2. Are battered women bad mothers? Rethinking the termination of abused women’s parental rights for failure to protect.

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Are Battered Women Bad Mothers?

Rethinking the Termination of Abused Women's Parental Rights for Failure to Protect

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It is often stated that intervention on behalf of abused and neglected children is intended to protect the child rather than punish the parent. This stance justifies a no-fault approach to child protection: If a child is being harmed and removal from the parents' custody is the only means to alleviate the harm, removal is justified. If reunification fails, regardless of whether the parent will not or cannot change, the termination of parental rights is justified. It matters not whether the parents acted to harm the child or failed to act to prevent harm. Nor does it matter whether the parents' action or inaction was intentional or unintentional, voluntary or involuntary. A parent who is unable to properly care for his or her child is as unfit as a parent who is unwilling to do so.

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Although the no-fault stance solves many dilemmas in theory, it is hard to maintain in practice. Anyone with any experience in child protection knows that the legal response to abusive and neglectful parents is experienced as punitive: certainly by the parents, most likely by the children, and often by the legal and social service professionals involved. Enforcers of child protection therefore feel much more comfortable taking action against morally blameworthy parents; such parents' pleas for sympathy sound hollow, because their deliberate harmful act is their own creation, separable from their horrible upbringing and hopeless circumstances. The hardest cases involve parents who are simply incapable of living up to minimal standards of care for their children; they can't be faulted for affirmatively acting to harm their children, for failing to love them, or failing to try to provide and protect. On the other hand, they can point to the failings of the system as the cause of their own deficiencies. With unlimited help from society, which they would gladly accept, they could live up to the standards of good care imposed by society. The neglectful parent is therefore more sympathetic than the abusive parent, the parent who fails to act more sympathetic than the parent who affirmatively causes harm.

Neglect and abuse overlap when a parent fails to protect a child against abuse by the other parent. If a parent knowingly and deliberately allows abuse to occur, it is not hard to assign blame. But if a parent is in some way helpless to prevent the abuse from occurring, one's belief in no-fault intervention is put to the test. What if the parent who fails to protect is an abused woman, abused by the same man who abuses her children? What if she is prevented from acting due to fear rather than lassitude? What if her attempts at self-help have failed because of society's own failings? Clearly, the abuser is blameworthy, and ought to suffer the consequences: Kick him out of the house until the abuse is stopped. But the realities of child protection are that if anyone goes, it is the child. From the perspective of the family involved, this response to abuse punishes each member of the family equally for what the abuser has done.

Social service agencies routinely add allegations of spouse abuse to dependency petitions, because it strengthens the case for removal. In Los Angeles County, the largest dependency court in the country, allegations of child abuse and neglect leading to removal of the child from the home are accompanied by reference to spouse abuse in about one third of the cases (Lyon & Saywitz, in press). The actual rate of overlap between child abuse and spouse abuse is probably even greater (Layzer, 1986 [one half of
spouse abuse cases also involve child abuse]; McKay, 1994 [same]; Walker, 1984 [same]; Stark & Flitcraft, 1988 [one half of child abuse cases also involve spouse abuse]). The fact that the child abuser also abused the mother strengthens the claim that the mother was unable (and possibly unwilling) to protect the child from abuse. An abused woman is well aware of her spouse’s violent tendencies and arguably aware that her children are at risk of abuse (In the Matter of Katherine C., 1984) at the same time that the spouse abuse renders her less capable of protecting her children.

The fact that allegations of spouse abuse act to strengthen the resolve to remove children from abusive homes is consistent with a true no-fault philosophy. Again, however, the realities of practice may clash with the abstract principles espoused by child protection professionals. In my experience representing social services in child dependency proceedings, I frequently encountered punitive reactions to battered mothers. The impulse to blame the adult victim resolves ambivalence about taking a mother’s children and offering little support to enable their return. Moreover, battered women appear blameworthy for their predicament when they fail to seek protection or, having sought protection, return to the abuser. When one squarely faces the structural and psychological obstacles that stand in the way of battered women seeking to protect their children and end their own abuse, it becomes more difficult to characterize spouse abuse as merely one more count against the mother’s right to her children.

In this chapter, I take some tentative steps toward assessing the rights of battered women who fail to protect their children against abuse. Primarily, I seek to correct misconceptions in the case law regarding battered women and the reasons for their repeated victimization. Although I believe that correcting such misconceptions does not change the necessity for intervening when children are physically and sexually abused and the mother is powerless to help because of her own victimization, it does counsel greater deference to the parental rights of battered mothers when the termination of parental rights is considered. Given the more far-reaching proposals of recent commentary advocating greater rights for battered mothers, my recommendations are quite conservative. Indeed, I spend much of this chapter arguing why the actions of child protection workers are justified, even in the face of sympathetic portrayals of the difficulties encountered by battered women. Nevertheless, my recommendations would require a substantial shift in the way that many child protection professionals understand battered mothers.
In the second section, I outline the differences between battered women who fail to protect and another group of battered women who have received a great deal of attention in the case law: battered women who kill. I discuss why arguments advanced for expanding self-defense doctrine to excuse the actions of battered women who kill do not easily translate into arguments for greater rights for battered women who fail to protect.

