to uncover and make visible the relations of power inherent and reflected in ideologies and discourses. Deconstruction is the “critical practice” (Weedon 1997, 158) used to achieve this aim.⁸⁰ Discourses and ideologies are, of course, reflected in language including written texts, and Weedon (1997, 162) suggests that in deconstructing texts,

[t]he central focus of interest becomes the way in which texts construct meanings and subject positions for the reader, the contradictions inherent in this process, and its political implications, both in its historical context and in the present.

While legal scholars did not develop deconstruction, critical legal scholars, including feminists, have found deconstruction to be a valuable method to analyze legal discourse (Balkin 1998, 1). As Balkin (1998, 7) notes:

Deconstruction has proved useful for ideological critique because ideologies often work through forms of privileging and suppression: Certain features of social life are privileged in thought and discourse, while others are marginalized or suppressed. Deconstructive arguments try to recover these subordinated or forgotten elements in legal thought and legal discourse.⁸¹

In Chapter 5 I will use deconstruction to analyze legal decisions involving women charged with failing to protect their children. Putting the language deployed in these judgments at the center of my analysis, allows me to ‘unpack’ the assumptions, categories, hierarchies,

⁸⁰ Jacques Derrida developed deconstruction originally for the purpose of analyzing literary and philosophical texts, but it has been ‘borrowed’ by feminist and other critical legal scholars. Deconstruction is based on the theory that language is merely a system of signs that consist of a signifier (sound or written image) and a signified (meaning). Weedon (1997, 23) explains that “[t]he meaning of signs is not intrinsic but relational. Each sign derives its meaning from its difference from all the other signs in the language chain.” For example, we do not understand cold except in relation to hot. Cold is what hot is not. But this relationship reflects not only difference but also a hierarchy of difference that is fluid and dependent on context. For example, cold is better than hot if we are discussing ice tea but worse if we are discussing hot tea.

⁸¹ See Balkin (1998, 6 to 9) for a discussion of the actual techniques of deconstruction. See also Hedges (undated) for a very accessible guide to deconstructive techniques.

omissions and exclusions that reflect the dominant ideologies and the discourses informing these judgments.

3. *The Problem of Legal Method*

Thus far I have been primarily discussing the ideological features of law and how the concepts of ideology and discourse can be used to account for the privileging of certain (more powerful) voices over other (less powerful) voices in and by law. I want to turn now to consider the methodological features of law and to the question of how this privileging is facilitated by law. As noted above, law has a particular ability to privilege some knowledges as well as to “subjugate and marginalize” (others). One way this subjugation and marginalization occurs in law is through legal method, including the rules of evidence and legal ‘tests’.⁸² Legal method works at a more immediate level than ideology and defines the contours of the legal inquiry, determines what ‘facts’ are legally relevant and, consequently, what parts of the mother’s story can be told and what parts will be silenced.⁸³ As Sheila Noonan (1996, 191) notes:

The enterprise of legal method, as traditionally defined, operates on the basis of erasure in the quest to generate coherent content and stable categories. Moreover, the established canons of reading and relevance permit the exclusionary practices of law to play a significant role in maintaining hegemony based on gender, race and sexual

⁸² Smart (1991, 197) suggests that even the “routine or mundane” aspects of law, such as the translation of a client’s story into ‘legal issues’, play a role in discounting women’s knowledges: “Most of the story will be chaff as far as the lawyer is concerned, no matter how significant the rejected elements are to the client. Having extracted what law defines as relevant, it is translated into a foreign language of, for example, ouster injunctions, unfair dismissals, constructive trusts. The parts of the story that are cast aside are deemed immaterial to the case and the good solicitor is the one who can effect this translation as swiftly as possible.” See also Cahn (1992, 1420, 1438) discussing the lawyer/client relationship and the construction of clients as ‘reasonable women’.

⁸³ See also Beaman-Hall (1996) for a discussion how traditional legal method excludes women’s experiences of abuse and Neilson (2000) on child custody.

orientation. In short, within the legal order erasure and marginalisation are violences of the everyday variety.

Women's knowledges⁸⁴ in particular have not fared well in law,⁸⁵ and feminist legal analysis makes visible the processes by which law accomplishes the silencing of women's stories. This thesis is concerned with two particular features of law that contribute to this silencing of women's voices; the 'decontextualization' of the legal subject⁸⁶ and the positing of the 'reasonable man' as the norm. These two features will run as the mes through the various discussions in the balance of this thesis, and they often run hand in hand. Naffine (1990, 52) describes the relationship between them. She argues (1990, 24) that the basis of law's claim to impartiality is a set of assumptions about legal personhood – the universal "reasonable man" who "is deemed to be able-bodied, autonomous, rational, educated, monied, competitive and essentially self-interested." Law's claim to impartiality is achieved, Naffine suggests, by abstracting the subjects of law from their particular contexts – the material and social conditions of their lived experience – and assuming, for legal purposes, that they are free, capable and competitive (1990, 52). Law is based on the liberal notion of equality but the 'equal', the individual at the heart of the theory, is the 'reasonable' 'man'. Accordingly, law is not very good at acknowledging or accounting for difference. Indeed law strips away differences and makes the subject of law the de-gendered, de-raced, de-sexed, reasonable

⁸⁴ First Nations or black women's historical knowledge and practice relating to shared or community responsibility for child care is an example of women's knowledges that are devalued and subordinated in dominant discourses including law and social work (Kline 1993, 319; Roberts 1993, 132).

⁸⁵ Or for that matter in most dominant discourses. As Weedon (1999, 112) points out, "[t]he absence of women as sites and sources of knowledge and culture, and the delegitimation of forms of knowledge associated with women in the wake of the scientific revolution, became central issues in second-wave feminism." See also McCalla Vickers (1989, 37).

⁸⁶ As Linda Neilson (2000, 127) notes "[c]riticism of non-contextual "fact" finding is one of the foundations for feminist criticism of law." See also Boyle (1991, 273).

'man'. Because this thesis is centrally concerned with impact of law on women who are battered, and because a rich body of feminist scholarship and case law provides the opportunity, I will use battered women's experience with the law of self-defence to ground the discussion of these ideas.

The processes by which law abstracts women from their material circumstances and silences their voices are often subtle. For example, one of the statutory pre-requisites to a claim of self-defence is that the accused must have acted "under reasonable apprehension of death or grievous bodily harm".⁸⁷ Prior to the Supreme Court of Canada decisions in *R. v. Lavallee*⁸⁸ and *R. v. Petel*⁸⁹ a further "gloss" (Boyle 1991, 277) on this requirement was the judge-made rule that the attack must have been 'imminent'.⁹⁰ The rationale for the rule was "to ensure that the use of defensive force is really necessary."⁹¹ However, the result of the "apparently gender-neutral concept of imminent attack" (Boyle 1991, 278) was to foreclose the claim of self-defence for battered women who sometimes killed their husbands in circumstances that would not meet this threshold criterion.⁹² Christine Boyle (1991, 278) suggested that the imminent attack 'rule':

is an explicit direction *not* to view the facts from the perspective of the woman involved...It is a direction not even to ask if she had been refused help by the police, not even to ask what were her realistic alternatives, not even to ask what would have

⁸⁷ Section 34(2) of the *Code*.

⁸⁸ [1990] 1 S.C.R. 852 (1990), 76 C.R. (3d) 329.

⁸⁹ *R. v. Petel*, [1994] 1 S.C.R. 3.

⁹⁰ The Supreme Court of Canada stated in *Petel*, *ibid*, at para. 22: "This alleged rule, which does not appear anywhere in the text of the Criminal Code, is in fact only a mere assumption based on common sense...There is thus no formal requirement that the danger be imminent. Imminence is only one of the factors which the jury should weigh in determining whether the accused had a reasonable apprehension of danger and a reasonable belief that she could not extricate herself otherwise than by killing the attacker."

⁹¹ *Lavallee*, *supra* note 8 at p. 348.

⁹² For example in *R. v. Whynot* (Stafford) (1983), 9 C.C.C. (3d) 449, Ms. Stafford shot her husband while he was sleeping. In *Lavallee*, Ms. Lavallee shot her husband in the back of the head as he was leaving the room.

happened if she had engaged in a face-to-face struggle and not to inquire into the state of mind induced by frequent vicious and sexual attacks.

It is a direction to divorce the incident from its context, the facts that would give it meaning. Thus, these questions have been relegated to the status of non-questions by people with the authority to say what is legally relevant and what is not.

Thus the (ostensibly) gender-neutral legal rule of 'imminent attack' not only deprived women of a defence but of the opportunity to tell their story of violence and to situate their actions in a context that might show that their actions were 'reasonable'. Moreover, as Wilson J. recognized in *Lavallee* the 'imminent attack' rule was itself based on a male-norm:

If there is a significant time interval between the original unlawful assault and the accused's response, one tends to suspect that the accused was motivated by revenge rather than self-defence. In the paradigmatic case of a one-time bar room brawl between two men of equal size and strength, this interference makes sense. How can one feel endangered to the point of firing a gun at an unarmed man who utters a death threat, then turns his back and walks out of the room? One cannot be certain of the gravity of the threat or his capacity to carry it out. Besides, one can always take the opportunity to flee or to call the police. If he comes back and raises his fist, one can respond in kind if need be. These are the tacit assumptions that underlie the imminence rule.⁹³

Thus legal method in the form of a gender-neutral rule, denuded women's acts of their context, and measures them against norms of reasonableness rooted in male experience.

As previously discussed, Lenore Walker's work on Battered Woman Syndrome (hereafter 'BWS'), has been used with some success by battered women's advocates in Canada and elsewhere to defend women charged with killing their abusive partners. The primary purpose of introducing evidence of BWS is, in the words of Kazan (1997, 551), to facilitate:

⁹³ *Lavallee*, *supra* note 8 at p. 348.

the Court's appreciation of the different circumstances and perspectives of battered women and how these factors might render their acts of self-defence reasonable and justified, despite the fact that these acts depart from the "reasonable man" standard.

The benefit of using evidence of BWS is that it situates battered women's actions within the context of their abuse. It is also useful from the perspective of providing 'scientific' evidence that refutes the common myths about women who are battered, such as they are masochists, they ask for it or the battering couldn't have been as bad as they say (Shaffer 1997, 8).⁹⁴

Lavallee is the leading case on BWS in Canada.⁹⁵ The broad issue in *Lavallee* was the admissibility and utility of expert evidence of BWS in support of Ms. Lavallee's claim that she killed her abusive partner in self-defence.⁹⁶ Wilson J., writing for a unanimous Supreme Court of Canada,⁹⁷ held that expert evidence of BWS was admissible, and in the course of doing so expressly acknowledged a number of feminist concerns about the treatment of women under the law of self-defence.

⁹⁴ The 'relevancy' test (or filter) is another method by which law silences women's voices. As previously mentioned, evidence of BWS makes it through this filter because of its 'scientific' credentials. Shaffer (1997) in fact argues that there are many circumstances where resort to the battered woman 'syndrome' is inappropriate. This will be discussed below.

⁹⁵ Another important decision is *R. v. Malott*, [1998] 1 S.C.R. 123, 121 C.C.C. (3d) 456, wherein Justices L'Heureux-Dubé and McLachlin revisit *Lavallee* and discuss aspects of that decision including concerns expressed by feminist scholars about the decision.

⁹⁶ The narrow issue was the adequacy of the trial judge's instructions to the jury on expert evidence.

⁹⁷ Sopinka, J. wrote separate but concurring reasons.

The significance of *Lavallee* can hardly be overstated.⁹⁸ First, the Court specifically acknowledged some of the many myths and stereotypes about women who are battered and the need for 'expert' evidence to assist fact finders to understand battered women's experiences.⁹⁹ Wilson, J. stated:

Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called "battered wife syndrome". We need help to understand it and help is available from trained professionals.¹⁰⁰

Secondly, the Court recognized that gender matters and that "people do not experience the world in gender-neutral ways" (Boyle 1990, 174). For example, the Court stated:

If it strains credulity to imagine what the "ordinary man" would do in the position of a battered spouse, it is probably because men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man".¹⁰¹

Also implicit in this statement is an acknowledgement that male norms do inform standards of reasonableness, and that judging women by these norms is unjust.

⁹⁸ My intention here is to briefly summarize the most significant aspects of the decision, as I will discuss some aspects of the case in later Chapters. More detailed analysis of this decision is provided by Boyle (1990) & (1991), Grant (1991), Martinson (1991) and MacCrimmon (1991). See also Shaffer (1997) and Kazan (1997).

⁹⁹ For example the myth that "a woman who says she was battered yet stayed with her batterer was either not as badly beaten as she claimed or else she liked it" (*Lavallee, supra* note 8 at p. 353). These myths and stereotypes will be discussed in detail in Chapter 3.

¹⁰⁰ *Ibid.* at p. 344.

¹⁰¹ *Ibid.* at p. 346.

Thirdly, the Court acknowledged that context is crucial to judicial assessments of the reasonableness of a battered woman's acts. The Court stated:

Given the relational context in which the violence occurs, the mental state of an accused at the critical moment she pulls the trigger cannot be understood except in terms of the cumulative effect of months or years of brutality.¹⁰²

Without [expert evidence of BWS] I am sceptical that the average fact-finder would be capable of appreciating why her subjective fear may have been reasonable in the context of the relationship.¹⁰³

While *Lavallee* appeared to be a tremendous victory for battered women and their advocates, the decision and the use of BWS in general is not without controversy.¹⁰⁴ Indeed, Martha Shaffer (1997, 6) suggests that "many feminists regard the judicial recognition of the battered woman syndrome as a double-edged sword". One primary concern is that BWS 'syndromizes' women's experience.¹⁰⁵ Thus a woman who is battered becomes 'abnormal', and her actions and reactions a 'consequence' of her 'abnormality' (Grant 1991, 51). Many feminists argue this is a dangerous and inaccurate characterization of women who are battered, who are usually active agents negotiating the problems, responsibilities and dangers of living and mothering in the context of violence (Grant 1991, 52; Mahoney 1995).¹⁰⁶ Evidence of violence is crucial to be sure, but portraying women who are battered as 'helpless' victims of evil men does little to further our understanding of women who are

¹⁰² *Ibid.* at p. 350.

¹⁰³ *Ibid.* at p. 352.

¹⁰⁴ There are a number of excellent articles on this issue. See Boyle (1991), Kazan (1997), Grant (1991), Shaffer (1997).

¹⁰⁵ See Grant (1991) and Shaffer (1997).

¹⁰⁶ The agency of women who are battered in resisting abuse and finding safe space for themselves and their children will be discussed in Chapter 3.

battered or domestic violence. Moreover, by playing into dominant legal paradigms, BWS, as a discourse of resistance, becomes less liberatory.¹⁰⁷

Secondly, feminist scholars have expressed the concern that the syndromization of battering may lead to new stereotypes of women who are battered as helpless, passive, victims (Grant 1991, 1997, 348, 354; Shaffer 1997, 25). Thus women who fight back, women who are aggressive, and women who do not otherwise conform to the 'ideal battered woman' in that they have substance abuse, mental health or other problems or histories may find themselves disqualified from asserting a 'battered woman's defence' (Grant 1991, 53; Shaffer 1997, 14).¹⁰⁸ Justices L'Heureux-Dubé and McLachlin expressly acknowledged this concern in *R. v. Malott*.¹⁰⁹

It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman...Professor Grant warns against allowing the law to develop such that a woman accused of killing her abuser must either have been "reasonable 'like a man' or reasonable 'like a battered woman'". I agree that this must be avoided. The "reasonable woman" must not be forgotten in the analysis, and

¹⁰⁷ Kazan (1997, 565 - 568) argues convincingly that Lavallee's claim of self-defence could have been supported on the basis of her individual and contextual factors without resorting to the syndrome and its psychological effects. For example, "Lavallee's history of failed attempts to obtain assistance are sufficient to support her claim that she reasonably believed that self-help was the only viable option". Also socio-economic evidence on the danger of leaving battering relationships demonstrates that staying in a battering relationship may in fact be quite reasonable without recourse to the BWS concepts of 'learned helplessness'. Kazan (1997, 569) uses the example of *R. v. Eyapaise* (1993), 20 C.R. (4th) 246 (Alta. Q.B.) to illustrate when a claim of BWS would be an appropriate and necessary strategy.

¹⁰⁸ There is actually no such thing as a 'battered woman's defence' and this is merely a short hand way to say, "entitled to provide evidence of a battering relationship in support of a claim of self (or other) defence". As Wilson J. stated in *Lavallee*, "Obviously the fact that the appellant was a battered woman does not entitle her to an acquittal. Battered women may well kill their partners other than in self-defence". The issue is not whether a woman is battered, it is whether she acted reasonably, and that normative determination must still be made but within the context of her own experience. See also *R. v. Malott*, *supra* note 95 at para. 41.

¹⁰⁹ *Supra* note 95 at paras. 39 - 41.

deserves to be as much a part of the objective standard of the reasonable person as does the "reasonable man".¹¹⁰

Indeed, Martha Shaffer (1997, 30) suggests that some cases following *Lavallee* have raised the prospect that a stereotype of the 'authentic' battered woman may be operating in Canadian criminal law, notwithstanding the Supreme Court's caution.¹¹¹

The aim of this discussion has been to illustrate three points. First, law in subtle ways and often through its method tends to abstract women from their material circumstances and experience. How this works to the detriment of women and particularly women who are battered charged with failing to protect their children will be a central theme of the next Chapter and will run throughout this thesis. Secondly, it is important to be attentive to whether the standard of 'reasonableness' against which women's acts (having been abstracted their context) are judged, is a standard based on (white, middle-class, heterosexual) male experience. Thirdly, discourses of resistance may be successful in achieving shifts in law that are beneficial to (some) women. But, as demonstrated by the possible emergence of the 'ideal' or 'authentic' stereotype of the battered woman, it is important to recognize that law has a tendency to contain or marginalize discourses of resistance.

While the Supreme Court of Canada's decisions in *Lavallee* and *Malott* provide reason for optimism that women's voices are (sometimes) being heard, we need to be sceptical about

¹¹⁰ *Ibid.* at para. 40. Citations omitted.

¹¹¹ *R. v. Witten* (1992), 110 N.S.R. (2d 149 (N.S.S.C.) and *R. v. Bennett*, [1993] O.J. No. 1011, (Q.L.). The issue of whether an 'authentic' battered woman standard has emerged in cases of women charged with failing to protect their children will be discussed in Chapter 5.

apparent accommodations made by law to women's interests. History has demonstrated that even though shifts have occurred to accommodate feminist challenges, dominant ideologies and social structures have remained largely intact. This is at least partly because law is a conservative force (Fineman 1992, 12), and many factors continue to militate against law genuinely encompassing women's difference. As Boyd (1991, 103) notes:

Law as a discursive site has a particular ability to empower or disempower. As Hunt says, judicial discourses may "present a more complex structure derived from the modes of legal reasoning,"¹¹² so that once an ideology is embedded in a particular field of judicial discourse, as the ideology of motherhood was through the tender years doctrine, it becomes particularly difficult to dislodge.

This thesis is concerned with the doctrine of failure to protect, which is equally informed by powerful ideologies of motherhood. The more deep-rooted the ideology – the more an idea, such as the idea that mothers ought to protect their children, appeals to 'common-sense' – the more resistant the ideology will be to liberatory discourses.

We are currently seeing evidence of this resistance at work in the area of domestic violence. After 20 years of working to get woman abuse recognized as a serious problem, feminists have had considerable success in achieving legal reforms such as domestic violence¹¹³ and anti-stalking legislation and mandatory charging policies against batterers.¹¹⁴ While feminists continue to debate the potential of these laws to emancipate women from domestic

¹¹² Citing Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law" (1985) 19 L. & Soc. Rev. 11.

¹¹³ For example see: Alberta's *Protection Against Family Violence Act* (Proclaimed June 1, 1999); Saskatchewan's *Victims of Domestic Violence Act* (February 1, 1995); Manitoba's *Domestic Violence Stalking, Prevention, Protection and Compensation Act* (June 29, 1998); Prince Edward Island's *Victims of Family Violence Act* (December 16, 1996); Yukon Territory's *Family Violence Prevention Act* (December 11, 1997); and Ontario's *Domestic Violence Protection Act*.

¹¹⁴ Success in achieving reform is not, of course, the same as 'successful reform' and not all feminists would agree that these laws were progressive or positive for women. See for, example, Currie (1998) on discussing some of the problems inherent in mandatory charging policies. And see Gagné (1998) for a history of the battered women's movement in the U.S.

violence,¹¹⁵ these achievements do, at least, signal the government's recognition of domestic violence as a serious social problem. At the same time however, child welfare authorities in both the U.S. and Canada¹¹⁶ now consider the presence of domestic violence in the home a ground for apprehending children from their mothers (Neilson 2000, 134, Working Group 2000, 852).¹¹⁷ This practice, that some consider arose out of feminist efforts to draw attention to the importance of considering men's violence against women in child custody cases, has the effect of punishing women for the fact that they are battered by removing the children from their care (Working Group 2000, 849).¹¹⁸ The concepts of discourse and ideology help to make sense of these complex and contradictory responses to feminist and other discourses around domestic violence.

¹¹⁵ See for example Dawn Currie (1998, 41).

¹¹⁶ Notably, six Canadian provinces include domestic violence in the home as a ground for declaring a child in need of protection: Newfoundland, *Child, Youth and Family Services Act*, S.N. 1998, c. C-12.1, s. 14(j); New Brunswick, *Family Services Act*, S.N.B. 1980, c. F-2.2, s. 31(1)(f); P.E.I., *Family and Child Services Act*, R.S.P.E.I. 1988, c. F-2, s. 2(i); Nova Scotia, *Children and Family Services Act*, S.N.S. 1990, c. 5, s. 22(i), Saskatchewan, *Child and Family Services Act*, S.S. 1989, c. C-7.2, s. 11(a)(vi); and Alberta, *Child Welfare Act*, S.A. 1984, c. C-8.1 s. (3)(a)(ii)(C). For example, New Brunswick's *Family Services Act*, S.N.B. 1980, c. F-2.2, provides:

Sec. 31 (1) The security or development of a child may be in danger when

(f) The child is living in a situation where there is domestic violence;

Newfoundland's *Child, Youth and Family Services Act*, S. Nfld. 1998, c. C-12.1, provides:

Section 14. Definition of a child in need of protective intervention. A child is in need of protective intervention where the child

(j) is living in a situation where there is violence.

In 2000, Ontario declined to follow the recommendation of the Panel of Experts appointed to advise the Government on changes to its child welfare legislation that domestic violence be included as a ground for declaring a child in need of protection. See Hutton (1999) for the 'Panel of Experts Report' and recommendations

¹¹⁷ Sheila Noonan (1996, 207) suggests that "[t]he recognition of BWS in the criminal context has given new purchase and lent empirical 'truth' to the suggestion that particular mothers are, by virtue of this 'condition', incapable of providing adequate parenting to their children. Typically the result of such an appraisal is that an application for society or crown wardship is granted". Citing *Children's Aid Society for the Districts of Sudbury and Manitoulin v. T(L)*, [1991] O.J. No. 1118 (Ont. C.J., Prov. Div.), online: QL (OJ). as an example.

¹¹⁸ This phenomenon will be considered in more detail in the next Chapter.

As discussed in the Introduction, the doctrine of failure to protect is an ideological construction based on the ideology of motherhood. My investigation of the operation of the doctrine of failure to protect in the Canadian criminal law will involve an analysis of criminal cases in which parents (both men and women) were prosecuted for crimes against their children when they did not themselves abuse or harm the child. Using the method of deconstruction, I will analyse the discourses deployed in these judgements in order to identify the dominant ideologies inherent therein. The task is one of 'unpacking' the language in the cases in order to reveal the dominant discourses and ideologies that have influenced the decisions in the cases and the development of the law in general.

4. A Final Word

I began this chapter by stating that I would discuss the theoretical and political commitments I bring to this work. One commitment remains thus far unstated, but is the commitment and the belief that drives my work. I believe that the best way to serve the best interests of children is to take care of and support their parents and especially, at least so long they are primarily held responsible for children by various social structures, their mothers. As Marie Ashe (1997, 215) has so eloquently stated:

When we construct any "bad mother" as "other", we falsely imagine that we have some substitute for her, some replacement, some better model. We commit the mistake of imagining that we can ever serve the "best interests" of children without supporting the well being of their parents.

This thesis is concerned with the *legal construction* of women who 'fail to protect' their children as 'bad' mothers and as criminals. However, I do not deny the reality of bad

mothers or the reality of the abused and neglected children of these women.¹¹⁹ The subject matter of this thesis is difficult in the sense that abused and neglected children lie at the heart of many of the cases that are discussed. These are children who suffered and whose mothers (and sometimes fathers) did not protect them from abuse by a third party as we would have hoped and expected that they would. But it is important not to let our outrage at these children's suffering or our anger at their mothers lead us into the trap laid by the doctrine of failure to protect. However tempting, it is too easy to dismiss these women simply as 'bad' mothers, and doing so tells us nothing about why these children suffered and how their suffering could have been prevented. It is my belief that it is far more productive to engage with 'bad' mothers because the abuse and neglect of children is related to larger systems of oppression that operate in our society. To the extent that 'mother-blaming' impedes our understanding of these systems of oppression and consequently our understanding of how to stop the violence, it is a dangerous practice and one that is harmful to children.

My criticism of the doctrine of failure to protect, which the Government is contemplating enshrining in the *Criminal Code*, is that it promotes essentialized, ideologically informed constructions of mothers. How these constructions are (re)produced in law and why this is harmful to women is the main subject of this thesis. However, in my criticism of the doctrine of failure to protect and 'failure to protect' laws, I do not suggest that mothers and fathers do not have a responsibility to protect their children. Children are the most vulnerable in our society, and the goal of protecting children is an important one. But the doctrine of failure to

¹¹⁹ See Ashe & Cahn (1994), Dougherty (1993) and Gordon (1988) for discussions of 'bad' mothers and women's violence against their children.

protect directs us to believe that mothers are completely, solely and always responsible for and able to protect their children from harm. It directs us to agree with the deputy district attorney who stated: "a women who fails to protect her children is no more a loving and good parent than the abuser" (Liang 1999, 443), and it directs us to blame mothers for the violence of others. This thesis challenges those claims and aims to complicate understandings of 'bad' mothers who fail to protect their children by situating the discussion of the doctrine of failure to protect in the context of women who are battered. In doing so I argue, not that the law should not hold bad mothers accountable for their (and other's) violence against their children, but rather, that the law, in its pursuit of the laudable goal of protecting children fails to recognize that not all women who fail to protect their children from abuse are 'bad' mothers. I argue that the legal construction of a 'bad' mother and the 'reality' of a bad mother are not always the same, and that the law's failure to recognize the difference impedes our ability to understand and to challenge larger systems of oppression that sustain violence and are harmful to mothers, to fathers and most of all to children.

Chapter 3 – Literature Review – The U.S. Experience

This thesis is concerned with the criminal prosecution of women who are battered under ‘failure to protect’ laws. The primary theme of the literature is that law, through a combination of ideology and method, excludes these women’s experiences of abuse from legal enquiry. The aim of this Chapter is to draw upon the literature to situate the material reality of mothering in the context of domestic violence, and to describe the way law, through legal method, excludes battered mothers’ experiences of violence in failure to protect prosecutions.

While the focus of this thesis is the *criminal* prosecution of women who are battered, it became apparent that, in general, the literature rarely focused solely on this type of prosecution because in many, if not all U.S. states, ‘failure to protect’ is also a legal basis for a finding of child abuse or neglect under child welfare laws.¹²⁰ Thus, most of the literature is attentive to ‘failure to protect’ in *both* the criminal and child welfare law contexts.

This insight lead me to examine the distinction I was making in the formulation of my own research problematic. Why did I think that ‘failure to protect’ in the criminal law was fundamentally different or more problematic for women than in child welfare law?¹²¹ And further, what Canadian research possibilities would be opened up if I expanded the

¹²⁰ Indeed, ‘failure to protect’ prosecutions under child welfare statutes have historically significantly outnumbered prosecutions under criminal statutes (Davidson 1995, 367). This remains the case today, despite what some commentators identify as a recent trend toward more criminal prosecutions (Davidson 1995, 367; The ‘Failure to Protect’ Working Group (“Working Group”) 2000, 849).

¹²¹ I use the term child welfare laws to refer to those primarily concerned with the welfare and protection of children.

problematic to include 'failure to protect' law in the child welfare context? I concluded that limiting my literature review to only the criminal prosecution of women would foreclose potentially significant sources of knowledge and avenues of enquiry, therefore elected to include all such literature in my review.

The greater breadth of literature provided a much fuller sense of the problem. For example, I learned that the ambit of 'failure to protect' laws is clearly expanding, at least in the U.S., to include women whose only act of neglect is their own experience of battering.¹²² As a result, battered mothers have become, by legal definition, 'bad' mothers. Although practical considerations subsequently resulted in my thesis topic being limited to the prosecution of women under *criminal* law, I nevertheless deal with child welfare law literature in this Chapter. I made this decision for three reasons. First, as mentioned, many authors do not make clear distinctions between the types of law – criminal, tort, child welfare – and it would be difficult to 'hive' off only 'criminal' parts of the work. Second, there are strong parallels between prosecutions of women under criminal and child welfare law. Looking at both types of law exposes these parallels and provides greater insights into both. Finally, including this research will give readers a fuller sense of the problem and may point to the importance of undertaking further research in the area of child welfare law.

In summary, the literature which is included in this review is that which considers 'failure to protect' in the context of child welfare and criminal prosecutions of women who are

¹²² The ambit of failure to protect laws has also expanded in both the U.S. and Canada to hold parents, including non-abusive battered mothers civilly liable to their children (Grace 1994; Neilson 2000; Panko 1995, 70).

battered.¹²³ Part 1 provides a brief overview of the general characteristics of the literature. Part 2 describes the context of violence in which women who are battered are situated and accounts for the complexities of their experience. Part 3 describes the 'failure to protect' laws in the U.S. and how of legal method operates to exclude women's experiences of violence from legal inquiry. Part 4 provides a summary and some conclusions to be drawn from the literature review.

1. General Characteristics of the Literature

The first significant characteristic of the literature is that it is overwhelmingly American.¹²⁴ This was neither unexpected nor unwelcome since I assumed the U.S. would have more experience with (and thus more consideration of) failure to protect laws. I am not sure whether the absence of Canadian literature on the subject is surprising or not.¹²⁵ One possible explanation is that, in the absence of criminal 'failure to protect' laws in Canada, the problem, and thus the impetus for research, has not been as obvious or pressing as in the

¹²³ My literature review was primarily conducted in the fall of 2000, and involved standard computer searches of a wide-range of databases (Canadian and foreign) using a variety of search terms designed to access as much literature as possible. I also reviewed an annotated bibliography (Bouchard, Boyd & Sheehy 1999) and the University of British Columbia library catalogue. I do not claim to have exhausted the literature on the topic, but believe that I have captured a significant portion of the literature that deals directly with the prosecution of women who are battered under criminal and child welfare 'failure to protect' laws. This literature does not, however, include literature that considers 'failure to protect' in the civil (tort) context.

¹²⁴ I am referring here of course to the 'failure to protect' literature. As we have seen there is a large body of Canadian feminist scholarship on violence against women generally and specific issues such as battered women's experiences with criminal law of self-defence.

¹²⁵ With one exception (Grace, 1994), I was unable to locate any Canadian literature that specifically considers the problem. The Grace article comments on *J.(L.A.) v. J.(H.) and J.(J.)* (1993), 13 O.R. (3d) 306 (Ont. Gen. Div.). In this case, the first of its kind in Canada, a mother was held civilly liable for damages to her daughter for failing to protect her from the sexual abuse of the father. I have recently come across an excellent article by Linda Neilson (2000, 134 to 137). The subject of this article is domestic violence in child custody cases, but Dr. Neilson does comment on child welfare practices in Canada, which result in abused women losing custody of their children on account of the domestic violence. Also, some of the Canadian criminal law treatises provide information on the various aspects of the problem. See Grant, Chunn & Boyle (1994, Chapters 3, 5) and Stuart (2001, 96).

U.S.. Another is that Canadian scholars have thus far been concerned with broader issues of domestic violence, and have simply not yet turned their minds to this problem, which is one where domestic violence intersects with child welfare and/or criminal law. Finally, Dorothy Roberts (1993, 98) notes that feminist scholars have devoted “surprisingly little” attention to ‘deviant’ mothers, particularly the criminal law’s treatment of mothers *as criminals*.¹²⁶ She attributes (1993, 136) this in part to “feminism’s uncompromising opposition to violence against women and children” and partly to “the way all women have so deeply internalized the dominant images of motherhood”. But, as Roberts (1993, 140) suggests,

It may be deviant mothers, rather than compliant ones, who reveal the mechanisms by which the institution of motherhood confines women and the price they pay if they resist.

Another characteristic of the literature is that virtually all of the work is that of feminist scholars and, with a few exceptions, it is the work of legal scholars or, at least, was published in legal journals.¹²⁷ The literature often follows the feminist tradition of grounding the discussion in the experiences of women in order to give voice to marginalized women. The stories are obtained from actual cases or from the personal experiences of the authors, and provide poignant illustrations of the injustice experienced by women who are battered under ‘failure to protect’ laws. The literature accounts for ‘failure to protect’ laws from the

¹²⁶ See also Ashe (1992) and Ashe & Cahn (1994) for a discussion of how better understanding of ‘bad’ mothers would inform feminist analysis of law.

¹²⁷ The work which I do not identify as feminist generally advocates stricter ‘failure to protect’ laws and harsher punishment. The work is not feminist because women, and the impact these laws have on women, are either not a feature of the analysis or are a secondary consideration. For example, Charles Phipps (1999) provides a comprehensive analysis of child homicide prosecutions in the U.S. and discusses the need for special child homicide statutes. Phipps argues (1999, 585) that child homicide statutes recognize the “unique harm to children and the unique manner by which harm is inflicted on children” and would address concerns that child homicides are currently prosecuted and punished inconsistently. Although Phipps (1999, 584) balances his advocacy of these statutes with the recognition of arguments against them, he does not attempt to account for the potential impact of these laws on women. See also, Liang & MacFarlane (1999), *infra*, note 177.

standpoint of women who are battered, but does not attempt to do so on any empirical basis.¹²⁸ Randy Magen (1999, 128) notes that there are no statistics generated on the number of battered women involved in child protection proceedings, and suggests this is problematic because it “helps to obscure the difficulties with these cases.”¹²⁹ Without data on numbers of women who are battered that are prosecuted under child welfare and criminal data it is difficult to get a sense of the exact size and scope of the problem.¹³⁰ Nevertheless, give the amount of literature on the subject we can conclude that the doctrine of failure to protect is affecting significant numbers of women in the U.S.

The literature is relatively recent. Most of the articles have been written since 1995, and the earliest article was written in 1987 (Johnson 1987). This is not surprising since ‘failure to protect’ laws have only emerged since the mid-1980s.¹³¹ Furthermore, only in the last fifteen to twenty years have North American feminists (in Canada and the U.S.) been successful in putting domestic violence on the public agenda (Working Group 2000, 849, 873). This work has led to a greater understanding of the scope of domestic violence and its impact on women, children and society at large. As feminist work on domestic violence has

¹²⁸ However, some of the literature does refer to the empirical studies of other feminist and non-feminist researchers, including that of sociologists, psychologists and governments.

¹²⁹ Criminal law poses similar difficulties because, as Linda Panko (1995, 86), the fact that a women has been battered is often not even mentioned in the case. See also (Neilson 2000, 126, 127,138).

¹³⁰ Although the term ‘prosecute’ generally refers to criminal matters, I use it in reference to mothers whose children are the subject of child welfare proceedings in order to signify two things. First, that these proceedings and the outcomes are very serious for mothers. Second, that notwithstanding the construction of child welfare proceedings as being ‘about’ the best interests of the child, the mother or the mother’s inadequacies is often a central issue in the inquiry.

¹³¹ As we will see there is a difference between the doctrine of ‘failure to protect’ and ‘failure to protect’ laws. ‘Failure to protect’ laws codify the doctrine and are a relatively recent phenomenon. However, one commentator reports that the first case prosecuted in the U.S. under the doctrine of ‘failure to protect’ was in 1960, *Palmer v. State* 164 A.2d467 (Md. 1960) (Zahniser 1997, 122) Interestingly, *Palmer* was cited as the authority in one of the early Canadian cases, *R v. Popen* (1981), 60 C.C.C. (2d) 232 (Ont. C.A.) that will be discussed in Chapter 4.

progressed, new sites of oppression, including 'failure to protect' laws, have continued to evolve as the focus of feminist scholarship.

Finally, while the literature is attentive to gender, it is not, in general, attentive to how race and class impact on the treatment of women under the doctrine. Annette Appell (1997, 584) observes that in the U.S., "[t]he mothers and children "served" by the public, protective system are overwhelmingly poor and disproportionately of color."¹³² Jane Murphy (1998, 690) and Dorothy Roberts (1993, 105) both remind us that poor, minority women in general are treated much more harshly in law than their white, middle-class counterparts, especially for their crimes as mothers.¹³³ Also, while domestic violence affects women of all socio-economic classes, as is the case in other areas, white, middle class battered women often have the resources to avoid at least the child welfare system (Murphy 1998, 709).¹³⁴ The stories of women in the literature suggest that this holds true for battered mothers charged with 'failure to protect'.

This is also true in Canada. As Marlee Kline (1992, 376) has shown, "the child welfare system in Canada has had a devastating and tragic impact on First Nations" that may be attributed to "racist structures" (1992, 381) in law that are rooted in the history of colonialism. As a result, First Nations women and children have been disproportionately

¹³² Appell observes (1997, 585) that because of their lack of resources poor women lead much more 'public' lives than middle-class women and this exposes them to increased state scrutiny. For example they live in apartments not houses, and thus in closer quarters with others. They take public transportation, and (in the U.S.) go to public medical clinics. If they receive public or social assistance many aspects of their lives (such as whether they live with a man) will be closely monitored by the state.

¹³³ See Marlee Kline's work (1992, 1993), which describes the experiences of First Nations women's experiences with the Canadian child welfare system.

¹³⁴ Murphy (1998, 691) notes that battered white middle class women face the same problems in custody and support hearings as poor minority women do in welfare law.

over-represented in the child welfare system (Kline, 1992, 377). Similarly, Anne McGillivray and Brenda Comaskey (1998, 132) note that, while First Nations people comprise approximately three percent of Canada's population,

“[n]ineteen percent of admissions to carceral institutions (up to 90% in some areas) are Aboriginal men. Rates are even higher for Aboriginal women who account for 50% of women incarcerated in provincial institutions, and 20% of women housed in federal institutions.”¹³⁵

Systems of oppression that operate to discriminate against First Nations women in child welfare and general criminal law should be expected to continue to operate harshly against these women under the doctrine of failure to protect.

2. *The Context of Violence*

Intimate violence constructs women's lives. It is the lens that shapes women's images, deconstructs women's bodies, defines women's relationships to their selves and delimits women's connections to their children. Intimate violence is both cultural and systemic, essentializing social discourse and civilized life. Insinuating itself in the social fabric, intimate violence is often indistinguishable from life. Domestic violence is a constant in many families where mother are beaten, children are traumatized and the family and surrounding community are destroyed (Miccio 1999, 89).

One consistent theme in the literature is that law's insistence, through a combination of ideology and legal method,¹³⁶ on abstracting battered mothers from the context of their material experiences of violence leads to injustice for battered mothers (Murphy 1998, 720). The law abstracts women from the context of violence and imposes 'objective' (and ideologically informed) standards to measure their conduct (Miccio 1999, 93; Murphy 1998,

¹³⁵ Citing Statistics Canada, "Adult Corrections Survey" (Ottawa: Centre for Justice Statistics, 1991).

¹³⁶ How legal method works to exclude women's experiences is the subject of Part 3 of this Chapter.

763). In fact, as Panko (1995, 86) notes, women's experiences of violence are so thoroughly erased from the cases that:

The difficulty in analyzing many failure-to-protect cases is the absence, in court opinions, of any discussion or even notation of whether the mother was also a victim of abuse.¹³⁷

The obstacles faced by women mothering in the context of domestic violence are not mentioned in the cases because law does not recognize these obstacles (Enos 1996, 239; Murphy 1998, 720; Panko 1995, 87). However, the violence experienced by these mothers shapes their responses and places very real limits on their ability to protect their children (Miccio 1999, 114). Accordingly, an appreciation of the context of violence is necessary to understand what women who are battered do to protect their children, why they do it and the injustice that results from the current treatment of women who are battered under 'failure to protect' laws (Enos 1996, 264; Miccio 1999, 114). The literature exposes this injustice by (re)situating women within this context. It describes not only the violence and the challenges faced by these mothers, but their agency in resisting it. In this way, the literature undertakes the project of undermining the paradigm constructed by the doctrine of failure to protect so that the question becomes not "why did she fail?" but rather, "why did he batter?", "why does the state not help?", "why does domestic violence continue to be perpetuated by men against women and children, and tolerated by the state?" and "why are women held responsible for it?"

¹³⁷ This failure to hardly even mention, much less explore, the violence experienced by the mother was a criticism the Canadian authors (Grace 1994) had of the judge in *Re J. (L.A.)* and is also an issue in my review of Canadian criminal case law. Similarly Canadian author Neilson (2000, 126, 127, 138) articulates the concern that child custody decisions in cases of domestic violence are made on the basis of "objective, incidence-based assessments" and in contextual vacuums.

Domestic violence is the context in which many women mother and yet it is not well understood (Magen 1999, 130; Working Group 2000, 854).¹³⁸ Kristian Miccio (1999, 115) locates domestic violence squarely within the “legal and social structures that protect the power of the patriarch.” Her point, as with other authors who recount the harm caused to women by men, is that domestic violence must be understood as a gendered concept (Miccio 1999, 115; Roberts 1993, 115).¹³⁹ Theoretical explanations of women battery link it with power. Contrary to popular belief, battery is not violence that emerges from anger, or passion, or which is ‘brought on’ or provoked by the woman (Enos 1996, 233; Phillips 1992, 1557; Working Group 2000, 855). Many scholars identify battery as the attempt by men to control and dominate women (Enos 1996, 232; Magen 1995, 132; Roberts 1993, 114) and as a response to “women’s struggle against male domination within the family” (Roberts 1993, 114).

a) *The “Why Didn’t She Leave” Question*

Because of misunderstandings about the nature and causes of domestic violence, the “why didn’t she leave?” question has become the familiar refrain in failure to protect cases involving woman battery. Underlying this ‘shop worn’ question is the assumption that “exit is always the appropriate response to violence...” (Mahoney 1994, 76), and as we shall see in the next section, there are many reasons why leaving is not always the best strategy for

¹³⁸ Domestic violence statistics were provided in Part 5 of the Introduction.

¹³⁹ I acknowledge that I am relying on literature which does not endeavour to account for woman to woman abuse, and that doing so requires specific theorizing. As Faulkner (1998, 52) suggests; “[b]ased on histories of exclusion from feminist theorizing, some theorists reject feminist approaches to explaining lesbian or gay battering. Typically, feminist theoretical frameworks and methodological approaches to understanding why some lesbian women hurt their partners either ignore how compulsory heterosexism contributes to violence and abuse, or simply ‘add and stir’ heterosexism and homophobia into existing explanations of heterosexual, male violence against women.”

battered women.¹⁴⁰ Moreover, the *goal* of many women is to end the abuse (Mahoney 1994, 76) and this does not *necessarily* involve leaving the batterer.¹⁴¹

The literature suggests that the “why didn’t she leave” question itself reflects misconceptions about domestic violence as well as victim-blaming attitudes (Magen 1999, 132), and that there are several problems with the assumption that leaving is the (simple) solution to the problems of women who are battered and children. First, the question assumes that leaving is a viable option for all women (Magen 1999, 132; Mahoney 1994, 76; Panko 1995, 92) and that women have control over all aspects of their circumstances (Enos 1996, 245; Daigle 1998, 298; Mahoney 1994, 74). In doing so, it ignores the complexities of a battered women's experience and the obstacles to or limitations on their agency (Panko 1995, 88). Secondly, it demonstrates a misunderstanding of the nature of woman battering by assuming (incorrectly) that leaving is an effective solution and will stop the violence (Enos 1995, 243; Mahoney, 1994, 79; Panko 1995, 85; Working Group 2000, 858). Thirdly, it reflects and reinforces the problematic paradigm created by the doctrine of failure to protect that shifts the responsibility for the results of domestic violence to the women who are battered. As a number of the authors point out: “why didn’t she leave” is the wrong question (Enos 1996, 247). The right question is “why does he batter?” (Magen, 1999, 133; Miccio 1995, 1100; Panko 1995, 85).

¹⁴⁰ See also, Magen (1999, 131) and Working Group (2000, 854).

¹⁴¹ See Mahoney (1994, 77) for a discussion of studies involving women’s efforts to stop the violence without leaving their relationships.

Many commentators argue that the assumption that women should and can leave their batterers is reflected in judicial discourse and is the standard against which battered women's conduct is measured (Enos 1996, 240, 244; Daigle 1998, 289; Magen 1999, 131; Murphy 1998, 743; Panko 1995, 74). Mahoney (1994, 65) is one of these, and notes:

Cultural stereotypes of women are imported into law through standards of reasonableness and 'objective' intuitions about what behaviour is appropriate in women who are hurt by our partners. The cultural preoccupation with exit from violent relationships is reinscribed in law through the preconceptions and expectations of legal actors, including judges, juries, social worker, and attorneys.

Moreover, the "why didn't she leave" question reveals the social location of the knowers who "typically speak from their own non-battered experience, beliefs, emotions, education, and socio-economic situation, rather than from a battered woman's point of view" (Enos 1996, 244; Panko 1995, 85). As one commentator¹⁴² notes:

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

Finally, Isabel Grant (1997, 362) points out that the "why didn't she leave" question often "masks" a scepticism of women's credibility, grounded in popular misconceptions of woman abuse such as "if the abuse were really as bad as claimed, then surely she would have left". The next section addresses some of these myths.

¹⁴² Nancy Hallander, "Bad' Mothers: Modern Day Witches ", *The Champion*, July 1993, 3. Cited in Murphy (1998, 722).

b) *Why She Doesn't Leave*

Where the doctrine of failure to protect and the “why didn’t she leave” question erase both women’s experience of domestic violence and their resistance against it, the literature brings these back into the picture. As Mahoney (1994, 59) notes, “fighting oppression requires describing and confronting it.” The literature explores and analyses the context of violence in order to expose the myths and misconceptions (re)produced by the doctrine of failure to protect.

Mahoney (1994, 60) points out an obvious, but often overlooked fact – that women experience domestic violence “in the context of love and responsibility, work and obligation, commitment and uncertainty.” Social inscriptions of family, women’s responsibility within and to the family, and the investments women have made in their family, mean that women often will not too easily ‘give up’ and leave (Enos 1996, 245; Johnson 1987, 379; Magen 1999, 132; Mahoney 1994, 75; Phillips 1992, 1553). Rather, women often strategically choose to stay and to attempt to change the batterers’ behaviour. Although this strategy is successful for many women, Mahoney (1994, 76) suggests that these success stories become invisible, thereby “perpetuating the concept that ‘staying’ is irrational.”

Economic (in)security is another major reason women don’t leave (Enos 1996, 246; Murphy 1998, 743; Panko 1995, 84). Linda Panko (1995, 84) shows that poverty is a very real consequence for women after the break up of a family. She notes (1995, 86), for example, that “[a]lmost half of all homeless women, in the eighties, were victims of domestic violence.” The very real limitations women face in terms of jobs, housing, and financial

support shape women's responses to domestic violence and their decisions to stay or leave (Murphy 1998, 739; Working Group 2000, 859).¹⁴³

Fear for themselves and their children is another reason why women don't leave (Johnson 1987, 380; Phillips 1992, 1552). Batterers often threaten to kill the mother or her children if she intervenes or attempts to leave (Davidson 1995, 363). The stories recounted in the literature show that for many women who are battered, "the project is one of staying alive" (Mahoney 1994, 73; Miccio 1999, 93). Canadian statistics (Statistic Canada, 2000) report that for four women in ten reporting violence in their relationships the violence or threat of violence was so severe that they feared for their lives. Tragically, many Canadian women are killed by their intimate partners.¹⁴⁴ In 2000, 51 women were killed by a current or ex-spouse in Canada.¹⁴⁵ Thirty-seven of these were killed by a current legal or common-law spouse. In addition, 16 women were killed by a current or ex-boyfriend. Thus, for many women, the right time to leave must be identified and implemented strategically (Mahoney 1994, 74), and what may appear passive (staying) "can, in fact, be a reasonable response to the violence, particularly in the face of past attempts to deal with the abuse" (Magen 1999, 132).

Often the violence does not end when the women leaves. To the contrary, this event often marks an escalation of violence (Enos 1995, 243; Mahoney, 79; Panko 1995, 85; Working Group 2000, 858). Mahoney points out that official statistics underestimate the number of

¹⁴³ For a discussion of the economic impact of motherhood on women see Turnbull (2001, 39).

¹⁴⁴ Canadian statistics indicate that 1,485 women were murdered by their male partners or ex-partners between 1978 and 1997 compared to 442 men (Statistics Canada 1999a, 35). And in 1997, 581 women sustained major physical injuries or death as a result of spousal assault (Statistics Canada 1999a, 14).

¹⁴⁵ Sixteen men were killed by a current or ex legal or common law female partner and 2 men were killed by a current or ex-girlfriend.

women murdered by their former partners, and one author estimates that “more than half of the women who leave abusive relationships are followed, harassed, or further attacked after separation” (Mahoney, 1995, 79; Phillips 1992, 1555). In Canada, the Family Violence Survey (Statistics Canada 2001, 8) reported:

Marital separation is a factor that elevates the rate of spousal homicide for women but not for men. Between 1991 and 1999, women were killed by estranged husbands at a rate of 39 per million couples compared to a rate of 5 per million killed by current husbands.

Wilson and Daly (Juristat 1994, 4) suggest that statistics show that Canadian women are “at greater risk of severe violence or even of being murdered just after they leave their husbands or partners”. The Family Violence Survey (Statistics Canada 2000, 13) reports that almost twice as many women reported violence by their former partner as by their current partner and suggests:

Perhaps of greatest concern are the number of people with previous violent relationships reporting severe forms of violence such as being beaten (26%) sexually assaulted (19%), choked (19%) or being threatened with/having a gun or knife used against them (17%).

Mahoney (1995, 79) points out that danger to women is why women’s shelters have “secret” phone numbers and addresses. The literature is replete with accounts of women who experienced such violence after they attempted to separate from their batterer but who were nevertheless prosecuted for failing to protect their children.¹⁴⁶

Enos notes that courts will often acknowledge a battered woman’s fear but refuse to consider it as exculpatory to a charge of failure to protect (Enos 1996, 258). Other commentators note

¹⁴⁶ The story of Julia Cardwell 515 A.2d 311 (Pa.Super.Ct. 1986) is a particularly poignant example of the way women struggle to make safe space in the face of mortal danger and adversity. Despite her struggles Julia was ultimately charged and convicted of failure to protect her daughter from a sexual assault by the father (Enos 1995, 241).

that judges underestimate the violence and danger to women (Enos 1995, 258; Mahoney 1995, 78; Miccio 1999, 116). Enos (1996, 244) suggests that this demonstrates “the general inability of the courts to understand fully the real terror of woman and child abuse.”¹⁴⁷

The inadequate and half-hearted support provided by state institutions such as the police and the courts is an impediment to women leaving their abusers (Enos 1996, 250).¹⁴⁸ Lack of shelter spaces (Working Group 2000, 859), police inaction (Working Group 2000, 860; Miccio 1999, 104), and ineffective court orders (Working Group 2000, 861) are only some of the characteristics of state malfeasance that support domestic violence. Miccio (1999, 116) reports, for example, that the Senate Judiciary Committee found that “crimes disproportionately affecting women are treated less seriously than comparable crimes affecting men.” Woman battering is one of the classes of crimes against women that is typically underreported and undercharged by the police (Enos 1996, 251; Miccio 1999, 116).

The literature recounts many stories of women like Cynthia D. where:

The same family court that refused to jail Cynthia’s abuser for twice violating an order of protection penalized the mother by removing the children because she failed to stop the abuse herself (Miccio 1995, 1103).

¹⁴⁷ Throughout the course of this review I will characterize the attitudes of judges and prosecutors as oppressive to women. Not all judges and prosecutors hold such views and indeed some judges have echoed feminist concerns in failure to protect cases. (See for example Phillips 1992, 1577. And see also the comments of Wilson, J. in *R. v. Lavallee supra* note 8, and those of L’Heureux-Dubé and McLachlin, J.J., in *R. v. Malott, supra* note 95) Nevertheless, on the whole, the literature reflects that the attitudes and beliefs of prosecutors and judges as evidenced by their judgements are ones that are harmful to women who are battered.

¹⁴⁸ It is important to note, as a number of authors do, that the feminist movement began addressing the problem of domestic violence in the 1970’s, and has succeeded in getting the state to recognize domestic violence and to enact a number of laws to combat it (Enos 1996, 234; Mahoney 1994, 61; Miccio 1999, 90, 99). Nevertheless, as Enos (1996, 234) points out, the number of women and children abused in the U.S. (and in Canada) remains “staggeringly high”.

As Miccio (1999, 103) notes, the response of social systems is critical since “‘leaving’ is not carried out in isolation.” Moreover, (ineffective) state response conditions not only the conduct of the batterer (who knows he can get away with violence against his partner) but of the woman (who comes to realize that the state will not support her or her efforts to resist the abuse) (Miccio 1999, 99, 114). By minimizing the importance and response to crimes against women, social institutions reinforce abusers’ control and perpetuate violence against women (Enos 1995, 262).

Domestic violence is an isolating experience for women. This is often a deliberate strategy of the batterer who attempts to isolate the woman socially but cutting her off from her friends, family and community supports, and economically, by controlling her access to financial resources, including paid employment (Enos 1996, 246). Often friends, family and religious institutions are unaware of the battered woman’s efforts to leave. Karen Rogers (1994, 20) finds that 22% of Canadian women who are battered surveyed had never told anyone about the abuse. Friends and family may be aware of the violence, but because of strong cultural prescriptions of women’s obligations to their husbands (‘til death do us part), and to maintaining the ‘family’ in its dominant (nuclear) form (children need a father), they are unsupportive of the battered woman’s efforts to leave the relationship (Enos 1996, 253).¹⁴⁹ Furthermore, even when friends and family are aware and do support a battered woman they may often be threatened, intimidated or harassed by the batterer (Enos 1996, 254).

Enos notes that:

¹⁴⁹ See N. Nason-Clark (1995) and (1996) for a Canadian perspective on religious institutions’ responses to domestic violence.

Too often, every person the battered woman turns to for help excuses herself from participation in the struggle and heightens the woman's sense of powerlessness (1996, 247).

The cultural inscriptions of "battered woman" result in these women being labelled as weak, masochist (Phillips 1992, 1557) and pathological (Mahoney 1994, 61; Phillips 1993, 1559). These labels, including "once a battered woman, always a battered woman",¹⁵⁰ are harmful to women. Furthermore, because these labels do not describe women's actual experience of battering, many women who are battered do not identify with them and resist self-defining themselves as battered women (Enos 1996, 247; Mahoney 1994, 62). This too adds to their isolation.

A number of authors locate law as a contributing factor to the isolation of women who are battered (Enos 1996, 251; Murphy 1998, 722; Phillips 1992, 1575). In constructing domestic abuse as evidence of 'bad' mothering, law prevents women from reaching out for the resources they need to resist the violence (Daigle 1998, 298; Davidson 1995, 373; Phillips 1992, 1557; Working Group 2000, 857).¹⁵¹ As Bonnie Rabin (1995, 1111) notes:

The paradox of society's treatment of battered women is that the word is 'out': if you report domestic violence in your home, your children might be removed; if you are a child and you make a report, you may be placed in foster care or a group home.

¹⁵⁰ *In re Farley*, 469 N.W.2d 295 (Mich. 1991) the court of appeal confirmed the termination of a battered mother's rights on the sole basis that the mother *might* be at risk of entering another battering relationship in the future. See Phillips (1992, 1564, 1565) for a good discussion of the case and her response to the 'myth of predictability'.

¹⁵¹ Evidence of this phenomenon was reported by the Massachusetts Department of Social Services that found that when it started to use domestic violence as an indicator of child abuse "without any corresponding training or clinical support" the result was both an increase in child abuse reports and a decrease in women who are battered seeking services" (Working Group 2000, 857).

Thus, there are many reasons why women do not leave their abusive husbands. Women make strategic choices to stay or to go based on a number of factors: their assessments of both known risk (the battery) and the unknown risks (poverty, homelessness, greater violence) (Daigle 1998, 310; Magen 1999, 132; Roberts 1993, 123). They make these choices in isolation and often in urgent circumstances (Mahoney 1995, 74). They battle not only the abuser, but also cultural stereotypes that label women who are battered as weak, masochistic and bad mothers. And, too often, they battle a legal system that, through a combination of ideology and method erases both their experience of violence and their resistance to the violence. An important point is that none of these should be viewed as *excuses* for women not leaving their abusers or 'failing' to protect their children. Rather they should be viewed as a constellation of factors that shape women's (reasonable) response to domestic violence and the challenges of mothering in that context (Mahoney 1994).

As long as law decontextualizes women, their experiences of violence and the strategic choices they make to resist it remain silenced. Because law decontextualizes women their decisions to remain with the batterers will not be considered or viewed as a strategic choice but only (retrospectively) as a failure (to leave) (Mahoney 1995, 77). The next section of the review examines the nature of failure to protect laws and how this silencing is accomplished through legal method.

3. *Nature of 'Failure to Protect' Laws*

This section of the chapter discusses what the literature has contributed to our knowledge of U.S. 'failure to protect' laws and how the doctrine of failure to protect is (re)produced in law

through legal method. This part is divided into three sections. Parts a) and b) provide brief overviews of the various laws, both criminal and child welfare, which are used to prosecute women for failing to protect their children. Part c) addresses the legal standards applied to determine the guilt or culpability of battered women accused of failing to protect their children. Part d) canvasses the defences that may be available to women who are battered charged under child welfare or criminal law with failure to protect, and what the literature advocates as a means of ameliorating the unfairness of the current legal standards to women who are battered.

a) *'Failure to Protect' under U.S. Criminal Law*

In the U.S., unlike Canada, criminal law is enacted by the individual states. Accordingly, there is no uniform criminal code which creates a 'failure to protect' law, and the literature reflects that women are variously prosecuted under what are known as child abuse 'commission' or 'omission' offences or under general criminal laws.¹⁵² The legal basis of the prosecution will depend on the legal regime that operates in the State where the woman is being charged, as well as on prosecutorial discretion (Murphy 1998, 719).

What are generally referred to in the literature as criminal 'failure to protect' laws are those laws found in criminal child abuse statutes which have codified the doctrine of failure to protect so as to impose criminal liability on those who have a duty to protect a child and fail to fulfil that duty (Enos 1996, 236; Panko, 1995, 65; Peters-Baker 1997, 1012). These are

¹⁵² See *supra* note 22 for discussion of U.S. Model Penal Code.

also known as 'omission' statutes and have been enacted by thirty-seven of the fifty states.¹⁵³ This is the type of legislation that the Canadian government is considering using as a model for its proposed amendments to the *Code*.

In contrast to 'omission' statutes are 'commission' statutes, which seek to punish those who have actually inflicted abuse on the child (Johnson 1987, 365; Peters-Baker 1997, 1013). Twelve states have only enacted 'commission' statutes under their child abuse laws (Enos 1996, 236; Johnson 1987, 366). Nevertheless, in these states, the doctrine of 'failure to protect' has been used to hold non-abusive¹⁵⁴ women who are battered accountable under the commission laws. For example, in *Terri Williquette v. State*¹⁵⁵ the mother was convicted of child abuse for leaving the children with the abusive father while she was at work. The mother did not herself abuse the children but the court found that the mother knew the father was abusing the children, and this demonstrated her "intent and effort to perpetuate the abuse" (Enos 1996, 239). The court broadly interpreted "child abuse" and held: "a parent who knowingly permits another person to abuse the parent's own child subjects the child to abuse within the meaning of [the child abuse statute]" (Johnson 1997, 374).

The doctrine of failure to protect is also used to prosecute non-abusive mothers under general criminal statutes (Lane 1997 1223; Peters-Baker 1997, 1013; Roberts 1993, 107). For

¹⁵³ One of the non-feminist articles (Liang & MacFarlane 1999, 409) criticizes these laws on the basis that they are generally 'misdemeanour' or less serious offences, and usually carry a penalty of less than 5 years in prison. None of the feminist literature actually discusses the penalties under the 'omission' statutes. This is not surprising given that the literature argues that the prosecution of battered mothers is in and of itself a travesty.

¹⁵⁴ I consider that mothers who do not themselves abuse their child(ren) are 'non-abusive' and describe them as such. Of course the laws that I am describing construct them otherwise. Under both 'omission' and 'commission' statutes, 'failure to protect' is constructed as abuse *per se* and these mothers, in turn, as abusers.

¹⁵⁵ 385 N.W.2d 145 (Wis. 1986)

example, where a child is killed, a non-abusive mother may be charged with murder, manslaughter or criminal negligence under the principles of accessory, complicity or aiding and abetting (Davidson 1995, 366; Enos 1996, 238; Peters-Baker 1997, 1013; Zahniser 1997, 1222).¹⁵⁶ In these circumstances, non-abusive battered mothers are held equally accountable with the abusers for the harm to the child. Even where child abuse 'omission' statutes exist, and could provide a basis of liability for the mother, she may be charged under general criminal statutes in order to achieve a higher penalty (Zahniser 1997, 1232).

b) Failure to Protect Under U.S. Child Welfare Law

The doctrine of 'failure to protect' also provides a basis for prosecuting non-abusive battered mothers under child welfare law for the abuse or neglect of their children. Once again, state laws vary greatly and the literature is not always attentive to differences. Nevertheless, the literature identifies two situations where a non-abusive battered mother might find herself struggling to retain custody of her children and defending herself against charges of abuse or neglect under child welfare statutes.

The first situation is where the mother has 'permitted' the child to be abused by another person. Most states have codified the doctrine of 'failure to protect' in their child welfare statutes (Miccio 1999, 91).¹⁵⁷ These statutes impose an affirmative duty on parents to protect

¹⁵⁶ As we will see in Chapter 4, it is these types of laws that are often the basis of charges against non-abusive parents in Canada.

¹⁵⁷ Most Canadian child welfare statutes contain 'failure to protect' language. In British Columbia, for example, the *Child, Family and Community Service Act*, R.S.B.C. 1996, c. 46 as am. provides: Sec. 13. When protection is needed. (1) A child needs protection in the following circumstances: ... (c) if the child has been, or is likely to be, physically harmed, sexually abused or sexually exploited by another person *and if the child's parent is unwilling or unable to protect the child*. [Emphasis added] Manitoba and Saskatchewan do not have specific

their children from harm. Where a child is physically abused, the basis of liability is the non-abusive parent 'allowing' the abuse or 'allowing' the child to be exposed to the risk of the abuse (Miccio 1995, 1089). "Allowing" the abuse may constitute either abuse or neglect by the mother herself. As with criminal proceedings, the court's enquiry will focus on whether the mother knew or ought to have known of the abuse or the risk of abuse. A mother's knowledge of abuse or the risk of abuse is taken as evidence of her complicity in the crime.

The second situation is where the allegation of neglect against the mother is based on her own abuse by the batterer. The basis for the finding of neglect against the battered mother is her 'failure to protect' her children from witnessing domestic violence. In these cases, in what has been described as "'Alice through the looking glass' logic" (Miccio 1999, 92), women are actually prosecuted for failing to stop their own abuse.¹⁵⁸

The literature indicates that this is a relatively recent and, needless to say, disturbing development in child welfare law (Working Group 2000, 852).¹⁵⁹ This 'punitive policy' toward women who are battered has been attributed to the recent awareness of the harm caused to children by witnessing domestic abuse.¹⁶⁰ Some commentators suggest that, ironically, this awareness resulted from feminists' advocacy to compel courts to consider

failure to protect language but include omissions in their definitions of what constitutes a child in need of protection. For example, the *Child and Family Services Act*, R.S.M. 1987, c C 80 as am. provides: Sec. 1 Definitions, "abuse" means an act or omission by any person where the act of omission results in (a) physical injury to the child... [Emphasis added]

¹⁵⁸ As discussed, *supra* note 35, research on this phenomenon in Canada is urgently needed.

¹⁵⁹ The Working Group notes that *Re Lonell*, 673 N.Y.S.2d 116 (App.Div. 1998), , 'changed the landscape' in holding a non-abusive battered mother negligent on the basis only of her failure to leave the batterer.

¹⁶⁰ As previously discussed in Part 5 of the Introduction, research in the U.S. has examined the harm caused to children from witnessing domestic violence but these research efforts and theories remain controversial. See Enos 1996, 235; Davidson 1995, 369; Magen 1999, 130; Rabin 1995, 1109 Trepiccione 2001.

domestic violence (mainly woman abuse) in child custody matters (Working Group 2000, 849). In 1996, the New York State Legislature implemented a seemingly progressive law, requiring courts to consider domestic violence in child custody cases. However, as the Working Group (2000, 851) suggests:

Domestic violence advocates could never have foreseen that this law, intended to assist victims of domestic violence...would provide the underpinnings for finding battered mothers guilty of neglecting their children.¹⁶¹

The Working Group (2000, 873) identifies (without articulating) this trend as a form of backlash, and notes:

It took until 1996, almost twenty years of education and advocacy, for the state legislature and judges to recognize the harmful effects of domestic violence. Now, child welfare and court systems have been quick to hold mothers accountable for the harm.

The victim blaming evidenced by this practice reveals the deep-seated belief that women are somehow responsible for their own abuse, and demonstrates the dangers of using law to effect social change without changes to underlying attitudes, systems and beliefs (Magen 1999, 134).

Four states have now expanded their definition of child neglect to include witnessing domestic violence (Magen 1999, 128).¹⁶² However, statutory enactment is not a prerequisite to a finding that a mother has been neglectful by reason of 'allowing' her own abuse. The literature indicates that courts are willing to broadly interpret child neglect statutes to include witnessing domestic violence (Magen 1999, fn 1; Working Group 2000, 852), and

¹⁶¹ This work is now underway in Canada (Neilson 2000). Hopefully the lessons from New York will assist Canadian feminists in formulating strategies that are sensitive to this potential outcome.

¹⁶² Six Canadian provinces include domestic violence in the home as a ground for declaring a child in need of protection. See *supra*, note 116.

commentators suggest this is a trend likely to continue and accelerate as awareness of the harm caused to children by domestic violence increases (Davidson 1995, 360, Working Group 2000, 855, 856).

c) *The Legal Standards in U.S. Failure to Protect Prosecutions*

As mentioned, a central theme in the literature is that 'failure to protect' laws 'decontextualize' women's actions and in so doing erase both women's experience of violence and their agency in resisting it. The question addressed in this section is how this decontextualization is achieved.

There is some danger in attempting to generalize the legal standards applied to determine the guilt or culpability of non-abusive mothers, and in my view the literature's attempt to do so has resulted in some weakness in the analysis. Nevertheless this decontextualization of women's actions appears to result primarily from the application of the 'reasonable parent' standard and a 'strict liability' standard.

i) *The 'Reasonable Parent' Test*

As we saw above, not only do the types of statutes used to prosecute mothers vary, but also the wording of the different statutes differs greatly from state to state (Liang 1999; Peters-Baker 1997). Nevertheless, as Enos (1996, 239) suggests:

Courts have employed a broad interpretation of commission, statutes, omission statutes and other criminal statutes to punish battered women for the injuries inflicted on their children by another.¹⁶³

¹⁶³ See also Peters-Baker (1997, 1018 and 1019).

Because the courts apply a broad interpretation of the statutes, very often the legal enquiry is confined to two questions, regardless of the actual legal basis for the charge or the circumstances of the offence:

- 1) Whether the mother knew or ought to have known that the child was or was at risk of being abused; and
- 2) Whether the mother failed to prevent or 'allowed' the abuse (Panko 1995, 68).

Whether the mother knows of the abuse is a question of fact. In many child abuse cases where a mother is also battered, the mother is aware of abuse to the child. If the mother denies knowledge of the abuse the courts may infer knowledge based on a 'reasonable parent' standard. The question in this case is whether a 'reasonable' parent would have known of the abuse or of the risk of abuse to the child (Enos 1996, 238; Liang 1999, 413; Miccio 1999, 111; Peters-Baker 1997, 1017).¹⁶⁴ In one case,¹⁶⁵ the mother's own abuse was held to be reasonable notice of the risk that the children might also be abused (Panko 1995, 87).

If the mother has actual or constructive knowledge of the abuse or the risk of abuse, she has a legal duty to prevent it.¹⁶⁶ Again, most courts impose a 'reasonable parent' standard to assess the steps taken by a mother (Daigle 1998, 298; Johnson 1987, 369; Peters-Baker 1997, 1011; Zahniser 1997, 1224). Under the 'reasonable parent' standard mother can discharge her legal duty to protect the child by removing the child from the risk, removing the abuser from the

¹⁶⁴ As I will demonstrate, the reasonably prudent parent is also now the standard in Canadian prosecutions of parents for failing to protect their children.

¹⁶⁵ *State v. Williams* 670 P.2d 122 (N.C. Ct. App. 1983).

¹⁶⁶ Enos (1996, 237) notes, "in all fifty states parents have an affirmative legal duty to protect and provide for their minors."

home or by reporting the abuse to the authorities (Johnson 1987, 369; Panko 1995, 68). As noted above, there are strong cultural inscriptions that battered woman should leave their batterers. If a mother does not leave her batterer or act in one of these other culturally and legally sanctioned ways, she will be viewed as complicit in the abuse (Mahoney 1994, 78; Magen 1999, 129).

The literature demonstrates that courts judge women extremely harshly. For example, in one case,¹⁶⁷ a court terminated a mother's parental rights because she had delayed reporting the abuse for five months based on the advice of an attorney that she needed evidence of the abuse before anything could be done (Murphy 1998, 197). The court ignored the mothers "extraordinary efforts" to protect her children and held that "the untimeliness and inadequacy of the actions provided clear and convincing evidence that the court should terminate parental rights" (Enos 1996, 257).

The courts have held that the 'reasonable parent' standard does not require a mother to put herself in danger (Johnson 1987, 369; Zahniser 1997, 1224). However, some authors argue that the case law indicates judges require just that (Enos 1996, 255; Miccio 1999, 109). *In re Dalton*¹⁶⁸ a mother was found neglectful for remaining with her abusive husband. Miccio (1999, 109) notes:

...the court dismissed uncontroverted evidence that when the mother attempted to intervene on behalf of the children, she was severely beaten... the abused mother was expected to act on behalf of her children, without regard for herself or for the potential harm that exists to the children. Such a standard is emblemative of the

¹⁶⁷ *In re S.D.S.* 648 S.W.2d 351. (Tex. App. 1983)

¹⁶⁸ 424 N.E.2d 1226 (Ill. App. Ct. 1981).

fatuous social expectation that the 'good mother' will sacrifice her own life for her child'.

'Reasonable' person tests are problematic for women and especially for women who are battered. While a 'reasonable parent' standard may be applied on either an objective basis or on a basis that purports to account for the circumstances of the mother (Miccio 1999, 111, 113), both are dangerous because, as Miccio (1999, 110) argues:

...in reality, the yardstick used to measure conduct is situated along axes of gender, race, class and sexual orientation since dominant cultural norms construct the standard. Thus, in spite of neutral language, the reasonable parent or person is white, male, heterosexual and middle class.¹⁶⁹

As discussed in the last Chapter, 'reasonable' person standards are endemic in law. Under the traditional liberal concepts that inform law, all legal subjects are presumed to be rational, autonomous, equal and functioning subjects (Lacey 2000, 90; Murphy 1998, 690). These concepts do not provide for 'difference', and when applied to battered mothers charged with 'failure to protect' result in the particular circumstances of battered mothers remaining unvoiced, unexplored, and unaccounted for. Miccio (1999, 95) argues: "any reasonableness determination is internally incoherent since it fails to consider the constitutive nature of domestic violence in shaping maternal conduct." Moreover, she suggests (1999, 115) that, "such neutrality obscures the gendered nature of domestic violence, the state's failure to respond and the construct of mothering."

¹⁶⁹ As discussed in the previous Chapter, the 'imminent attack' rule was based on male norms of when it is reasonable to use physical force in self-defence. See also Cahn (1992, 1404), Forell (2000, 14) and Lacey (2000,92) for discussion of how male norms inform the 'reasonable person standard'.

For women who are battered, the strong cultural belief that they should leave their batterers informs the standard of reasonableness against which their conduct will be measured.¹⁷⁰ The 'reasonable parent' standard validates the "why didn't she leave question'. Mahoney notes:

The idea that women should leave – and that a woman acting in her own interest will always leave – is shaped by [an] atomistic view of agency.

As a result of the application of reasonable parent standards, the battered woman's actual experience, including the context of violence and the agency she exerted within that context is legally irrelevant to the determination of the issues (Grace 1994, 189, 190; Miccio 1999, 113). Thus, the application of the "reasonable parent' test is one way that law silences the voices of battered mothers.

ii) Strict Liability

Generally, U.S. 'failure to protect' laws do not require that the mother intend to harm the child (Enos 1996, 237; Liang 1999, 425; Peters-Baker 1997, 1016; Tanck 1987, 686). The elements of the offence will be satisfied where the mother 'permits' or 'creates' a substantial risk of injury. The critical issues are the legal relationship that creates the duty of care, and the existence of harm (Miccio 1999, 107). Witnessing the abuse without stopping it, leaving the child with a known abuser or failing or delaying to seek medical attention will all attract liability (Murphy 1998, 720; Peters-Baker 1997, 1015).

¹⁷⁰ This was acknowledged by the Supreme Court of Canada in *Lavallee*. The result of *Lavallee* is, of course, to mitigate the harshness of the 'reasonable person' standard by allowing evidence of BWS to contextualize women's actions and perceptions. The question that will be taken up in later Chapters of this thesis is whether women charged with failing to protect their children benefit from this approach.

Even in cases where there is an intent element to the crime, for example where mothers are charged with murder or assault under the doctrine of failure to protect, courts will interpret the mother's knowledge of the abuse and her failure to take action to prevent it as evidence that she intended the abuse of the child (Peters-Baker 1997, 1019). For example, in *People v. Peters*¹⁷¹ a mother was convicted for murdering her infant son under an "accountability" statute. The court held:

The accountability statute mandates that the person charged must have the intent to promote or facilitate the offence. Intent may be gleaned from knowledge. A person who knows that his or her child is in a dangerous situation and fails to take action to protect the child, presumably intends the consequence of the inaction (Liang 1999, 415).

The willingness of the courts to hold mothers accountable in the absence of an intent to harm or neglect the child and without enquiring into the mother's circumstances, has lead many of the commentators to argue that *strict liability* is often the operative standard in failure to protect cases (Enos 1996, 229; Miccio 1995, 1092).¹⁷² Strict liability has been defined as "one which imposes criminal sanction for an unlawful act without requiring a showing of criminal intent" (Johnson 1987, 372). It is important to note that strict liability is a legal standard which is reserved for only the most compelling matters because of the potential injustice it creates for the accused (Johnson 1987, 373). It permits no defence to the allegation. If the prohibited act occurs, the person is liable and whether or not it is "committed intentionally, knowingly or negligently is immaterial" (Johnson 1997, 373). This was dramatically illustrated in a 1984 case, *In re Katherine C.*¹⁷³ where the court held

¹⁷¹ *People v. Peters*, 586 N.E. 2d 469 (Ill. App. Ct. 1991).

¹⁷² As will be discussed in Chapter 4, the operative standard in Canada is the 'penal negligence' not 'strict liability'. Nevertheless, there are strong parallels between the two and the U.S. experience is still informative.

¹⁷³ 122 Misc. 2d 276 (N.Y. Fam. Ct. 1984).

“[g]ood faith, good intentions, and even best efforts are not, *per se*, defences to a child protective petition” (Miccio 1995, 1092).

Some courts have specifically articulated strict liability as the standard that applies in child neglect and child abuse proceedings (Johnson 1987, 372; Miccio 1995, 1092; Panko 1995, 87). *In re Glenn G.*,¹⁷⁴ a New York State family court found a non-abusive battered mother neglectful for failing to protect her children from sexual abuse by the father. Evidence that the mother suffered battered woman syndrome was accepted by the court as a defence to the allegations of abuse but not for neglect. The court held that the mother’s inability to prevent the abuse was neglect *per se* because “the neglect statute was a strict liability statute, and the reasons for the mother’s failure to remove herself and the children from the batterer had no bearing on her culpability” (Working Group 2000, 853). Miccio (1999, 108) suggests that in practical terms, the distinction made between strict liability as a basis for neglect but not abuse is meaningless since both trigger the same penalty, the loss of the child to the state.

Even where a court does not expressly articulate a strict liability standard, the judicial decisions and reasons suggest that it is. For example, *In re Lonell J.*,¹⁷⁵ a case where the sole allegation of neglect against the mother was her own abuse, the court found that she had failed to meet the standard of ‘exercising a minimum degree of care’ to protect her children because she stayed in the relationship. As the Working Group notes, “without saying so, the appellate court appeared to hold the mother ‘strictly liable for the actions of her abuser’

¹⁷⁴ 587 N.Y.S.2d 464 (Fam.Ct. 1992). Miccio notes (1995, 1092) that this case is noteworthy because it was the first case to “name what the courts had been doing for eight years, applying the strict liability standard in neglect matters.”

¹⁷⁵ 673 N.Y.S.2d 116 (App. Div. 1998).

(2000, 852). In *Lonell*, as in other cases, the courts never considered why the mother might have stayed or the steps she took (repeated calls to police, obtaining an order of protection, attempting to leave) to protect herself and her children (Working Group 2000, 852).

The problem with strict liability is that it means no less than preventing the violence to herself and her children. It means doing, as Miccio (1995, 1094) points out, what society cannot – stopping the violence. Strict liability focuses the court's inquiry only on the *results* of the maternal effort. The acts of the mother in the context of the violence within which she and the children live are irrelevant (Miccio 1999, 109). In other words, strict liability decontextualizes the mother and is another way that law silences the voices of battered mothers and blames them for acts of others that are beyond their control.

Enos (1996, 264) notes that strict liability is not required by the statutes, but is a result of the interpretation and application of the statute by the courts. That the courts are willing to impose a strict liability test to hold mothers accountable for failing to protect their children from harm is telling. Some might argue that it is evidence of the high value society places on children. I'm more inclined to agree with Roberts (1993, 98):

Considering our society's general neglect of children, it is probable that laws which punish mothers' conduct do so just as much to enforce gender roles as to protect children.

d) Defences to Failure to Protect

Three states allow affirmative defences in criminal child abuse proceedings (Enos 1996, 237; Davidson 1995, 365; Magen 1999, 129, Panko 1995, 86). One statute provides,

that at the time of the neglect there was a reasonable apprehension in the mind of the defendant that acting to stop or prevent the neglect would result in substantial bodily harm to the defendant or the child in retaliation.¹⁷⁶

Some commentators suggest that the implementation of these provisions is a positive development and that the adoption by more states would correct the injustice currently perpetuated by 'failure to protect' statutes (Daigle 1998, 312; Davidson 1995, 365; Magen 1999, 134; Peters-Baker 1997, 1022; Roberts 1993, 114; Working Group 2000, 866).¹⁷⁷

Others argue that the problem with these provisions is that they still cast the question in terms of the mother's *failure* to act (Magen 1999, 129). Moreover, under these provisions, domestic abuse becomes an *excuse* for failure. This is the reason that a number of commentators are sceptical about the value of the Battered Woman Syndrome ("BSW") defence¹⁷⁸ in 'failure to protect' cases.¹⁷⁹ In the previous Chapter I discussed a number of the concerns with the use of BWS in the context of self-defence and these apply equally to

¹⁷⁶ Minn. Stat. Ann., 1993. Note that this is quite similar to the requirements for a claim of self-defence in our *Code* discussed in Chapter 2.

¹⁷⁷ One of the non-feminist articles on the subject characterized these provisions as "loopholes" (Liang & MacFarlane 1999, 425). Expressing the concern that child abuse is a "widespread social plague" (1999, 449) in the U.S., these authors argue that the current legal regime fails to hold 'passive parents' sufficiently accountable for harm to their children. They argue that prosecution of the 'passive parent' for the murder is currently too difficult and that the punishments are inadequate. This article expressly considers the liability of battered women for failing to protect their children and argues that evidence of battered woman syndrome should not be admissible in death by child abuse cases. The authors' primary concern appears to be that allowing battered women a "loophole" (1999, 425) would "create no incentive for battered women to report abuse..." (1999, 442). They argue (1999, 442): "To deter passive acceptance of known child abuse, the duress defense should not be permitted in cases when a child *dies* as a result of abuse. To require otherwise would create the bizarre incentive to let the child die before seeking help. Such a result is unconscionable." The authors' views in this regard reflect their obvious commitment to the liberal view of the subject as an autonomous, rational, unconstrained agent (1999, 450), which leads them to believe that being a battered woman and being able to protect a child is a matter of 'choice' (1999, 441, 443, 445), and in turn reflects the stereotypes about women who are battered that have been discussed in this Chapter.

¹⁷⁸ As previously noted BWS is not a defence *per se* (See *supra* note 108).

¹⁷⁹ Of course, because of the strict liability standard most U.S. courts will not allow evidence of BWS in failure to protect cases. This may not be the case with the penal negligence standard and I will discuss this issue in Chapter 4.

failure to protect proceedings. However, in child neglect/abuse proceedings evidence of BWS has the additional problem of being counterproductive, since it demonstrates that the mother *is not capable of mothering* (Miccio 1995, 1099). Not only is this a bad result for the mother, it is often a misrepresentation of battered mothers who often actively resist and seek ways to end the abuse (Magen 1999, 132; Miccio 1995, 1100). In any event it misses the point. Because BWS seeks to explain *why she didn't leave*, it legitimizes the paradigm established by 'failure to protect' laws and does nothing to refocus the enquiry where it should be – on the batterer.

Johnson (1987, 367) suggests that courts are, in any event, reluctant to accept the affirmative defences on the basis that, even if the mother could not have stopped the abuse at the time, she had other 'options', such as removing the child or reporting the abuse to someone who could have stopped it. As this Chapter has demonstrated the experiences of women who are battered are much too complex to assume that these are necessarily viable or reasonable options. This demonstrates that, in the absence of more fundamental changes to the paradigm and to the attitudes and beliefs of prosecutors and judges, affirmative defences will not likely result in the acquittals of many battered mothers charged with failing to protect their children.¹⁸⁰

Many of the authors (Daigle 1998, 312; Enos 1996, 268; Miccio 1994, 94; Murphy 1998, 766) argue that what is needed is a legal standard that takes into account women's experiences of battering and requires a 'broader and more careful consideration of women as

¹⁸⁰ Just as the use of BWS has not resulted in the acquittals of large number of women charged with killing their husbands. See (Shaffer 1997) and discussion Chapter 2.

mothers” (Murphy 1998, 761). Miccio (1999, 94) advocates a reasonable battered mother test. She argues (1999, 95):

Imposition of a standard incorporating the experiences of abused mothers and their children more adequately reflects the content and context of the violence and how that violence shapes maternal decisions. By considering the circumstances within which mothers and children live, the violence is not longer obscured but given voice...Additionally, RBMT identifies the structural and systemic dimensions to domestic violence.

However, in addition to legal standards that allow for the (re)contextualization of battered mothers’ experiences, many authors underscore the vital importance of education aimed at dispelling the myths surrounding domestic violence (Daigle 1998, 313; Enos 1996, 263; Murphy 1998, 764) and of maintaining and strengthening social supports including shelter services, economic supports for women and law enforcement, that empower women to end the abuse (Daigle 1998, 312; Enos 1996, 262; Miccio 1995, 1106). It is these efforts that will lead to a more fundamental shift in the paradigm of maternal ‘failure’ currently established by the doctrine of failure to protect.