In the third section, I discuss some specific suggestions made by legal commentators for the reform of child protection law with respect to battered mothers. I highlight the distinction between jurisdiction and removal on the one hand and termination on the other and suggest that reforms can occur at the termination stage without putting children at greater risk of further abuse.

In the fourth section, I criticize the case law on the termination of the parental rights of battered mothers. Specifically, I discuss the double standard for mothers and fathers, the unwarranted assumption that a battered woman who has escaped one abusive relationship will enter another, the lack of attention to adoptability and the parent-child relationship, and the problems presented by cases in which there is evidence that the mother was unwilling (rather than merely unable) to leave the relationship.

There is a substantial literature defending battered women who kill their abusive spouses (e.g., Dutton, 1993; Schneider, 1992). Defense attorneys in such cases have had some success in presenting expert testimony on battered woman's syndrome to explain why battered women kill their abusers rather than leave.

Review of the case law reveals that similarly sympathetic treatment has not been given to battered women who lose parental custody because of allegations that they failed to protect their children against abuse. There are a number of reasons for this distinction. A relatively good reason is that child protection is a no-fault system, which has no room for sympathy: Inability is as damning as unwillingness when the child's safety is at stake. Practically speaking, however, sympathy plays a role in decision making, even when it is not supposed to. A second reason battered women who
fail to protect are treated worse than battered women who kill is that it is more difficult to feel empathy for a woman who helplessly allows her child to be abused (no child deserves to be abused) than for a woman who kills her abusive spouse (he gets what he deserves). Moreover, the woman who kills overcomes her weakness and passivity and thus pleases those who bemoan the stereotypically feminine, whereas the mother who fails to protect can’t even live up to society’s minimal expectations for when a woman should take action—when the lives of her children are threatened. Indeed, many women muster the ability to leave (or to kill) when the spouse abuser begins to abuse the children (Browne, 1987 [spousal homicide sometimes triggered by child abuse]; Rounsaville, 1978 [child abuse related to decision to leave]; Snyder & Fruchtman, 1981 [same]; but see Strube & Barbour, 1984 [child abuse not related to decision to leave]).

Another reason that battered women who kill are treated better than battered women who fail to protect is that the purported effects of spouse abuse on the psychology of the victim have different implications for the woman who kills than for the woman who fails to protect. In criminal cases charging battered women with murder, battered woman syndrome (Walker, 1984) helps to explain why the woman kills instead of leaves. Her initial decision to remain in the relationship is largely due to what Walker calls the “cycle of violence,” whereby the acute battering incident is followed by a period of repentance and pleas for forgiveness, which convinces the woman that the abuse will not recur. Her subsequent inability to leave is attributable to learned helplessness, whereby repeated attacks render her incapable of perceiving opportunities for escape. Battered woman syndrome also helps to explain why the woman perceived an imminent threat to her life when she killed, when the average bystander might be unaware that an attack was imminent (Schneider, 1992).

Traumatic bonding describes the process by which strong emotional attachments form between victim and abuser when the abuser is perceived as dominant and when the abuse is intermittent (Dutton & Painter, 1981, 1993). The process is said to occur between some hostage victims and their captors or between abused children and their abusive parents. Traumatic bonding helps to explain a battered woman’s decision to return to her abusive spouse and her paradoxically positive feelings for the abuser.

If a woman has not killed her spouse, however, and has been charged with failing to protect her child against the batterer’s abuse, the logic of the disorders (battered woman syndrome and traumatic bonding) suggests that the woman will remain in the relationship even if there are realistic
opportunities for escape. A diagnosis of battered woman syndrome can thus strengthen a claim that a woman is unable to protect her child (In re Interest of C.P., 1990; In the Matter of Glenn G., 1992; Miccio, 1995).

Moreover, to the extent that learned helplessness and traumatic bonding affect the woman’s motivation to leave, such that she appears unwilling rather than simply unable to sever the relationship, this strengthens a court’s resolve that intervention (and ultimately, termination) is justified. Although learned helplessness was originally formulated as including an inability to learn that escape is possible (thus rendering one unable to leave), Strube (1988) states that there is little support for this aspect of learned helplessness and that “it appears that the self-perpetuating nature of learned helplessness arises primarily from the lack of motivation to emit new responses” (p. 243). Hence, an individual suffering from learned helplessness is capable of recognizing avenues of escape when they arise but is insufficiently motivated to pursue those avenues.