4. *Summary & Conclusions*

Feminist work that examines ‘failure to protect’ laws in the context of women who are battered shows that these mothers are doubly oppressed. First battered mothers are oppressed, as are all women, by the cultural inscriptions of ‘good’ mothering, which create unrealistic standards against which women are measured and judged; ‘good’ mothers are those whose love for their children overcomes all obstacles; ‘good’ mothers always know when their child is at risk and can always protect them from those who would abuse them; and, it seems, ‘good’ mothers are not battered mothers.

These cultural standards are (re)produced in the doctrine of failure to protect. The fact that the laws informed by the doctrine are applied on a strict liability basis is a testimony to the power of the ideology. There is no defence to a woman failing to protect her child. Even where defences may be permitted, judges are reluctant to allow that there is any legitimate 'excuse' for a woman to fail to protect her child. Thus, if a woman is not complicit in the abuse, she is at least neglectful.

Secondly, these women are oppressed by cultural misconceptions of domestic violence. These misconceptions are evidenced by the belief that the solution to being battered is to leave the batterer, and are imported into law through the 'reasonable parent' standard applied to battered mothers. A reasonable person would not accept being beaten. A reasonable person would leave or, in the case of witnessing the abuse of a child, would intervene to stop the abuse. Thus, if a woman does not leave or intervene to stop abuse, then she is complicit in the abuse of herself and/or her children. Battered women who don't leave are viewed as pathological, weak or masochistic. In any case, they are not 'good' mothers.

The literature exposes the fallacy of the dominant knowledge about domestic violence, and gives voice to the complexity of battered women's experience. It shows that women employ strategies to resist domestic violence and create safe space for themselves and their children within the limits of the options that they have available. These limits are imposed partly by patriarchal structures that subordinate women both socially and economically and operate to trap women in violent homes. These limits are also imposed by the state, which the literature exposes as complicit in the perpetuation of domestic violence through its failure to support

women's efforts to leave with shelters, financial aid and other supports, and its unwillingness or inability to keep women and their children safe from their batterers.

'Failure to protect' laws construct battered mothers as 'bad' mothers and punish them for the violence perpetrated by men. These laws are dangerous because they effectively isolate and further marginalize women who are battered. They discourage battered mothers from seeking help because battered mothers have learned that if they do report violence in their homes they risk losing their kids (at best) or going to jail (at worst). The literature challenges the paradigm established by the doctrine of failure to protect and exposes it as fundamentally flawed. What is needed is a paradigm that accounts for the context of violence in which battered mothers mother. As Miccio (1999, 121) argues,

By contextualizing mothering, it is possible that courts charged with the protection of children can identify the individual and systemic actors that perpetuate the harm. Perhaps then we can craft protection paradigms that keep children safe, empower mothers and locate the contours of maternal and state responsibility.

In this regard, what is advocated are legal standards that would "situate maternal responsibility within a particularized social reality" (Miccio 1999, 121). In this way, failure to protect laws would still hold culpable parents responsible while taking into account the material realities of women's lives, and limits on both their agency and their ability to protect their children.

We cannot "assume in advance" of doing research that the insights offered by the U.S. experience with failure to protect laws will necessarily apply in Canada (Boyd 1991, 111). However, the American literature makes several valuable contributions to this project. First, it reminds us of the complexity of battered women's experience and the challenges of

mothering in that context. Secondly, it suggests that we need to be attentive to both the ideological and methodological features of law. The processes by which the doctrine of failure to protect is incorporated into law are subtle and the project of mapping the law must account for these subtle processes. Finally the literature warns that, although this thesis is centrally concerned with the impact of the doctrine of failure to protect on *women who are battered*, we should not expect that the *fact* of battering will appear in many of the 'failure to protect' cases. After all, a feature of the doctrine of failure to protect is that it operates to render these experiences invisible in law.¹⁸¹ With these lessons from the U.S. experience in mind, the next two Chapters will address the main project of this thesis which is to identify how women are prosecuted for failing to protect their children under Canadian criminal law and how these laws are oppressive to women.

¹⁸¹ Indeed, in the Introduction I presented the case of Donna Roud. This is an unusual case, not because Donna Roud was charged and convicted for the crime of attempted murder committed by her husband, but because evidence of domestic violence became part of the court record and the decision of the court of appeal. Most of the cases reviewed in this section do not contain any reference to domestic violence although some contain clues that it existed. The reason for this will be explored in the Chapter 5 of the thesis.

Chapter 4 – The Doctrine of Failure to Protect in Canada and Legal Method

This Chapter will map the actual and potential ways that parents (often mothers) are criminally prosecuted in Canada for failing to protect their children from abuse. As Christine Miccio (1995, 1088) has stated:

In law, as in the literary canon, the split image of the good/bad mother exists. Through the convergence of ideology (beliefs) and methodology (law), there exists a prescribed set of behaviours that distinguish the good mother from the bad mother, the neglectful mother from the concerned mother.

The central question in this Chapter is how law from a methodological (as opposed to ideological) perspective, facilitates the construction of mothers who fail to protect their children as ‘bad’ mothers – indeed not just ‘bad’ mothers, but so ‘bad’ that they are deserving of sanction by the criminal law. The ideology part of this equation will then form the central focus of Chapter 5.

I begin by providing a brief summary of the research method used to gather the cases upon which the research in this Chapter and the next is based. I also provide some general information about the cases that I classify as ‘substantiated’ failure to protect cases. Part 2 provides an overview of the various sections of the *Criminal Code*¹⁸² (hereafter the “Code”) that are used to prosecute mothers (and fathers) for failing to protect their children. Part 3 develops the thesis that the doctrine of failure to protect does operate in Canadian criminal law in so far as parents (usually mothers) are prosecuted under a variety of sections of the *Code* for failing to protect their children. While there is no ‘failure to protect’ provision per se (at least not yet) in the *Code*, I will demonstrate that, as in the U.S., existing criminal

¹⁸² R.S.C. 1985, c. C-46 as am.

offences have been interpreted so as to accommodate such prosecutions. Moreover, the law has developed in a way that facilitates the imposition of dominant societal standards of motherhood on women who fail to protect their children through 'objective' determinations of fault. That is, mothers who are criminally charged on the basis of their 'failure to protect' their children will be judged by the standard of the 'reasonable' person. Part 4 brings together various strands of this discussion and demonstrates how the law based on the doctrine of failure to protect has resulted in an "overly broad" (Enos 1995, 229) application of the doctrine of failure to protect.

1. Research Method

The cases that inform this study were gathered by standard library and computer searches using the Canadian Abridgement and the Quicklaw electronic database. My search strategies were designed to capture all decisions in criminal cases involving the failure of a parent to protect a child and/or the failure to provide the necessities of life under s. 215 of the *Code*.

While computer technology has vastly improved the accessibility of judicial decisions especially at the superior court level, many cases remain inaccessible. For example unreported decisions prior to 1986¹⁸³ are not generally included in the Quicklaw database or generally available through standard library searches. Even since 1986, many decisions, and especially those at the provincial court level, are not contained in the Quicklaw database. Many of the decisions that would fit my criterion would, in fact, be decided at the Provincial

¹⁸³ 1986 is the time that Quicklaw began its 'comprehensive coverage' of decisions from all courts in the provinces.

Court level, and accordingly would not be accessible through standard searches. Cases that involve guilty pleas may also be vulnerable to under-inclusion. For example, I was unable to obtain to locate any record in two cases concerning non-abusive mothers that had pled guilty to manslaughter for failing to protect their children.¹⁸⁴

Analysis of the cases gathered in my searches gave rise to two categories of failure to protect cases. The first category includes 17 cases that I identify as 'substantiated' failure to protect cases because it is clear on the facts that one of the parents¹⁸⁵ charged in connection with the abuse of a child did not themselves physically abuse the child.¹⁸⁶ The second category includes a further 20 decisions where both parents were charged but where: both parents were found to have been physically abusive to the child (5 cases); there were insufficient facts to determine the individual responsibility of the respective parents for the abuse or neglect (11 cases); the cases concerned issues of law and no facts of the case were provided (2 cases); or the parents' actions were based on religious grounds (2 cases). I consider these cases unsubstantiated because although one often got the sense that one parent was more responsible for the neglect or abuse of the child than the other, there were no findings of fact which supported their inclusion in the first category.

¹⁸⁴ My searches were broad enough to pick up the decisions concerning the abusive fathers that mentioned the mothers' guilty pleas.

¹⁸⁵ For the purposes of this section I use the term 'parent', 'mother' or 'father' as an omnibus term that includes people in significant or intimate relationships with the child or the child's parent.

¹⁸⁶ Classification of these cases is sometimes difficult. For example I was tempted but did not include *R. v. Speid* in this category. In that case the battered mother pled guilty to manslaughter for failing to protect the child, but the father (Speid) alleged that it was the mother who inflicted the final beating on the child. He was ultimately acquitted for reasons that will be discussed in Chapter 5. The mother also did admit to abusing the child, although not to the degree alleged against the father. I therefore include this case in the 'unsubstantiated' category.

This thesis also relies on a large number of cases that are not 'failure to protect' cases but contribute to various aspects of the discussion including the cases illuminating the historical development of the law.

This is not, of course, an empirical study, and the number of 'failure to protect' cases is too small to draw any statistically relevant conclusions. These cases are, nevertheless, illustrative of the themes that are developed in this thesis, and are useful for the purpose. The following observations about the cases in my 'substantiated' failure to protect category provide a general sense of the contours of failure to protect prosecutions.

- None of the 17 decisions pre-dated 1981. Nine were decided in the 1980s, seven in the 1990s and one in the 2000s.
- Ten cases involved decisions by courts of appeal.
- Mothers were the non-abusive parent in 12 cases.
- Fathers were the non-abusive parent in five cases. In one of these cases the abuser was the baby-sitter and the single father was prosecuted.
- In the vast majority of cases (all but 5) the same charges were *laid* against both the non-abusive parent and the abusive parent.¹⁸⁷ Of the remaining five, two decisions did not mention charges against the abusive father (presumably these fathers were prosecuted but I was unable to locate the decisions). Of the remaining three cases, (two of which involved non-abusive fathers) lesser charges were laid against the non-abusive parent.

¹⁸⁷ I use charges laid as the measure because, as will be seen, the cases cannot be as easily classified by outcome. This is because some involved guilty pleas, some were appeals of sentence, some appeals of convictions and in some, the ultimate outcomes are unknown.

- In eight cases the non-abusive parent was convicted or pled guilty to the same offence as the abusive parent.¹⁸⁸ In three cases the non-abusive parent was convicted or plead guilty to a lesser offence than that of which the abusive parent was ultimately convicted. In one case charges were eventually withdrawn against the mother. One case was dismissed against both parents at the preliminary hearing and the balance of the ultimate outcomes are unknown.
- In the vast majority (all but three) of decisions where sentences were mentioned, they were lower for the non-abusive parent.¹⁸⁹ In the remaining three cases the sentences at trial were the same for the (non-abusive) mothers and the fathers. The mothers' sentences were reduced on appeal in two cases, and the disposition of the appeal of the mother's sentence in the third case is unknown.

Once again I emphasize this information has no statistical significance. Nevertheless, it may be helpful in providing the reader with a general sense of the failure to protect cases that will be discussed in this Chapter and below.

¹⁸⁸ Four cases involved guilty pleas.

¹⁸⁹ It is not possible to draw any useful generalizations from the information on sentencing because of the great variations. For example, in the six cases where the parents were convicted of the same offence in the same proceeding the sentences of the abusive parents ranged from 4 years to 25 years and that of the non-abusive parent from 2 years to 15 years. The non-abusive parents received anywhere from $\frac{1}{4}$ to $\frac{3}{4}$ of the abusive parent's sentence.

2. Overview of Charging Sections

Parents who have allegedly failed to protect¹⁹⁰ their children may find themselves facing a variety of charges depending, in part, on the degree to which the child was harmed by the abuse.¹⁹¹ Section 215 is arguably the most important section of the *Code* because, either on its own or in combination with other sections it is the basis of most 'failure to protect' prosecutions. Section 215 provides, in part:¹⁹²

215(1) Every one is under a legal duty

- (a) as a parent, foster parent, guardian or head of a family, to provide the *necessaries of life* for a child under the age of sixteen years;

215(2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies upon him, to perform that duty, if

- (a) with respect to a duty imposed by paragraph (1)(a) or (b),
 - (i) the person to whom the duty is owed is in destitute or necessitous circumstances, or
 - (ii) the failure to perform the duty endangers the life of the person to whom the duty is owed or *causes or is likely to cause the health of that person to be endangered permanently*; or ... [Emphasis added]

¹⁹⁰ For non-abusive parents of abused children, the two types of 'failures' that most often attract criminal liability are failing to get medical attention for the child and failing to protect the child from abuse by a third party. In this section I will use the term 'fail to protect' to describe both these 'failures'.

¹⁹¹ I will discuss the other factors that affect the charges laid in failure to protect cases at the conclusion of this section.

¹⁹² I have included here only those portions relevant to parents' obligations to their children, however s. 215 also imposes duties on spouses, and caretakers of dependant persons. See Appendix 1 for the complete section. Similarly, I will, for the most part confine my discussion to cases involving children.

Section 215 both creates a duty to provide children with the 'necessaries of life' and an offence for failing to do so.¹⁹³ The purpose of Section 215 has been recently expressed as follows:

The purpose of the provisions is to protect the most vulnerable and defenceless members of society and to ensure that these individuals are provided, at a minimum, with the basic and essential care necessary to sustain life.¹⁹⁴

and

I agree with the Crown that the purpose of this provision is to protect those who are vulnerable and to ensure that they are provided with, at a minimum, the essential necessities to sustain human life by those who are responsible for them.¹⁹⁵

"Failing to provide the necessaries of life" includes, perhaps obviously, the failure of a parent to provide food, shelter and, often, medical attention to a child. However, it also includes, less obviously, failing to provide a child with a 'safe environment' and protecting a child from harm. As I will show in the next section, the fact that this section is now capable of supporting such prosecutions is a result of judicial interpretation.

One important aspect of s. 215 is that the offence of failing to provide the necessaries of life requires only that the failure to perform the duty "endangers the life" of the child or "causes

¹⁹³ Under the common law there can be no criminal responsibility for failing to act unless there is a legal as opposed to a mere moral duty to act (Stuart 2001, 91). *R. v. Nixon* (1990), 57 C.C.C. (3d) 97 the Court held: "...only in narrow and well-defined circumstances will the law punish an omission to act. (See Glanville Williams, *Criminal Law, The General Part, Second Edition* (1961) at p. 4 where he quotes from Macaulay):

We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation."

¹⁹⁴ *R. v. Middleton* (1997), 33 O.T.C. 21 (C.J. Gen. Div.), [1997] O.J. No. 2758 Online: QL (OJ). See *Middleton* for a brief history of s. 215. See also Crankshaw's *Criminal Code* (looseleaf, 8-5 to 8-8) for complete legislative history.

¹⁹⁵ *R. v. Curtis* (1997), 123 C.C.C (3d) 178 (Ont. C.A.).

or is likely to cause the health” of the child to be “endangered permanently”.¹⁹⁶ In other words, although s. 215 could be the basis of a charge if a child was physically injured or died, culpability does not depend on or require harm to the child.¹⁹⁷ There is no minimum penalty under s. 215 and the maximum penalty is 2 years in prison.

Section 215 may also be the basis (or predicate offence) of a charge of manslaughter. A person may be found to have committed manslaughter by causing the death of a person either by an “unlawful act” or by criminal negligence.¹⁹⁸ A parent may be charged with “unlawful act” manslaughter if they commit the unlawful act of ‘failing to provide the necessities of life’ under s. 215(2) and the child dies as a result of that omission.¹⁹⁹ A parent could also be charged with criminal negligence manslaughter. However, as Justice Arbour noted in *R. v. Morrisey*²⁰⁰ there is no difference between the offences of criminal negligence causing death and manslaughter by criminal negligence.

Parents who fail to protect their children may also be charged under the criminal negligence provisions of the *Code*. Criminal negligence is defined in s. 219 of the *Code* as follows:

¹⁹⁶ We will consider these terms in detail in the next section.

¹⁹⁷ For example in *R. v. Degg* (1981), 58 C.C.C. (2d) 387 (Ont. Prov. Ct.) s. 215 was the only charge against a ‘single’ mother whose new born infant died of malnutrition and dehydration. As a practical matter, in all of the cases I have reviewed the child was physically harmed.

¹⁹⁸ Sections 222 and 234 of the *Code*. See Appendix 1.

¹⁹⁹ In *R. v. Turner*, (1997), 185 N.B.R. (2d) 190 (C.A.), leave to appeal to S.C.C. refused [1997] S.C.C.A. No. 532, online: QL (SCR), aff’g (1995), 165 N.B.R. (2d) 241. the parents were convicted of ‘unlawful’ act manslaughter with s. 215 forming the predicate offence. One of the grounds of appeal was that the “trial judge erred in holding that the failure to provide the necessities of life could be a predicate offence for unlawful act manslaughter in the circumstance of this case.” (*Ibid.* at para. 21). The Court of Appeal upheld the conviction. See *ibid.* at paras. 26 – 30 for a discussion of the issue.

²⁰⁰ [2000] 2 S.C.R. 90 at para. 61.

219 (1) Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that it is his *duty* to do,

shows wanton or reckless disregard for the lives or safety of other persons.

(2) For the purposes of this section, “*duty*” means a *duty imposed by law*.
[Emphasis added]

Parents who have allegedly omitted to perform a legal duty owed to their child may be charged under the criminal negligence provisions of the *Code*. The duty must be a “duty imposed by law”, and the source of that duty may be s. 215 or it may be the common law “parental duty”.²⁰¹

Once criminal negligence is established, the *Code* specifies different offences depending on the consequences of the criminal negligence. If a child is physically harmed, a parent may be charged with criminal negligence causing bodily harm.²⁰² There is no minimum penalty for criminal negligence causing bodily harm and the maximum penalty is 10 years in prison. If a child dies, the parent may be charged with criminal negligence causing death.²⁰³ There is no minimum penalty for criminal negligence causing death and the maximum penalty is life imprisonment.

Finally, parents who fail to protect their children may be charged with being a party to the offence of murder, if the child dies, or a party to the offence of attempted murder, if the child

²⁰¹ These duties will be discussed in the next section.

²⁰² Section 221 of the *Code*. See Appendix 1.

²⁰³ Section 220 of the *Code*. See Appendix 1.

does not die.²⁰⁴ While it is not uncommon to charge non-abusive parents who fail to protect their children as parties to the offence of second degree murder, usually the parents are convicted only of the lesser or included offences of manslaughter or failing to provide the necessities of life.²⁰⁵

As mentioned above, the charges laid against a parent who has 'failed to protect' their child depends, to some extent, on the harm to the child. However, even though, as will be demonstrated in the next section, s. 215 provides a fairly wide basis to support criminal charges against parents, charges are rarely brought on this basis alone. It is much more likely that parents will be charged under the criminal negligence sections of the *Code* with s. 215 forming an additional charge or an included offence. Although I will revisit this theme at other times in this Chapter and the next, it would seem that the main reason that Crown prosecutors charge more serious offences is their belief that a higher penalty than the 2 years

²⁰⁴ The non-abusive parent is charged under s. 21 of the *Code* which sets out the provisions relating to parties to offences. See Appendix 1. I do not intend to discuss these provisions but see Grant et al. (1995, 5-1) for a discussion of party liability in homicide. See Stuart (2001) for a general discussion of party liability under the *Code*. Murder is defined in s. 229 of the *Code* and attempted murder in s. 239 of the *Code*. Section 231 sets out the criterion for determining if murder is first degree murder. First degree murder includes, for example, murder that is planned and deliberate and the murder of a police officer. Pursuant to s. 231(7) of the *Code* all murder that is not first degree murder is second degree murder.

²⁰⁵ I am aware of only one conviction of a non-abusive mother for second degree murder. In *R. v. Olsen* (1999), 116 O.A.C. 357, Lisa Olsen was convicted of the second degree murder of her daughter Sara. The basis of her 1996 conviction was her failure to protect her six month old daughter from abuse by her husband Michael Podniewicz and failing to obtain medical care for the child. Olsen was sentenced to life imprisonment without parole for 15 years (the minimum is 10 years). Podniewicz was sentenced to life imprisonment without parole for 25 years (the maximum). Podniewicz and Olsen were reported to be the first parents in Canada to both be convicted of second degree murder in the death of their child (Blatchford, 1996). Marcia and Edward Dooley, convicted by jury in April, 2002, were the second. Marcia Dooley was sentenced to life imprisonment with no parole for 18 years and Edward Dooley received life with no parole for 13 years. It appears that the basis of Edward Dooley's conviction was his failure to protect the child Randal, however, unlike Lisa Olsen, he also physically abused the child. I am also only aware of one conviction of a non-abusive mother for attempted murder - *R. v. Roud* (1981), 58 C.C.C. (2d) 226 (Ont. C.A.) discussed in the Introduction.

available under s. 215 is warranted when children are have been harmed.²⁰⁶ As I will show in the next section, Crown counsel have a very wide discretion in the charges they may bring against non-abusive parents for 'failing to protect' their children because of the way the courts have broadly construed these sections.

3. The Doctrine of Failure to Protect

Two discernable and important shifts have marked the introduction of the doctrine of failure to protect into Canadian criminal law. The first shift occurred in 1981 in the Ontario Court of Appeal decision in *R. v. Popen*,²⁰⁷ and marked the expansion of parental responsibility to include protecting children from abuse by intimate partners. The second shift occurred in 1993 in the Supreme Court of Canada decision in *R. v. Naglik*,²⁰⁸ and marked the introduction of the penal negligence standard to the offence of failing to provide the necessities of life. Taken together, these developments have significantly expanded the liability of non-abusive parents for failing to protect their children from the abuse of their intimate partners and will be the focus of this section.²⁰⁹

²⁰⁶ In contrast, criminal negligence causing death (s. 220) provides for life imprisonment, and criminal negligence causing bodily harm (s. 202) provides for up to ten years in prison. Another reason for bringing more serious charge of criminal negligence against a non-abusive parent was that, at least for a period of time, which may have now passed with developments that have expanded the scope of s. 215, prosecution of parents for criminal negligence offences may actually have been easier than prosecutions under s. 215. This will be the subject of the discussion below. Obviously, ease of prosecution would be an impetus for the Crown to elect to proceed by way of charging criminal negligence.

²⁰⁷ (1981), 60 C.C.C. (2d) 232.

²⁰⁸ [1993] 3 S.C.R. 122, (1993) 83 C.C.C. (3d) 526, rev'g (1991) 65 C.C.C. (3d) 272 (Ont. C.A.).

²⁰⁹ Interestingly, *Popen* was primarily a criminal negligence case but *obiter* in the decision paved the way for similar developments under s. 215. *Naglik* on the other hand was a s. 215 case, but the findings of *Naglik* have been incorporated into criminal negligence decisions.

First I will consider the issue of parental duty or responsibility. I will begin by providing a brief review of the parental duty under s. 215 of the *Code* before the *Popen* decision.²¹⁰ My aim in doing so is to provide some historical context within which to appreciate the significance of the decision. I will then consider the *Popen* decision itself and will argue that it expanded the parental duty beyond its traditional boundaries and is, in fact, an articulation of the doctrine of failure to protect. Finally I will consider the impact of the *Popen* and decisions that followed on women, and women who are battered in particular.

I will then turn to the issue of the “reasonable prudent parent”, which as a result of the Supreme Court of Canada’s decision in *Naglik*, is now the operative test for determining fault under both s. 215 and the criminal negligence provisions.²¹¹ Again I will situate my discussion of the *Naglik* decision in its historical context, and will conclude the section with some observations about the impact of the ‘reasonable prudent parent’ standard on women.

²¹⁰ It is not necessary to review the parental duty under the law of criminal negligence because prior to *Popen* the only duty that would constitute a ‘duty imposed by law’ in the criminal negligence section would be the duty under s. 215.

²¹¹ Objective determination of fault in criminal negligence actually flows from *R. v. Creighton*, [1993] 3 S.C.R. 3, (1993) 83 C.C.C. (3d) 346 a case decided by the Supreme Court of Canada at the same time as *Naglik* and, together with *R v. Gosset*, [1993] 3 S.C.R. 76, 83 C.C.C. (3d) 494 (unlawful act manslaughter); and *R. v Finlay*, [1993] 3 S.C.R. 103, 83 C.C.C. (3d) 513 (careless storage of firearms) form what is known as the ‘*Creighton* quartet’. *Creighton* was actually a decision on unlawful act manslaughter but, as we will see, the principles established in the case have been applied to the criminal negligence provisions. See discussion *infra*, note 299.

a) *The Expansion of the Parental Duty*

i) *The Parental Duty Pre-Popen*

The duty imposed under s. 215 of the *Code* is simply to provide a child under the age of sixteen years of age with the 'necessaries of life'. 'Necessaries of life' is not defined in the *Code* and is therefore open to judicial interpretation. In many cases, what is a necessary of life is obvious: Food, for example, where a child dies of starvation, or medical care, where the death of the child could have been prevented by treatment. However, circumstances do arise where what constitutes a necessary of life is not so clear. It is possible to make some observations about the general approach the courts have traditionally taken to the interpretation of 'necessaries of life' in these circumstances.

First, the courts have traditionally resisted defining what constitutes a necessary of life with any precision. This position was most clearly articulated in the 1912 case of *R. v. Sidney*,²¹² where the Saskatchewan Supreme Court stated: "[w]hat is to be considered as necessaries must be determined by the circumstances of each particular case." While perhaps permitting wide interpretations, this approach recognizes the diversity of needs and circumstances that may give rise to the duty.

Secondly, the potential for an overly broad application of a circumstance approach was tempered by the requirement that the 'necessary' be something required to preserve life. It is likely that this second requirement was historically grounded in the fact that s. 215 was

²¹²(1912), 20 C.C.C. 376 at 381(Sask. S.C.).

originally enacted in the *Code* under the heading "Duties Tending to the Preservation of Life".²¹³ In 1902 the British Columbia Court of Appeal in *King v. Brooks*²¹⁴ relied on these headings in stating:

The terms necessities of life and necessities which occur in the respective sections, mean, when read in connection with the headings mentioned, such necessities as tend to preserve life, not necessities in their ordinary sense.

Sidney illustrates the application of the traditional approach. In *Sidney* a father was charged in relation to the deaths of his wife and child who died of exposure on the Saskatchewan prairie. The mother, angry with the father, had left the house at night with the child in tow. The father assumed that the mother was going to a neighbor's house, and indeed that appeared to be her objective. Unfortunately she became lost and she and the child died. The father was acquitted of failing to provide the necessities of life. However, the Court noted:

I can readily conceive that if a father knew or should have known that his child of tender years was out on the prairie in danger of being frozen to death, and he had the ability to succour it and omitted without lawful excuse so to do, he might properly be convicted under this section. To send aid to him under those circumstances might be just as necessary and just as much a parent's legal duty as to send for medical assistance in case of sickness.²¹⁵

Thus, a 'necessary' could quite literally be anything, provided it was necessary to preserve life. Correspondingly, the failure of the parent to provide the necessary must have resulted,

²¹³ This remains the case. See Appendix 1. Part VIII of the *Code* titled "Offences Against the Person and Reputation".

²¹⁴ (1902), 5 C.C.C. 372 (B.C.C.A.)

²¹⁵ *Supra*, note 208 at p. 381. More recently, in *R. v. Morris* (1981), 61 C.C.C. (2d) 163 (Alta.Q.B.) section 215 was raised as a defence to a charge of assault by the husband against the wife. The court suggested in *obiter*, that the provision of care and safe transportation home could be a necessary of life in circumstances where an intoxicated wife wished to walk home on a dark night. The Court stated: "Given the intoxicated and irrational condition of the complainant, as found by the learned Provincial Judge, it may be that the respondent had a duty to see his wife home safely... The provision of medical care in case of urgent need has been held to be a "necessary of life". By analogy, the provision of care and safe transportation home in the present circumstances could be a "necessary of life" which the respondent was legally bound to provide."

at a minimum, in some 'endangerment' of the child's life or health.²¹⁶ The point is that s. 215 seems to be aimed at more egregious conduct than mere neglect, and to use the words of Lamer C.J.C. in *Naglik*, "sets the floor" at the minimum of what is necessary to sustain life.

The distinction between neglect and failing to provide the necessities of life was made by the Manitoba Court of Appeal in *R. v. Chief*.²¹⁷ In this case, the parents had left their four children ages 1 to 7 alone in an apartment that had a faulty stove. The actual substance of the appeal was whether the provincial child welfare law was encroaching on the federal powers over criminal law.²¹⁸ The Court of Appeal found that the pith and substance of the provincial legislation was the prevention of every kind of ill treatment and neglect of children, and was therefore valid legislation. The Court stated:

The failure to provide necessities of life would probably always be neglect but neglect would not always be a failure to provide necessities. There are innumerable cases of ill treatment and neglect of children which are quite unconnected with the matter of the provision of necessities... [the facts of the case in *Chief*] could make out a case of ill-treatment or neglect likely to cause suffering or injury to health. It is the sort of parental irresponsibility which it is the purpose of the Child Welfare Act to discourage. The conduct probably did not involve a failure to provide necessities of life nor, probably, was there any question of the health of children being "endangered permanently".²¹⁹

²¹⁶ What constitutes endangerment will be discussed below, but in *R. v. McIntyre* (1898), 3 C.C.C. 413 at 418 (N.S.C.A.), the court held that "it is impossible to define the amount of evidence necessary to convince a judge that the wife's health was likely to be permanently injured."

²¹⁷ [1964], 3 C.C.C. 347.

²¹⁸ The parents were charged under s. 127 of the *Child Welfare Act*, R.S.M. 1954, c.35, that provided:
A person who, having the custody or charge of a child, ill-treats, neglects, abandons, or exposes the child, or causes the child to be ill-treated, neglected, abandoned, or exposed, in a manner likely to cause the child suffering or injury to his health, is guilty of an offence and liable, on summary conviction, to imprisonment for a term not exceeding five years.

²¹⁹ *Supra* note 217 at p. 351.

Thus, while the courts have resisted a rigid definition of 'necessaries of life', they nevertheless consistently maintained a connection with the preservation and/or endangerment of the child's life. Successful prosecution of non-abusive parents under s. 215 would require, obviously, a finding that the parent omitted to provide a 'necessary of life' but the important question in the context of this thesis is whether 'protection from harm' is a necessary of life. This was the question that arose in the 1981 case of *R. v. Popen*.²²⁰

ii) *R. v. Popen*

The first suggestion that a non-abusive parent could be criminally responsible for failing to protect their child from abuse by a partner was made by the Ontario Court of Appeal in *R. v. Popen*.²²¹ In *Popen* a non-abusive father was prosecuted as a party to the offence of manslaughter under s. 21 of the *Code*. Popen's 19-month-old child died as a result of injuries inflicted by her abusive mother.²²² The evidence was that the father did not inflict injuries on the child, nor did he witness the mother abusing the child. In fact, evidence at trial established that the father "was a gentle person who was fond of the child and was patient with her." The Crown's theory was that the father must have been aware (although there was no evidence that he actually was aware) of the mother's abuse of the child, and that his failure to do anything to stop or prevent the abuse made him guilty as a party to the wife's crime under s. 21 of the *Code*.

²²⁰ (1981), 60 C.C.C. (2d) 232.

²²¹ *R. v. Cyrenne et. al*, and *R. v. Deabay* [1966], 2 C.C.C. 148 (N.B.S.C.A.D.), were the only two pre-*Popen* cases I located where both parents were charged with criminal negligence in respect of their children. Both of these cases involved the failure to provide necessary medical treatment.

²²² The mother was charged and pled guilty to manslaughter. Comments in the decision suggest that the mother had recently given birth to a second child. She was sentenced to 7 years and the trial judge "endeavoured to ensure that her sentence was served in a psychiatric facility."

The Court was unable to find that Mr. Popen had formed the necessary intention in common with his wife to support a conviction as a party to the offence. However, rather than acquit Mr. Popen, the Court ordered a new trial, suggesting that he might be independently convicted of manslaughter if:

the jury reached the conclusion that the appellant was criminally negligent in falling [sic] to take proper steps to protect the child, and that his criminal negligence contributed to her death...²²³

Of course, to be guilty of criminal negligence he would have had to have done or omitted to do something that it was his duty to do. The Court identified two potential sources of the duty to protect a child from illegal violence. The first potential source of the duty was s. 215. The Court stated:

We are disposed to think that the words “necessaries of life” in s. 197 [now 215] may be wide enough to include not only food, shelter, care and medical attention necessary to sustain life, but also necessary protection of a child from harm.²²⁴

The court did not, perhaps unfortunately, actually decide this question because it found that in any event a parent has such a duty at common law, and this would be sufficient to sustain a conviction under the criminal negligence provisions of the *Code*. Accordingly, the comments in *Popen* with respect to ‘necessaries of life’ under s. 215 of the *Code* were *obiter dicta*.

The more important aspect of the case, however, was the Court of Appeal’s finding that there is a common law “parental duty” in Canadian criminal law, described as “a legal duty at common law to take reasonable steps to protect his or her child from illegal violence used by

²²³ *Supra* note 207 at p. 6.

²²⁴ *Ibid.* at pg. 7.

the other parent or by a third person towards the child which the parent foresees or ought to foresee.”²²⁵

Popen was the first criminal case to identify a ‘common law parental duty’ as a basis for criminal liability in Canada.²²⁶ The Court of Appeal finds this common law duty in the authority of *R. v. Russell*.²²⁷ In *Russell*, a father was charged with the murder of his two young children and of his wife. The mother had drowned the children while the father stood by and made no attempt to rescue either the children or the wife. The father’s defence was simply that, although he had been present and had witnessed the event, he had taken no part in the crime and could not be held responsible for the deaths.

Russell is quite simply, weak authority for a ‘common law parental duty’. First, the fact that *Russell* was a 1933 (old) decision of the Supreme Court of Victoria (Australia) (a dubious authority) is telling. Secondly, *Russell* can hardly be said to be unambiguous on the point. Each of the three judges on the panel wrote separate decisions. While certain passages suggest that the Court is finding a ‘moral’ and even legal duty of parents to protect their children from physical harm, other passages suggest the duty is much more limited than the Court describes in *Popen*. Indeed, Mann J.A., who was the trial judge as well as sitting on

²²⁵ *Ibid.*

²²⁶ This common law duty has subsequently formed the basis of civil liability for mothers who have been sued for failing to protect their daughters from sexual abuse by their fathers. See *J.(L.A.) v. J.(H.)* (1993), 13 O.R. (3d) 306 (Ont. C.J.). And see *H.(D.L.) v. F. (G.A.)* (1987), 28 C.P.C. (2d) 79 (Ont. C.J.) where court discussed case as possible basis for civil liability of a non-abusive mother.

²²⁷ [1933], V.L.R. 59 (C.A.).

appeal specifically states that he relies on a number of cases that he regards as setting out the parental duty.

I rested my answer to the jury in effect upon the principles of such cases as *R. v. Instan*²²⁸, *R. v. Gibbons and Proctor*²²⁹ and *R. v. Bubb*²³⁰. These cases may be regarded as defining the legal sanctions which the law attaches to the moral duty of a parent to protect his children of tender years from physical harm.

Indeed, a review of the authorities relied on by Mann JA. (and also it seems McArthur JA.), involve the deaths of dependent persons – children and in one case an adult – as a result of starvation and, in the case of the adult, neglect of medical attention. In *Regina v. Instan*²³¹ for example, the accused was convicted of manslaughter as a result of a failure to provide for a person under her care. Lord Coleridge C.J. stated:

There can be no question in this case that it was the clear duty of the prisoner to impart to the deceased so much as was *necessary to sustain life* of the food which she from time to time took in, and which was paid for by the deceased's own money for the purpose of the maintenance of herself and the prisoner; it was only through the instrumentality of the prisoner that the deceased could get the food. There was, therefore, a common law duty imposed upon the prisoner which she did not discharge. [Emphasis added]²³²

²²⁸ [1893], 1 Q.B. 450 (C.A.).

²²⁹ [1918], 13 Cr. App. R. 134 (C.A.).

²³⁰ [1850] 4 Cox C.C. 455.

²³¹ [1893] 1 Q.B. 450 at pp. 453-454.

²³² Also, in *R. v. Bubb and Hook*, Richard Hook and Elizabeth Bubb were charged with murder by starvation of Hook's daughter. The evidence was that Bubb (the girl's aunt) had charge of the household and was charged with caring for the children. Hook worked and provided funds to Bubb, which were sufficient to maintain the household. In his charge to the jury Williams J., sets out the law with respect to the defendants' duties to the child: "The indictment alleges, first, *a duty on the part of the prisoner at the bar to supply the necessaries of life to the child* whose death is the subject of the indictment. ...there is a duty directly cast upon the prisoner [Hook] to provide sufficient food and clothing for the child, if he has sufficient means for doing so, and, inasmuch as it is plainly proved that the prisoner had such means, there can be no doubt but that the law and the common feelings of mankind threw upon him the duty of preserving the child's life, by providing it with proper food and clothing." [Emphasis added].

In other words, these cases deal with 'necessaries of life' in the traditional sense and as codified in s. 215 of the *Code*.²³³ There is no evidence that the 'common law' duty to which *Russell* and the authorities relied on in *Russell* refer extended beyond the duty to provide a child or dependent adult with the necessaries of life. Furthermore, any Canadian court would have convicted Russell on the authority of *Sidney*,²³⁴ and it is interesting that the very cases relied on in *Russell* are, in fact, also cited and relied on in *Sidney*.

So, what is the mischief of *Popen*? If a parent has a duty to try to rescue a child from dying of exposure or drowning doesn't a parent have the duty to rescue the child from abuse? What is wrong with saying that a parent has a duty to take reasonable steps to protect his or her child from illegal violence used by the other parent or by a third person towards the child which the parent foresees or ought to foresee?

The answer to that question is not an easy one. It seems, after all, to be 'common sense' that parents have the duty to protect their children from harm. But as discussed in Chapter 2, the power of ideology is that it appeals on some intuitive level to most people. Ideologies contains a 'kernel of truth' (Boyd 1991, 97) that is then elevated to a more generalized truth. It is noteworthy that the courts in both *Sydney* and *Russell* particularly underscore that the parental duty is contingent on the parent's power to 'succour' the problem. This qualification is lost in *Popen*. The *Popen* duty requires a parent to take 'reasonable steps' to

²³³ Section 215 was originally enacted in 1892 and remains in substantially the same form today.

²³⁴ *Supra* note 212. As previously discussed, *Sidney* is authority for the proposition that rescue will be a 'necessary of life' under s. 215 in circumstances where a father is aware or ought to have been aware of that his child's life was in danger, and where the father has the ability to provide the rescue.

protect a child, not to take such reasonable steps *as are available to the parent*. As we shall see, later in this Chapter and the next, this is an important distinction.

Another problem is that the term 'protect' and, by reference, 'fail to protect' is itself an ideologically laden and, for women, dangerous term. 'Protection' invokes a sense of power and automatically invests the mother with power and agency she may, for a variety of reasons, simply not have. Moreover, while 'protect' implies power on the one hand, it also implies defencelessness, need and vulnerability on the other. Who really would argue that parents should not have a duty to protect their children? However, as Turnbull (2001, 41) reminds us, "[w]hen policy is made affecting mothers, or cases decided about mothers, the outcomes are shaped by the way in which the questions are asked in the first place." So is there a difference if, instead of asking whether the mother 'failed to protect the child', we ask did she 'fail to prevent the abuse' or better still, was she 'able to stop the abuse'?²³⁵ At least two things are different. First, it is a better description of the problem because it locates the source of the abuse where it should be – with the abuser. Secondly, the words 'prevent' or 'able' are more contingent than the word 'protect'. We understand that sometimes it is not possible to prevent or to avoid problems that come our way. We may try, indeed we ought to try to prevent bad things from happening to our children, but we are not always successful. Returning then to the mischief of *Popen*, we can say that one problem is it asks the wrong question and a question we know is problematic for women.

²³⁵ The term 'prevent' has its own problems as I discuss below. But this is an interesting example of the power of dominant discourses in the sense that not only has the problem been defined by and in dominant discourses but they are also shaping what can be said in resistance to the problem.

Another qualitative difference introduced in *Popen* (because of the facts) was the idea of a 'necessary' (in this case protection from abuse) as prospective. In other words, 'protection' invokes the idea that the duty to provide necessities of life includes not only the duty to aid and assist a child who is in danger (like in *Sydney* and *Russell*), but to be able to *predict* and *anticipate* "illegal" violence which may endanger the child.²³⁶ Of course, one theoretically needs to predict that a child needs food or shelter. But it is one thing to predict that your child needs food and quite another to predict that your husband is abusing or will abuse your child. Nevertheless, within two years of *Popen*, two decisions involving mothers charged with failing to protect held that the common law 'parental duty' included the duty to make inquiries about injuries sustained by the child.²³⁷

The Court of Appeal in *Popen* also relied on three American cases for the following proposition:

A parent may be criminally negligent in permitting a child to remain in an environment where, to the knowledge of the parent, it is subject to brutal treatment by the other parent or a third person with whom the parent is living, and may be convicted of manslaughter where the death of the child has been caused by such brutal treatment.²³⁸

The Court of Appeal's reliance on these American authorities is puzzling. A review of these cases shows them to be 'failure to protect' cases. Indeed, *Palmer* has been identified as the first failure to protect case in the U.S. The primary issues in these cases appeared to be

²³⁶ The qualification of 'illegal' is important since in Canada violence against children is legal so long as it is within the parameters of s. 43 of the *Code*. See *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2002), 161 C.C.C. (3d) 178 (Ont. C.A.) aff'g (2000), 146 C.C.C. (3d) 362 (C.J.) which upheld the constitutionality of s. 43.

²³⁷ *R. v. Ubanovich* (1985), 19 C.C.C. (3d) 43 (Man. C.A.); leave to appeal to SCC refused (1987), 38 C.C.C. (3d) 479 (S.C.C.) aff'g (1983), 22 Man. R. (2d) 166 (County Ct.) and *R. v. Goldberg*, [1987] O.J. No. 1697 (Ont. Dist. Ct.) Online: QL (CJP). I will discuss both of these cases below.

²³⁸ *Supra*, note 207 at p. 241, citing *Palmer v. State of Maryland* (1960), 164 A. 2d 467; *Commonwealth of Pennsylvania v. Howard* (1979), 402 A. 2d 674; *State of South Dakota v. Zobel* (1965), 134 N.W. 2d 101. Interestingly, *Palmer* has been recognized as being the first failure to protect case in the U.S.

causation. That is, the question of whether a parent who fails to discharge a (statutory) duty to protect children from abuse can be said to have *caused* the death of the child? If this was the issue the Court of Appeal was addressing, one wonders why the Court looks to American authorities at all. Furthermore, if causation was a live issue with the Court, why did it not canvass the Canadian authorities on the issue and why was there no discussion of causation beyond the bald statement provided?²³⁹ The statement itself is troubling because the Court of Appeal appears to be reiterating a general proposition of law (a doctrine?), thereby obscuring the statute and fact specific nature of the authorities on which it purports to rely.²⁴⁰ Finally, the specific and (in using the term 'brutal treatment' twice) inflammatory language used by the Court of Appeal misrepresents the actual legal findings of the cases.²⁴¹

This lengthy doctrinal analysis of *Popen* and the authorities relied in it demonstrates that the Court of Appeal went to great lengths to find some basis of liability for non-abusing parents. It is obvious that the Court was of the view that s. 215 of the *Code* (at least as it was then interpreted) would not likely sustain a conviction of a non-abusive parent. To remedy the situation it found that a 'common law parental duty' existed.

²³⁹This issue was also specifically addressed in *Russell* where the Court held that the father's omission could be said to be a proximate cause of the children's death.

²⁴⁰ One suspects it was lifted straight from the Crown's factum.

²⁴¹ For example, in *Palmer* the Court stated: "Thus, it is seen that the appellant herein was legally charged with her minor child's care and welfare; and we stated in *Craig v. State*, that where the defendant owed to a deceased person a specific legal duty, but failed to perform the same, and death resulted to the deceased because of the non-performance of the duty, (at least under circumstances where the failure to perform constituted gross and wanton negligence) the defendant is guilty of involuntary manslaughter." At 469.

In doing so, it is very possible that the Court was responding to what it perceived was an unsatisfactory state of the law. Two years earlier, in the case of *R. v. Schell and Paquette*²⁴² the Ontario Court of Appeal entered an acquittal against the mother and the father of a 3 year old girl who died of injuries resulting from child abuse. There was evidence that both parents had abused the child, but a single beating caused her death. Both parents denied inflicting the fatal beating. The parents were twice convicted of manslaughter.²⁴³ The issue on both appeals was that unless the evidence at trial could support the finding that the parents had aided and abetted one another in the commission of the offence, only one or other of the parents ought to have been convicted. In the absence of evidence of aiding and abetting, if the jury was unable to determine which parent inflicted the fatal beating, they both should have acquitted. The Court Appeal found that “the evidence is so tenuous as to the formation of an intention in common between the appellants to abuse the child, and to assist each other in that abuse that a verdict of guilty would be unreasonable.”²⁴⁴ Accordingly, “after anxious consideration” the Court directed verdicts of acquittal.²⁴⁵

Whether the Court of Appeal in *Popen* was responding to a ‘deficiency’ in the criminal law or not, *Popen* appears to be an articulation of the doctrine of failure to protect.

²⁴² *R. v. Schell and Paquette* (1979), 47 C.C.C. (2d) 193 (Ont. C.A.), Martin J.A. sat on both *Schell and Paquette* and *Popen*, and wrote the Court’s decision in *Popen*.

²⁴³ The Court of Appeal’s decision in the first appeal is found at (1977), 33 C.C.C. (2d) 422. Martin J.A. sat on both *Schell and Paquette* and *Popen*, and wrote the decision in *Popen*.

²⁴⁴ This decision would not be the same today. See *R. v. Thatcher*, [1987] 1 S.C.R. 652 aff’d (1986) 24 C.C.C. (3d) 449.

²⁴⁵ Similarly, in *R. v. Myrby* (1975), 28 C.C.C. (2d) 395 at p. 398 (Alta. C.A.) the Court quashed the conviction of a mother convicted of manslaughter in the beating death of her child. Both parents were charged with the child’s murder. The mother confessed to the killing and directed police to the murder weapon. At trial the father was acquitted and the mother convicted. The Court of Appeal held that the mother’s confession and the evidence of the murder weapon were inadmissible and that there was insufficient evidence to order a retrial. However, the Court concluded: “This case illustrates the deficiency of the criminal law in respect of the protection of children and we have brought the matter to the attention of the Minister of Justice.”

Notwithstanding the rightness or wrongness of the Court's analysis or holdings in *Popen*, it remains good law and as a result, parents in Canada now have a fairly broad common law duty to protect their children from harm by their partner or a third party.

iii) The Parental Duty After Popen

It is no surprise that the prosecutions of non-abusive parents for failing to protect their children began after *Popen*.²⁴⁶ Also, not surprisingly, these parents were prosecuted under the criminal negligence provisions as opposed to failing to provide the necessities of life. After *Popen* the common law parental duty to protect a child from harm was broader than the statutory duty under s. 215, making prosecutions easier under the criminal negligence provisions.²⁴⁷

Popen established that there was a common law parental duty to protect a child from illegal violence by a third party. But as Stuart (2001, 100) notes, “[f]rom the context of torts we know that the notion of duty is an unruly horse.” Legal duties are “not discoverable facts of nature, but merely conclusory expressions [of policy]”.²⁴⁸ Predictably, criminal negligence cases that followed *Popen* continued to expand the common law duty. Most notably, both *Urbanovich* and *Goldberg* held that where a mother is aware that the child has been injured, her duty to protect a child from harm includes the duty to make inquiries about the cause of

²⁴⁶ See for example, *R. v. Urbanovich and Brown*, *supra* note 237 (mother); *R. v. Goldberg*, *supra* note 237 (mother); *R. v. MacHielson* (1983), 60 N.S.R. (2d) 397 (S.C.) (father).

²⁴⁷ Remembering that the Court's comment that failing to provide the necessities of life may include protection from harm were *obiter dicta*.

²⁴⁸ Quoting from *Tarasoff v. Regents of Univ. of Cal.* 551P (2d) 334 at 342.

those injuries.²⁴⁹ *Goldberg* further extended the duty to protect a child from harm by including the duty to 'maintain her baby in a safe environment'.²⁵⁰

As to the statutory duty under s. 215 of the *Code*, while *Popen* opened the door for subsequent courts to find that 'necessaries of life' included the protection of children from harm, the cases that followed were content to rely on the alternative 'common law parental duty' that *Popen* established and avoided the question. It was not until 1999 in *R. v. Hariczuk*²⁵¹ that the issue was directly raised.

In this tragic case a father was charged with manslaughter in connection with the death of his 6-½ year old son by accidental ingestion of the father's methadone. The father was addicted to heroin but was successfully participating in a methadone program. The father stored the methadone mixed with orange juice in an orange juice bottle in the refrigerator. The child, despite numerous warnings by the father, accidentally drank it and died.

The father was charged with manslaughter and one of the grounds was the unlawful act of failing to provide the child with the 'necessaries of life' under s. 215 of the *Code*. One of the interesting features of the case is the position taken by the Crown. The Court noted:

²⁴⁹ In *Urbanovich*, *supra* note 237 at p. 53, the Court of Appeal held, "it ought to have been plain to the mother that something was drastically and radically wrong with that child. She may not have known immediately the cause of the illness, since she did not see the striking of the blows, but she nevertheless had a duty to inquire and if unable to obtain a satisfactory explanation to immediately seek medical attention". In *Goldberg*, *supra* note 237 at p. 16, the Court stated: "Anna Goldberg had a duty to make inquiries respecting her daughter's injuries".

²⁵⁰ *Goldberg*, *ibid.* at p. 16.

²⁵¹ [1999] O.J. 1424 (Ont. C.J.) Online: (QL) (CJP)

The Crown wants the court to include the provision of a *safe environment* as a component of s. 215. [Defence counsel] takes the position that such an interpretation would distort the legislative intent of the section. [Emphasis added]

Vaillancourt J. directed himself to the question: “whether or not the actions of the accused in relation to the storage of his methadone amounts to a failure by the accused to meet his duty as a parent in not providing the necessities of life, to wit: a safe environment?” His Lordship reviews the law relating to the interpretation of ‘necessaries of life’, including the *Sidney*, *Popen* and *Naglik* cases discussed above. Unfortunately the case is poorly reasoned, and the Court offered no analysis to support its conclusion that “when a parent has in his possession a dangerous drug such as methadone, he had a duty to keep it safely away from his child.”²⁵² Although the Court may have been trying to limit the *ratio* of the case to its strict facts, even narrowly stated, the *ratio* of the case likely is that the duty to provide necessities of life includes the duty to keep dangerous things safely away from children.²⁵³

While the ‘parental duty’ has expanded under both s. 215 and the common law, this does not mean that any parent who, for example, forgets to send their child’s lunch to school, will be criminally charged. An important element of the offence is that the child’s life or health must be endangered and consequently, as I have previously observed, non-abusive parents are usually charged with failing to protect their child only when the child has been harmed in

²⁵² *Ibid.* at para. 52.

²⁵³ More recently, in *R. v. R.W.*, [2001] N.W.T.J. No. 87 (S.C.), online: QL (CJP) at para. 31, a lower court held, again without discussion, “that for a young child, adequate supervision is one of the necessities of life” under s. 215. It is interesting that whereas early cases were careful to acknowledge that what constitutes a ‘necessary’ depends on the facts of the case, the courts in *Popen* (protection from harm), *Hariczuk* (safe environment) and *R.W.* (supervision) have not felt so constrained. There are currently no reported cases citing *Hariczuk* or *R.W.* but this does not mean that these cases are not, or will not have an impact. To the extent that such cases may encourage guilty pleas or plea bargains by showing the likely outcome at trial, they may very well be operating to the detriment of women who are battered.

some relatively serious way. Perhaps it is for this reason that I have not found any 'modern' failure to protect cases that consider the meaning of 'endangerment'. Outside of s. 215, the most authoritative interpretation of the term 'endangers' is the Ontario Court of Appeal decision in *R. v. Thornton*²⁵⁴ where the Court stated,

the word "endangers" does not have any special technical meaning. Among the ordinary meanings of that word are the concepts of exposing someone to danger, harm or risk or of putting someone in danger of something untoward occurring.

More importantly, however, the Court suggested that determining whether 'endangerment' has occurred includes an evaluation of the quality or "gravity" of the potential harm. If the potential harm is great ("catastrophic" in *Thornton*), even a slight risk will cause 'endangerment'.

The 'endangerment' wording in s. 215 is virtually identical to that in the offence of child abandonment,²⁵⁵ and there are several cases that have considered the meaning of 'endangered' in the context of this section.²⁵⁶ The most onerous interpretation of the meaning of 'endangers the life or health' is found in the 2001 decision of *R. v. D.N.*²⁵⁷ In this case a mother pled guilty under s. 218 for leaving her seven-year-old child alone while she

²⁵⁴ (1991), O.R. (3d) 480 (C.A.), aff'd [1993] 2 S.C.R. 445.

²⁵⁵ Section 218 of the *Code*. See Appendix 1

²⁵⁶ See *R. v. L.M.*, [2000] O.J. No. 5284, online: QL (CJP) at p. 55, where a mother who left young children unsupervised in an allegedly dangerous neighborhood was found not to have endangered them because neighbors were actually watching kids and "potential of danger befalling them in these circumstances is too remote to say that it constitutes evidence that ...their lives "were, or were likely to be endangered, or their health was or was likely to be permanently injured."

For a more onerous standard see *R. v. C.C.D.*, [1998] O.J. No. 4875 (Prov. Div.), online: QL (CJP) where the mother was found to have endangered the lives of small children by putting them in taxi directed to the wrong address. Children's lives endangered because "if [the driver] had simply followed the instructions of Ms. D., he would have dropped off the children ...If he had left them there, as the children desired, then there was a real risk, given the cold and the fact that no one was at home, that their life was likely to be permanently endangered. XXXX D Street is near a busy intersection, and so a reasonably instructed jury could conclude that three children ranging in age from two to six left at that location with no adult supervision, *could* come to some harm."

²⁵⁷ [2001] O.J. No. 647 (C.J.), online: QL: (CJP).

went gambling. A fire broke out in the apartment in her absence, although the child was not injured. In the course of its decision on sentence the Court stated:

This section of the Criminal Code attracts criminal liability to the *mere potential* to endanger the life or seriously injure the child. When actual endangerment to life or serious injury is realized in the commission of the offence, the Courts must consider that this fact makes the offence more serious.

This 'mere potential' appears to be the standard adopted in *R. v. K.R.*²⁵⁸ In *K.R.* her husband told the non-abusive mother that he had abused and injured the baby. Ms. R. took the baby to the hospital but did not disclose to the doctors what her husband had told her about his abuse of the child. Nevertheless, the doctors detected the abuse in the course of treating the child and the child was apprehended. The mother was charged and convicted under s. 215 notwithstanding that there was no suggestion that the child's health was endangered by the mother's non-disclosure.²⁵⁹ Rather, it seems that the basis of the Court's finding of endangerment and guilt was the fact that if the doctors had not discovered the abuse, the child would have been returned to the abusive environment. The Court stated:

I think a reasonable inference for me to make, that the reason she concealed [the abuse] is she didn't want anybody to know about it. And the reason she didn't want anybody to know about it is because she knew, in her heart, that her spouse had done something bad to her baby and she wanted to cover it.

Naglik says if you do that, there might be a risk that your baby won't get properly treated. In this case that didn't happen. The baby got properly treated because the doctors didn't really listen to her. But what about the risk that people in authority – the doctors in this case—wouldn't twig into the fact that the injuries were caused by abuse? – and the child would be returned to the abusive situation and abused again. *I think that risk comes within the ambit of the Naglik case, and that makes her guilty.* [Emphasis added]

²⁵⁸ [1998] O.J. No. 5802 (C.J. Gen. Div.), online: QL (CJP). I will discuss this case in detail at the conclusion of this Chapter.

²⁵⁹ I assume that the father was also charged for abusing the child but was unable to locate a decision in his case.

If s. 215 requires proof of endangerment, this case demonstrates that the threshold may sometimes be very low. Indeed, in this case, one could describe the threshold as a mere potential risk of endangerment to the child's life or health, since no one knows what the mother would have done if the doctors had not detected the abuse.

Lord Coleridge, C.J. stated in *R v. Instan*²⁶⁰:

It would not be correct to say that every moral obligation involves a legal duty; but every legal duty is founded on a moral obligation. A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement.

The distinction offered by Lord Coleridge is an interesting one. Applying it to the issue at hand, many may believe that parents have moral obligations to their children that extend far beyond the legal obligation created under s. 215 of the *Code*. The developments in the law witnessed by *Popen* and the cases following demonstrate that the courts are more than willing to convert what they perceive as the moral duty of parents into a legal duty sanctioned by criminal law, and suggest that the doctrine of failure to protect, based on ideologies of parental responsibility, is informing judicial interpretation of the law.

b) *Introducing the Reasonable Mother*

A second significant shift in the law relating to the prosecution of non-abusive parents for failing to protect their children was the result of the Supreme Court of Canada decision in *R. v. Naglik*.²⁶¹ *Naglik* marked the introduction of the 'penal negligence' standard to the offence

²⁶⁰ [1893] 1 Q.B. 451.

²⁶¹ [1993] 3 SCR 122. This case will be discussed in detail below. Although this is the leading case on s. 215, I do not consider it to be a 'substantiated' failure to protect case because Ms. Naglik was convicted along with

of failing to provide the necessities of life, and this standard has subsequently been extended to apply to parents charged under the criminal negligence provisions.²⁶² As I will show, the penal negligence standard facilitates the imposition of dominant ideologies of motherhood by subjecting women to a standard of the 'reasonable' person.

i) The Standards of Fault Pre-Naglik

The mental state of the accused or '*mens rea*' required under s. 215 has been the subject of much jurisprudence and disagreement. The fundamental issue has been whether the mental element of the crime should be determined on an objective or subjective basis. That is, whether the accused must subjectively appreciate the nature and consequence of her omissions, or whether her conduct will be judged in accordance with the standard of the 'reasonable person'. Section 215 does not contain the words "knows or ought to know" which typically indicate Parliament's intention that a crime is one where no subjective mental element is required to convict the accused. Accordingly, what constitutes the mental element of the crime is open to judicial interpretation.

This debate strikes at the core of criminal law policy and theory. In *R. v. City of Sault Ste. Marie*, Dickson J. expressed the fundamental importance of *mens rea* to criminal liability:

The doctrine of the guilty mind expressed in terms of intention or recklessness, but not negligence, is at the foundation of the law of crimes. In the case of true crimes there is a presumption that a person should not be held liable for the wrongfulness of his act if that act is without *mens rea*. Blackstone made the point over two hundred years ago in words still apt: "... to constitute a crime against human law, there must be

her common law husband of assaulting her child. This does not, however, diminish the importance of the case or its impact on non-abusive parents.

²⁶² See for example, *R. v. Canhoto* (1999), 127 O.A.C. 147, [1999] O.J. No. 4601 [hereinafter cited to O.J.], aff'g [1996] O.J. No. 401 (C.J.), online: QL (CJP), and *R. v. Heikamp*, [1999] O.J. No. 5382 (Ont. C.J.), online: QL (CJP). See also discussion, *infra.*, note 299.

first a vicious will, and secondly, an unlawful act consequent upon such vicious will..."²⁶³

In this paragraph Dickson C.J.C. refers to three states of mind: intention, recklessness and negligence. Negligence and recklessness should not be confused. Negligence is carelessness. Negligence is a state of not thinking of risks that you should have (and that a reasonable person would have) thought of or been aware of.²⁶⁴ It can also be thought of as inadvertence. Recklessness, on the other hand, involves an awareness of (or advertence to) risks, but a determination to proceed with a course of conduct regardless thereof. In this sense, recklessness is mindful conduct, while negligence is mindless. Absent clear statutory language, 'mere' negligence is not sufficient to attract criminal liability, a point Dickson J. made in *City of Sault Ste. Marie*:

Where the offence is criminal, the Crown must establish a mental element, namely, that the accused who committed the prohibited act did so intentionally or recklessly, with knowledge of the facts constituting the offence, or with wilful blindness toward them. Mere negligence is excluded from the concept of the mental element required for conviction. Within the context of a criminal prosecution a person who fails to make such enquiries as a reasonable and prudent person would make, or who fails to know facts he should have known, is innocent in the eyes of the law.²⁶⁵

It is perhaps not surprising that early cases dealing with s. 215 generally held that conviction required subjective *mens rea*.²⁶⁶ Nevertheless, the mental requirement of the crime continued

²⁶³ [1978] 2 S.C.R. 1299, 40 C.C.C. (2d) 353 at p. 357. (hereafter cited to C.C.C.). See also the comments of Dickson C.J.C. in *R. v. Leary*, [1978] 1 S.C.R. 29 at 34. And see Stribopoulos (1999, 229) for a discussion of the evolution of *mens rea* at common law.

²⁶⁴ As Stribopoulos (1999, 268) notes, [e]mploying the criminal law against the negligent actor entails punishing an individual, not for what he intended or foresaw, but for not foreseeing that which a reasonable person would have. Advocates of a descriptive approach to *mens rea* argue that recklessness should mark the outer boundary of criminal law."

²⁶⁵ *Supra* note 263 at p. 362. I will discuss, 'mere' negligence is still not sufficient to attract criminal liability. The criminal standard is a 'marked and substantial departure' from the conduct of the reasonable person.

²⁶⁶ *R. v. Lewis* (1903), 7 C.C.C. 261 (Ont. C.A.); *R. v. Steele* (1952), 102 C.C.C. 273 (Ont. C.A.); *R. v. Deabay*, [1966] 2 C.C.C. 148 (N.B.S.C. App. Div.); *R. v. Degg* (1981), 58 C.C.C. (2d) 387 (Ont. P.C.).

to be an issue that appeared to constantly 'bedevil' the courts, notwithstanding that the weight of authority favoured the subjective approach. The problem was the extent to which objective assessments of conduct could be used to determine subjective fault. In other words it is not inappropriate for judges and juries, when trying to determine what the accused must have thought, to consider what a reasonable person would have thought in the circumstances. But there is a distinct line between using the reasonable person test as a guide to what the accused thought and using it as a standard against which to judge her. How this line may be crossed by the courts is demonstrated in the case of *R v. Atikian*.²⁶⁷

In *Atikian*, the parents had taken the advice of a herbalist on the treatment of their 17-month-old child. The child died after a prolonged illness, and without the parents seeking traditional medical advice. The only issue at trial was the parents' defence that they honestly believed they were providing the necessities of life to their child. Under the subjective approach, which all parties accepted was the proper one, an honest though mistaken or even unreasonable belief will negate *mens rea*. The trial judge gave the jury proper instructions on the issue of honest belief, but then stated:

However, when you get all through in the jury room telling each other what you think of [the herbalist who prescribed the child's treatment], please take another hard look at s. 215 of the Criminal Code.

Does it say: if a parent goes to a herbalist, or a snake charmer, or takes up with some cult, some off beat philosophy, that the parent no longer has the duty imposed upon him or under s. 215(1) of the Criminal Code?

No, it doesn't say that.

Does s. 215(1) of the Criminal Code say: if you fail to provide the necessities of life required by the section, it becomes a lawful excuse if you say: "Sorry"?

No, it doesn't say that.

Does s. 215(1) of the Criminal Code say: only non-gullible parents have a duty to

²⁶⁷ (1990), 62 C.C.C. (3d) 357 (Ont. C.A.)

provide necessities?

No, it doesn't say that.

S. 215(1) of the Criminal Code doesn't allow for any "buck passing".

S. 215(1) of the Criminal Code does not let parents parcel out their duties to other people. There is no provision for parents to "play musical chairs" with the duty imposed to provide the necessities of life.

If a person pulls a thick sack over his or her head, surely that person cannot then be heard to blame the bag maker for his or her inability to see.

The problem with this charge is the suggestion that there is a standard of reasonableness inherent in s. 215 and that conduct that does not measure up to the standard of reasonableness is criminal. The Ontario Court of Appeal held that the charge was inappropriate because the central question was not the *reasonableness* of the parents' belief but its *honesty*: an honest belief, whether or not reasonably held, negates the *mens rea* requirement for 215.²⁶⁸ In other words, failing to provide the necessities of life was a '*mens rea*' offence, and actual or subjective awareness of fault was a necessary component of the offence.

Similar debates as to the appropriate mental state were "bedeviling" the law of criminal negligence. In *R. v. Gingrich*²⁶⁹ the Ontario Court of Appeal stated:

The crime of criminal negligence is negligence...The crime is the well-recognized tort of civil negligence; the sins of omission and commission that cause injury to one's neighbor, elevated to a crime by their magnitude of wanton and reckless disregard for the lives and safety of others.

Despite this deceptively succinct statement, criminal negligence is a notoriously difficult area of criminal law.²⁷⁰ As with the offence of failing to provide the necessities of life, the

²⁶⁸ *Ibid.* at 369.

²⁶⁹ (1991), 65 C.C.C. (3d) 188 at 199.

²⁷⁰ MacKinnon (1990, 177) suggests: "There is no shortage of testimonials by Canadian writers to the confused state of the law of criminal negligence. The difficulty lies in the fact that criminal negligence and the related

difficulties related mainly to determining the appropriate level of fault that will attract criminal liability. Criminal negligence is designed to punish those whose conduct shows a “wanton or reckless disregard for the lives or safety of others”, but as Grant, Chunn & Boyle (1994, 4-25) suggests:

[i]t is clear that something more than [sic] civil negligence is required...the question is whether it points to a subjective or objective approach to the state of mind of the accused.

This question was the subject of the 1989 Supreme Court of Canada decision in *R. v Tutton and Tutton*.²⁷¹ The Tuttons were charged with manslaughter by criminal negligence in failing to provide their diabetic child with a necessary of life (insulin). The parents’ defence was that they had an honest but mistaken belief that the child had been cured ‘through divine intervention’.²⁷² This would be a defence if the *mens rea* of criminal negligence were determined on a subjective basis. However, if the *mens rea* were determined on an objective basis, the honest belief of the parents would have to be reasonably held.

Unfortunately no clear principles emerged from *Tutton* because the Court split 3-3 in its reasons.²⁷³ McIntyre J. would have imposed an objective test.²⁷⁴ In his view, s. 219 is “aimed at mindless but socially dangerous conduct” and the appropriate test is therefore “one

concept of recklessness are central to unresolved and often complicated arguments about theories of culpability and the appropriate threshold of criminal liability.” Wilson J., of the Supreme Court of Canada stated in *Tutton and Tutton*, *infra* note 271 at p. 148, “Section 202 of the *Criminal Code* is, in my view, notorious in its ambiguity. Since its enactment in its present form in the 1955 amendments to the *Criminal Code* it has bedevilled both courts and commentators who have sought out its meaning.” See also the comments of Sopinka J. in *R. v. Anderson*, [1990] 1 S.C.R. 265 at para. 10.

²⁷¹ [1989] 1 S.C.R. 1392, 48 C.C.C. (3d) 129 aff’g (1985) 18 C.C.C. (3d) 328 (Ont.C.A.) [hereinafter cited to C.C.C.).

²⁷² *Ibid.* at p. 134.

²⁷³ McIntyre J. wrote for L’Heureux-Dubé J., Lamer J. concurring in result. Wilson J. wrote for Dickson C.J.C. and La Forest J..

²⁷⁴ As will be discussed below, this view would prevail in the Supreme Court of Canada within four years of the Supreme Court’s decision in *Tutton*.

of reasonableness, and proof of conduct which reveals a *marked and significant departure* from the standard which could be expected of a reasonably prudent person in the circumstances will justify the conviction of criminal negligence.”²⁷⁵ However, to abrogate the harshness of the objective approach, McIntyre J. would assess the conduct of the accused in light of prevailing circumstances. Lamer C.J.C. agreed that the objective approach was the correct one, but he too was concerned about the potential harshness of the ‘reasonable person’ standard and would make a “generous allowance” for factors that “are particular to the accused, such as youth, mental development, education”.²⁷⁶

Wilson J., found that the subjective approach was required:

This court made clear in *Sault Ste. Marie* and other cases that the imposition of criminal liability in the absence of proof of a blameworthy state of mind, either as an inference from the nature of the act committed or by other evidence, is an anomaly which does not sit comfortably with the principles of penal liability and fundamental justice.²⁷⁷

One of her primary concerns was that criminal negligence offences were very serious criminal offences carrying, in the case of criminal negligence causing death, the possibility of life imprisonment.²⁷⁸ As a matter of policy, such serious offences ought not to be what she terms an ‘absolute liability’ offence where liability would follow proof of conduct that fell below a certain standard.²⁷⁹ Moreover, an objective approach was not consistent with past

²⁷⁵ *Supra* note 271 at p. 140.

²⁷⁶ *Ibid.* at p. 143. Lamer C.J.C. repeats this view in his reasons in the *Creighton* quartet.

²⁷⁷ *Ibid.* at p. 147.

²⁷⁸ MacKinnon (1990, 182 suggests that it is doubtful the criminal negligence provisions would have caused the amount of “anguished debate” they have if the penalties were not as severe as they are.

²⁷⁹ Some confusion results from Wilson J.’s use of the term ‘absolute liability’, a term that refers to crimes where conviction follows proof of the act and there is no mental element. (This would be akin to the ‘strict liability’ standard that applies in the U.S. failure to protect cases.) Grant, Chunn & Boyle (1994, 4-25) suggests that “[i]t is likely that this opinion flowed from the fact that they saw conduct which could be labelled as showing a wanton or reckless disregard as part of the *actus reus* of the offence. This led them to suppose that

precedent²⁸⁰ and would “expand criminal liability beyond its normal limits and to the detriment of the accused.”²⁸¹ As a matter of statutory interpretation she determined that the terms ‘wanton and reckless’ contained in s. 219, suggest a subjective awareness, or ‘advertance’ to the risk. This is a minimal requirement and, Wilson J. suggests, “can in most cases be determined by reference to an objective standard without in the final analysis itself constituting an objective standard.”²⁸²

Tutton was decided 4 years before the Supreme Court decisions in *R. v. Naglik*²⁸³ and its companion cases in the *Creighton* quartet, and was a clear foreshadowing of the Court’s move to the objective *mens rea* approach that was ultimately reflected in those decisions.²⁸⁴ The *mens rea* of criminal negligence remained unsettled after *Tutton* and has not yet been clarified by the Supreme Court. Nevertheless, as I will demonstrate, the *Creighton* quartet of which *Naglik* was a part, has influenced the development of criminal negligence in ways that are not beneficial to battered women who are being prosecuted for having failed to protect their children.

an objective approach would leave a gap where the usual fault element would be.” See also Stuart (1989, 332) for a critique of this aspect of Wilson J.’s judgment.

²⁸⁰ In particular the Supreme Court’s decision in *O’Grady v. Sparling*, [1960] S.C.R. 804; *Mann v. The Queen*, [1966] S.C.R. 238; *Binus v. The Queen*, [1967] 594; and *Pede v. The Queen*, [1969] S.C.R. 905.

²⁸¹ *Supra* note 271 at p. 154.

²⁸² *Ibid.* at p. 154.

²⁸³ [1993] 3 S.C.R. 122, (1993) 83 C.C.C. (3d) 526, rev’g (1991) 65 C.C.C. (3d) 272 (Ont. C.A.) [hereinafter cited to S.C.R.]

²⁸⁴ The Supreme Court’s decision in *Naglik* was one of four released concurrently (and known as the *Creighton* quartet), in which it attempted to clarify the concept of ‘penal negligence’ (See *supra* note 211). The standard of ‘penal negligence’ was actually first adopted by the Supreme Court in *R. v. Hundal*, [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97 (dangerous driving), a decision that will be discussed below. By the time the *Creighton* quartet was decided in 1993, Wilson J. and Dickson C.J.C., both proponents of the subjective approach in *Tutton*, were retired.

ii) R. v. Naglik and the Creighton Quartet

One year after the Ontario Court of Appeal decided in *Atikian*²⁸⁵ that s. 215 was a *mens rea* offence, the issue came before it again in *Naglik*.²⁸⁶ Christine Naglik and Peter Pople were common law partners charged with aggravated assault and failing to provide the necessities of life to their infant son Peter Jr.. Peter Jr. was eleven weeks old when he was taken to the hospital with numerous serious injuries including broken bones, head and brain injuries. These injuries resulted from abuse and were apparently sustained over a period of time. Both parents denied knowledge and responsibility for the injuries.

The charges under s. 215 were based on the parents' failure to obtain medical aid for the child. Ms. Naglik's defence was that she had an honest, although perhaps unreasonable, belief that the child did not require medical attention. The trial judge instructed the jury to determine whether, in the circumstances of the case, including Ms. Naglik's knowledge of the child's condition, it was "reasonable and proper that medical attention be provided". He went on to instruct the jury that Ms. Naglik's honest belief that medical attention was unnecessary would only provide a defence if it were reasonably held. As we have seen, this instruction would be appropriate only if s. 215 was an offence that could be committed negligently as opposed to requiring subjective (which would include reckless) fault.

Both parents were convicted and sentenced to 4 ½ years for aggravated assault and 2 years concurrent for failing to provide necessities of life. Naglik successfully appealed her

²⁸⁵ *Supra* note 267.

²⁸⁶ (1991), 65 C.C.C. (3d) 272 (Ont. C.A.)

conviction. The Court of Appeal granted the appeal on the basis of its previous decisions including *Atikian*²⁸⁷ stating:

...The offence in question requires actual knowledge of (which would include wilful blindness with respect to) the circumstances which make the failure to perform the duty to provide necessities an offence. It is an offence that may be committed intentionally or recklessly. It is not an offence of mere negligence, where an honest belief in circumstances, which do not require the performance of the duty, must be based on reasonable grounds.²⁸⁸

Given the particularly egregious facts of the *Naglik* case, one expects that triers of fact would have had little difficulty convicting on basis of the higher subjective standard of fault. Nevertheless, the decision was appealed to the Supreme Court of Canada. Lamer C.J.C. acknowledged that prior judicial authority had established s. 215 as a *mens rea* offence.²⁸⁹ However, he suggested that the precedential value of those authorities was “less than compelling” and proposed to “consider the basis of liability under s. 215 afresh and on first principles.”²⁹⁰

Lamer C.J.C. acknowledged that s. 215 does not contain the term “ought to have known”, which obviously would indicate Parliament’s intention that an objective standard of fault apply, but he did not consider that determinative of the issue. Rather, he seized on the fact that s. 215 creates a duty:

²⁸⁷ *Supra* note 267. The other cases were *R. v. Steele*, *supra* note 266, and *R v. Lewis* (1903), 7 C.C.C. 261. The Court of Appeal acknowledged that *Atikian* was not the strongest authority because it appeared that all parties had proceeded on the common position that subjective *mens rea* was a necessary component of the offence and the only issue was the trial judges charge to the jury.

²⁸⁸ (1991), 65 C.C.C. (3d) 272 at p. 290 (Ont. C.A.).

²⁸⁹ Lamer C.J.C. technically wrote the minority judgement although the majority agree with his reasons except on this issue of the relevance of personal characteristics of the accused in the objective approach.

Stuart (1993, 248) suggests that it appears Lamer C.J.C. thought he was writing the majority decision but suffered a ‘last minute’ defection.

²⁹⁰ *Supra* note 208 at para. 37

The language of s. 215 referring to the failure to perform a “duty” suggests that the accused’s conduct in a particular circumstance is to be determined on an objective, or community standard. The concept of duty indicates a societal minimum which has been established for conduct: as in the law of civil negligence, a duty would be meaningless if every individual defined its content for him or herself according to his or her subjective beliefs and priorities. Therefore, the conduct of the accused should be measured against an objective, societal standard to give effect to the concept of “duty” employed by Parliament.

The policy goals of the provision support this interpretation. Section 215 is aimed at establishing a uniform minimum level of care to be provided for those to whom it applies, and this can only be achieved if those under the duty are held to a societal, rather than a personal, standard of conduct. While the section does not purport to prescribe parenting or care-giving techniques, it does serve to set the floor for the provision of necessities, at the level indicated by, for example, the circumstances described in subsection (2)(a)(ii). The effects of a negligent failure to perform the duty will be as serious as an intentional refusal to perform the duty.

I would hold that 215(2)(a)(ii) punishes a marked departure from the conduct of a reasonably prudent parent in circumstances where it was objectively foreseeable that the failure to provide the necessities of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health, of the child.²⁹¹

The Chief Justice once again reiterated his concern that the objective standard has the potential to operate quite harshly against people stating:

the reasonableness of the accused’s conduct is not to be assessed in the abstract, but with *reference to the circumstances of the accused* and the offence, to avoid punishing the morally innocent who could not have acted other than they did in the circumstances...²⁹² [Emphasis added].

He suggested (as he did in *Tutton*) that personal characteristics of the accused, such as age, education, and lack of experience, should be taken into account in determining the reasonableness of the accused under the objective standard. It is on this point that a majority of judges disagreed with the Chief Justice. McLachlin J.A. for the majority, stated:

²⁹¹ *Ibid.* at para. 36.

²⁹² *Ibid.* at para. 40.

I respectfully disagree with the Chief Justice's conclusion that when considering what the accused 'ought to have known' under an objective standard, one should have regard to Ms. Naglik's "youth, experience, [and] education"...For the reasons discussed in *R. v Creighton*, SCC No 22593 (released concurrently), it is my view that in determining what Ms. Naglik "ought to have known", the trier of fact must determine the conduct of the reasonable person when engaging in the particular activity of the accused in the specific circumstances of that prevailed. These circumstances do not include the personal characteristics of the accused, *short of characteristics which deprived her of the capacity to appreciate the risk*. Youth, inexperience, and lack of education were not suggested on the evidence to deprive Ms. Naglik of the capacity to appreciate the risk associated with neglecting her child. Therefore, she must be held to the standard of the reasonably prudent person.²⁹³ [Emphasis added]

As a result of *Naglik* the *mens rea* of s. 215 will be established if it was objectively foreseeable, in the circumstances of the case, that the failure to provide the necessities of life would lead to a risk of danger to the life, or a risk of permanent endangerment to the health of the child. Similarly, the *actus reus* of the offence will be established if the parent's conduct is a 'marked and substantial' departure from the conduct of a reasonable prudent parent in the circumstances.

Obviously, the Supreme Court's decision to interpret s. 215 as a penal negligence offence rather than a subjective *mens rea* offence was a policy choice because nothing in the history or the language of the statute (or the facts of the case) required this interpretation. An analysis of the Court's decision in *Naglik* needs, perhaps, to be located in the context of the *Creighton* quartet. As mentioned above, the debates about subjective and objective states of mind strike at the core of criminal law policy. Grant (1995, 211) argues that the *Creighton* quartet signalled a fundamental shift in that policy by the Supreme Court. Patrick Healy (1993, 266) suggests:

²⁹³ *Ibid.* at para. 4. Note that McLachlin, J. uses the term 'neglecting' presumably intending it to be synonymous with 'failing to provide the necessities of life'. Perhaps the section should, after *Naglik*, be referred to as 'criminal neglect' as opposed to 'failing to provide necessities'.

...there is nothing new in the application of objective standards of fault to criminal liability but there is something new in the willingness of the courts to extend the scope of criminal liability for some form of negligence.

Grant (1995, 211) suggests that this shift was part of the Court's general retreat from liberalism and evidenced in the criminal law by its willingness to use the criminal law as a positive force to prevent harm.²⁹⁴

The Court is increasingly legitimizing the use of the criminal law to protect the particularly vulnerable²⁹⁵ and to ensure that those who engage in inherently dangerous activities use reasonable care. The need for rigorous state control of firearms, upheld over the past two terms, for example, reflects a positive use of criminal law to protect the safety of society.²⁹⁶

Thus in the *Creighton* quartet, the Court moved from what Grant (1995, 212) describes as a "culpability" model where the criminal law punishes the (bad) actor's bad intention, to the "harm" model, where the focus is on the harm caused by the (but negligent) actor. The shift from a culpability to a harm approach demonstrates that policy underlying the shift favours using law to discourage harmful conduct over protecting the rights of the accused.

²⁹⁴ Grant (1995, 211) suggests that the Supreme Court of Canada had been retreating from a liberal-informed view of the state for some time prior to the release of the *Creighton* quartet. This shift had been most visible in constitutional decisions, but analysts assumed that the criminal law was or would be exempt from this retreat. This assumption may have been based, in part, on the 'fit' between liberal ideology and criminal law. As Rosemary Cairns Way (1992, 144) explains: "The dominant construction of criminal law is paradigmatically liberal, a contest between the "free rights-bearing individual and the state under the rule of law." The rights afforded the individual counterbalance the power wielded by the state. The distrust of the state, which is implicit in classical liberalism, is in fact a legitimate and defensible distrust when balanced against the state's overwhelming capacity for violence through the criminal law."

²⁹⁵ Grant is referring to *Naglik, Rodriguez v. British Columbia (Attorney General)*, [1993] S.C.R. 519; and *R. v. Chartrand*, [1994] 2 S.C.R. 964 as examples of decisions concerning vulnerable persons. But see Grant (1996, 204) where she suggests that in *R. v. Daviault*, [1994] 3 S.C.R. 761 (holding extreme drunkenness can be a defence to crimes of general intent (sexual assault)) "the Court seems to have ignored or moved away from [the *Creighton* quartet] decisions and its concern for the particularly vulnerable".

²⁹⁶ Referring to *Gosset, Finlay, R. v. Felawka*, [1993] 4 S.C.R. 199 and *R. v. Hasselwander*, [1993] 2 S.C.R. 398.

The need for subjective intention or at least recklessness on the part of the accused has been a fundamental tenet of the criminal law, and is one of the rights and protections for accused persons under the criminal law.²⁹⁷ The important question for the purposes of this thesis (leaving aside the complex debates about the appropriateness of extending criminal sanctions to negligent conduct) is whether it is appropriate to include the offence of failing to provide the necessities of life in the category of 'mindless but socially dangerous' offences where the abrogation of a basic tenet of criminal law is appropriate?

In my view it is unfortunate that the Supreme Court of Canada chose to include failing to provide the necessities of life among the class of offences for which it is appropriate to abrogate traditional principles of criminal law relating to fault. The goal of protecting children is a laudable one and it is true, as Lamer, C.J.C. states, that "the effects of a negligent failure to perform the duty will be as serious as an intentional refusal to perform the duty". But the criminal law is a heavy and blunt instrument and, while the result of the penal negligence standard will be to cast a much wider net, an important question is whether it will substantially improve the protection of children over a standard that punished parents for recklessness. As Alan Gold (1994, 162) has suggested:

Absent proof of actual additional societal benefit, the principle of restraint in the use of criminal law would require limiting punishment to advertent mental states and not punishing mere negligence as criminal until such restraint was shown to be self-defeating for the criminal process. Always the correct, *differential* issue must be kept in mind: the question is not whether wider and more severe criminal liability will

²⁹⁷ For some offences, such as murder, *mens rea* is constitutionally protected under section 7 of the *Charter*. See *R. v Vaillincourt*, [1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118. Although I will not discuss this aspect of the *Naglik*, the Court did engage in a 'stigma' analysis developed in *Vaillincourt* and determined that the abrogation of subjective fault would be not be unconstitutional in respect of s. 215. (See Grant (1995, 226 – 228) for a critique of the 'social stigma' test and particularly its 'inherent' circularity as demonstrated by its application in the *Creighton* quartet.

deter or otherwise achieve the purposes of criminal justice, but whether a wider and more severe criminal liability (such as punishment for mere negligence) will deter or otherwise achieve the purposes of criminal justice in a *substantially improved fashion* over the more restrained and fairer alternative (punishment of recklessness or higher mental states).²⁹⁸

Failing to provide the necessities of life is in many ways analytically distinct from other 'penal negligence' offences, and falls within the category that Healy (1995, 207) describes as "offences of endangerment" where "some element of risk-creation or negligence qualifies a defined act or omission."²⁹⁹ In *R. v. Hundal*,³⁰⁰ for example, the Supreme Court of Canada recognized that the objective approach was "particularly appropriate" to the offence of dangerous driving in part because the licensing requirements assured the "persons choosing to engage in the regulated activity of driving" met minimum physical standards and were aware of the standards of care required of drivers.³⁰¹ Furthermore, the "so routine, so

²⁹⁸ Citing *Reference re: s. 94(2) Motor Vehicle Act*, [1985] 2 S.C.R. 486.