Recently, legal scholars have criticized the extent to which battered woman syndrome pathologizes the battered woman and characterizes their reluctance to leave as delusional, rather than recognizing the real barriers to successful escape from abuse and the woman’s realistic perception of imminent danger (Dutton, 1993; Schneider, 1992). Browne (1993) points out that

behaviors that outside observers may interpret as helplessness—such as staying with the abuser or refraining from initiating legal actions against him—may simply be accurate evaluations of the assailant’s potential for violent responses and others’ inability to intervene in time to guarantee safety. (p. 1080)

The real difficulties of leaving an abusive relationship are now well documented, including economic pressures (Strube & Barbour, 1983, 1984 [unemployment and self-reported economic hardship increases likelihood of staying]; but see Gelles, 1976 [employment unrelated to decision to leave]); inadequate police protection (Buzawa, 1982; Eisenberg & Moriarty, 1991; Elk & Johnson, 1989), insufficient shelters (Becker, 1995; Strube & Barbour, 1984 [having nowhere else to go predicts staying]), and increased risk of death following separation (Barnard, Vera, Vera, & Newman, 1982).

If battered women are more rational than pathological, and if their inability to separate is wholly (or even primarily) attributable to society’s
failure to offer them protection, termination of their parental rights is harder to justify. They are clearly willing to protect their children. Moreover, although they are technically unable to protect, one can no longer point to an inability that is specific to the individual. Recent commentary criticizing the harsh treatment of battered women by child protective services thus has emphasized the rationality of battered women’s fears (e.g., Miccio, 1995). It is to that commentary that I now turn.

**TEMPORARY REMOVAL VERSUS TERMINATION**

Battered mothers’ custody rights have become a popular topic among legal commentators. Miccio (1995) argues that dependency jurisdiction should not be taken against a parent when a “reasonably prudent parent, under like circumstances,” would have failed to act. Miccio cites a case in which a mother failed to report her husband’s sexual abuse of her daughter for more than 3 years due to his violence and threats, suggesting that under the proposed standard, the mother would not be held to have failed to protect (In the Matter of Glenn G., 1992). Enos (1996) similarly argues for an “objective standard” (which considers actions in light of what a reasonable person would do) for taking jurisdiction in child protection proceedings. Davidson (1995) and Dohrn (1995) argue that greater use should be made of protective orders, which would remove the spouse abuser and allow the mother and her children to remain together. Becker (1995) argues more generally that to justify civil action against battered women who fail to protect their children, society must make it easier for them to leave their abusive spouses.

The problem with these suggestions is that appreciation of the dangers of an abusive spouse and the failure of society to protect women against those dangers leads one to conclude that until society expends much more effort in protecting abused women, children who remain with their abused mothers will not be safe. Presumably, a reasonably prudent parent will not act should her life be in grave danger. Therefore, the more dangerous and persistent the abuser, the more likely an objective standard would necessitate leaving abused children in the home. Similarly, protective orders “work only if the assailant respects those orders or at least does no harm
during times of violation" (Browne, 1993, p. 1080). If protective orders fail to keep abused women safe, they will hardly be more effective in protecting children. Society should make it easier for women to leave their abusive spouses, but the immediate needs of abused children cannot wait for such changes to occur. Dependency court is filled with sympathetic parents—developmental disabilities, substance abuse problems—who might overcome their inabilities with greater social spending, yet we remove their children just the same.

Legal scholars are aware of these criticisms and sometimes express some ambivalence regarding their proposals. In an introductory footnote, Miccio (1995) calls her piece a “work in progress” and states her intention to write a “longer piece that infuses the voices of children as an integral part of the reconceptualization of protective statutes” (p. 1087). Becker (1995) emphasizes that “bias against mothers cannot preclude maternal responsibility unless we are willing to ignore harm to children (half of whom are girls)” (p. 22). (Cf. Watkins, 1995, p. 1420, who advocates greater deference to the rights of parents with developmental disabilities but emphasizes that he “does not advocate keeping children with parents who are . . . unable or unwilling to provide adequate care.”)

A partial solution to the dilemma lies in recognizing the different phases of dependency jurisdiction, which include taking jurisdiction over a case so that services may be provided, removal of the child from the home pending rehabilitation of the parents, and the termination of parental rights in those cases where rehabilitation is not successful (e.g., California Welfare and Institutions Code, 1998). Commentators critical of the applicability of failure to protect laws to battered mothers often fail to clearly distinguish the different phases (Becker, 1995; Davidson, 1995, Enos, 1996). Yet the harms of failing to take action against an unfit parent vary, depending on the type of action contemplated. When serious abuse has occurred, failure to take jurisdiction and to remove the child from an abusive home places the child at immediate risk of future abuse.