²⁹⁹ Healy (1995, 207) identifies three forms of negligence that will attract criminal liability. Negligence with respect to inherently dangerous activities, negligence "found generally in the construction of unlawful act" and negligence which exists in s. 219. The Supreme Court of Canada has not yet pronounced on the issue of the fault requirement for criminal negligence offences. However, Grant, Chunn & Boyle (1994, 4-26) suggests that recent cases, although "side-stepping" the issue, have favored the objective approach set out in the *Creighton* quartet. Certainly recent cases involving the prosecution of parents for criminal negligence in respect of their children have tended to employ the objective standard citing *Naglik* and *Creighton* as authority. See for example, *R. v. Brown*, [2000] O.J. No. 2588 (Ont. C.A.). However in *R. v. I.W.F.* (2000), A.R. 319 (Q.B.), where an infant almost died of malnutrition, the Court applied the objective test in *Naglik* to the s. 215 charge and the subjective test in *Tutton* to the criminal negligence charge. The mother appeared to be suffering from severe post-partum depression and the father was a full-time student, preoccupied with his studies at the time. In the result, the parents were convicted of s. 215 but found not guilty on the criminal negligence charge. Another issue that remains open is whether under the criminal negligence provisions foreseeable must relate to *death* or whether the foreseeability of *serious bodily harm* will be sufficient as was determined by the Supreme Court in *Creighton* for the offence of unlawful act manslaughter. Grant, Chunn & Boyle (1994, 4-27) argues: "Given that the whole practical burden of justifying punishment lies on [the harm] (unlike unlawful act manslaughter) it seems justifiable to require a higher standard of fault so that the danger of death or serious bodily harm would have to be foreseeable." However, the New Brunswick Court of Appeal held in *R. v. Grimmer* (1998), N.B.R. (2d) 251, that the *mens rea* for manslaughter by criminal negligence is objective foreseeability of bodily harm (not death) bringing this aspect of criminal negligence into line with unlawful act manslaughter and the standard developed in *Creighton*.

³⁰⁰ [1993] 1 S.C.R. 867, 79 C.C.C. (3d) 97.

³⁰¹ *Ibid.* at para. 30. Other factors noted by the Court as important to the appropriateness of the objective standard included the wording of the section (*Ibid.* at para. 34) and, importantly, statistics that demonstrated a "obvious and urgent" need to "curb conduct which is exceedingly dangerous to the public." The Court noted

automatic” nature of driving made it extremely difficult to determine subjective states of mind.³⁰² Similar observations may be made about firearms (*R. v. Finlay*)³⁰³; they are inherently dangerous; the state controls their sale, registration and use; and the state also requires those who own firearms to demonstrate appropriate knowledge designed to avoid and minimize the dangers inherent in owning and operating firearms.³⁰⁴ Thus firearm owners and drivers stand out as a special groups engaged in activities that, because of their inherent dangerousness and regulation by the state, lend themselves to objective assessment. In these circumstances the proverbial ‘reasonable man’ may very well provide a useful guide to assessments of culpability for breaches of duty.

On the other hand, failing to provide the necessities of life occurs in the context of caring for children and other dependants. Parenting, while entailing great responsibility, is not generally regarded as an *inherently* dangerous activity. Moreover, parenting is undertaken by people from all walks of life with varying abilities and in varying circumstances. As Marie Ashe (1995, 149) has noted:

...while caring for children is never easy, being poor makes it harder; experiencing racism makes it harder; experiencing homophobia makes it harder; and experiencing the fear of violence within one’s own household makes it harder still.

This is not to say that parents do not have responsibilities to their children, but simply that, in the case of parenting, the objective standard is insensitive to these and other realities of

that in the year 1991 there were 3654 deaths from traffic accidents (*Ibid.* at para. 36). While I do not in any way wish to minimize the tragedy of children’s death by abuse, the fact that in the 19 year period between 1979 and 1998, 864 children were killed by a parent demonstrates that, fortunately, the scope of the problem is much more contained (Statistics Canada 2000, 39).

³⁰² *Ibid.* at para. 32.

³⁰³ [1993] 3 S.C.R. 103, 83 C.C.C. (3d) 513.

³⁰⁴ See Canadian Firearms Centre web-site for information on firearms ownership including legislation. Online: <http://www.cfc-ccaf.gc.ca> (date accessed: May 14, 2002).

parenting and the fact that all parents are not equally situated. While Lamer stated that s. 215 does “not purport to prescribe parenting or care-giving techniques” the objective standard facilitates the imposition of dominant social expectations of ‘good’ parenting. The ‘reasonable prudent parent’, in spite of the gender (and race, class, sexuality and (dis)ability) neutral language, is likely to be constructed along axes of power and to reflect white, heterosexual, middle-class, male norms of ‘good’ motherhood and fatherhood (Miccio 1999, 110).

By facilitating the imposition of dominant social expectations of ‘good’ motherhood (and fatherhood), the objective standard has the potential to operate very harshly against parents who do not meet these expectations. Marlee Kline’s work (1992; 1993) has shown, for example, that the imposition of dominant social expectations of ‘good’ mothering has had “devastating” effects on First Nations women and children. Judith Mosoff (1994) has demonstrated how these standards operate to the detriment of women with mental health histories. Finally, as discussed in the last Chapter, the U.S. experience with failure to protect laws has demonstrated that dominant expectations of ‘good’ mothering operate very harshly against women who are battered.

Lamer, C.J.C. recognized the potential harshness of the objective standard in calling for the test to be applied in a manner that accounted for “the personal characteristic and circumstances of the accused.” Unfortunately the majority did not, and could not in the context of the *Creighton* quartet, agree with this qualification and thus the *personal characteristics* of the parent such as “youth, inexperience, or lack of education”, are not to be

taken into account when determining what a reasonable parent would do.³⁰⁵ As Stuart suggests (1993, 250) the effect of the “rigid” objective standard adopted by the majority is to “put a young head on old shoulders”.³⁰⁶ This “inflexibility” (Stuart, 1993, 250) certainly has the potential to operate harshly against many parents whose ‘personal characteristics’ such as youth, education and experience are very different from those of the (white, able-bodied, middle-class?) ‘reasonable’ parent.

The potential harshness of this standard is demonstrated in *Naglik*. Ms. Naglik’s defence was not that she was unaware of the duty she owed to her child or, that she did not, to use the words of McLachlin J., “appreciate the risk associated with neglecting her child”.³⁰⁷ Her defence was that she did not know her child was in need of medical attention. Would a “reasonable parent” have known the child needed medical attention? Perhaps so, indeed the particular facts of *Naglik* suggest that the higher mental state of recklessness could have been made out. But one can easily see how a young, inexperienced parent might not subjectively appreciate the seriousness of their child’s medical condition and reasonably so given her age and inexperience. Whether or not this was the case with Ms. Naglik, the effect of the decision is that *the question may not even be asked* (Boyle 1991, 278). The words of Dubin J.A. of the Ontario Court of Appeal in *Tutton* have some resonance:

I do not think, however, that a loving and caring parent who omits to seek medical assistance because of the honest but mistaken belief that his or her child was not in need of such assistance should be found to have shown a wanton or reckless disregard for its life or safety merely because it can be said that reasonable parents would have

³⁰⁵ In *Hundal*, *supra* note 300 at p. 34 the Court rationalized this by stating: “As a general rule, a consideration of the personal factors, so essential in determining subjective intent, is simply not necessary in light of the fixed standards that must be met by licensed drivers.”

³⁰⁶ I suggest he means put an ‘old head on young shoulders’.

³⁰⁷ *Naglik*, *supra* note 208 at para. 4.

responded otherwise, or even that in omitting to seek medical assistance, there was a marked and substantial departure from the standard of care of reasonable parents.³⁰⁸

Unfortunately, this is what *Naglik* directs.

The Supreme Court of Canada's goal in imposing the penal negligence standard was the protection of children and other vulnerable persons. However, as Stuart (1993, 251) suggests:

The objective test is being applied in such an abstract vacuum that the law is unworldly. What is the purpose of punishing someone who has measured up to a standard that could reasonably have been expected of one in the accused's situation but who fell below an average standard that the accused could not meet?

The Supreme Court of Canada's unstated premise is that potential criminal liability will make people more careful with their children's health and safety. This reflects a liberal view of the legal subject as atomistic, free and rational, and a belief that being a 'good' parent is a matter of choice – an assumption that simply does not reflect the material reality of parenting for many mothers (and fathers). Bearing in mind that all parents are not equally situated; that the resources they have or bring to the task of parenting are not equally distributed; that most parents do love and care for their children to the best of their ability; and that even 'good' and loving parents make mistakes and/or exercise poor judgment, sometimes with terrible consequences; it difficult to see how imposing an objective standard that is not sensitive to the personal circumstances of the parent will promote the interests of justice or the safety of children. As Gold (1994, 162) says the punishment of recklessness or higher mental states is a more restrained and fairer alternative.

³⁰⁸ (1985), 19 C.C.C. (3d) 328 at p. 345 (Ont. C.A.).

Naglik and its companion cases in the *Creighton* quartet were decided only 3 years after the Supreme Court of Canada's decision in *R. v. Lavallee*.³⁰⁹ As discussed in Chapter 2, *Lavallee* was a significant decision for women, and in particular women who are battered, in part because it recognized the importance of grounding criminal law inquiries into the 'reasonableness' of women's actions in the context of their experiences. Are we to take the Supreme Court's decision in *Naglik* and the *Creighton* quartet as abrogating the important moves toward recognizing the importance of issues of gender (and potentially those of race, class, (dis)ability and sexuality) that were made in *Lavallee*?

Boyle and Grant (1993, 253) caution against this conclusion. These scholars have written extensively on the *Lavallee* decision and its impact on and for women who are battered.

They suggest,

In assessing the effect of *Creighton* on *Lavallee* it is important not to fall into the trap laid by the use of the expression "battered woman syndrome". That phrase encourages the idea that what the court was doing in *Lavallee* was looking at a mental condition of the accused, rather than seeing her as a normal person responding to external stress. *Lavallee* does not, however, individualize the reasonableness standard, – it simply requires the decision-maker to be informed of the setting in applying that standard. Indeed, it could be seen as part of a trend away from an individual standard. That would be the case if the old test were seen as tilting the meaning of reasonableness toward making sense of situations more likely to be experienced by men than women.

In *R. v. Hibbert*,³¹⁰ the Supreme Court of Canada discussed the *Creighton* quartet in relation to *Lavallee*. Specifically, the Court articulated the differences in the objective standards of fault to be applied to penal negligence offences and to excuse-based defences such as self-defence, duress and necessity. Lamer C.J.C., writing for a unanimous court, confirms that

³⁰⁹ [1990] 1 S.C.R. 852, 76 C.R. (3d) 329 [hereinafter cited to C.R.]

³¹⁰ [1995] 2 S.C.R. 973, 99 C.C.C. (3d) 193

objective standards of reasonableness are to be applied to both penal negligence offences and to excuse-based defences. The difference is that the standard of reasonableness that applies to defences "takes into account the particular circumstances and human frailties of the accused", while the standard of reasonable applied to penal negligence offences excludes a consideration of these factors.³¹¹ In penal negligence offences the standard is that:

of the reasonable person when engaging in the particular activity of the accused in the specific circumstances that prevailed. These circumstances do not include the personal characteristics of the accused, short of characteristics which deprived her of the capacity to appreciate the risk.³¹²

Lamer C.J.C. explains that the difference in the two standards is justified on policy grounds.

Offences defined in terms of negligence typically impose criminal liability on an accused person for the consequences that flowed from his or her inherently hazardous activities -- activities that he or she voluntarily and willingly chose to engage in. In Creighton, supra, the majority was of the view that people "may properly be held to [a strict objective standard] as a condition of choosing to engage in activities which may maim or kill other innocent people" (p. 66). Even if a person fails to foresee the probable consequences of their freely chosen actions, these actions remain the product of genuine choice. In contrast, excuse-based defences, such as duress, are predicated precisely on the view that the conduct of the accused is involuntary, in a normative sense -- that is, that he or she had no realistic alternative course of action available. In my view, in determining whether an accused person was operating under such constrained options, his or her perceptions of the surrounding facts can be highly relevant to the determination of whether his or her conduct was reasonable under the circumstances, and thus whether his or her conduct is properly excusable.³¹³

The question is whether, absent a claim of an excuse-based defence or incapacity,³¹⁴ anything in *Lavallee* or in *R. v. Malott*³¹⁵ would support the admissibility of evidence that a women

³¹¹ *Ibid.* at para. 60.

³¹² *Naglik*, supra note 208 at para. 4.

³¹³ *Ibid.* at para. 61.

³¹⁴ The courts have typically been unreceptive to women's claims of incapacity in relation to offences as mothers. See *infra*, note 412. See Grant (1997) for an analysis of evidence of repeated abuse to the defence of duress. See Skinazi (1997) for a specific consideration of duress as a defence for women who are battered in relation to charges of failing to protect.

charged with failing to protect her children under s. 215 or under the criminal negligence or manslaughter provisions was herself battered? In other words, could or should the courts consider the context of battering in assessing whether the conduct of a woman charged with failing to protect her child constituted a marked and substantial departure from the reasonable prudent parent?

I would argue that such evidence should be permitted, albeit given *Naglik*, *Creighton* and *Hibbert*, within certain defined parameters. Specifically, evidence of battering of the mother and violence in the home should be admissible for the sole purpose of informing the trier of fact of the “specific circumstances that prevailed.” The purpose of this evidence is the same as when offered in defences, to inform the decision-maker of circumstances that might demonstrate that the battered woman’s conduct was reasonable – but different from defences in that it would not, under *Naglik*, *Creighton* or *Hibbert*, be admissible for the purpose of demonstrating the “personal characteristics” or the “frailties” of the mother, or even her *perceptions* of the surrounding facts.

The concurring minority reasons of L’Heureux-Dubé and McLachlin JJ. in *Malott* may provide some support this view. In these reasons L’Heureux-Dubé and McLachlin JJ. take the opportunity to revisit *Lavallee* and to address some concerns that arose from that decision.³¹⁶ They also discuss some of the significant contributions of *Lavallee* and suggest:

[T]he significance of this Court’s decision in *Lavallee*, which first accepted the need for expert evidence on the effects of abusive relationships *in order to properly understand the context* in which an accused woman had killed her abusive spouse in self-defence,

³¹⁵ [1998], 1 S.C.R. 123. Concurring reasons written by L’Heureux-Dubé J.

³¹⁶ See Chapter 2 for a discussion of these concerns.

reaches beyond its particular impact on the law of self-defence. *A crucial implication of the admissibility of expert evidence in Lavallee is the legal recognition that historically both the law and society may have treated women in general, and battered women in particular, unfairly...Accordingly, the utility of such evidence in criminal cases is not limited to instances where a battered woman is pleading self-defence, but is potentially relevant to other situations where the reasonableness of a battered woman's actions or perceptions is at issue (e.g. provocation, duress or necessity).*³¹⁷

And later in the decision:

More important, a majority of the Court accepted that the perspectives of women, which have historically been ignored, *must now equally inform the "objective" standard of the reasonable person* in relation to self-defence.³¹⁸

There is no express statement that *Lavallee* would apply other than in relation to defences. However, if contextual factors must inform "objective" standards of reasonableness in relation to self-defence, they should equally inform "objective" standards of reasonableness under s. 215 or criminal negligence provisions.³¹⁹ The analytical distinction made by Boyle and Grant (1993, 253) between the use of 'battered woman syndrome' to describe the mental state (personal characteristic) of the accused and its use to inform the decision maker of the 'setting' (circumstances) in applying the standard of reasonableness is crucial. Put another way, is 'woman abuse' a personal characteristic or a circumstance? I would argue that it is the latter and that it is on that basis, and for that limited purpose, that evidence of battering should be admissible in criminal proceedings against women charged with failing to protect their children. The evidence offered would include that of the battering relationship and the socio-economic circumstances of women who are battered, including, if applicable, their

³¹⁷ *Supra* note 315 at para. 36.

³¹⁸ *Ibid.* at para. 38. L'Heureux-Dubé J., went on to make important observations about the importance of resisting the construction of an 'ideal' or stereotypical battered woman. *Ibid.* at paras. 40 – 41.

³¹⁹ The Supreme Court emphasized the importance of context in *Lavallee*. Even in *Naglik McLachlin J.*, while specifically rejecting a consideration of personal characteristics, continued to emphasize the importance of context.

economic dependence and social isolation, the inadequacy or inability of police and social agencies to provide meaningful support and protection to them; and the very real risks associated with separation from the batterer. As discussed in Chapter 2, this approach accords with what many feminist (Grant 1991, 1997; Kazen 1997; Shaffer 1997) argue is the appropriate use of battered woman 'syndrome'. As opposed to 'syndromizing' women's experiences and constructing battered women as 'abnormal', its goal is to demonstrate that women's actions reflect "good judgment and sound reasoning" in many cases (Kazan 1997, 565). As Wilson J. notes in *Lavallee*, "[o]bviously the fact that the appellant was a battered woman does not entitle her to an acquittal."³²⁰ The question of her guilt or innocence must still be determined and the standard is still the 'reasonable parent' standard. But the standard is the reasonable parent "engaging in the particular activity of the accused in the specific circumstances that prevailed" and evidence of the woman's experience of violence and socio-economic circumstances of battering should be relevant to that standard.³²¹

One case, *R. v. Heikamp*³²², although not involving a woman who was battered, demonstrates how lower courts might resist the potential harshness of the objective fault requirements by taking a contextualized approach. Renee Heikamp was 19 years old when she gave birth to Jordan, her first child. Due to the unavailability of space in maternity homes, Ms. Heikamp and Jordan were placed by the Catholic Children's Aid Society in a women's shelter. Tragically, Jordan died of chronic starvation at the age of 5 weeks while he and his mother

³²⁰ *Supra* note 309 at p. 890.

³²¹ *Supra* note 208 at para. 4. Grant, Chunn & Boyle (1994, 6-48) suggests that the contextual approach taken in *Lavallee* might also be used to contextualize the experience of First Nations or other racialized groups in relation to criminal offences.

³²² [1999] O.J. No. 5382 (Ont. C.J.), online: QL (CJP)

were living at the shelter. Ms. Heikamp and the social worker involved in the case were charged with criminal negligence causing death for failing to provide Jordan with the necessities of life. At the preliminary hearing Hogan J., recognized the authority of *Creighton* and *Naglik* and specifically that the objective standard of fault was to be applied. Hogan J. stated:

While Madame Justice McLachlin, in *Naglik*, has stated that one must examine the conduct of the reasonable person in the specific circumstances that prevailed, counsel for Ms. Heikamp has submitted that the concept of a “reasonable person” itself is not a monolithic one but one that must also be placed in context. Perhaps this is just a different way of approaching what the Court was trying to get at in *Naglik*, but the practical result appears to be that in applying the so-called objective standard there is room for flexibility given the context.³²³

Hogan J., found that the context included the fact that Ms. Heikamp was a “single, young, inexperienced woman who [was] without housing or family support” and who, prior to the birth of Jordan, lived “essentially as a street person.”³²⁴ Hogan J. found that Ms. Heikamp had no knowledge of how to care for a baby, and that no one had “educated her on the critical importance of regular medical appointments, frequent monitoring of the baby’s weight or the basic details of appropriate feeding for a baby.”³²⁵ Hogan J. found that Ms. Heikamp neither had the capacity to appreciate the risk to her child nor departed from the standard of the reasonable person in the circumstances. In the course of the judgment Hogan J. stated:

If no one else raised a concern, how was Ms. Heikamp, given her background and lack of experience, to know something was wrong? I find there was no evidence adduced to show that she could have or should have.³²⁶

...

Given her circumstances and absent any evidence whatsoever that she had been told about the importance of doctor’s appointments and monitoring of a baby’s weight, I

³²³ *Ibid.* at para. 56.

³²⁴ *Ibid.* at para. 57.

³²⁵ *Ibid.* at para. 66.

³²⁶ *Ibid.* at para. 68.

cannot find that this particular conduct constitutes any evidence of a wanton or reckless disregard for the safety of Jordan or a marked or substantial departure from the standard to which she could be held.³²⁷

...

Because steps were not taken to teach, train and monitor Ms. Heikamp, she never attained the capacity to recognize the risk that flowed from her conduct.³²⁸

Hogan J. dismissed the charges against Ms. Heikamp and the decision was not appealed.³²⁹

The importance of case lies in its denial of the ideology of motherhood, specifically the Judge's refusal to accept that all mothers have an 'intrinsic' capacity to care for their children. By doing so the Judge was able to locate the state's failure to provide adequate space in maternity home or adequate resources to the child protection system within the contours of responsibility for Jordan's death. While the decision provoked outrage in many quarters, in my view, the contextualized approach used in the case is a positive one for women, including women who are battered.

Allowing evidence of mother's experiences of battering will no likely result in the frequent acquittal of mothers charged with failing to protect their children. As Marilyn MacCrimmon (Martinson et. al 1991, 50) notes:

While it may be that changing the rules of evidence will make it easier in some cases, for women to bring their experiences to bear on legal decision making, we should not be misled into thinking this will necessarily permit women's voices to be heard. The silencing of women's experiences by the legal system is a product both of the rules of evidence and the deeper structures of social knowledge.

The next Chapter addresses the question of the influence of social knowledge, in the form of ideologies that operate against mothers charged with failing to protect their children. It is

³²⁷ *Ibid.* at para. 80.

³²⁸ *Ibid.* at para. 85.

³²⁹ Charges against the social worker were also dismissed. *Ibid.* at para. 47.

important to note, however, that even allowing for some contextualization of women's experiences of battering, the objective standard of fault will continue to operate harshly against many mothers who because of their 'personal characteristics' such as age, experience and education fall below the 'reasonably prudent parent' standard. Moreover, it remains to be seen who the 'reasonable prudent parent' is. To the extent that the reasonable prudent parent is a reflection of the ideologically constructed 'good' mother, objective standards will operate oppressively for most women charged with 'failing to protect' their children. Before turning to these questions I will demonstrate the result of an "overly broad application" (Enos 1995, 229) of the doctrine of failure to protect that has been facilitated by legal method.

4. An Overly Broad Application of the Doctrine of Failure to Protect

It would seem that the decisions in *Popen* and *Naglik* have paved the way for an "overly broad application" (Enos 1995, 229) of 'failure to protect' law against non-abusive mothers (and fathers). In this final section, I want to bring the various strands of the discussion in this Chapter together by illustrating the results of *Popen* and *Naglik* through examination of the 1998 decision of the Ontario Court of Justice in *R v. K.R.*³³⁰

Ms. R. was charged with failing to provide her child with the 'necessaries of life' under s. 215 of the *Code*.³³¹ By all accounts, including that of a doctor who testified at her trial, Ms. R. was a 'good' mother. She worked full time and was a "caring and loving parent". Mr. R.

³³⁰ [1998] O.J. No. 5802, online: QL (CJP).

³³¹ Although the court does not refer to the charging section this is the obvious conclusion based on the court's discussion and the authority cited.

was the primary caretaker of the child when Ms. R. was at work. It appears that the baby had sustained a series of 'accidents' over a two-month period while in Mr. R.'s care.³³² Ms. R. sought medical treatment for the child on these occasions. On the last occasion, Mr. R. confessed to Ms. R. that he had abused the child. Ms. R. took the child to the hospital but did not disclose that the injuries had resulted from the father's abuse. Nevertheless, a thorough examination of the baby disclosed that injuries had resulted from abuse. The child received proper medical treatment and there was no suggestion that its life or health were permanently endangered by the mother's non-disclosure.

The mother was charged under s. 215. The court was satisfied that she was not aware of the abuse except on the last occasion when the father confessed to her.³³³ Nevertheless, after acknowledging that the mother's non-disclosure did not in fact endanger the child, the Court convicted her, stating:

But what about the risk that people in authority – the doctors in this case—wouldn't twig into the fact that the injuries were caused by abuse? – and the child would be returned to the abusive situation and abused again. *I think that risk comes within the ambit of the Naglik case, and that makes her guilty.*

The following excerpts are drawn from the sentencing part decision.³³⁴

MR. GRAYDON [Defence Counsel]: May I just have a moment please, Your Honour? What Miss R. is concerned about is this: that she will be prejudiced...she will be prejudiced in her application to have the children returned...She is rightly concerned how this will impact on the Children's Aid.

THE COURT: I don't see the sentencing changing...what penalty she gets won't have an impact on that, I wouldn't think.

³³² Some of the facts are not particularized.

³³³ The Court was aware that subjective awareness was not a requirement of the offence.

³³⁴ Because the Judge's reasons were delivered orally, the subsequent exchange between counsel and the Judge (provided here) was captured on the transcript.

MR. GRAYDON: Well for instance, one might argue that if the Court felt that she was convicted on such a narrow point, that given her past good behaviour with those children, the fact she was working full-time, and trying to make a living and provide for the children, that she probably wasn't around; that she knew or ought to have known something at the eleventh hour, if you will, on the 16th, took the baby to the doctor, took the baby to the hospital, and stayed there with the baby, and that the nurses were impressed with her, impressed with her sincerity and the way that she conducted herself. If the Court was impressed with that, and the Children's Aid learned that the Court, one might argue, on these narrow facts, convicted her or found her guilty, but gave her a conditional discharge and that she was on probation for two years, they might -- they might look, therefore, at the criminal conviction, in another light. She's afraid she won't get the children back because she's been convicted. She's afraid it will be much more difficult now for her to see her children. The children are in the hands ... she's fighting with the paternal grandparents over custody. The children have been in the possession -- the physical possession, as I understand it, of the paternal grandparents for the better part of two years now, and Miss R. has been, if you will, struggling for access. There isn't much sympathy or love between the two families, and this conviction, if you will -- if she's convicted she's concerned, will prejudice her.

...

MISS WALSH [CROWN]: Yes, Your Honour, and with respect, I appreciate my friend's arguments, except that I really don't think it's appropriate for this court to sentence according to, you know, something that's within the jurisdiction of a competent court. There's a CAS Court.

THE COURT: They have that expertise and that specialty. That's their specialty, and that's what they're doing. I would say that aside from the fact that I found her guilty on that, the sentence should be largely irrelevant. They have a different standard all together. Their standard is connected to what's best for the child.

MR. GRAYDON: But then, no judge...no judge has been as close to the case as Your Honour, and I think, in my respectful submission, that someone will be guided by Your Honour's perception of how Ms. R. conducted herself. That may be found in your reasons for judgment.

...

MR. GRAYDON: I'd like an opportunity to check some cases on that point, Your Honour. If it hasn't happened, then I don't know that I would be in a position to say this is an extraordinary case. But my sense is that the doctors who testified at the Preliminary, for instance Dr. Lisowski, spoke glowingly of Ms. R. - said she is a good mother. He supported her, he backed her. The nurses backed her. Dr. Patel, who saw the child, reassured her. So that if her guilt was to be founded on her omissions on the 16th of August, then factored into that sentence, if you will, will be her conduct as to what she did when she left work, the people whom she contacted, the fact that she

took the baby to the doctor, went right home and left early; and that may be sufficient, if I can find some conditional discharges. It may be enough to mount an argument, and if I don't think there's any sense to it, then I'll abandon it.

...

THE COURT: I'd be more interested in knowing how a probation order, or what terms could be helpful to her. It seems to me we want to help this lady. She's probably going to have more babies; and leaving aside this baby, she's young enough she's going to have more babies, and we need to help her be a good mom. So can I do something in the probation order that will do that?

MR. GRAYDON: Your Honour, she has counsel in Family Court. I'll contact her Family Court counsel, and see if they're at some stage in the proceedings whereby a report is available for Your Honour, and I'll ask whether or not anybody has recommended anything on the part of Children's Aid to Miss R., as to what she might do.

...

THE COURT: I would ask that counsel maybe contact the Children's Aid, or contact counsel to say, how can we help this lady in a probation order to be a better mom.

These lengthy excerpts revealed three important points. First, in my earlier discussion of this case I suggested that it demonstrated a very low threshold for proof of endangerment, but the case also demonstrates the broad and malleable meaning of 'necessaries of life', in this case disclosure of abuse to the authorities. Section 215 now has the potential to cast a very wide net which will include mothers who, while perhaps not exercising the best judgment in difficult circumstances, otherwise appear to fit even the dominant ideological image of 'good' mothers.

Secondly, if the 'reasonable parent' standard is informed by 'community standards' of parenting,³³⁵ these standards are in turn informed by dominant ideologies of motherhood and fatherhood. The (unarticulated) assumption underlying the decision is that a 'reasonable'

³³⁵ Naglik, *supra* note 208 at para. 37.

(good?) mother would immediately disclose her knowledge of the abuse to the authorities. In this way the decision is also a remarkable example of judicial paternalism. The Judge seems to assume the mother would have “returned the child to be abused again”, thereby discounting the mother’s agency and the potential that she would pursue options to safeguard the child’s well-being that did not involve maintaining the status quo. Ms. R. seemed to have garnered some sympathy from the Court by demonstrating her general conformity to the ideology of ‘good’ motherhood. But one can imagine that women who do not so easily meet these standards will not be so fortunate.

The third point demonstrated by these excerpts is the inappropriate intrusion of the criminal law into the domain of child welfare.³³⁶ The actors in this case found themselves on the horns of a dilemma, which has been created by the criminal law extending its reach to prevent harm rather than to punish culpability. The Supreme Court suggests that it is interested in protecting society’s most vulnerable, but the criminal law is a blunt instrument, and prosecuting parents like Ms. R. and labelling them criminals is not likely to address the best interests of their children.³³⁷

³³⁶ For example:

- defence counsel argues that this judge has been the closest to the case and his views are likely to be taken into account in the child welfare proceedings;
- defence counsel offers CAS reports to the judge;
- the judge asks defence counsel to seek guidance from the Children’s Aid Society on appropriate terms of a probation order;
- Crown Counsel suggests it is inappropriate for the Court to consider, or to tailor its decision on sentence to address matters that are the jurisdiction of another court. The Court, however, appears to be willing to do so.

³³⁷ I find it somewhat disconcerting, to say the least, that the parents of the abuser were given custody of the child over the non-abusive mother in these circumstances.

Furthermore, I suggest that on the basis of *Popen*, and *Hariczuk* discussed above, and of course the penal negligence standard imposed by *Naglik*, much of what we have tended to call 'accidents' could now attract criminal liability. For example, consider situations where a child ingests cleaning supplies left accessible to her; falls down stairs because a toddler gate is left open; or is bitten by the family dog? Could it not be said, in all of these circumstances, that a reasonably prudent parent would foresee a risk that the child's life or health might be endangered if they did not properly store cleaning supplies; close the safety gate or supervise interactions between the child and dog?³³⁸ And since it is a parent's duty to protect a child from harm and to provide a 'safe environment' and 'supervision' the parent should be guilty.

As Huband J.A. noted in *Urbanovich*:

A dangerous precedent will be created if these parents are found guilty of criminal negligence for failing to obtain appropriate medical care on a timely basis. Children are regularly injured in accidents caused by themselves or others. Their heads and other part of the anatomy are banged and cracked with considerable force. It then becomes a matter of judgment as to whether and when medical attention is sought. If a child does not seem to be troubled by discomfort, and if the injuries seem to be healing spontaneously, many parents will decide that the matter can wait, particularly if a regular medical appointment is not long off. Errors in judgment will sometimes be made by concerned and devoted parents. Such errors are not sufficient to base a charge of criminal negligence.³³⁹

I am not suggesting that most parents will be criminally charged in these types of circumstances. 'Common sense' dictates that these are oversights, lapses in judgment or

³³⁸ For a chilling case see *R. v. Brown*, [2000] O.J. No. 2588 (Ont. C.A.) online: QL (CJP). The boyfriend of a child's mother was charged and convicted of criminal negligence 13 years after a child was scalded in his bathtub. He had left the child unattended to answer the telephone, and she crawled into the (too hot) tub. In upholding the conviction on the basis of *Naglik* and *Creighton* and findings of fact that he was aware of the risk of leaving the child alone in the bathroom, the Court of Appeal stated: "Notwithstanding the foregoing, we leave this matter with some misgivings. These arise from the fact that despite a full investigation at the time this event occurred, the matter was not prosecuted for some thirteen years, that the appellant was discharged after a preliminary hearing, that the charge was restored by way of mandamus and that the matter was prosecuted at all. Only the fact that it was fairly tried by a jury reduces, but does not completely abate, those misgivings." *Ibid.* at para. 15.

³³⁹ *Supra* note 237 at p. 86.

attention and ought not to attract criminal liability. However, decisions about when charges should or should not be laid are made by the police and by crown attorneys. The difficulty is that, with s. 215 and the common law 'parental duty' being as broad as the decisions suggest, a great deal of discretion may be exercised by the crown and police. As discussed in the Chapter 2, in Canada, First Nations women have historically been treated much more harshly in both criminal and child welfare law. Indeed, it is likely that those mothers who deviate from the ideologically informed standards of 'good' mothers, such as poor, single, substance abusing or First Nations mothers, are those more likely to be prosecuted. As previously discussed, these mothers lead much more 'public' lives and often their lack of resources means they are dependant on, and thereby under greater scrutiny by public agencies. Furthermore, women who are battered (at least in the U.S.), come into contact with these agencies by reason of their battery since calls to the police for assistance may trigger the involvement of the child welfare authorities. Also, in these days of legal aid funding cut-backs, lack of resources means they are less able to obtain legal assistance that is needed to defend themselves in legal proceedings. As one Judge commented in dismissing charges against a mother charged in relation to the accidental scalding of her child:

Another concern that I have is that the mother was on welfare as I understand it and the father of the child was in prison. These should not in any way lessen her rights as a Canadian citizen and as a mother of her child. And I can only wonder if the child and the mother of a child of a more fortunate level in our society might have been treated in a different way. I do not know.³⁴⁰

The next Chapter takes up the question of the social knowledge, in the form of ideologies that inform the standard of the 'reasonable prudent parent' against which the conduct of mothers charged with failing to protect their children are judged.

³⁴⁰ *R. v. K.C.*, [1998] O.J. No 6156 (Ont. C.J.).

Chapter 5 – The Doctrine of Failure to Protect and Ideology

In Chapter 4, I developed the thesis that the doctrine of failure to protect operates in Canadian criminal law in so far as parents are prosecuted under a variety of sections in the *Code* for failing to protect their children. Although there is no ‘failure to protect’ statute *per se* (at least not yet), existing criminal offences have been interpreted so as to accommodate such prosecutions. Moreover, the law has developed in such a way as to facilitate the imposition of dominant societal standards of motherhood on women who fail to protect their children through ‘objective’ tests that fail to take the context of a mother’s actions into account. Whereas Chapter 4 was primarily concerned with how legal method facilitates the imposition of dominant societal ‘standards’ of motherhood on women charged with failing to protect their children, this Chapter looks at what those normative standards of motherhood are, as revealed by the cases themselves.

In this final substantive Chapter, I also return the gaze more specifically to women and, at the end, to women who are battered in particular. The central question in this Chapter is whether the doctrine of failure to protect can be said to operate to the particular detriment of women. There are a number of ways this can occur but this Chapter is centrally concerned with two: the (re)production of particular constructions of motherhood that are oppressive to (some) women; and holding women to higher or different standards than men.³⁴¹

³⁴¹ Another way that these laws can be said to operate to the particular detriment of women is if women are disproportionately impacted by the application of these laws. Obviously, women are the primary caretakers of children and the primary survivors of domestic violence and for that reason alone are likely to be disproportionately impacted by the doctrine of failure to protect. Although women were the subjects of more failure to protect proceedings than men in the cases reviewed, given the limitations of data collection method, no general conclusions can be extrapolated from this fact. The questions of whether prosecutors are more likely to charge, or judges and juries are more likely to convict, women for failing to protect their children are

The discussion that follows is an analysis of judicial discourse deployed in failure to protect cases involving both mothers and fathers. I make no claim to empirical validity. The purpose is to identify the ideological content of discourses deployed in judgments as a way of seeing how various ideologies related to motherhood, family and children, may have influenced and been reproduced by the outcomes in particular cases.

Whereas Chapter 4 concentrated on the significant or higher court decisions that have *shaped* the law, this Chapter focuses primarily on the lower court decisions that have *applied* the law. It is here, in the routine application of the law by lower courts, that the impact of these decisions on women is best revealed.

Part 1 offers a brief look at how children are constructed and presented in failure to protect cases in contra-distinction from their parents. The purpose is to demonstrate that the fact that a child has been abused provides a context that evokes particularly emotional and essentialist constructions of children and of their parents. Part 2 discusses discourses that reflect the ideology of motherhood, organized around three themes that emerged from my review of the cases and reflecting particular aspects of the ideology of motherhood. These are that a 'good' mother is all loving, all-knowing and all-powerful. I illustrate each theme with different cases and, where possible, draw distinctions between the standards that apply for

important questions but ones that would require empirical data rather than the qualitative data available in a study of this nature. Nevertheless, we may get some insights into this question from our analysis of the other two questions because in a sense, the main issue resolves itself into a more general question as to whether women and men are treated differently in failure to protect cases. If the answer is yes, then we may conclude (at least provisionally) that they are treated differently at the charging stage also.

women and men. Finally, Part 3 looks at how the context of violence is (or is not) (re)presented in failure to protect cases. My aim is to demonstrate how the law erases the context of women's actions, and to suggest some possibilities for further research.

1. *Avenging Angels?*

Before moving into the substance of this Chapter, I want to make some observations about the *context* of these cases, which is that a *child* has been injured by a parent or someone close to the parent. I emphasize the word *child* because the very fact that a child is the victim provides the context and the backdrop of most failure to protect cases. Canadian society professes to place a very high value on children, and the trials of parents of abused and neglected children provide excellent pedestals from which to preach that this is so.³⁴²

Serious crimes of violence against defenceless children warrant a strong and firm response from the courts. Children are amongst the most vulnerable in our society.³⁴³

The courts are seeking to make it known to the community of parents in British Columbia and those who deal with children that we will take a serious view of child abuse.³⁴⁴

Crimes against small children are perhaps the most abhorrent to the community.³⁴⁵

Judges and Crown prosecutors frequently remind the jurors, spectators, the press (and thereby interested Canadians) of the "innocence",³⁴⁶ "helplessness",³⁴⁷ "defencelessness",³⁴⁸

³⁴² The Government suggests (Canada 1999b 1999, 3) that "The law and society have come to expect higher standards of conduct toward child and young people by persons they should be able to trust."

³⁴³ *R. v. Johnson*, [1995] O.J. No 3764 (Ont. C.J.), online: QL (CJP) at para. 13.

³⁴⁴ *R. v. Soper and Bohnenkamp*, [1986] B.C.J. No. 449 (B.C.C.A.), online: QL (CJP) at para. 22.

³⁴⁵ *R. v. Lawrence*, [1989] O.J. 2060 (Ont C.A.) rev'g [1987] O.J. No. 1250 (S.C.), online: QL (CJP).

³⁴⁶ *Olsen*, *supra* note 205 at 51.

³⁴⁷ *R. v. Drudge*, [1988] O.J. No. 125 (S.C.); *Johnson supra* note 343 at 13, *Olsen supra* note 205 at 51.

³⁴⁸ *Soper and Bohnenkamp supra* note 344 at para. 14, *Grimmer, supra* note 299 at para. 12.

and “dependence”³⁴⁹ of these children on their parents. In contra-distinction, the parents’ acts are categorized as “horrifying”,³⁵⁰ “savage”,³⁵¹ “reprehensible and abhorrent”,³⁵² “despicable”,³⁵³ “inhuman”,³⁵⁴ and as revealing “the depths of human depravity”.³⁵⁵ And, perhaps in a futile attempt to explain or to distinguish ‘them’ from ‘us’, parents are characterized as “cowards”³⁵⁶ or “monsters”.³⁵⁷ In media accounts any personal failing of the parent becomes a common descriptor: “welfare-cheat”, “drug-dealer”, and “crack-addict”.

As I write this, I have spent several hours reviewing the newspaper accounts of Marcia and Edward Dooley’s trial for the second degree murder of Mr. Dooley’s 7 year old son Randal.³⁵⁸ The two national newspapers, *National Post* and *The Globe and Mail* devoted their headline banners and four pages and two pages respectively of copy to the story. These reports, and countless others made over the course of this trial, tell of jurors and spectators breaking down in tears as the horrors that this 7 year old child endured at the hands of his father and his evil, ‘welfare cheat’ step-mother Marcia were recounted in Court. They tell of the poignancy of the visual images presented and ever-present in the courtroom: a child’s bunk bed, Randal’s tiny Toronto Maple Leafs pyjamas.³⁵⁹ The trial judge is reported to have

³⁴⁹ *R. v. Vaudreuil* (1995), 98 C.C.C. (3d) 316 (B.C.C.A.).

³⁵⁰ *Drudge*, *supra* note 347

³⁵¹ *Lawrence*, *supra* note 345,

³⁵² *Soper and Bohnenkamp*, *supra* note 344 at para. 15.

³⁵³ *Olsen*, *supra* note 205.

³⁵⁴ *Ibid.* at para. 51

³⁵⁵ *Ibid.* at para. 1.

³⁵⁶ Reasons for Sentence in Dooley trial reported by Huffman (May 4, 2002).

³⁵⁷ *Soper supra* note 344 at para. 14.

³⁵⁸ In this high profile case, the evidence showed that Randal was severely abused by both parents but especially his step-mother Marcia. The Judge is reported to have found Ms. Dooley responsible for the injuries that caused the child’s death but Mr. Dooley failed to get medical help for the boy and failed to protect him from Ms. Dooley. (Huffman, May 4, 2002). Both parents were convicted. Ms. Dooley was sentenced to life imprisonment and 18 years without parole. Mr. Dooley was sentenced to life without parole for 13 years.

³⁵⁹ See also a newspaper report (Blatchford, May 10, 1996) from Lisa Olsen and Michael Podniewicz trial for the second degree murder trial of their 6 month old daughter Sara (*Olsen, supra* note 205): “The fourth object

referred to the child as “poor, pitiful Randal” 19 times in his charge to the jury (Huffman, 2002).

Whose heart does not go out to Randal, a “poor, pitiful” child indeed, for the horrors he endured? And within this context, who would even attempt to rationalize, justify or excuse his parents’ treatment of him? But it is often in the context of these “poor, pitiful” children that mothers must defend themselves. Marie Ashe (1995, 152) suggests:

The law compounds the insidiousness of this discursive process by constructing in opposition to the bad mother her precise other in the figure of her extremely sympathetic, vulnerable, injured or needy, tender, and – above all – innocent child. Each of these constructs – the essentially bad mother and the innocent child – pose problems for the defence lawyer’s interpretation of his or her role.

The injury or death of a “poor, pitiful” child provides a very different context than that faced by, for example, battered women who kill their husbands.³⁶⁰ Batterers as victims generally do not evoke the emotion, the outrage and the sympathy that child victims do. If some victims are more deserving of ‘justice’ than others, children are the most deserving of all, and ‘failure to protect’ prosecutions, by their very nature, attempt to portray the mother as complicit in the abuse of her child.

In the few cases under s. 215 where the victims are not children but adults, criminal charges were only laid under s. 215 and did not include the more serious offences of criminal

in line on the jury box was the small bald doll which has been front and center throughout the trial, always visible. Wearing turquoise pyjamas imprinted with clowns, the doll was lying face down on the ledge of the jury box, exactly, [the Crown] said in her soft voice when she placed it there roughly, so roughly, the noise was shocking in the big courtroom, the way the trial has been told that Podniewicz often put Sara to bed.”

³⁶⁰ I would venture to say that the dramatic displays of mementos provided by prosecutors in Dooley or Olsen case would not evoke the same response when the victim is a woman batterer.

negligence, manslaughter or murder.³⁶¹ In contrast, where children are the victims, charges routinely include at least criminal negligence and, if the child dies, murder or manslaughter. Although conclusions cannot necessarily be drawn, this disparity supports the earlier judicial statements suggesting that crimes against children have a special quality and are treated as being more serious than offences against adults.

I called this section “Avenging Angels?” because of this headline that appeared in the Toronto Star after the sentencing of Lisa Olsen and Michael Podniewicz:

“*Sentencing Judge is Avenging Angel in Infant’s Murder*” (DiManno, 1996).

I suspect that no judge would be particularly pleased to hear themselves described as an ‘avenging angel’, but that does not mean that they are immune to human responses to the tragedy of child abuse, or that they do not participate in the essentialist constructions of mothers and children in the course of criminal child abuse trials.³⁶² As we saw in Chapter 4, the laws under which mothers are prosecuted for failing to protect their children give judges a great deal of discretion to determine what constitutes harm, risk and endangerment and, most importantly, what constitutes community standards of ‘reasonableness’.

These determinations will be based on the fact finder’s own experience. As Wilson J. suggested in *Lavallee*,³⁶³ there is a belief that “judges and juries are thoroughly

³⁶¹ *R. v. Swereda and Hewitt*, 2000 O.J. No.2537 (C.J.), online: QL (CJP) (caregivers in group home for developmentally challenged); *R. v. Curtis and Hudson* (1998), 123 C.C.C. (3d) 178 (Ont. C.A.) (jail guards); *R. v. Deaveraaux and Whitty*, [1999] N.J. No. 25 (S.C.), online: QL (CJP) (correctional officers) *R. v. Middleton* (1997), 33 O.T.C. 21 (C.J.) (companion/caregiver).

³⁶² The Judge’s constant referrals to Randal as a ‘poor pitiful Randal’ is an example. He is also reported to have referred to Marcia Dooley as a “cruel, evil stepmother” in his Reasons for Sentence (Huffman, May 4, 2002).

³⁶³ (1990), 76 C.R. (3d) 329 at 344. Wilson J. suggests that this belief “obfuscates” the need for expert evidence on woman battering.

knowledgeable about “human nature” and no more [information] is need. They are, so to speak their own experts on human behaviour.” We are all experts in our own experience, which includes parenting. If we are not parents we have, at least, been parented. We all think that we ‘know’ what ‘good’ mothers are; it is a self-evident ‘truth’ that ‘good’ mothers are loving, nurturing, caring and protective of their young. This knowledge is based on our personal experiences, including one’s exposure to cultural norms of motherhood through different discourses.³⁶⁴ It is this knowledge that judges bring to bear on mothers charged with failing to protect their children and is revealed in the judicial discourse to which I now turn.

2. *Judicial Discourse Reflecting the Ideology of Motherhood*

In Chapter 2, I suggested that ideology may be described as socially constructed representations about social life. The focus of this section is the dominant social constructions of *motherhood* that inform the doctrine of failure to protect. The purpose is to identify judicial discourse in cases of mothers (and fathers) charged with failing to protect their children that reflects ideologically informed standards, and to determine whether these standards are different for mothers and fathers.

³⁶⁴ As Mary Eberts (1987, 95, 96) notes: “Any male judge trying cases will inevitably have personal reactions to what is being said about the position of women. If he is a male and a husband, father, employer, professional, he is somehow involved and invested in the male-female issue. His own life experience will have given him views on the question ranging from real receptivity to arguments in favor of women’s equality to viewing the equality claim as a substantial threat to the existing, satisfactory order of things.”

a) *All-Loving - Mother Love*

One of the primary requirements of 'good' motherhood, so self-evident that it hardly needs to be said, is that a mother should love her children. Badinter (1981, xxiii) suggests,

Intellectually and –more to the point, in fact –emotionally, people continue to think of mother love as an absolute. In spite of our most open-minded intentions, the mother who does not love her child is still regarded as abnormal. We are prepared to explain away everything, to justify anything rather than to admit her within the range of normality. Deep down we are repulsed to think that mother love is not immune to all defects or variations of character...perhaps because we refuse to question what we prefer to believe is the absolute and unconditional love for us of our own mothers.

But in law, or at least in criminal trials, this love must be demonstrated in certain prescribed ways that conform to dominant expectations of 'good' mothering. While there are a number of examples,³⁶⁵ for the purposes of this discussion I will focus on the two that seem to be most often reflected in the cases. The first is the expectation that a 'good' mother will always put her child's needs above her own needs and certainly above her husband's. The second is that a 'good' mother is self-sacrificing to the point that she will willingly give up being a mother for the good of her children. I will deal with each of these in turn.

³⁶⁵ Some of these are quite minor in nature. For example, as in other types of law, it would seem that a mother's devotion (or lack thereof) to her children may be demonstrated by the cleanliness of her house. In *R. v. I.W.F.* (2000), A.R. 319 (Q.B.), the parents were charged under s. 215 and with criminal negligence cause bodily harm in connection with the severe malnutrition and dehydration of their infant son. Three paragraphs of the judgement were devoted to the state of the home. For example, "[A child welfare worker] stated that there was a smell of garbage in the kitchen and noted garbage on the floor. There were numerous dirty dishes in the kitchen with food....." The mother's defence was that she was suffering from postpartum depression so it is possible that this is offered to support the mother's claim that she was not capable of performing tasks of mothering which would, of course, include keeping a clean house. See also *R. v. K.C.*, [1998] O.J. No. 6156 (Ont. C.J.), online: QL (CJP) at 15 "K.C. was a good mother to the child generally and kept a clean house, and the child M.W. was well nourished." Also, needless to say, good mothers are not drug addicts. In *R. v. Olsen* (1999), 116 O.A.C. 357, the mother, a crack cocaine addict, was admonished by the judge: "You are entitled to your crack habit but not at the expense of Sara. Your conduct in all of this is totally unbelievable." This was only one of four references to the mother's drug use in the short decision.

i) “Mom’s gotta choose”

The notion that mothers have ‘chosen’ their partner over their children arises so often in the cases that it is remarkable.³⁶⁶

Her behavior throughout constituted an attempt to protect her husband.³⁶⁷

My inclination, Mr. Graydon, is to think, like many women, she was in a position where she chose her husband over her baby. ...she’s caught on the ‘horns of a dilemma’. She knows there’s something wrong with her baby. She keeps taking him, however reluctantly, to the hospital. But she also is trying to protect her husband. At the end of the day, Moms have to choose. They have to choose. And their choice has to be, dump the abuser. Dump him quick... she was on the horns of a dilemma, like many mothers are, between their husband and their child. But mothers have to choose their babies first. That’s the way it is.³⁶⁸

Her conduct is totally unbelievable – she witnessed the frightening abuse of her child & instead of doing something – anything –to help Sara, she repeatedly lied and covered up for [her husband].³⁶⁹

Le Tribunal est convaincu que l’accusée a commis des infractions graves, répugnantes et horribles quand elle a laissé ses enfants être violentés parce qu’elle préférerait protéger sa relation avec P.L au lieu de protéger le bien-être de ses enfants. L’accusée n’avait pas à coeur l’interêt de ses enfants, mais elle avait a coeur sa propre relation avec Monsieur P.L. C’est un principe reconnu de notre système de justice que la peine doit être imposée en fonction du niveau de culpabilité morale du délinquant et dans notre cas, la culpabilité morale dont l’accusée a fait preuve en abusant de sa situation comme parent est extrêmement élevée.”³⁷⁰

A mother must never sacrifice her baby’s well being to save her lover from possible charges.³⁷¹

³⁶⁶ Why this is problematic will be discussed below.

³⁶⁷ *R. v. Goldberg*, [1987] O.J. No. 1697 (Ont. Dist. Ct.), online: QL (CJP)

³⁶⁸ *R. v. K.R.*, [1998] O.J. No 5802 (C.J. Gen. Div.), online QL (CJP).

³⁶⁹ *Olsen*, *supra* note 205.

³⁷⁰ *R. v. S.S.*, [2001] J.Q. No 4532 (C.S.), online: QL (CJP) at para. 44. Translation: “The court is convinced that the accused committed serious repulsive and horrible offences when she let her children be abused because she preferred to protect her relationship with P.L. over the well being of her children. She did not have the interest of her children at heart, but rather her relationship with P.L. It is a recognized principle of our justice system that punishment must fit the level of moral guilt of the accused and in our case, this level is extremely high. See also para. 33.

³⁷¹ *R. v. S.R.*, [1993] O.J. No. 1108 (C.J.), online: QL (CJP) at para. 8.

These statements are notable because they clearly reflect and affirm that in our social world there is a hierarchy of loves and that in the hierarchy, the social expectation is that mother love is the highest, best and most important type of love.³⁷² Also notable is that the judges, in their effort to explain the mother's conduct, reduce her complex, often difficult circumstances to her 'choice' of her man over her children. This disregards, for example, the strong cultural prescriptions associated with being a good wife ("love, honor & obey"), and on maintaining a 'proper' (i.e. nuclear) family for the children ("til death do us part"). It also ignores the emotional investment women have made in their relationship with the batterer, and the risk and uncertainties associated with alternative.³⁷³ All of these excerpts explicitly or implicitly invoke the notion of 'protection'. The mother has *protected* someone and that someone is her husband not her child.

The term 'failure to protect' is itself an ideologically laden term. 'Protection' invokes a sense of power, fierceness, justice, rightness, and moral duty. The notion of protection automatically invests the mother with power and agency. So when judges say that a mother has 'protected her husband' they are implicitly suggesting that the mother has power, has unfettered agency and that she exercised both on behalf of her husband, presumably because she loves him better than she loves her child. At the same time, the idea of a mother protecting her child-abuser husband invokes or invites the absurd comparison of the child to the father; the child, who of course is in need of the mother's protection, versus the father who, of course, does not. Thus the mother's 'choice' to protect the father rather than the child takes on an element of evil, connivance and conspiracy that simply would not be there

³⁷² And simultaneously disregards the strong cultural prescriptions associated with being a good wife.

³⁷³ These issues were discussed in Chapter 3.

if we said, rather, that the mother had “failed to prevent the abuse”. It establishes the mother as a ‘bad’ mother, and deserving of criminal sanction.

These comments also reflect the simplistic assumption that the quality of a mother’s love can be measured in terms of outcomes. A mother who loves her child can protect the child, ergo if she does not prevent the child’s abuse she must not love her child enough.³⁷⁴ Put another way, the only way a mother can prove her love for her child is to have been successful in whatever strategy she employed to protect her child. When judges focus only on outcomes, they render invisible all of the efforts the mother did make on behalf of her child. For example in *Olsen*, the court admonishes the mother that “instead of doing something, anything to help Sara...” she protected her husband. This statement immediately discounts all the caring work that Olsen did do for the child; she did ‘get mad at the way [her husband] picked up the baby’, she did take the child to the doctor, she did meet with the home care workers, she did buy medicine, give it to the child, and monitor her temperature.³⁷⁵ But none of these actions counted as doing ‘something, anything’ to help the child. Implicitly, the only ‘something or anything’ that would have counted was something that would in the end have saved the child’s life – taking the child to the hospital and reporting her husband.³⁷⁶

³⁷⁴ It is also, of course, an affirmation that to ‘protect’ or not ‘protect’ a child is (simply) a matter of free choice. The dominant liberal construction of the autonomous individual free to elect any particular course of action among an array of many. This implies that the mother has unfettered power, a theme that will be discussed below.

³⁷⁵ *R. v. Olsen*, *supra* note 205. Transcript of crown and defence counsel’s address to the Jury at p. 23, 93, 94, 97, 98.

³⁷⁶ Similarly, we saw that Donna Roud would defy her husband’s edits and get the children out of harm’s way. In the one incident she described at trial her husband responded by turning on her and shooting a bullet five inches over her head. Yet, rather than see this as an act of self-sacrifice on behalf of her children the court viewed it as evidence of her knowledge and complicity in her husband’s shooting of her son.

Finally, although the “why didn’t she leave” question remains unarticulated in most of these decisions, indeed, it seems to me that the comments cited above both ask and answer it. As I discussed in Chapter 3, the “why didn’t she leave question” underlies most inquiries related to domestic violence. As will be discussed later in the Chapter, the decisions are generally silent on the whether the mother was also battered. Nevertheless, leaving, together with reporting the abuser, are still the (only) socially and legally sanctioned way a woman can discharge her obligation to protect her child,³⁷⁷ because the leaving is, of course, what the “reasonable parent” would do if her (or his children) were abused.³⁷⁸ This ignores that fact that women’s strategies for ending abuse often succeed, but the “success” stories remain invisible. As Mahoney (1994, 76) suggests, it is only the ‘failures’ that become ‘visible’ and “perpetuate the concept that ‘staying’ is irrational.” Why did the mother not protect the children? Why did the mother not leave the husband who was abusing her children? The examples of discourse provided suggest that the courts’ answer to that question is that she didn’t leave because she loved him better. As the court in *K.R.* plainly states: “her choice *has* to be dump the abuser...dump him quick”.³⁷⁹

Reducing the complexity of a mother’s experience to the ‘choice’ of her man overlooks myriad of (reasonable) reasons women are unable or unwilling to leave their abusers. As discussed in Chapter 3, the strong cultural prescriptions that shape women’s knowledge and

³⁷⁷ See Canada (1999a, 16, 17). See also discussion in Chapter 3.

³⁷⁸ Wilson, J. acknowledged this in *R. v. Lavallee* (1990), 76 C.R. (3d) 329 at 344 where she stated: “The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this kind of treatment? Why should she continue to live with such a man? How could she love a partner who beat her to the point of requiring hospitalization? We would expect the woman to pack her bags and go. Where is her self-respect? Why does she not cut loose and make a new life for herself? Such is the reaction of the average person confronted with the so-called “battered wife syndrome”.

³⁷⁹ *Supra*, note 258 at para. 23.

expectations of love, marriage and family, their isolation, their economic dependence, their realistic fear of worse violence if they leave, form the constellation of factors that shape women's 'choices' and their strategies in resisting the abuse – their own and that of their children. Although the Supreme Court of Canada has expressly recognized all of these factors in both *Lavallee*³⁸⁰ and *Malott*,³⁸¹ the strong ideologies of motherhood that inform the doctrine of failure to protect and judicial discourse in these cases are proving resistant to liberatory discourses.

ii) *Sacrifice of Motherhood*

A second compulsory prescription of motherhood that often emerges in the cases is that mothers must sacrifice their own interests for their child's. Not uncommonly, mothers seem to have known that their children are ill or are being battered but do not get medical treatment for the child. There are a number of possible, plausible explanations for why a parent might not immediately seek medical attention for a child and why this might be a reasonable course of action. For example, the mother may not be aware of the seriousness of the child's condition or may think she can provide appropriate treatment.³⁸² Often, though, I suggest that the mother's reason for inaction was her fear (probably reasonably based) that the consequence of taking the child to the doctor or hospital would be the loss of the child to child welfare authorities.

³⁸⁰ (1990), 76 C.R. (3d) 329 at 356.

³⁸¹ [1998] 1 S.C.R. 123 at para. 42.

³⁸² In *Olsen*, the 6 month old baby died of pneumonia. There was evidence that the mother, Lisa Olsen, was providing the child with food, medicine, monitoring her temperature etc.

It is not usually framed this way in the decisions, however, and typically, the courts attribute parents' reluctance to seek medical attention for their child as demonstrating concern for their own liability. That is, they don't want to get into 'trouble'.

They were afraid that they might get in trouble with the authorities if it was known that the child had been injured again.³⁸³

Le docteur a dit que S.S. a toléré que P.L. frappe l'enfant, et qu'elle n'a pas amené l'enfant à l'hôpital même si, à l'occasion, elle pensait qu'elle aurait dû, parce que P.L. lui disait que si elle allait à l'hôpital, on lui enlèverait les enfants, parce que tout le monde croirait qu'elle a violenté les enfants et qu'elle serait considérée comme une mauvaise mère.³⁸⁴

Sharon did not wish to take the child to hospital previously because she was afraid that she would be considered a child abuser as a result of the bruises on Robbie's body.³⁸⁵

I believe that S.R. was concerned about [the child] and would have taken him to the hospital if it wasn't for the noticeable bruises which might trigger child abuse allegations.³⁸⁶

Each of you lied and conned each and every person who came to help: the social workers, the Catholic Children's Aid workers, the parole people, the medical doctors at St. Joseph's Hospital and the people at the Queen Street Medical Centre.³⁸⁷

The inference to be drawn from [the parents'] lack of frankness, is that they did not want to be found out.³⁸⁸

It is, no doubt, not incorrect to say that mothers felt they would "get in trouble with the authorities" but it is important to go the next step, which is – that "trouble with the authorities" means losing one's children to the state. Of course, there may be circumstances where possible criminal charges are the parent's dominant concern, but my sense from the

³⁸³ *R. v. Kelly*, [1989] N.S.J. No. 88 (S.C.A.D.), online: QL (CJP) at p.2.

³⁸⁴ *R. v. S.S.*, *supra* note 370 at 32 and 33. Translation: She did not take her kids to the hospital because P.L. told her that if she did everyone would think she abused the kids and was a bad mother.

³⁸⁵ *R. v. Drudge*, *supra* note 347 at p. 2.

³⁸⁶ *R. v. S.R.*, *supra* note 371 at para. 12.

³⁸⁷ *R. v. Olsen*, *supra* note 205 at p. 11.

³⁸⁸ *R. v. Urbanovich* (1983), 22 Man. R. (2d) 166 (County Ct.) at para. 29.

cases is that more often parents dread the involvement of children's aid societies because of the possible loss of their children. As I have discussed in previous Chapters, it is mothers who are poor, First Nations, racialized or (dis)abled that are most susceptible to scrutiny by child welfare authorities and to losing their children (Kline 1993; Mosoff 1994). If child welfare authorities have had some involvement with the family the mother will be well aware of the potential of losing her child. The mother hopes and prays that the child is not as sick as they seem and that they will recover, or at least that they will not take a turn for the worse before the bruises fade. It's a calculated risk. If she takes the child to the hospital and discloses the abuse she will lose the child. If the mother herself has some personal experience of life in care, she may not be convinced that that would be the best course of action for her child.

Furthermore, it is not simply enough that a mother seeks medical treatment for the child, the cases suggest that she must also tell the doctors everything she knows about the child's health and the injuries she knows of or suspects. In *R. v. Urbanovich*,³⁸⁹ a case that will be discussed in more detail below, the Manitoba Court of Appeal upheld the conviction of an 18-year-old mother convicted of criminal negligence causing death. The mother's conviction was based on her failure to protect the child from injuries inflicted by her partner and failing to get medical treatment for the child. While the mother had taken the child to the family doctor on several occasions, Matas, J.A. states:

The visits to the pediatrician do not absolve Ms. Urbanovich, from her responsibility to ensure that her medical advisers knew as much as possible about the state of health of the infant. Withholding the vital information from physicians could only be

³⁸⁹ (1985), 19 C.C.C. (3d) 43 (Man. C.A.)

categorized as willful blindness and wanton and reckless disregard for the infant's safety.³⁹⁰

Similarly, in *R. v. Olsen*, the child died from pneumonia that had resulted from her ribs being broken by her father two to four weeks prior to her death. The mother, Lisa Olsen, had taken the child to the hospital for treatment of a broken arm three times in the month prior to the child's death. The last appointment was 5 days before the child's death. Nevertheless, the Court was satisfied that the mother knew her husband was injuring the child, and her failure to disclose this knowledge appears to have been the primary basis of her conviction for second degree murder. In *R. v. K.R.*,³⁹¹ discussed last Chapter, the mother's conviction for failing to provide the necessities of life was based solely on the ground that mother did not disclose her husband's abuse of the baby to the doctors that treated the child.

This finding relates to Marlee Kline's (1995, 121) observation that in child welfare cases mothers who are deemed to be 'unfit' are encouraged to give up their child 'for the good of the child'. Kline notes,

Motherhood has been ideologically constructed as compulsory only for those women considered "fit," and women have often been judged "unfit" on the basis of their social location. This has been the case (at various times during the last century and in different places) for disabled women, Black women, First Nation women, immigrant women, Jewish women, lesbian women, sole-support women, poor women, unmarried women, young women and others. For these women, procreation has often been devalued and discouraged. The ideology of motherhood, therefore, speaks not only to gender roles and behavior. It also constructs some locations within social relations of race, class, sexuality, ability, and so on as more appropriate for motherhood than others. Thus, motherhood is better conceptualized as a privilege than as a right, a privilege that can be withheld, both ideologically and in more

³⁹⁰ *Ibid.*, at p. 68. There was evidence that supported the mother's claim that she had told the paediatrician about the accident that likely caused the baby's head injury.

³⁹¹ [1998], O.J. No. 5802 (C.J.), online QL (CJP).

material ways, from women who are not members of the dominant groups in society or who are otherwise considered unfit.

As demonstrated in Chapter 3, although a relatively recent phenomenon, dominant legal and social work discourses now construct mothers who ‘allow’ their children to be abused as ‘unfit’ mothers.³⁹² As Rabin (1995, 1111) notes, word gets “out” and often these mothers have learned that their ‘unfitness’ will likely result in the loss of their motherhood ‘privileges’. Nevertheless, they are expected, indeed they are required, to report their partner’s abuse of the child and in effect, their own ‘unfitness’ as revealed by their failure to protect the child, in the full knowledge that their child may be apprehended, at least temporarily, by the child welfare authorities. If the mother has other characteristics of ‘unfitness’ such as poverty, substance abuse issues or being a ‘victim’ of domestic violence, the likelihood of losing the child increases. Thus, what the law informed by the doctrine of failure to protect demands of women is no less than that they willingly sacrifice their own motherhood, of course, for the “good of the child”.

b) All-knowing – “Mother’s Intuition”

Another striking feature of these cases is that judges invest mothers with an extraordinary amount of knowledge with respect to the health and well being of their children. In fact, the knowledge mothers are presumed to have about their child verges, I suggest, on omniscience. We have all heard of ‘mother’s intuition’, and maybe even some of us have experienced it. It refers to the ‘intrinsic’ capability that ‘good’ mothers have to ‘know’ or to ‘sense’ what their

³⁹² In *R. v. A.M.*, [2000] B.C.J. 1325 (B.C.S.C.), online: QL (CJP), for example, the judgement disclosed that a non-abusive mother who *did* report her boyfriend’s assault of her child to the police lost custody of the child for three months to the child welfare authorities even though she was not criminally charged in connection with the abuse.

child is thinking or feeling and when their child is hurt, ill or in danger. But is there really such a thing as 'mother's intuition' or is it an ideological construct that reinforces certain expectations of motherhood? This section is concerned with that question because of the way that the assumption that all (good) mothers have 'mother's intuition' arguably informs the legal standard in some cases.

There are at least two components to the knowledge that mothers are often presumed to have. First, mothers will know when the child is in danger of being abused or has been abused. *R. v. Canoto*³⁹³ provides an excellent example of discourse reflecting the degree of sensitivity mothers are presumed to have to their children's needs. In that case a young mother was found criminally negligent in failing to protect her daughter. The child died during the course of an exorcism that was being conducted on the child by her grandmother. The procedure involved force-feeding the child water and had been performed previously by the grandmother on both this child and the child of a friend with no adverse consequences. However, on this occasion, the child asphyxiated and died. The mother was present in the house and may, at some point, have been in the same room. The mother's defence was that she honestly believed that her mother would not hurt the child.³⁹⁴ The trial judge held that the mother must have been or become aware that the child was in danger because:

[The mother] had care of the [sic] Kira since birth and I am convinced that she was capable of distinguishing between the child's crying caused by discomfort and the child's crying and struggling and kicking while attempting to fight for her life.³⁹⁵

³⁹³ (1999), 127 O.A.C. 147, [1999] O.J. No. 4601 [hereinafter cited to O.J.], aff'g [1996] O.J. No. 401 (C.J.), online: QL (CJP).

³⁹⁴ This case was decided in 1996 and the charge against the mother was manslaughter by criminal negligence. Accordingly, unless reasonably held, her honest belief was not a defence to the charge and the Court found that she had the capacity to appreciate the risk to her child. The court applied *Creighton* and the penal negligence standard of objective fault.

³⁹⁵ [1996] O.J. No. 401 at para. 23.

On appeal, the Ontario Court of Appeal stated:

I see nothing wrong with the common sense inference that, as Kira's mother, the appellant could tell the extent of Kira's distress based on those screams.³⁹⁶

Similarly, in *K.R.* the judge, while not prepared to find as a fact that the mother had previous knowledge of her husband's abuse of their child implies that she must, on some (intuitive?) level have known. He stated:

I think probably the only person that really knows the truth on this issue, is Miss R herself. I think in her *heart* she knows what she knows.³⁹⁷ [Emphasis added]

Another expectation of 'good' motherhood is that a mother always 'knows' what her child's medical needs are. This is one of the more dominant themes in the cases and reflects a very high standard. For one thing, the reasonable 'good' mother apparently has excellent powers of observation. In *R. v. Goldberg*³⁹⁸, the parents unfortunately were not able to meet that standard.

[The parents] were uncertain when the swelling of the leg first began, perhaps two days before. Dr. Murphy thought this was unusual because parents are very observant and can usually tell exactly when a symptom started.³⁹⁹

Also, a 'good' mother will always know that there is something wrong with her child even if the doctors tell her there is not. An excellent example of this expectation is *R. v. Urbanovich*.⁴⁰⁰ Tracy Urbanovich was an 18-year-old mother convicted of criminal negligence causing death of her 4-month-old daughter from a brain injury. There was no

³⁹⁶ [1999] O.J. No. 4601 at para. 14

³⁹⁷ [1998] O.J. No. 5802 at para 8.

³⁹⁸ [1987] O.J. No. 1697 (Ont. Dist. Ct.), online: QL (CJP).

³⁹⁹ *Ibid.* at p. 4.

⁴⁰⁰ (1985), 19 C.C.C. (3d) 43 (Man. C.A.) aff'g. (1983), 22 Man. R. (2d) 166 (County Ct.).

issue that the child's injuries were inflicted by the father, although probably accidentally.⁴⁰¹ The mother was convicted on the basis of her failure to protect the child from the father's violence and to seek appropriate medical attention for the child.⁴⁰² Both she and the father were sentenced to seven years in prison.⁴⁰³

The evidence at trial disclosed that the mother was aware that the child was not well and that she had sought medical attention for the child. In fact, the child was hospitalized a week before its death at the mother's request. Monnin C.J.M., of the Manitoba Court of Appeal observed:

A peculiar aspect of this case is that none of the examining physicians or nurses noticed anything unusual or untoward.⁴⁰⁴

However, notwithstanding this acknowledgment that even medical experts were unable to find anything wrong with the child, he states:

It ought to have been plain to the mother that something was drastically and radically wrong with that child. She may not have known immediately the cause of the illness, since she did not see the striking of the blows, but she nevertheless had a duty to inquire and if unable to obtain a satisfactory explanation to immediately seek medical attention.⁴⁰⁵

⁴⁰¹ The father admitted to a number of incidents that could have caused the baby's injuries. At trial the judge held that the injuries were deliberately inflicted, but he apparently changed his mind at the sentencing based on a pre-sentence report. The judge stated: "It now seems clear from this further evidence that the acts of the [father] were probably not consciously deliberate, but rather took place when his mind was besotted by the effects of the consumption of alcohol, or drugs, or both." The ability of the trial judge to change his mind at the sentencing stage of the proceedings was an issue on the appeal to the Manitoba Court of Appeal. The Court of Appeal held that the trial judge had made improper use of the pre-sentence report and it was not open to him to, in effect, change his mind after conviction. Huband, J., in dissent stated "it would mark the gravest injustice for a trial judge to sentence a person on the basis of deliberate acts when he is of the belief that they were not deliberate. That, in my view, would constitute the greatest impropriety." *Ibid.* at 76.

⁴⁰² (1983), 22 Man. R. (2d) 166 (County Ct.) at para 33.

⁴⁰³ This case is even more remarkable for the fact that the Crown itself apparently presented a case of accidental injury (*Supra* note 400 at p. 72). Thus the mother was sentenced to seven years in prison for failing to prevent the father from accidentally injuring the child. I have been unable to confirm the Court of Appeal's disposition on the mother's sentence appeal.

⁴⁰⁴ *Supra* note 400 at p. 47.

⁴⁰⁵ *Ibid.* at p. 53.

Only Huband, J., writing in dissent, appears to appreciate how untenable the majority's position is. He states:

The finding that the mother "deprived the child of necessary medical attention" is nothing short of remarkable in face of the uncontradicted evidence that the mother and child visited either medical doctors or a hospital, seeking medical services for the child of one sort or another, no less than nine times in the last two and one-half months of the child's life.

There is no evidence that the mother hid anything from doctors or hospital authorities on any of these occasions. On the contrary, the evidence discloses that the child had no visible symptoms of injury. A week before its death the child did not seem to be well. The family paediatrician could find nothing seriously wrong, but asked whether the mother would like to have the infant admitted to hospital, as a precaution. The mother agreed with alacrity, which is hardly the conduct of one who is attempting to cover up deliberate injuries or to deny needed medical treatment to her own child. The evidence is that the mother was more perplexed over the condition of her daughter than the doctors!

It is difficult to imagine what the reasonable 'good' mother could have done for her child that Tracy Urbanovich did not, and this case demonstrates the (unreasonably) high standards mothers are expected to meet.

How reasonable is it to hold women to these standards? Interestingly, the cases also provide some insight into that question.

Dr. Lindzon testified that it is possible that a doctor could examine the fractured limbs of a baby and come to a different conclusion if the doctor were not experienced with abnormal problems such as are seen by specialists.⁴⁰⁶

During cross-examination, Dr. Smith testified that a lay person could confuse an unconscious baby with a drowsy baby.⁴⁰⁷

⁴⁰⁶ *Goldberg, supra* note 237 at p. 6. – Mother convicted of failing to protect and to get proper medical attention.

Given the puzzling nature of infants and the lack of external signs, I think that you ascribe wisdom and capacity to the medical profession that none of us have.⁴⁰⁸

To me this last statement is nothing short of remarkable given how frequently mothers are both ascribed the wisdom and capacity of the medical profession, and charged or convicted on the basis of 'expert' medical evidence.⁴⁰⁹ These excerpts reveal that the diagnosis of children is not always easy and what may be wrong with them, indeed *whether* anything is wrong with them, is not always obvious. The point is that surely age, education and experience, all of those factors that the Supreme Court of Canada has determined in *Naglik*⁴¹⁰ to be irrelevant to determining parent's liability for failing to protect their children, will affect a parent's ability to recognize and diagnose ill health or injury to a child. It seems unfair that the Crown may say about Lisa Olsen: "She is the mother of five children. Crown submits that she could not fail to notice that her baby was suffering from serious injuries",⁴¹¹ invoking the mother's experience against her. But it is no defence that Tracy Urbanovich was an 18 year old inexperienced first time mother, or that, as in the case of one mother, she had "problems understanding anything conceptual, will only do well with very concrete and rote material, and will think more like a six to eight-year old."⁴¹² Both women were expected

⁴⁰⁷ *R. v. Smith*, [1997] O.J. No. 4721 (C.J.), online: QL (CJP) at para. 72. – Father acquitted of failing to provide necessary medical attention

⁴⁰⁸ *Urbanovich*, *supra* note 402 at para. 26. - Mother convicted of failing to protect and to get proper medical attention.

⁴⁰⁹ *Olsen* is an excellent example. The condition of the child prior to her death was a live issue at trial. Medical testimony that the child would have been in acute distress was a significant factor in the mother's conviction even though there seemed to be eyewitness accounts that contradicted this suggestion.

⁴¹⁰ [1993] 3 S.C.R. 122.

⁴¹¹ *Olsen*, Transcript of Crown's final address to jury.

⁴¹² *R. v. M.M.*, [1998] O.J. No. 3032 (C.J.), online: QL (CJP). This is an interesting case in that the mother pled guilty to failing to provide the necessities of life undoubtedly as part of a plea arrangement that resulted in a joint submission recommending a suspended sentence. The difficulty is that a psychiatric report concluded: "As for the charges against her, I do not believe that she was ever capable of providing the necessary care for her children in the first place... To pursue these charges would be merely to punish her disability, her low

to recognize the critical nature of their child's condition notwithstanding their personal inexperience or incapacity.

Fathers, it seems, are neither presumed nor required to have this same knowledge about their children. This suggests that mothers and fathers are held to different standards of conduct that are themselves informed by different ideologies of motherhood and fatherhood.⁴¹³

Indeed, what I call the "mother knows best" strategy has been used as a defence for men. *R. v. Smith*⁴¹⁴ provides an excellent illustration. Sherwyn Smith was the twenty-three year old father of Latrell, a 3-month-old child, who died of undetermined causes.⁴¹⁵ The child was brought to a walk-in clinic in extremis and could not be revived. The issue was whether Smith's 5 hour delay in seeking medical treatment for the child constituted a failure to provide the child with a necessary of life or criminal negligence.⁴¹⁶ Smith, had sole custody of Latrell and was living with a woman (Tanya) and their two children (Taniqua, 2 years and

intellectual level, her poor social adaptive skills and her emotional impoverishment" (at para. 7). Nevertheless, the Court stated: to his credit, Mr. Servos and his client do not for one moment argue that the condition as it existed could not have been recognized, it should have been recognized and should have been treated" (at para. 12). One wonders in what circumstances a mother would be found not to have had the "capacity to appreciate the risk". The conviction of Andrea Yates, the Texas mother who killed her 6 children while in a psychotic state brought on by extreme post-partum depression, was widely condemned in Canada. But on similar facts (only one child was killed) Canadian mother Susan Murie was charged with 1st murder. She eventually pled guilty to manslaughter (perhaps to avoid the risks associated with a trial (she was committed to stand trial on 2nd degree murder). At the time of sentencing she had been in a psychiatric hospital for 3 years. The Crown's position was that hospital time was insufficient and was seeking a penitentiary term of 8 to 10 years. The judge imposed a conditional sentence. *R. v. Murie*, [2000] O.J. No 5029 Online: QL (CJP). See Healy (1993, 277) for a discussion of some problems relating to the meaning of 'incapacity' in the penal negligence standard.

⁴¹³ In *Smith*, for example, an entire paragraph of the judgment is devoted to praising the father for his assumption of the primary caregiving role for his child. *Infra*, note 414 at para. 6. Mothers are never praised for being the primary caregivers (or for their caring work), because it is assumed to be their 'natural' role.

⁴¹⁴ [1997] O.J. No. 4721 (C.J.) online: QL (CJP).

⁴¹⁵ There was evidence from Smith's partner that he had been slapping the child the night before he died (which evidence the trial judge declined to accept on the basis of her lack of credibility) and also that the child had spent the night covered with blankets. The cause of death was possibly asphyxiation but the medical experts disagreed and the court could not make a finding on cause of death.

⁴¹⁶ The Crown's theory was that Smith delayed because he was concerned about abuse charges (*supra* note 414 at para. 32).

Taja, also 3 months) in a welfare shelter – a one-room unit in a motel. The evidence was that the Smith “did all the cooking and was the primary caregiver for Latrell and Taniqua ...Tanya Francis, on the other hand, did virtually nothing other than look after Taja.”⁴¹⁷

Tanya testified that she knew the baby was in trouble that morning but she did not take a proactive role in seeking medical aid for the child. The Court held that:

...[Tanya’s] inaction is a factor to consider in evaluating the actions of the accused. Tanya Francis and the accused had a relationship dating back four years. She was the mother of two of his children. After his residence was destroyed by fire, Tanya looked after all three children for two weeks, before she and the accused began living together. The two lived together at the Maple Leaf Motel, with the three children and shared parenting responsibilities. In evaluating the conduct of the accused, it is significant to note that the person with whom he shared parenting duties, and who, at one point, had looked after all three children by herself, was taking no action whatsoever to assist him in obtaining medical assistance for Latrell. She told the court she thought the baby was in serious trouble, but her actions may not have conveyed that to the accused. When determining whether the accused’s actions represent a marked departure from what a reasonable person would have done in the circumstances, it is significant to note that another parent in the same room was sending no signals to indicate that Latrell was a baby in crisis.⁴¹⁸

In other words, notwithstanding that Smith was the child’s primary caregiver, it was reasonable for him to rely on a woman’s (mother’s) assessment of the child’s needs.⁴¹⁹ It is difficult to envision a court holding the reverse – that a mother was entitled to rely on a

⁴¹⁷ *Ibid.*, at para. 11.

⁴¹⁸ *Ibid.* at para. 76. There was other evidence that addressed the issue of the reasonableness of Smith’s conduct including medical evidence that suggested that “a lay person could confuse an unconscious baby with a drowsy baby.”

⁴¹⁹ The “Mother knows best” was a strategy attempted in *R. v. Hariczuk*, [1999] O.J. 1424 (Ont. C.J.), online: QL (CJP) where the accused father argued that his mother’s approval of his drug storage techniques was significant. The Court states that the mother’s acceptance of the measures did not bolster the argument that his actions were reasonable *because* her “conduct more closely resembled acquiescence and adherence” to the accused’s procedures rather than approval of them. Implicitly, approval of the procedure *by a mother* may indeed have been significant to the court. But see *R. v. IWF* (2000), A.R. 319 (Q.B.) where the father was convicted of failing to provide the necessities in that he should have realized something was wrong with the malnourished baby.

man's assessment of the child's need. Indeed in *R. v. Grimmer*,⁴²⁰ the mother was charged with murder on the basis that "when she learned of an incident with the baby that required CPR she had believed her husband's advice that no further action was necessary."⁴²¹ This illustrates that although men are sometimes charged with 'failure to protect' offences, gender influences the standards against which men and women are judged and determinations of culpability.

The ideology of motherhood reifies mother's intuition and sensitivity to their children's needs. As always with ideology, these ideas contain a 'kernel of truth' (Boyd, 1991, 97). Mothers tend to be the primary caretakers of children and spend more time with their children than fathers do. Thus the fact that mothers tend to be the adult that knows most about their children is not attributable so much to 'instinct', as to the way social relations have been ordered in society. Many mothers would no doubt claim that they have a heightened sense of awareness, which they would characterize as a 'mother's intuition', when it comes to their children. But the question is whether it is appropriate to invest the reasonable 'good' mother with such a characteristic without regard to her age or experience or the context within which she was mothering. Indeed, even those who claim to have 'mother's intuition' would no doubt acknowledge that their 'intuition' does not operate at all times and in all circumstances, and that factors such as emotional or physical stress had a bearing on the functioning of their 'intuition'. Perhaps they would also acknowledge that their 'intuition' was to some degree a function of their age, experience and education.

⁴²⁰ (No 1) (1998), 206 N.B.R. (2d) 251 (C.A.), (No. 2) (1999) 219 N.B.R. (2d) 150 (C.A).

⁴²¹ This mother, who was not present when the father 'shook' the child, went through a preliminary trial. Charges against her were eventually stayed, although not until after her husband's conviction in a separate trial.

Imposing such standards on mothers without accounting for women's different social locations, makes it difficult for many to conform to the dominant social expectations of 'good' motherhood.

c) All-powerful – “The Maternal Instinct”

Recently, the story of a lioness that had adopted an Oryx calf grabbed headlines around the world. The BBCi reported:

Instead of then attacking the defenceless calf, the lioness adopted the baby, protecting it from other predators, including a leopard. "This is either an extraordinary case of maternal instinct or simply the eighth wonder of the world," local Herman Mwasaghu told The Nation newspaper.⁴²²

The appeal of this story may have been in the fact that the lioness is the perfect metaphor for mothers and the 'maternal instinct' – beautiful, powerful, fierce, deadly when crossed. Equally, the calf is a perfect metaphor for a child – adorable, defenceless, vulnerable, totally dependant on the lioness for protection.⁴²³

The 'maternal instinct' is celebrated as one of the most wonderful aspects of motherhood, and has been described as "an inborn tendency to want to protect and nurture one's offspring."⁴²⁴ Also, apparently "almost all mothers (human and animal alike) eventually

⁴²² BBCi, "The lioness and the oryx" 7 January, 2002, online:

http://news.bbc.co.uk/1/hi/english/world/africa/newsid_1746000/1746828.stm (date accessed June 6, 2002).

⁴²³ Badinter (1981, 156) shows how images of the animal were invoked to support the idea of the maternal instinct and also to demonstrate appropriate uses of women's bodies – such as breast feeding and diet in 18th century France.

⁴²⁴ Attributed to Elyse Rubenstein, "a Philadelphia psychiatrist who counsels new mothers" and found on BabyCenter.com, which describes itself as "the leading destination on the Internet for new and expectant parents". BabyCenter.com is part of the Johnson & Johnson "family" of companies. Online: <http://www.babycenter.com/refcap/pregnancy/newbornprep/9897.html> (date accessed: 15 May, 2002)

come to feel this way after they have a child."⁴²⁵ "Maternal instinct" conveys the notion that a mother's capacity and desire to protect her child is as fundamental as it gets – it is beyond common-sense, it is beyond intuition, it is *instinct*. Furthermore, the 'maternal instinct' is understood as universal. All mothers, or at least all 'good' mothers have 'it'.

The 'maternal instinct' itself needs to be understood in terms of power. It describes not only the (apparently) overwhelming desire women have to protect and nurture their off-spring but also implies that it is the source of women's power to do so. The 'maternal instinct' allows women to tap into great wellsprings of strength necessary to protect their young.

If one subscribes, as I do, to the post-modern view that there is nothing natural, inevitable or universal in our social world, then the concept of the 'maternal instinct' becomes a socially constructed product of power and discourse.⁴²⁶ Again, I am not arguing that (most) women do not have powerful feelings of love for their children including desire to keep them safe. As always, we see that 'kernel of truth' that makes the concept of the 'maternal instinct' so appealing. But as with other oppressive aspects of the ideology of motherhood, the 'maternal instinct' has been reified, and universalized as a reflection of *all* women's experience. Moreover, to the extent that a woman's 'maternal instinct' is understood to empower her to

⁴²⁵ *Ibid.* See also Schappell (1997) who suggests in an essay on her personal search for her 'maternal instinct' that "After two and a half months I discovered that I could differentiate between Isadora's 'I'm-starving' cry and her 'Hello-I'm-soaking-in-it' cry." It is this type of discourse the (re)produces both social expectations and mothers' personal expectations that all "normal" women have or develop a 'maternal instinct'.

⁴²⁶ See Badinter (1981) for a debunking of the maternal instinct. Badinter suggests "A review of the history of different forms of maternal behaviour gives birth to the conviction that maternal instinct is a myth. No universal and absolute conduct on the part of the mother has emerged. On the contrary, her feelings, depending on her cultural context, her ambitions, and her frustrations have shown themselves to be extremely variable...No, there is no universal law in this matter, which transcends natural determinism. Mother love cannot be taken for granted. When it exists, it is an additional advantage, an extra, something thrown into the bargain struck by the lucky ones among us."

overcome all obstacles in protecting her children from harm it is, as we saw in Chapter 3, simply wrong.

This powerful and I would say oppressive prescription of motherhood is reflected in failure to protect cases. Sometimes it is referred to expressly:

Even in the animal kingdom, the mother and father of the newborn protect, nurture, and assist their young in every way possible.⁴²⁷

...it is clear that Mrs. Bohnenkamp failed to follow the instincts which a mother would normally show of protecting her child from abuse or injury.⁴²⁸

More often, however, the power that is attributed to mothers either in the form of the 'maternal instinct' or otherwise, remains implicit and unexamined. For example,

Anna Goldberg knew her husband was seriously abusing her newborn infant and *failed to control the acts of her husband when she had a right and a duty to do so...*⁴²⁹

She fell increasingly under the spell of Soper and, for one reason or another, did *not see fit to take steps to stop* his injurious and ultimately fatal actions with respect to her infant daughter.⁴³⁰

She knew that [her husband] was injuring Sara yet she abdicated her legal duty to protect her child.⁴³¹

The judges reiterate the mothers' 'right and duty' to protect the child but never mention her (perhaps limited) ability to do so. The judge's use of the word 'abdication' tells us quite a lot about its operating assumptions about the mother's power. 'Abdication' is a 'choice' not to exercise or to relinquish the power that one has. Thus, in constructing a mother's failure to

⁴²⁷ *Olsen, supra* note 205 at p. 10., Ironically, we know that in the animal world, the males are often the primary threat to the offspring. The mothers are not always able to protect the offspring from this peril.

⁴²⁸ *R. v. Soper and Bohnenkamp, supra* note 344 at para. 26.

⁴²⁹ *Goldberg, supra* note 237 at p. 16.

⁴³⁰ *Soper and Bohnenkamp, supra* note 344 at para. 38.

⁴³¹ *Olsen, supra* note 205 at para. 2.

protect her child as an 'abdication' of her responsibility judges are equally affirming that she had unlimited power to either fulfil the responsibility or to abdicate it.

While it may be difficult to imagine the circumstances under which a woman could abdicate her responsibilities, the Court in *R. v. I.W.F.*⁴³² describes a circumstance (not found on the facts of that case) where a father could do so:

This is not a situation where the father, as *breadwinner*, was working out of the city for a protracted period of time. In such circumstances, responsibility for the daily care of a child might be abdicated to the spouse.

Indeed, this seems to have been the case in *Soper, and Bohnenkamp*. In this case both the mother and father were charged with criminal negligence causing death for failing to protect their child from Soper, a man who lived with the family.⁴³³ The parents reportedly "gave over the care, custody and discipline of the child to Soper."⁴³⁴ In fact the child was apprehended by the ministry but returned to the parents on the condition that Soper not be allowed near the child. "Soper defied the court order ...and he was facilitated in that respect by Mrs. Bohnenkamp".⁴³⁵ The mother was convicted and sentenced to 6 years in prison. The father was acquitted on the basis that "his involvement with the infant was minimal around the time of the offence, and he was frequently out of the home working."⁴³⁶ Thus it would seem that, at least in this case, a father's lack of involvement with a child could absolve him of responsibility for her welfare.

⁴³² (2000), A.R. 319 (Q.B.) at para. 76.

⁴³³ The decision implies that the mother and Soper had some form of liaison.

⁴³⁴ *Supra* note 344 at para. 3.

⁴³⁵ *Ibid.* at para. 6

⁴³⁶ [1985] B.C.D. Crim. Conv. 5545 – 01.

One possible reason that issues of power remain submerged in the cases is that a mother's power or capacity to protect her children operates as a type of legal presumption. This view was expressed by the Ontario Court of Justice in *Canoto*,

*Law presumes that the ordinary citizen, even one with strong religious beliefs, will be more concerned with the safety of their child's physical being rather than their spiritual being and is capable of protecting the safety of that child's physical well-being.... [Emphasis added]*⁴³⁷

It is interesting to contrast the modern formulations of a mother's duty with that articulated in *R. v. Russell*:

In describing the duty of the prisoner it would perhaps have been more accurate to have said that he came under a duty to take *all reasonable* steps to prevent the commission of the crime. A man is not bound to take steps which in the circumstances no reasonable man would take in an attempt to save the life of his child. But it is clear that the learned Judge's charge would convey nothing more than that to the jury, because he almost immediately pointed out *that it was only where he had "power to interfere" and "could have saved them," and "refrained from interfering" that he was criminally responsible*; and moreover, ...it was obvious that the steps which the prisoner might have taken in order to have prevented his wife from drowning the children were such as any reasonable man would have taken, *and could have taken, without risk or serious trouble to himself.*⁴³⁸

In contrast with the modern cases, the Court's formulation of the parental duty in *Russell* at least recognizes the possibility that there may be impediments to a parent's power to protect their child. The Court acknowledges the possibility that, in some circumstances, even 'good' and 'loving' mothers will not always be able to protect their child from harm. But as we have seen in both the U.S. literature and the Canadian cases, the doctrine of failure to protect holds that, if a mother wants to protect her child she can, and her failure to do so is

⁴³⁷ [1996] O.J. No. 401 (C.J.), online: QL (CJP) at para 25.

⁴³⁸ [1933] V.L.R. 59 at p. 81 (C.A.).

attributed to her (poor) 'choice' of her husband or possibly drugs⁴³⁹ or other (selfish) 'lifestyle' choices over the well-being of her child.

The doctrine of failure to protect only makes sense, of course, in the context of liberal ideology and the autonomous, rational, unconstrained and powerful subject of law. Evidence that situates women's actions within the context of their material realities and demonstrates the very real limitations on women's power to stop abuse will undermine the doctrine and expose it for what it is; social construction based on dominant and oppressive ideologies of motherhood that are rooted in power and social relations of race, class and gender. Marie Ashe (1995, 150, 151) argues:

In defining or naming "bad mother," law operates to erase realities of class, of race, of inequality, and of danger that variously define the lives of different bad mothers...In justifying their exercise of the discretion to prosecute child abuse and neglect matters, prosecutors often assert that the conditions of constraint relating to class, to race, and to domestic violence are either intrinsically or ultimately irrelevant to their determination to prosecute...The prosecutor's assurance will often take the form of an assertion that any woman who behaved as the bad mother is alleged to have done should be prosecuted.

In Chapter 3, I suggested that one of the dominant themes in the U.S. literature was that the law abstracts women from the context of their material experiences including the experience of violence. The final section of this Chapter considers how domestic violence emerges, when it emerges at all, in Canadian failure to protect cases.

⁴³⁹ For example in *Olsen, supra* note 205 at p. 13, the trial judge admonishes Lisa Olsen: "You are entitled to your crack habit but not at the expense of Sara".

3. *The Context of Violence*

I want to conclude this Chapter with some observations about judicial discourses concerning domestic violence. Up to this point in the Chapter I have been examining judicial discourse on mother love, mothers' intuition and the maternal instinct from the perspective of what judges have *said* about women who fail to protect their children. But judicial discourse on domestic violence is, in my view, best revealed by what judges *do not say* about domestic violence. At the end of Chapter 3, I warned that we should not expect that the fact of battering will appear in many of the failure to protect cases since a feature of the doctrine of failure to protect is to render these experiences invisible in law. Indeed, it would appear that, with a few exceptions that I will discuss at the end of this section, judicial discourse does no more than suggest the existence of domestic violence: references to the mother's circumstances including domestic violence are usually oblique and vague.⁴⁴⁰ For example:

The facts are set forth in great detail in exhibit number 1... There is no necessity to review those facts except to say that the neglect and lack of parental responsibility of Ms. M. is clearly apparent. *She was under the control of her co-accused, Mr. C.* She did what he said, without effort to properly care for the child and ignored the basic and fundamental needs of the child...It is of significance that [the psychiatrist] makes this comment: "She indicated that she was always afraid of her husband and that she had to do what he told her. Her function in the home was to mop the floors, to vacuum, and to feed the children and be with them."⁴⁴¹

For the appellant, Kelly, it is argued that the trial Judge neglected to consider her reduced intelligence and the fact that she was *under the influence of Mr. Ackroyd* when the failure to contact medical authorities occurred.⁴⁴²

The accused were both teenagers when the met...She was pregnant. Up to her confinement she had left him a number of times, but *willy-nilly she would go back to him*...The day the child was born the husband mentioned that she should go back to work to buy him a car. She was back to her old job of nude dancing within days. A

⁴⁴⁰ Neilson (2001, 126, 129) discusses how women's experiences of violence are "trivialized" or erased in Canadian custody decisions.

⁴⁴¹ *R. v. M.M.*, [1998] O.J. No. 3032 (C.J.) online: QL (CJP) at pp. 2 and 6.

⁴⁴² *R. v. Kelly*, [1989] N.S.J. No. 88 (S.C.A.D.), online: QL(CJP) at p. 2.

psychiatrist who saw them both testified that the situation fitted both their patterns. It was a *perfect match of "dominant-domine"* except that now the child was a bother to both of them.⁴⁴³

As a result of the *circumstances in which her relationship* with Soper placed her, she suffered some loss of ability to make moral and rational judgements and to think and act independently...It seems clear to me that we have here a very immature woman, highly susceptible to the influence of a *dominant personality* to whom she was strongly attached.⁴⁴⁴

After being released from prison, he returned home to conduct another *reign of terror*.⁴⁴⁵

These examples of discourse are remarkable in a number of ways. First, there is no mention of physical violence in any of these, except perhaps an oblique suggestion in the last 'reign of terror' remark. Nor is there any suggestion, except in the first excerpt, that these women were or had any reason to be afraid of their partner or to be concerned about their physical safety. Of course, we do not know that violence was a feature of these women's relationships with their partners because the circumstances that resulted in them "being under the control or influence" of their partners have been rendered invisible. For example, in *R. v. M.M.*⁴⁴⁶ the court refers to evidence that Ms. M. was afraid of her husband as 'significant' but even so does not discuss of the basis of that fear.

Secondly, this discourse pathologizes⁴⁴⁷ the women by constructing them as non-functioning agents who are under the control and/or domination of their husbands. This construction

⁴⁴³ *R. v. Zurlo* (1990), 57 C.C.C. (3d) 407, leave to appeal to S.C.C. refused 60 C.C.C. (3d) viat pp. 411 – 12.

⁴⁴⁴ *Soper and Bohnenkamp*, *supra* note 344 at para. 31.

⁴⁴⁵ *Olsen*, *supra* note 205 at para. 54.

⁴⁴⁶ *Supra* note 412 at para. 6.

⁴⁴⁷ According to Mirriam-Webster Dictionary, 'Pathology' is defined as: "something abnormal: **a** : the structural and functional deviations from the normal that constitute disease or characterize a particular disease **b** : deviation from propriety or from an assumed normal state of something nonliving or nonmaterial". Online: <http://www.m-w.com/cgi-bin/dictionary> (date accessed June 6, 2002)

invites the conclusion that these mothers are weak, deviant, and perhaps masochistic. When women's experiences are made invisible so too is the possibility of locating their actions and reactions (including their fear) in the context of those circumstances or of finding that their actions constituted a reasonable response in those circumstances.

At the same time, this type of portrayal erases women's acts of agency within the context (and the limitations) of their material existence. Are we to conclude that these women mounted no resistance to their partners' abuse of them or their children? As discussed in Chapter 3, the knowledge that we have about women who are battered suggests this is not likely.⁴⁴⁸ Women do employ strategies of resistance that are reasonable within the context of violence, danger and isolation that constitutes their material reality. What these strategies of resistance may be emerges more clearly in the few Canadian cases where the violence against the mother is allowed to emerge.

It is telling that there were only four cases in which clear pictures of the extent of the violence perpetrated by the abusive fathers on both the mothers and the children was allowed to emerge. The first was *R v. Roud* discussed at the beginning of this thesis. The Court stated:

She testified that she did not leave her husband because "if I had even so much as made a move to the front door he would have stopped me...he made a threat that if I had threatened, if I even made a move to walk out on him he knew a bunch of fellows that owed him a favor and that if I did walk out they would do me bodily harm because he had seen them in action before."⁴⁴⁹

⁴⁴⁸ See Mahoney (1994) for a discussion of battered women's agency.

⁴⁴⁹ (1981), 58 C.C.C. (2d) 226 (Ont. C.A.) at para. 11.

In that case while the mother's "justifiable fear" of her partner appeared to have been a mitigating factor on sentence, the court was satisfied that her knowledge of her husband's propensity for violence was actually evidence of her guilt.

In *R. v. S.S.*⁴⁵⁰ the mother plead guilty to criminal negligence causing bodily harm for failing to protect her child from the abuse of her common law partner.⁴⁵¹ The court acknowledged that it had received evidence that the mother had been verbally and psychologically abused by her partner P.L. although no details of the abuse were discussed.⁴⁵² The evidence was that the children were severely abused by S.S.'s partner and that she had on two or three occasions stopped her abusive partner from drowning her child. The court stated:

Le Tribunal est satisfait que le fait, qu'à deux ou trois reprises, elle a arrêté P.L. qui voulait noyer l'enfant S.S. démontre clairement qu'elle était capable de confronter Monsieur P.L. et d'arrêter ses attaques sur les enfants quand elle le voulait.⁴⁵³

These cases illustrate that even when mothers' actions are situated in the context of domestic violence, the courts are not willing to accept that it in any way abrogates her power to prevent the abuse of the children. This would confirm what the U.S. research has shown, that judges are reluctant to accept that there can be any 'excuse' for a woman to fail to protect her children (Johnson 1987, 367).

⁴⁵⁰ [2001] J.Q. No. 4532 (C.S.), online: QL (CJP).

⁴⁵¹ *Ibid.* The a decision related to sentence. The crown was asking for 2 years and defence wanted 2 years less a day but for time to be served in a transition house and in the community. The sentence was 18 months in jail.

⁴⁵² *Ibid.* at para. 31. S.S. also had a low intellectual capacity (an I.Q. of 72 where 120 to 180 is 'normal').

⁴⁵³ *Ibid.* at para. 38. Translation: "The Court is satisfied that the fact that S.S. stopped P.L. from drowning the child 2-3 times shows clearly that she was able to stand up to him and to stop the attacks on her children when she wanted."

The other two cases are *R. v. Speid*⁴⁵⁴ and *R. v. Lawrence*⁴⁵⁵. Notably, these cases are not actually decisions involving mothers who 'failed to protect' their children, but rather are decisions in the trials of their abusive partners. In both cases the mothers had already pled guilty to criminal negligence causing death on the basis of their failure to protect their children.⁴⁵⁶ Nevertheless, these cases give us a sense of the violence that provided the context for these women's mothering. In *Speid* we also get a sense of the mother's range of 'choices' and her acts of agency within the constellation of factors that defined her material existence. For example we are told that:

Miss Nugent testified that the appellant on one occasion had struck her on the head with a piece of statuary, inflicting a cut on her forehead. She went to the apartment of the superintendents of the building where she telephoned the police who called an ambulance for her. She was taken to the hospital where the injury to her forehead was sutured.

Shortly after the baby was born, the appellant again beat her. On this occasion she went to the apartment of Cynthia Porter who lived in the same building. Cynthia accompanied Nugent back to Nugent's apartment, but the appellant by then had left.

Around June of 1981, the appellant again beat Nugent. As a result of the beating she called the police. An officer came to the apartment and told the appellant to leave. The appellant then left with the officer.

Nugent testified that around Thanksgiving in 1981 the appellant beat her by hitting her on the head with one of the legs that supported the sink in the bathroom. On this occasion she fled the apartment, pursued by the appellant and went next door to the

⁴⁵⁴ *R. v. Speid* (No. 1), [1985] O.J. No. 125, 20 C.C.C. (3d) 534 (C.A.).

⁴⁵⁵ [1989] O.J. 2060 (Ont C.A.), rev'g [1987] O.J. No. 1250 (S.C.), online: QL (CJP). Although Lawrence's partner Charlene McLeod did testify about Lawrence's violence toward her and her daughter, no particulars are provided in the sentencing judgement. The judge notes: "On the evidence of McLeod and other witnesses at trial I find that the accused was a drug user, a drug trafficker and had a strong propensity for physical violence and threats of violence. Although the jury could only consider that evidence for a very limited purpose at trial there is no such limitation on its use now. I must however sentence Lawrence today for manslaughter and not for any previous offences he may have committed. His violence is a factor that I consider in balancing in this case the various principles of sentencing which I must apply."

⁴⁵⁶ In both *Speid* and *Lawrence*, the evidence of domestic violence was allowed for the sole purposes of explaining that previous statements by the mothers exculpating the accused were made because of the mothers' fear of their partners.

apartment of a girl named Linda who called the police. The police accompanied Nugent back to her apartment, but the appellant was no longer there.

Nugent also testified that the appellant frightened her by pointing a revolver at her and pulling the trigger. She said that although the gun was empty, she was, nevertheless, frightened. The gun the appellant pointed at her was a small gun, but the appellant had a larger gun as well. She said the appellant had bullets for the gun which he kept in a cupboard in the kitchen.

She testified that on one occasion, after the appellant had beaten her, she contacted the Children's Aid Society to obtain their assistance in moving to another city.

Crown counsel also introduced a letter which Nugent testified that she had received from the appellant around August 1981. The letter includes the following:

Take heed to the word of my mouth Verna gril [sic] ore [sic] you will surely pay. This is the word of King Junior the prophecy that my mother taught me....but a woman that love and feareth her husband. She shall be praised ...

Miss Nugent said that in the letter the appellant was threatening her. She said that she had received other letters from the appellant in which the appellant said basically the same thing, and they frightened her.

These excerpts demonstrate that (at least) isolation and fear limited Verna Nugent's 'choices'. She knew she was alone: she knew the police wouldn't or couldn't help her, she knew the children's aid society wouldn't or couldn't help her and she knew that the risk associated with leaving was, for the moment at least, too great to attempt. So Verna Nugent did not 'choose' to leave her partner 'Junior' Speid, but that does not mean that she was a non-acting agent. Rather, Verna's choice appears to have been to focus on the "project of staying alive" (Mahoney 1994, 73) and on minimizing the harm Junior inflicted on her and her children. One of her 'choices' was to hit her 3-year-old the child herself.

She said that she had struck the child because she knew that if she did not the appellant would hit the child and she preferred to hit the child herself rather than have the appellant do so.

Of course, in the end Verna was not able to prevent Speid from killing the child. Verna pled guilty to criminal negligence causing death on the basis that she had 'failed to protect' the child from Junior.⁴⁵⁷ A terrible post-script to this case is that Junior himself was ultimately acquitted after evidence of the extreme violence that Verna and the child endured was excluded from evidence.⁴⁵⁸ In excluding this evidence the Ontario Court of Appeal quoted from a 1969 Manitoba decision:

Obviously we are here concerned with a crime that is particularly sordid and brutal in character. The death by violence of a child of three years of age, under the circumstances above-recited, is an event which by its very nature is calculated to excite emotions of shock and indignation. In such a situation special care must be taken by those charged with the administration of justice to see that the trial of an accused person is not marred by the improper creation of an atmosphere of prejudice and hostility.⁴⁵⁹

It is ever thus that women's stories are silenced in and by law. One wonders why evidence that situates men's offences in their context is excluded on the basis of its prejudice to the accused, even as this contextualization might be of benefit to the mother.

It is not clear why domestic violence does not seem to be a factor that is considered or taken seriously in these cases.⁴⁶⁰ There are, of course, several possible reasons. One possible reason is that these women were not subjected to physical or other violence. Another reason is that no evidence of violence was introduced at trial. This may be because the mothers'

⁴⁵⁷ See *Re A.J.N.*, [1982] O.J. No. 652 (Prov. Ct – Fam. Div.) a decision concerning the apprehension of Ms. Nugent's newborn child by child welfare authorities.

⁴⁵⁸ *R. v. Speid* (No. 2), [1986] O.J. No. 1441 (S.C.). The evidence was originally admitted only for the purpose of explaining that Nugent's previous exculpatory statement about Speid were made because of her fear of him. At trial she did not admit to making these statements and so the Court of Appeal excluded the evidence.

⁴⁵⁹ *R. v. Drysdale* (1969), 2 C.C.C 141 (Man. C.A.). The Ontario Court of Appeal also quoted this passage in *R. v. Lawrence*, [1989] O.J. 2060, where it excluded evidence of the accused's drug dealing and welfare fraud.

⁴⁶⁰ Interviewing legal counsel in failure to protect cases would provide valuable insights into this question and is an avenue of research that a different research project might pursue.

lawyers are not asking the right questions of the mothers or do not know how to use the evidence of abuse or that that judges are not allowing it.⁴⁶¹ Good advocacy in these cases is critical and as Boyle (1991, 282) suggests,

A lawyer's job is to help decision-makers see the situation from his or her client's perspective. An unwillingness to use [feminist method] is not simply a matter of personal taste. I see it as a matter of competence. If decision-makers are more inclined to be male-oriented than not, then a lawyer representing a woman has to make the attempt to redress the balance.⁴⁶²

The question remains, of course, would it matter? In some of these cases it appears that the judges had evidence of abuse but may simply have disregarded it or, as in the cases of Donna Roud and S.S., been unimpressed with it.

In this Chapter I have described the powerful prescriptions of motherhood that are reflected in the judicial discourse in failure to protect cases. These discourses construct mothers as all-loving, all-knowing and all-powerful. In contrast, mothers who have 'failed to protect' their children reflect as the "photographic negative" (Kline 1993, 312) of the ideological 'good' mother. They have 'chosen' their husbands over their children, their concern for their own liability is greater than their concern for their children, they have failed to recognize the danger to their child, they have failed to recognize and diagnose their children's medical condition, they have failed to demonstrate their 'maternal instinct' which would provide them with unqualified power to protect their child. And, finally, they have failed in all these respects in a contextual vacuum. Readers of these cases are invited to conclude that they are (simply and essentially) 'bad' mothers. But Marie Ashe (1995, 151) cautions:

⁴⁶¹ See Neils on (2000, 129) for a discussion of a study to determine how lawyers tend to conceptualize woman abuse and the impact on child custody litigation.

⁴⁶² See also Ashe (1992) and (1995) for discussion of the importance (re)presenting 'bad' mothers.

I want to suggest that it is precisely at the point at which the mother-client appears to her lawyer truly “bad” that the lawyer needs to re-turn to an ethic based on notions of resistance, needs to re-turn to a faith that every essentialist casting of women as essentially “bad” is suspect. It is at this point that lawyers need to remind ourselves that every construction of the “bad mother” as a pure and essentialistic figure operates to arrest our inquiries into the material and spiritual conditions of women’s lives, making those conditions irrelevant to the law.

Although Ashe is speaking about mothers’ lawyers, this statement equally applies to the ‘knowers’ who read the cases or the media accounts of various ‘bad’ mothers. Marcia Dooley, Lisa Olsen, Anna Goldberg and all of the (other) mothers that have been the legal subjects of the cases discussed in these Chapters have stories to tell. Those stories are of particular interest because, as Roberts (1993, 140) suggests “it may be the deviant mothers who reveal the mechanisms by which the institution of motherhood confines women and the price they pay if they resist.” The possibility for transformation of the doctrine of failure to protect and the dominant, oppressive ideologies of motherhood it reinforces lies in the context of these cases. As Miccio (1999, 121) suggests,

By contextualizing mothering, it is possible that courts charged with the protection of children can identify the individual and systemic actors that perpetuate the harm. Perhaps then we can craft protection paradigms that keep children safe, empower mothers and locate the contours of maternal and state responsibility.

As *R. v. Heikamp*⁴⁶³ demonstrated, when judges (and society) look beyond blaming the bad mothers, systemic and structural problems and conditions become visible. This opens up at least the possibility that these problems and conditions can be addressed in advance of more children being harmed. This seems to be a much more productive approach than punishing parents after the fact.

⁴⁶³ *Supra*, note 463.

As for the question of whether mothers and fathers are held to different standards, there is some evidence, albeit subtle, that fathers may be held to different standards. Fathers are expected to protect their children from abusive mothers, but some judicial discourse suggests that fathers might not always be expected to be primarily responsible for their children, might be more readily excused from their responsibilities and are not expected to be quite so attuned to their children's needs. But after all, who ever heard of the 'paternal instinct'?

Chapter 6 - Conclusion

This thesis has addressed the emergence and the operation of the doctrine of failure to protect in Canadian criminal law. First emerging in the U.S. in 1960, the doctrine of failure to protect presumes that mothers always can and always will be able to protect their children from harm and abuse. Mothers who, for any reason, fail to live up to this primary obligation of motherhood will fall into the category of 'bad' mothers and will be subject to punishment under child welfare, criminal law or both for their transgressions. Since its emergence over four decades ago, the doctrine of failure to protect in the U.S. has become firmly entrenched in the criminal law⁴⁶⁴ and its scope has expanded to child welfare⁴⁶⁵ and tort law. Over the last ten years the doctrine of failure to protect has come to the attention of feminist scholars because of its particularly troubling impact on women, and particularly on women who are battered. Specifically, feminist scholars have identified problems in both the way the doctrine is conceptualized to reflect an oppressive ideology of motherhood, and the way it is applied in law to disproportionately hold women accountable for the violence of others.

There is currently no explicit 'failure to protect' provision in the *Criminal Code*⁴⁶⁶ (the "Code"). However this study was prompted by the Canadian federal government's proposal (Canada 1999a, 1999b) to introduce such a provision, modeled on the U.S. law, in conjunction with amendments to the *Code* that would create new 'child specific' offences.⁴⁶⁷

Concerned that this could have serious implications for women and, in particular women who

⁴⁶⁴ Thirty-seven states have codified the doctrine in their criminal laws. See Chapter 3, Part 3.

⁴⁶⁵ A recent and particularly troubling effect of the doctrine of failure to protect, has been the practice of apprehending the children of women who are battered on the basis of these mothers' failure to protect their children from witnessing domestic violence.

⁴⁶⁶ R.S.C. 1985, c. C-46 as am.

⁴⁶⁷ The federal government's proposals were discussed in Part 2 of Chapter 1.

are battered, my initial research goals were to identify how these laws operated in the U.S. Based on this research, I began to suspect that the doctrine of failure to protect was already operating in Canadian criminal law. Thus the research goals of this project shifted to include investigating the ways in which women are currently prosecuted under Canadian criminal law for failing to protect their children (even without a specific criminal offence in the *Code*), and to identify the actual and potential ways that these laws are oppressive to women in general, and to women who are battered in particular.

As I stated in my Introduction, this work is important, as is all research that investigates domestic violence, because of the numbers of women and children whose lives are shaped by the material reality of living with violence and abuse.⁴⁶⁸ The potential changes to the *Code* proposed by the federal government (Canada 1999a; 1999b) that may see the doctrine of failure to protect codified in Canadian criminal law underscores the importance of generating knowledge that may assist feminist advocates for battered women to formulate strategies to respond to such reform that may be forthcoming. In this Conclusion I will summarize my basic research findings and will then discuss the implications of these findings for current criminal law practice and for future policy. In this regard, I will suggest that the Canadian government should think twice before introducing the doctrine of failure to protect expressly into the *Code*.

1. *Basic Research Findings*

As discussed, I began my research by examining the U.S. experience with 'failure to protect' laws as revealed by a significant body of recent literature examining these laws from the

⁴⁶⁸ See Chapter 1, Part 5.

perspective of women who are battered.⁴⁶⁹ The literature review in Chapter 3 served two purposes in this thesis. First, I used it to demonstrate the complexity of battered women's experiences and the challenges of mothering in that context. The doctrine of failure to protect is based on the premise that mothers always can and always will protect their children – at least by leaving the batterer or by reporting him to the authorities. Contextualizing women's actions within their experiences of violence undermines this paradigm by demonstrating that violence limits and shapes women's (re)actions to the abuse – their own and that of their children. In particular, I discussed the “why didn't she leave?” question which seems to run as a central theme through most cases involving domestic violence, and the contribution of the literature to debunking prevailing myths about this question and domestic violence generally in the context of failure to protect proceedings. I demonstrated that there are many compelling reasons why women do not or cannot (simply) leave battering relationships, including powerful social inscriptions of family and women's responsibilities to and within the family; economic insecurity that makes poverty and homelessness a very real possibility for many women; and the well-founded fear that the violence may escalate if they leave and that leaving may actually compromise their safety and that of their children. Women make strategic choices to stay or to go based on these and many other factors (for example the amount of support available from community, police, friends and family) and often ‘staying’ is a reasonable response to violence. Moreover, ‘staying’ does not mean that women are not in other ways actively resisting the violence. In addition to describing women's material experiences of violence and their resistance to it, this discussion provided some context for the balance of the discussions in the thesis.

⁴⁶⁹ See discussion in Chapter 3.

The second purpose of the literature review was to gain insight into the actual operation of the doctrine of failure to protect and 'failure to protect' laws in the U.S. Because the Canadian government is contemplating the enactment of failure to protect laws modelled on U.S. laws (Canada 1999a; 1999b), it seemed that this literature would provide some interesting insights into what might happen in Canada should these laws be enacted. In addition, the literature would provide insight into what we should be attentive to in analyzing what might currently be happening in Canada even in the absence of explicit 'failure to protect' laws.

Indeed, I found that although the doctrine of failure to protect has been codified in the child welfare and/or criminal statutes of many States, this is by no means a prerequisite to the operation of the doctrine. The doctrine of failure to protect cuts across all types of laws, civil, criminal and child welfare, to hold mothers accountable for violence perpetrated by their partners and in this way is revealed as a powerful, ideological force. Indeed, not only does the doctrine operate outside of 'failure to protect' laws, it shapes how these and other laws are interpreted and applied to hold women accountable for the violence of their partners. For example, U.S. courts have broadly interpreted "child abuse" and held that "a parent who knowingly permits another person to abuse the parent's own child subjects the child to abuse within the meaning of [the child abuse statute]."⁴⁷⁰ This finding suggested that we should be attentive to similar broad interpretations of *Code* provisions in Canada.

⁴⁷⁰ *Terri Williquette v. State*, 385 N.W.2d 145 (Wis. 1986)

The literature review also highlighted particular features of law, both ideological and methodological, that in the U.S. experience with 'failure to protect' laws have proved particularly problematic for women. I found that women's experiences of violence are not often accounted for in legal determinations of whether they failed to protect their children because law operates to abstract women from their experiences of violence and erases their agency and resistance to this violence. This is largely a result of legal method and, in particular the standards of 'strict liability' and the 'reasonable person'. The strict liability standard abrogates the traditional *mens rea* requirement in criminal law, and the mother's intentions, even her efforts to protect the child, are irrelevant to the question of whether she failed to protect her child. Moreover, the strict liability standard is not a statutory requirement in the U.S. but is a result of judicial interpretation of the various statutes under which mothers are prosecuted for failing to protect their children.

The 'reasonable parent' standard is used to determine whether a mother knew of her child's abuse and/or in assessing the steps she took to prevent it. 'Reasonable person' standards are problematic for women, and especially for women who are battered since the standard is based on "dominant cultural norms" (Miccio 1995, 1110) that do not account for women's experiences generally and battered mothers' experiences of violence specifically. Because dominant cultural norms inform the reasonable parent standard, women are judged against dominant ideological constructions of 'good' mothers that do not reflect women's actual experiences of mothering, but nevertheless continue to be a powerful and oppressive force in shaping social expectations.

Finally, although some U.S. states have recently included provisions in their failure to protect laws that purport to account for domestic violence as an impediment to women's ability to protect their children⁴⁷¹, the literature suggests that judges are nevertheless reluctant to accept that there is any 'excuse' for a mother failing to protect her children. In this regard, the powerful ideological prescriptions of motherhood and popular misconceptions of domestic violence continue to operate against battered mothers charged with failing to protect their children.

Turning to the Canadian criminal law in Chapter 4, my research determined that the doctrine of failure to protect does operate in Canada, and in many ways parallels the U.S. experience. First, notwithstanding that there is no explicit 'failure to protect' provision in the Code, mothers (and also fathers) are prosecuted for failing to protect their children under a number of provisions. As I discussed in Chapter 4, these include s. 215 (failing to provide the necessaries of life), ss. 220 and 221 (criminal negligence causing bodily harm or death), s. 234 (manslaughter), s. 229 (murder) and s. 239 (attempted murder). I showed that the doctrine of failure to protect has been imported into Canadian criminal law through judicial interpretation of duty to provide the necessaries of life imposed by s. 215 of the *Code* and through the common law 'parental duty' established in 1981 by the Ontario Court of Appeal in *R. v. Popen*.⁴⁷² Indeed, one of the authorities relied on by the Court of Appeal in *Popen* was identified in the U.S. literature as the first 'failure to protect' case in the U.S.⁴⁷³

⁴⁷¹ See discussion in Part 3(d) of Chapter 3.

⁴⁷² (1981) 60 C.C.C. (2d) 232 (Ont. C.A).

⁴⁷³ *Palmer v. State*, 164 A.2d 467 (Md. 1960).

Subsequent decisions have expanded these duties such that the duty to protect a child from 'illegal' violence by a third party is firmly entrenched in Canadian criminal law.⁴⁷⁴

Secondly, the Canadian experience has paralleled that in the U.S. in that the traditional principles of *mens rea* and fault have also been abrogated in most criminal prosecutions of parents for failing to protect their children. As in the U.S., this is not a result of statutory authority but of judicial interpretation. I found that s. 215, originally enacted in 1892, was historically a subjective *mens rea* offence. That changed in 1993 when the Supreme Court of Canada held in *R. v. Naglik*⁴⁷⁵ that s. 215 was an offence of 'penal negligence'. The result of imposing a penal negligence standard is that women charged with failing to protect their children will be judged against the standard of the "reasonable parent" without regard to their 'personal characteristics' such as age, experience or education.

The Supreme Court of Canada's decision to include s. 215 in the category of offences for which it was appropriate to abrogate traditional principles of *mens rea* was a pure policy decision, based on the important goal of preventing harm and protecting society's most vulnerable members – children. However, I have argued that extending the standard of penal negligence and objective standards of fault to the offence of failing to provide the necessities of life was inappropriate because, while parenting entails great responsibility, it is a responsibility undertaken by people from all walks of life and in greatly varying

⁴⁷⁴ Since under s. 43 of the *Code* some violence against children is legal in Canada, the qualification of violence as "illegal" is not superfluous. See *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2002), 161 C.C.C. (3d) 178 (Ont. C.A.) aff'g (2000), 146 C.C.C. (3d) 362.(C.J.)

⁴⁷⁵ [1993] 3 S.C.R. 122, (1993) 83 C.C.C. (3d) 526, rev'g (1991) 65 C.C.C. (3d) 272 (Ont. C.A.).

circumstances.⁴⁷⁶ This thesis has demonstrated that the material circumstances of mothers, for example violence experienced at the hand of a partner, and their social locations, for example as women who are poor, First Nations or disabled, will shape women's experiences of mothering and the 'choices' available to them to resist the violence against her and her children. La mer J. stated in *Naglik* that s. 215 does "not purport to impose parenting or care-giving techniques".⁴⁷⁷ However, the objective standard of fault facilitates the imposition of dominant social norms and expectations of 'good' motherhood, and by failing to account for the material circumstances in which mothers exercise their care-giving responsibilities, has the potential to operate very harshly against those mothers who do not conform to these dominant social expectations. In this regard, although judicial decisions tend not to identify the social location of their legal subjects, Canadian experience has shown that it is already women who are already marginalized, such as women who are First Nations, poor, disabled or new Canadian, that pay the greatest price for deviating from the dominant expectations of motherhood (Kline 1993; Mosoff 1994). Because these mothers often have less of the resources that ease the challenges of parenting; because they are subject to more public scrutiny; and because they are less likely to conform to (or more likely to resist) dominant social expectations and norms of motherhood, these mothers are more likely to find themselves placed in the category of 'bad' mothers deemed 'unfit' for motherhood (Kline 1993). Women who are battered have also recently emerged as a category of 'bad' mother that are deemed 'unfit' for motherhood, and under a penal negligence standard that excludes

⁴⁷⁶ Other penal negligence offences, such as dangerous driving and careless use of firearms, involve inherently dangerous activities that are controlled and regulated by the Government.

⁴⁷⁷ *Supra* note 475 at para. 38.

their experiences of violence from judicial assessments of their failure to protect their children, are held unjustly accountable for the violence of others.

A third parallel to the U.S. experience with the doctrine of failure to protect was my finding that powerful and oppressive prescriptions of motherhood inform the standards of 'reasonableness' against which women charged with failing to protect their children are judged. In Chapter 5, I examined judicial discourse in failure to protect cases and found that this discourse strongly reflects the dominant ideology of motherhood discussed in Chapter 1. I began by suggesting the injury or death of a child evokes strong, emotional responses in the community and that this is reflected in judicial discourse in failure to protect cases. The backdrop of a 'poor, pitiful' child who has suffered abuse, provides a particularly difficult context for mothers charged with failing to protect these children to demonstrate that they are not 'bad' mothers.

The doctrine of failure to protect reflects the expectation that 'good' mothers always can and always will protect their children from harm, and this expectation is reflected in judicial discourse in failure to protect cases. Judicial discourse reflects very high expectations of mothers. Indeed, I argued that mothers are judged against a ideologically informed standard that constructs 'good' mothers as 'all-loving', 'all-knowing', and 'all-powerful'. In contrast, judicial discourse constructs mothers charged with failing to protect their children as 'bad' mothers for having 'chosen' their husbands over their children, for being more concerned with their own liability than their child's health or safety, for failing to recognize that their child is at risk of or being abused, or in need of medical attention, and finally for failing to

demonstrate their 'maternal instinct' which would provide them with unqualified power to protect their child. In other words, mothers who have 'failed to protect' their children reflect in the decisions as the "photographic negative" (Kline 1993, 312) of the ideological 'good' mother. To the extent that the doctrine of failure to protect operates in law to create the presumption that mothers always can and always will protect their children it will oppress those women who are, for any number of reasons, not able to live up to this very high standard. However, the power of the criminal law extends beyond those it punishes. The criminal law "not only defines and mandates socially acceptable behavior; it also shapes the way we perceive ourselves and our relationships to others" (Roberts 1995, 97). Thus the power of the criminal law to name a 'bad' mother, reinforces both social expectations and individual women's expectations of 'good' maternal behavior. In this way the criminal law's enforcement of expectations that are based on unrealistic, ideologically informed standards of motherhood is oppressive to all women.

Finally, my research confirms what the U.S. literature warned of, that the fact that a mother charged with failing to protect her child was herself abused is not likely to appear in many of the cases. Although several of the cases contained oblique references to domestic violence, for the most part, mothers' experiences of violence were completely erased by judicial discourse. Rather, judicial discourse constructed these women as 'under the control' of their partners. By describing women who are battered as 'under the control' of their partners, judicial discourse simultaneously constructs these women as weak, pathological and deviant, and renders invisible their agency in resisting the abuse of themselves and their children. In doing so, this discourse perpetuates myths and stereotypes of women who are battered.

2. *Implications of the Thesis*

The findings in this thesis have implications for criminal law practice and policy. Criminal law practice and effective advocacy on behalf of mothers who are battered and other mothers (such as mothers who are First Nations, black or disabled) is crucial to exposing systems of oppression that are harmful to women. Marie Ashe (1995, 152) argues that an important aspect of defence lawyers' work is resisting essentialist constructions of 'bad' mothers that result when law does not account for these women's experiences:

...lawyers representing bad mothers undertake what may be the most difficult aspect of [resisting essentialistic constructions of motherhood]: they attempt to represent the most unsympathetic of women. While the task is one of enormous difficulty, it is one of commensurate urgency. To the degree that lawyers fail to access and represent the subjectivities of neglectful or abusive mothers we participate in sustaining the legal structures of class division, of racial injustice, and of domestic violence that denigrate and oppress all women and that absolutely assure the reproduction and perpetuation of child abuse as a prevalent cultural reality.

In 1991, the Supreme Court held in *R. v. Lavallee*,⁴⁷⁸ that evidence of battered woman syndrome was admissible for the purpose of supporting Ms. Lavallee's claim that she had killed her abusive partner in self-defence. The broad significance of this decision was the legal recognition that "both the law and society may have treated women in general, and battered women in particular, unfairly",⁴⁷⁹ and that legal determinations about the 'reasonableness' of women's conduct in the context of self-defence need to be grounded in the context of their perceptions and experiences, including their experiences of violence. The

⁴⁷⁸ [1990] 1 S.C.R. 852 (1990), 76 C.R. (3d) 329.

⁴⁷⁹ *R. v. Mallott* [1998] 1 S.C.R. 123, 121 C.C.C. (3d) 456. Concurring minority reasons of L'Heureux-Dubé and McLachlin JJ.

Supreme Court of Canada's subsequent decisions in *Naglik, R. v. Creighton*⁴⁸⁰ and *R. v. Hibbert*,⁴⁸¹ seem to have limited the application of *Lavallee* to excuse-based defence claims, by suggesting that the objective standards of reasonableness are not to take into consideration the personal characteristics of the accused except with respect to excuse-based defences. However I have argued that these decisions did not completely foreclose the possibility that battered mothers' 'failures to protect' their children can be contextualized within their material experiences of violence. Indeed, within certain parameters, assessments of the reasonableness of the mothers' actions still need to be grounded in context, and I have argued that evidence of domestic violence should be admissible for this purpose.

Lawyers representing mothers charged with failing to protect their children must therefore endeavour to introduce evidence which situates their client's actions within the context of their experiences. When battering is a part of this experience, evidence of domestic violence must be introduced *before* assessments of culpability are made, not merely as a factor in mitigation of sentence. In this regard, lawyers representing battered mothers must be aware of the various debates concerning the use and abuse of 'battered woman syndrome' in criminal proceedings. The improper use of battered woman syndrome is dangerous because it pathologizes women who are battered and perpetuates the myth that women who are battered are deviant. Moreover, concern has been expressed that the misuse and misunderstanding of battered woman syndrome have given rise to a new stereotype, that of the 'ideal battered woman'.⁴⁸² As Kazan (1997, 569) has argued, socio-economic evidence

⁴⁸⁰ [1993] 3 S.C.R. 3, (1993) 83 C.C.C. (3d) 346.

⁴⁸¹ *Supra*, note 310.

⁴⁸² See Grant (1991), Kazan (1997) and Shaffer (1997) and discussion in Chapter 2, Part 3 above.

establishing, for example, the danger associated with leaving battering relationships, may often be as effective in establishing why women 'don't leave' battering relationships, as psychiatric evidence of the battered woman syndrome. Lawyers need to be informed about these issues so that their strategies reflect appropriate uses of expert evidence. While representing 'bad' mothers is a difficult task, this work is crucial to the project of undermining the doctrine of failure to protect and the oppressive ideology of motherhood.

Lawyers representing mothers charged with failing to protect their children also must resist the broad formulations of the parental duty that have resulted in a number of decisions.⁴⁸³ Endangerment to the life or health of the child remains an element of the *actus reus* of s. 215, and the 'mere potential' standard imposed in cases like *R. v. K.R.* reflects a judicial standard that is far too low.

The findings in this thesis also have implications for policy, and in particular the federal government's proposal to codify the doctrine of failure to protect in amendments to the *Code* (Canada 1999a; 1999b). As discussed in the Introduction, the government has an obligation to assess the gender implications of its proposed legislation.⁴⁸⁴ This thesis has demonstrated the highly gendered impact of the doctrine of failure to protect. Women continue to assume the bulk of child care responsibilities and for this reason alone are likely to be disproportionately implicated in criminal failure to protect proceedings. However, women are also the primary survivors of domestic violence. If research indicating a strong

⁴⁸³ See for example *R. v. K.R.*, *supra* note 258, discussed in Chapter 4, Part 4 above.

⁴⁸⁴ Status of Women Canada, *Gender-Based Analysis: A Guide for Policy-making* (Ottawa: Status of Women Canada, 1996). See also *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 15 and 28.

correlation between women battering and child abuse is correct, then women who are battered are very likely to be disproportionately impacted by laws informed by the doctrine of failure to protect.⁴⁸⁵ But the gendered nature of the doctrine of failure is not a result only of its disproportional application to women. It is also a gendered doctrine in so far as it is informed by and (re)produces dominant ideologies of motherhood and family that are oppressive to women, and most especially to those who in some sense fail to measure up to the unrealistic standard of the 'good' mother. The Government must both account for and address this fact in any proposed revisions.

In terms of addressing this problem, I must to a certain degree of ambivalence about codifying the doctrine of failure to protect in the *Code*. On the one hand, this thesis has demonstrated that the doctrine of failure to protect already operates in Canadian criminal law and that, as currently constituted and enforced, it results in women being charged and convicted of very serious criminal offences such as criminal negligence causing death or bodily harm, manslaughter and murder. It is possible that a new provision that restored the *mens rea* element of the offence and was carefully crafted to require courts to consider contextual factors might provide a more restrained alternative.

On the other hand I fear that the codification of the doctrine of failure to protect in the *Code* would simply (re)enforce an oppressive dominant ideology of motherhood and result in even more unjust prosecutions of women. If we consider the U.S. experience with failure to

⁴⁸⁵ This also underscores the imperative of continuing to provide strong social supports to women. Unfortunately in British Columbia, currently government policy is resulting in the dismantling of these supports. See the recent studies released by the B.C. Institute Against Family Violence (Research Advisory 2002).

protect laws, which this thesis has proved to be a reliable harbinger of what to expect in Canada, this is very likely to be the case. Accordingly, such amendments are more likely to be seriously regressive.

Moreover, I share the concerns of many feminists that at a fundamental level, the criminal law is not an appropriate way to address issues that are rooted in social, economic, political and cultural inequality, and that the relationship between woman abuse, child abuse and these structural inequalities must be recognized. As Wilson J. observed in *Lavallee*.⁴⁸⁶

Far from protecting women from [domestic violence], the law historically sanctioned the abuse of women within marriage as an aspect of the husband's ownership of his wife and his "right" to chastise her. One need only recall the centuries old law that a man is entitled to beat his wife with a stick "no thicker than his thumb". Laws do not spring out of a social vacuum. The notion that a man has a right to "discipline" his wife is deeply rooted in the history of our society. The woman's duty was to serve her husband and to stay in the marriage at all costs "till death do us part" and to accept as her due any "punishment" that was meted out for failing to please her husband. One consequence of this attitude was that "wife battering" was rarely spoken of, rarely reported, rarely prosecuted, and even more rarely punished. Long after society abandoned its formal approval of spousal abuse, tolerance of it continued and continues in some circles to this day.

The doctrine of failure to protect holds women accountable for male violence against women and children that is strongly rooted in social norm and conventions. Women, and especially marginalized women such as poor women, immigrant women and First Nations women, are now paying the price for centuries old practices that have already contributed greatly to their oppression.

⁴⁸⁶ *Supra* note 8 at p. 345.

Moreover, the criminal law is a blunt instrument. The state does not licence or train people to be parents, but neither does it assume that all parents are equally capable of fulfilling this most 'primary of roles'. As noted in *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*,⁴⁸⁷

There is a framework in place in each province and territory to monitor the family and deal with issues of child protection as they arise. This framework addresses such issues in a flexible manner with the goal of assisting families. The provincial framework reflects the reality that criminalization is often too blunt and heavy-handed an instrument with which to address many of the problems concerning the welfare of children.

Provincial child welfare legislation attempts to respond to the inherent complexities of the problem.⁴⁸⁸ It is surely not likely that further criminalization will deter parents from committing negligent acts in respect of their children when the much more comprehensive child welfare laws would not. The words of one U.S. commentator come to mind on this question:

Perhaps, before a judge lectures a desperate, frightened woman on what it means to be a good mother, he or she should trade places with her and endure the pain of watching a child's beating, without the ability to leave or with the knowledge that leaving brings a worse fate. Even good mothers sometimes cannot protect their children.⁴⁸⁹

The Government suggests (Canada 1999b, 13) that its proposals for reform would "enhance the protection of children". While this is an important goal and deserving of the government's time and resources, the principle of restraint is an important one in the criminal law. I suggest that in light of the findings in this thesis concerning the impact of failure to

⁴⁸⁷ (2000), 146 C.C.C. (3d) 362 (C.J.) at para. 93, aff'd (2002), 161 C.C.C. (3d) 178 (Ont. C.A.).

⁴⁸⁸ See also Vreeland (2000).

⁴⁸⁹ Nancy Hallander, "Bad' Mothers: Modern Day Witches", *The Champion*, July 1993, 3. Cited in Murphy (1998, 722).

protect laws on battered women and other marginalized groups, the government needs to carefully assess whether further criminalizing child abuse and neglect can or will actually prevent children from being harmed.

In that regard, I suggest that a far more productive route is to provide strong and meaningful supports to parents that will empower them to protect and provide for their children. These would include: child care, education, housing, shelters, counseling, legal aid and adequate levels of social assistance. Ironically it is these very supports that are being systematically eliminated by neo-liberal governments across Canada. In British Columbia, the Research Advisory on the Provincial Cuts and Violence Against Women (2002, 1) has concluded that:

[w]ith the cuts to provincial funding, it is anticipated that women will be less able to leave abuse, will be more vulnerable financially to abuse, and will be less able to protect their children. Cuts to legal aid and aspects of the justice system are particularly problematic.

As the Research Advisory notes, these cuts deprive women of the resources they need to resist violence and abuse, and will inevitably result in more violence against women and children. Using the criminal law to blame mothers obfuscates the role of government in perpetuating systems of oppression that result in child abuse and neglect. The federal government's suggestion to create new 'child-specific' offences reflects the growing trend in Canada and the U.S. to criminalize child welfare matters.⁴⁹⁰ It is a dangerous and regressive trend that will only harm women and not protect children. It is a trend that must be resisted.

⁴⁹⁰ See Vreeland (2000) for a discussion of the criminalization of child welfare in New York City. To illustrate how far this regressive trend has gone in the U.S., Vreeland (2000, 1062) reports: "In 1997, Sourette Alwysh, a thirty-four year old mother, was arrested for living with her five year old son in a roach-infested apartment without electricity or running water. Ms. Alwysh, a Haitian immigrant, had been living

3. *Further Research*

This thesis has been concerned with the impact of the doctrine of failure to protect on women, and most especially women who are battered. However, important questions concerning intersecting oppressions remain. Specifically, the question is how race, class, sexuality or (dis)ability will impact on the prosecution of women for failing to protect their children. There was little opportunity to explore these issues in the context of this project. The U.S. literature made the point, as I have in this thesis, that we can *expect* the doctrine to have a more harsh impact on already marginalized groups of women. However the U.S. literature did not attempt to account for how or in what ways women's intersecting oppressions would complicate the way mothers experienced the effects of the doctrine of failure to protect.⁴⁹¹ The Canadian judicial decisions examined in this thesis tended not only to erase women's experience of domestic violence but also to de-race and de-class the women who were the 'legal' subjects of these decisions. There is an urgent need for women who are marginalized in Canadian society to add their perspectives to the questions addressed in this thesis. And, because of their long and terrible experience with child welfare law, it is especially important that the voices of First Nations women be heard.

This thesis has examined the doctrine of failure to protect in the context of women who are battered, but I do not claim that this thesis can or should speak *for* these women. Research that brings the voices of these women to bear on the questions examined and raised in this thesis would be a valuable contribution to knowledge. For example, in light of the federal

in the foreclosed building. When the police discovered this fact they took her away in handcuffs and placed her son in foster care.

⁴⁹¹ See McIvor & Nahanee (1998, 63) who suggest that "Aboriginal women are invisible victims of violence" because of the dearth of literature that examines the impact of violence on First Nations women.

government's proposal, the question of how women who are battered account for potential criminal liability in their strategies of resistance might generate knowledge that would help to assess the potential of these laws to protect children.

There is an obvious and pressing need to continue to map the contours of the doctrine of failure to protect in Canadian law. Specifically, this work needs to be undertaken in the child welfare law context. I have described elsewhere the emergence of the practice of apprehending children on the basis of the abuse of the mother. This practice is clearly established in the U.S. (although efforts are underway to resist it),⁴⁹² and it appears likely that it has also become established in Canada.⁴⁹³ Research that specifically explores this phenomenon in Canada is needed and I suggest urgently so.

This thesis has, I hope, contributed to knowledge about the doctrine of failure to protect by mapping its contours in Canadian criminal law, and demonstrating how it is oppressive to women and most especially to women who are battered. I acknowledge that the knowledge generated in this thesis is partial, incomplete and contingent, and that 'others' will have important insights to add. This work is also but a small part of a much larger problem, since the doctrine also operates in child welfare and tort law. Nevertheless, I hope that this work has succeeded in laying the foundation upon which future research may continue to build critical analysis of the doctrine of failure to protect.

⁴⁹² See *infra*. note 35.

⁴⁹³ *Ibid.* See also Neilson (2000,134).

BIBLIOGRAPHY

- Abell, Jennie, & Sheehy, Elizabeth, *Criminal Law & Procedure: Proof, Defences and Beyond* (North York, Ont.: Captus Press, 1998).
- Anglin, Jim, "Meaning and Implications of the Move to Paramountcy of the Safety and the Well-Being of the Child in Child Welfare Legislation" (Working Together For Children: Protection and Prevention (Conference on Child Victimization and Child Offending, Hull, Quebec, September 27-29, 1999) Department of Justice Canada.
- Appell, Annette R., "Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System" (1997) 48 S. Carolina L. Rev. 577.
- Armstrong, Pat, "Restructuring Public and Private: Women's Paid and Unpaid Work" in Susan B. Boyd ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997).
- Ashe, Marie, "The 'Bad Mother' in Law and Literature: A Problem of Representation" (1992) 43 Hastings L.J. 1017.
- Ashe, Marie, "Postmodernism, Legal Ethics, and Representation of 'Bad Mothers'" in Martha Fineman and Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995).
- Ashe, Marie, "Bad Mothers" and Welfare Reform in Massachusetts: The Case of Claribel Ventura" in M. Mahoney, ed., *Feminism, Media, and the Law* (New York: Oxford University Press, 1997).
- Ashe, Marie and Cahn, Naomi, "Child Abuse: A Problem for Feminist Theory" in Martha Fineman and Roxanne Mykitiuk eds., *The Public Nature of Private Violence* (New York: Routledge, 1994).
- Balkin, J. M., "Deconstruction's Legal Career" (1998) [unpublished], online: <http://www.yale.edu/lawweb/jbalkin/> (date accessed: 22 January 2002)
- Badinter, Elisabeth, *The Myth of Motherhood: A Historical View of the Maternal Instinct*, trans. R. DeGaris (London: Souvenir Press (E & A) Ltd., 1981).
- Barrett, Michèle, "Words and Things: Materialism and Method in Contemporary Feminist Analysis" in M. Barrett & A. Phillips, *Destabilizing Theory: Contemporary Feminist Debates* (Stanford: Stanford University Press, 1992).
- Beaman-Hall, L., "Abused Women and Legal Discourse: The Exclusionary Power of Legal Method" (1996) 11 Can. J. L & Soc'y 125.

- Beaman, Lori G., "Women's Defences: Contextualizing Dilemmas of Difference and Power" (1998) 9:3 *Women & Crim. Jus.* 87.
- Bissett-Johnson, Alastair, "Domestic Violence: A Plethora of Problems and Precious Few Solutions", (1986) 5 *Can. J. Fam. L.* 253.
- Bonnycastle, Kevin & Rigakos, George, eds., *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998).
- Bouchard, Josee, Boyd, Susan B., Sheehy, Elizabeth A., "Canadian Feminist Literature on Law: An Annotated Bibliography" (1999) 11 *C.J.W.L.* 1.
- Boyd, Susan B., "Child Custody, Ideologies and Employment" (1989) *C.J.W.L.* 111.
- Boyd, Susan B., "Some Postmodernist Challenges to Feminist Analyses of Law, Family and State: Ideology and Discourse in Child Custody Law" (1991) 10 *Can. J. Fam. L.* 79.
- Boyd, Susan B., "(Re)Placing the State: Family, Law and Oppression" (1994) 9 *CJLS* 39.
- Boyd, Susan B., "Is There an Ideology of Motherhood in (Post)Modern Child Custody Law?" (1996) 5:4 *Social & Legal Studies* 495.
- Boyd, Susan B., "Challenging the Public/Private Divide: An Overview" in Susan B. Boyd ed., *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (Toronto: University of Toronto Press, 1997).
- Boyd, Susan B., "Family, Law and Sexuality: Feminist Engagements" (1999) 8 *Social & Legal Studies* 369.
- Boyle, Christine, "The Battered Wife Syndrome and Self-Defence: *Lavallee v. R.*" (1990) 9 *C.J.F.L.* 171.
- Boyle, Christine, "A Feminist Approach to Criminal Defences" in Richard Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications, 1991).
- Bessner, Ronda, "The Duty to Report Child Abuse" (1999) 17 *C.F.L.Q.* 313.
- Brockman, Joan & Chunn, Dorothy, eds., *Investigating Gender Bias: Law, Courts, and the Legal Profession* (Toronto: Thompson Educational Publishing Inc., 1993).
- Cahn, Naomi, "The Looseness of Legal Language: The Reasonable Woman Standard in Theory and In Practice" (1992) 77 *Cornell L.R.* 1398.

- Chunn, Dorothy E., "Feminism, Law and the Family: Assessing the Reform Legacy" in E. Comack, ed. *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999).
- Cooper, Mary, *Current and Future Effects on Children Witnessing Parental Violence: An Overview and Annotated Bibliography* (Vancouver: B.C. Institute of Family Violence, 1992).
- Comack, Elizabeth, "Theoretical Excursions" in E. Comack, ed. *Locating Law: Race/Class/Gender Connections* (Halifax: Fernwood Publishing, 1999)
- Cosman, Brenda & Kapur, Ratna, "Women, Legal Regulation and Familial Ideology" in *Subversive Sites: Feminist Engagements with Law in India* (New Delhi: Thousand Oaks/London: Sage Publications, 1996).
- Currie, Dawn & Kline, Marlee, "Challenging Privilege: Women, Knowledge and Feminist Struggles" (1991) 2:2 J. of Hum. Jus. 1.
- Currie, Dawn, "The Criminalization of Violence against Women: Feminist Demands and Patriarchal Accommodation" in Bonnycastle, K. & Rigakos, G., eds. *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998).
- Daigle, Lesley E., "Empowering Women to Protect: Improving Intervention With Victims of Domestic Violence in Cases of Child Abuse and Neglect: A Study of Travis County, Texas" (1998) 7 Texas J. Women & L. 287.
- Davidson, Howard A., "Child Abuse and Domestic Violence: Legal Connections and Controversies" (1995) 29 Fam. L. Q. 357.
- Devlin, Richard, "Mapping Legal Theory" (1994) 32 Alta. L. Rev. 602
- Diduck, Alison, "Legislating Ideologies of Motherhood" (1993) 2:4 Social & Legal Studies 461
- Duffy, Ann and Momirov, Julianne, *Family Violence: A Canadian Introduction* (Toronto: James Lorimer & Company, 1997).
- Dougherty, Joyce, "Women's Violence Against their Children: A Feminist Perspective" (1993) 4:3 Women & Criminal Justice 91.
- Eagleton, Terry, *Ideology: An Introduction* (London, New York: Verso, 1991).
- Enos, V. Pualani, "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered women and Abused Children" (1996) 19 Harv. Women's L. J. 229.

- Faulkner, Ellen, "Woman-to-Woman Abuse: Analyzing Extant Accounts of Lesbian Battering" in Bonnycastle, K. & Rigakos, G., eds. *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998).
- Fineman, Martha A., "Feminist Theory in Law: The Difference it Makes" (1992) 2 Colum. J. of Gen & L. 1.
- Fineman, Martha, "Images of Mothers in Poverty Discourse", in Martha Fineman and Isabel Karpin, eds., *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (New York: Columbia University Press, 1995).
- Forell, Caroline A., & Matthews, Donna M., *A Law of Her Own: The Reasonable Woman as a Measure of Man* (New York: New York University Press, 2000).
- Fugate, Jeanne A., "Who's Failing Whom? A Critical Look at Failure-to-Protect Laws" (2001) 76 N.Y.U. L. Rev. 272.
- Gagné, Patricia, *Battered Women's Justice: The Movement for Clemency and the Politics of Self-Defense* (New York: Twayne Publishers, 1998).
- Gavigan, Shelley, "Law, Gender, and Ideology" in A. Bayefsky, ed. *Legal Theory Meets Legal Practice* (Edmonton: Academic Printing and Publishing, 1988).
- Gold, Alan D., "Constructive Manslaughter Should Not Have Survived" 1993 23 C.R. (4th) 262.
- Gold, Alan D., "Lessons About Mens Rea: Three Recent Cases", (1994) 36 Crim. L.Q. 157.
- Gordon, Linda, *Heroes in Their Own Lives: The Politics and History of Family Violence: Boston, 1880 - 1960* (New York: Viking, 1988).
- Gordon, Linda, "Feminism and Social Control: The Case of Child Abuse and Neglect" in Juliet Mitchell & Ann Oakley eds., *What is Feminism?* (New York: Pantheon Books, 1986).
- Grace, Elizabeth K.P. and Vella, Susan M., "Vesting Mothers With Power They Do Not Have: The Non-Offending Parent in Civil Sexual Assault Cases: J.(L.A.) v. J.(H.) and J.(J.)", (1994) 7 C.J.W.L. 184.
- Grant, Isabel, Chunn, Dorothy & Boyle, Christine, *The Law of Homicide*, looseleaf (Scarborough, Carswell, 1994).
- Grant, Isabel, & Boyle, Christine, "Equality, Harm and Vulnerability: Homicide and Sexual Assault Post-Creighton", (1993) 23 C.R. (4th) 252.

- Grant, Isabel, "Developments in Criminal Law: The 1993-94 Term", (1995) 6 Supreme Court L.R. (2d) 209.
- Grant, Isabel, "Developments in Criminal Law: The 1994-95 Term", (1996) 7 Supreme Court L.R. (2d) 203.
- Grant, Isabel, "Exigent Circumstances: The Relevance of Repeated Abuse to the Defence of Duress" (1997) 2 Can. Crim. L. R. 331.
- Harding, Sandra, "Is there a Feminist Method?" in S. Harding, ed., *Feminism and Methodology* (Milton Keynes: Open University Press, 1987).
- Healy, Patrick, "The Creighton Quartet: Enigma Variations in a Lower Key" (1993) 23 C.R. (4th) 265.
- Healy, Patrick, "Repeal Criminal Negligence", (1995) 37 Crim. L.Q. 205.
- Hedges, Warren, "Using Deconstruction to Astonish Friends & Confound Enemies" [unpublished], online:
<http://www.sou.edu/English/Hedges/sodashop/rcenter/theory/howto/decon.htm>
 (date accessed: 22 January 2002)
- Iyer, Nitya, "Some Mothers are Better Than Others: A Re-examination of Maternity Benefits" in Susan Boyd, ed. *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (Toronto: University of Toronto Press, 1997).
- Johnson, Anne T., "Criminal Liability for Parents Who Fail to Protect" (1987) 5 L & Inequality J. 386.
- Kazan, Patricia, "Reasonableness, Gender Difference, and Self-Defense Law" 24 Man. L.J. 549.
- Kline, Marlee, "Child Welfare Law, "Best Interests of the Child" Ideology, and First Nations" (1992) 30:2 O.H.L.J. 375.
- Kline, Marlee, "Complicating the Ideology of Motherhood: Child Welfare Law and First Nation Women" (1993) 18 Queen's L.J. 306.
- Lacey, Nicola, "General Principles of Criminal Law? A Feminist View" in Nicolson, Donald & Bibbings, Lois, eds., *Feminist Perspectives on Criminal Law* (London: Cavendish Publishing, 2000).
- Lahey, Kathleen A., "Reasonable Women and the Law" in Martha Fineman & Nancy Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (New York: Routledge, 1991).

- Liang, Bryan A. & Macfarlane, Wendy L., "Murder By Omission: Child Abuse and the Passive Parent" (1999) 36 Harv. J. on Legislation 397.
- Magen, Randy H., "In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect" (1999) 4:2 Child Maltreatment 127.
- Mahoney, Martha R., "Victimization or Oppression? Women's Lives, Violence, Agency", in Martha Fineman and Roxanne Mykitiuk eds., *The Public Nature of Private Violence* (New York: Routledge, 1994).
- MacKinnon, Peter, "*The Queen v. Tutton; Waite v. The Queen*" Case Comment (1990) 69 Can. Bar Rev. 177.
- Manson, Allan, "Morrisey: Observations on Criminal Negligence and s. 12 Methodology" (1994) 36 C.R. (5th) 121.
- Martinson, Donna, MacCrimmon, Marilyn, Grant, Isabel & Boyle, Christine, "A Forum on *Lavallee v. R.: Woman and Self-Defence*" (1991) 25 U.B.C. L. Rev. 23.
- McCalla Vickers, Jill, "Memoirs of an Ontological Exile: The Methodological Rebellions of Feminist Research" in Angela Rose Miles & Geraldine Finn, eds., *Feminism: from Pressure to Politics* (Montreal: Black Rose Books, 1989).
- McDonald, Karen D., "Michigan's Efforts to Hold Women Criminally and Civilly Liable for Failure to Protect: Implications for Battered Women" (1998) 44 Wayne L.R. 289.
- McGillivray, Anne, & Comaskey, Brenda, "'everybody had black eyes...nobody don't say nothing:' Intimate Violence, Aboriginal Women, and Justice System Response" in Bonnycastle, K. & Rigakos, G., eds. *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998).
- McIvor, Sharon D. & Nahanee, Teresa, "Aboriginal Women: Invisible Victims of Violence" in Bonnycastle, K. & Rigakos, G., eds. *Unsettling Truths: Battered Women, Policy, Politics, and Contemporary Research in Canada* (Vancouver: Collective Press, 1998).
- Miccio, Kristian G., "In the Name of Mothers and Children Deconstructing the Myth of the Passive Battered Mother and the "Protected Child" in Child Neglect Proceedings" (1995) 58 Albany L. Rev. 1087.
- Miccio, Kristian G., "A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings" (1999) 22 Harv. Women's L. J. 89.

- Mosoff, Judith, *Motherhood, Madness, and the Role of the State* (L.L.M. Thesis, University of British Columbia 1994) [unpublished].
- Mullender, Audrey, & Morley, Rebecca, eds., *Children Living with Domestic Violence: Putting Men's Abuse of Women on the Child Care Agenda* (London: Whiting & Birch, 1994).
- Murphy, Jane C., "Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform", Family, and Criminal Law", (1998) 83 Cornell L. Rev. 688.
- Naffine, Ngaire, *Law & the Sexes: Explorations in Feminist Jurisprudence* (North Sydney, Australia: Allen & Unwin, 1990).
- Nason-Clark, N., "Religion and Violence against Women: Exploring the Rhetoric and the Response of Evangelical Churches in Canada" (1996) 43 *Social Compass* 515.
- Nason-Clark, N., "Conservative Protestants and violence against Women: Exploring the Rhetoric and the Response" (1995) *Religion and the Social Order* 109.
- Neilson, Linda, "Partner Abuse, Children and Statutory Change: Cautionary Comments on Women's Access to Justice" (2000) 18 Windsor Y.B. Access Just. 115.
- Noonan, Sheila, "Battered Woman Syndrome: Shifting the Parameters of Criminal Law Defences (or (Re)inscribing the Familiar?) in Anne Bottomley, ed., *Feminist Perspectives on the Foundational Subjects of Law* (London: Cavendish Publishing Limited, 1996).
- Panko, Linda J., "Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse" (1995) 6 Harv. Women's L. J. 67.
- Peters-Baker, Jean, "Punishing the Passive Parent: Ending a Cycle of Violence" (1997) 65 UMKC L. Rev. 1003.
- Phillips, Jill A. "Re-Victimized Battered Women: Termination of Parental Rights for Failure to Protect Children From Child Abuse" (1992) 38 Wayne L. Rev. 1549.
- Philipps, Lisa, "Discursive Deficits: A Feminist Perspective on the Power of Technical Knowledge in Fiscal Law and Policy" (1996) 11 CJLS 141.
- Phipps, Charles A., "Responding to Child Homicide: A Statutory Proposal" (1999) 89 J. of Crim. L. & Criminology 535.
- Rabin, Bonnie E., "Violence Against Mothers Equals Violence Against Children: Understanding the Connections", (1995) 58 Albany L. Rev. 1109.

- Reaume, Denise G., "What's Distinctive about a Feminist Analysis of Law" (1996) 2 Legal Theory 265.
- Research Advisory on the Provincial Cuts and Violence Against Women, "B.C. Provincial Cuts: Anticipated Impact on Children" B.C. Institute Against Family Violence, online: <http://www.bcifv.org/cuts/index.html> (date accessed: May 30, 2002).
- Research Advisory on the Provincial Cuts and Violence Against Women, "B.C. Provincial Cuts: Anticipated Impact on Women Who Experience Violence" B.C. Institute Against Family Violence, online: <http://www.bcifv.org/cuts/index.html> (date accessed: May 30, 2002).
- Roberts, Dorothy E., "Motherhood and Crime" (1993) 79 Iowa L. Rev. 95.
- Robinson, Paul H., "An Introduction to the Model Penal Code of the American Law Institute" Online: <http://www.law.northwestern.edu/faculty/fulltime/Robinson/Robinson.html> (date accessed: May 10, 2002).
- Rogers, Karen, "Wife Assault: The Findings of a National Survey" *Juristat* Vol. 14:9 (Ottawa: Statistics Canada, Canadian Centre for Justice Statistics, 1994).
- Rogers, Mary F., "The Politics of Knowledge" in M.R. Rogers, ed., *Contemporary Feminist Theory: A Text* (Boston: McGraw Hill, 1998).
- Shaffer, Martha, "The Battered Woman Syndrome Revisited: Some Complicating Thoughts Five Years After *R. v. Lavallee*" (1997) 47 U.T.L.J. 1.
- Schappell, Elissa, "In Search of the Maternal Instinct" in Kline, C.B. ed., *Child of Mine: Writers Talk About the First Year of Motherhood* (Hyperion Press, 1997) Online: BabyCentre <http://www.babycenter.com/essay/baby/newborns/3406.html> (date accessed: May 15, 2002)
- Skinazi, Heather R., "Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect" (1997) 85 Cal. L.R. 993.
- Smith, Dorothy, "Women's Experience as a Radical Critique of Sociology" in D.E. Smith ed., *The Conceptual Practices of Power: A Feminist Sociology of Knowledge* (Toronto: University of Toronto Press, 1990).
- Smart, Carol, "Law's Power, the Sexed Body, and Feminist Discourse" (1991) 17 J.L. & Soc. 194.
- Stribopoulos, James, "The Constitutionalization of "Fault" in Canada: A Normative Critique" (1999) 42 Crim. L.Q. 227.

- Stuart, Don, "Criminal Negligence: Deadlock and Confusion in the Supreme Court", (1989) 69 C.R. 331.
- Stuart, Don, "Objective Fault in the Supreme Court: Continuing Inconsistency But Also Now Insensitivity That Won't Work" 1993, 23 C.R. (4th) 240.
- Stuart, Don, *Canadian Criminal Law: A Treatise*, 4th ed. (Toronto: Carswell, 2001).
- Tanck, Nancy A., "Commendable or Condemnable? Criminal Liability For Parents who Fail to Protect Their Children From Abuse" (1987) Wisconsin L. Rev. 659.
- Trepiccione, Melissa A., "At the Crossroads of Law and Social Science: Is Charging a Battered Mother with Failure to Protect Her Child an Acceptable Solution When Her Child Witnesses Domestic Violence?" (2001) 69 Fordham L. Rev. 1487.
- Trocme, Nico, et. al, *Canadian Incidence Study of Reported Child Abuse and Neglect: Final Report* (Ottawa: Minister of Public Works and Government Services Canada, 2001).
- Turnbull, Lorna A., *Double Jeopardy: Motherwork and the Law* (Toronto: Sumach Press, 2001).
- Ursel, Jane, *Private Lives, Public Policy: 100 Years of State Intervention in the Family* (Toronto: Women's Press, 1992).
- Vreeland, Alison B., "The Criminalization of Child Welfare in New York City: Sparring the Child or Spoiling the Family" (2000) 27 Fordham Urban L. J. 1053.
- Wachholz, Sandra, "Confronting the Construct of Child Neglect as Maternal Failure: In Search of Peacemaking Alternatives" in MacDonald, Gayle M., ed., *Social Context and Social Location in the Sociology of Law* (Peterborough, Ontario: Broadview Press, 2002)
- Weedon, Chris, *Feminist Practice & Poststructuralist Theory*, 2nd ed. (Oxford: Blackwell Publishers Inc., 1997).
- Weedon, Chris, *Feminism, Theory and the Politics of Difference*, (Oxford: Blackwell Publishers Inc., 1999).
- Williams, Lucy A., "Race, Rat Bites and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate" (1995) 22 Fordham Urban L. J. 1159.
- Working Group, The "Failure to Protect" Working Group, "Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim", (2000) 27 Fordham Urban L. J. 849.

Zahniser, Rachel S., "Morally and Legally: A Parent's Duty to Prevent the Abuse of a Child as Defined by *Lane v. Commonwealth*" (1997-98) 86 Kentucky L. J. 1209.

Government Reports

Canada, Department of Justice Canada Family, Children and Youth Section, *Child Victims and the Criminal Justice System: A Consultation Paper* (Ottawa: Department of Justice, 1999a).

Canada, Department of Justice Canada Family, Children and Youth Section, *Child Victims and the Criminal Justice System: Technical Background Paper* (Ottawa: Department of Justice, 1999b).

Federal-Provincial-Territorial Council on Social Policy Renewal, *A National Children's Agenda: Developing a Shared Vision* (Ottawa: 1999)

Health Canada, National Clearinghouse on Family Violence, *The 'State of the Art' in Child Abuse Prevention, 1997* by Andy Wachtel (Ottawa: Health Canada, 1997).

Health Canada, National Clearinghouse on Family Violence, *Breaking the Links Between Poverty and Violence Against Women: A Resource Guide* by Jane Gurr et al. (Ottawa: Health Canada, 1996).

National Counsel of Welfare, *Profiles of Welfare: Myths and Realities* (Ottawa: National Counsel of Welfare, 1998).

National Counsel of Welfare, *Preschool Children: Promises to Keep* (Ottawa: National Counsel of Welfare, 1999).

Ontario, "Protecting Vulnerable Children" (Toronto: Panel of Experts on Child Protection, 1998) (Chair: Judge Mary Jane Hutton).

Statistics Canada, *Family Violence in Canada: A Statistical Profile 1999* (Ottawa: Statistics Canada, 1999a).

Statistics Canada, "Canada's Shelters for Abused Women, 1999 – 2000" 1999b 21:1 *Juristat*.

Statistics Canada, "Children Witnessing Family Violence" 1999c 21:6 *Juristat*.

Statistics Canada, *Family Violence in Canada: A Statistical Profile 2000* (Ottawa: Statistics Canada, 2000).

Statistics Canada, *Family Violence in Canada: A Statistical Profile 2001* (Ottawa: Statistics Canada, 2001).

Status of Women Canada, *Gender-Bases Analysis: A Guide for Policy-making* (Ottawa: Status of Women Canada, 1996).

Status of Women Canada, *Benefiting Canada's Children: Perspectives on Gender and Social Responsibility* by Christa Freiler, and

Shanay Johnson Inquest on-line:

<http://www.iprimus.ca/~martenh/childabuse/Shanay.html>

Newspaper Articles

Huffman, T., "A Life of Domestic Abuse, Drugs" *The Toronto Star* (17 April, 2002).

Huffman, T., "Marcia Dooley Must Serve 18 Years, Tony 13" *The Toronto Star* (4 May, 2002).

Blatchford, C., "Baby Sara's life, death on display" *The Toronto Sun* (10 May, 1996) 5.

Blatchford, C., "Click of handcuffs eases the horror" *The Toronto Sun* (15 May, 1996) 5.

DiManno, R., "Sentencing Judge is Avenging Angel in Infant's Murder" *The Toronto Star* (20 September, 1996) A7.

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<i>Canadian Foundation for Children, Youth and the Law v. Canda (Attorney General)</i> (2002), 161 C.C.C. (3d) 178 (Ont. C.A.) aff'g (2000), 146 C.C.C. (3d) 362 (C.J.).....	117, 211
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APPENDIX 2 – CRIMINAL CODE PROVISIONS

Criminal Code (R.S. 1985, c. C-46)

PART I **Parties to Offences**

Parties to offence

- 21.** (1) Every one is a party to an offence who
- (a) actually commits it;
 - (b) does or omits to do anything for the purpose of aiding any person to commit it;
 - or
 - (c) abets any person in committing it.

Common intention

- (2) Where two or more persons form an intention in common to carry out an unlawful purpose and to assist each other therein and any one of them, in carrying out the common purpose, commits an offence, each of them who knew or ought to have known that the commission of the offence would be a probable consequence of carrying out the common purpose is a party to that offence.

R.S., c. C-34, s. 21.

Person counselling offence

- 22.** (1) Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled.

Idem

- (2) Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

Definition of "counsel"

- (3) For the purposes of this Act, "counsel" includes procure, solicit or incite.
R.S., 1985, c. C-46, s. 22; R.S., 1985, c. 27 (1st Supp.), s. 7.

Accessory after the fact

23. (1) An accessory after the fact to an offence is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.

(2) [Repealed, 2000, c. 12, s. 92]
R.S., 1985, c. C-46, s. 23; 2000, c. 12, s. 92.

Where one party cannot be convicted

23.1 For greater certainty, sections 21 to 23 apply in respect of an accused notwithstanding the fact that the person whom the accused aids or abets, counsels or procures or receives, comforts or assists cannot be convicted of the offence.
R.S., 1985, c. 24 (2nd Supp.), s. 45.

Attempts

24. (1) Every one who, having an intent to commit an offence, does or omits to do anything for the purpose of carrying out the intention is guilty of an attempt to commit the offence whether or not it was possible under the circumstances to commit the offence.

Question of law

(2) The question whether an act or omission by a person who has an intent to commit an offence is or is not mere preparation to commit the offence, and too remote to constitute an attempt to commit the offence, is a question of law.
R.S., c. C-34, s. 24.

Part VIII
Offences Against the Person and Reputation

Duties Tending to Preservation of Life

Duty of persons to provide necessaries

215. (1) Every one is under a legal duty
- (a) as a parent, foster parent, guardian or head of a family, to provide necessaries of life for a child under the age of sixteen years;
 - (b) to provide necessaries of life to their spouse or common-law partner; and
 - (c) to provide necessaries of life to a person under his charge if that person
 - (i) is unable, by reason of detention, age, illness, mental disorder or other cause, to withdraw himself from that charge, and
 - (ii) is unable to provide himself with necessaries of life.

Offence

- (2) Every one commits an offence who, being under a legal duty within the meaning of subsection (1), fails without lawful excuse, the proof of which lies on him, to perform that duty, if
- (a) with respect to a duty imposed by paragraph (1)(a) or (b),
 - (i) the person to whom the duty is owed is in destitute or necessitous circumstances, or
 - (ii) the failure to perform the duty endangers the life of the person to whom the duty is owed, or causes or is likely to cause the health of that person to be endangered permanently; or
 - (b) with respect to a duty imposed by paragraph (1)(c), the failure to perform the duty endangers the life of the person to whom the duty is owed or causes or is likely to cause the health of that person to be injured permanently.

Punishment

- (3) Every one who commits an offence under subsection (2) is guilty of
- (a) an indictable offence and is liable to imprisonment for a term not exceeding two years; or
 - (b) an offence punishable on summary conviction.

Presumptions

- (4) For the purpose of proceedings under this section,
- (a) [Repealed, 2000, c. 12, s. 93]
 - (b) evidence that a person has in any way recognized a child as being his child is, in the absence of any evidence to the contrary, proof that the child is his child;
 - (c) evidence that a person has failed for a period of one month to make provision for the maintenance of any child of theirs under the age of sixteen years is, in the absence of any evidence to the contrary, proof that the person has failed without lawful excuse to provide necessaries of life for the child; and
 - (d) the fact that a spouse or common-law partner or child is receiving or has received necessaries of life from another person who is not under a legal duty to provide them is not a defence.

R.S., 1985, c. C-46, s. 215; 1991, c. 43, s. 9; 2000, c. 12, ss. 93, 95.

Abandoning child

218. Every one who unlawfully abandons or exposes a child who is under the age of ten years, so that its life is or is likely to be endangered or its health is or is likely to be permanently injured, is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years.

R.S., c. C-34, s. 200.

Criminal negligence

219. (1) Every one is criminally negligent who

- (a) in doing anything, or
- (b) in omitting to do anything that it is his duty to do,

shows wanton or reckless disregard for the lives or safety of other persons.

Definition of "duty"

(2) For the purposes of this section, "duty" means a duty imposed by law.

R.S., c. C-34, s. 202.

Causing death by criminal negligence

220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable

- (a) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
- (b) in any other case, to imprisonment for life.

R.S., 1985, c. C-46, s. 220; 1995, c. 39, s. 141.

Causing bodily harm by criminal negligence

221. Every one who by criminal negligence causes bodily harm to another person is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

R.S., c. C-34, s. 204.

Homicide

222. (1) A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

Kinds of homicide

(2) Homicide is culpable or not culpable.

Non culpable homicide

(3) Homicide that is not culpable is not an offence.

Culpable homicide

(4) Culpable homicide is murder or manslaughter or infanticide.

Idem

(5) A person commits culpable homicide when he causes the death of a human being,

- (a) by means of an unlawful act;
- (b) by criminal negligence;
- (c) by causing that human being, by threats or fear of violence or by deception, to do anything that causes his death; or
- (d) by wilfully frightening that human being, in the case of a child or sick person.

Exception

(6) Notwithstanding anything in this section, a person does not commit homicide within the meaning of this Act by reason only that he causes the death of a human being by procuring, by false evidence, the conviction and death of that human being by sentence of the law.

R.S., c. C-34, s. 205.

Manslaughter

234 Culpable homicide that is not murder or infanticide is manslaughter.

236 Every person who commits manslaughter is guilty of an indictable offence and liable

(a) Where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and

(b) in any other case, to imprisonment for life.