Failure to terminate parental rights, on the other hand, does not return the child to an abusive home. The child is harmed if the failure to terminate prevents the child from establishing a secure relationship with an adoptive parent or guardian, and if the child’s relationship with the parent is detrimental. However, unless prospective adoptive parents have been identified, it is unclear whether children of abused mothers will find greater permanence and safety if the mothers’ rights are terminated. Indeed, premature termination before the mother has an opportunity to establish herself as
a competent caretaker independent of the batterer jeopardizes the likelihood of a positive parent-child relationship.

_In the Interest of Betty J. W._ (1988) provides an example of the differing standards for removal and termination. _In Betty J. W._, the Supreme Court of West Virginia overturned a trial court’s termination of an abused mother’s parental rights. The father had physically abused his five children and sexually abused his 17-year-old daughter. On the night of the sexual assault, the mother had “interceded and was beaten and threatened with a knife” (p. 332). On the day after the assault, the mother reported the abuse to the authorities and sought refuge with relatives. However, shortly before the termination petition was filed, the father, who had been out of the home, stayed overnight.

The fact that the father had returned to the household, albeit temporarily, is clearly cause for concern. On the other hand, the court noted that social services had done nothing to assist the mother in remaining apart from the father. By overturning the termination order and remanding the case for a consideration of temporary custody, the court made it possible for the mother to demonstrate her willingness to remain separate from the father and to regain full custody of the children during a reunification period. Hence, the children’s safety was ensured, while the children’s and mother’s interest in maintaining their relationship was not prematurely sacrificed.

In what follows, I will outline what I believe to be a child-centered approach to issues concerning the proper treatment of battered women who fail to protect their children against abuse. The approach touches on several areas in which the courts have made unwarranted assumptions about battered women’s behavior, beliefs, and responsibility.

**UNFAIRNESS IN THE CASE LAW TERMINATING THE PARENTAL RIGHTS OF BATTERED MOTHERS**

**Double Standards for Mothers and Fathers**

If the courts are sincere in applying a no-fault standard of neglect in failure to protect cases, then mothers and fathers ought to be equally susceptible to legal action when their children are maltreated. However,
mothers are more often faulted for neglect than fathers (Becker, 1995; Dohrn, 1995).

An example of the different treatment of mothers and fathers is illustrated by two Illinois appellate court cases, decided one year apart. In In the Interest of Dalton (1981), an Illinois appellate court upheld the termination of parental rights of a mother whose two children had been physically and emotionally abused by their father, who was a convicted murderer and kidnapper. To prevent the mother from leaving with the children, the father had pointed a gun at the son’s head, held one of the children outside a third-floor window, attempted to run over one of the children with a car, and followed the mother and kidnapped the children. These events were testified to by the mother and corroborated by two neighbors. The father had also abused the mother, including choking her until she had fainted and holding a gun to her head. At the time of the hearing, the father was serving a life sentence, and the mother’s therapist noted that she was “employed and living in a suitable environment, was cooperative and sincere in her counseling effort, and had shown a genuine interest in improving the quality of her life” (p. 1230).

The court was unimpressed, however, emphasizing the mother’s history:

We believe that an adequate opportunity to flee could have presented itself within the seven-year period that respondent lived with Mr. Dalton. In fact, by respondent’s own admission, during this seven year period, she and her children had lived apart from Dalton several times, but she continually chose to return to him. On one occasion, after reading in the newspaper of her husband’s murder of a young woman, respondent still drove to Indiana to be with him. (p. 1232)

Notably, the court failed to understand why hearing proof of the abuser’s ability to fulfill his threats might lead a battered woman to return to her abuser. One might excuse the court’s incomprehension, however, given its appropriate emphasis on the mother’s failure to present evidence of her current relationship with her children and the children’s desire to remain apart from her. Perhaps had the children expressed a desire to maintain a relationship with the mother, the court would not have upheld termination. Moreover, one might defend the court by noting that it was merely upholding the well-established precedent that it is the “success of the parent’s efforts” and not “the fact that efforts were made” that determines parental fitness (p. 1231).
What makes the result in *Dalton* troubling, however, is the holding by another Illinois appellate court, one year previously, in *In the Interest of Brown* (1980). That case terminated the rights of a mother whose daughter was abused by the stepfather. The stepfather had been convicted of killing the child’s sister. The court concluded that the mother had herself abused the child but emphasized that even had she not done so, termination was warranted, because “any parent has the obligation to protect a child against harm.” This aspect of the decision appears quite consistent with *Dalton*.

With respect to the child’s noncustodial father, however, the court took a different approach. The court emphasized that the father had once reported the child’s injuries to child protective services. Refusing to terminate his parental rights, the court sympathetically noted that he “was far in arrears in his child support and had no regular job or place of residence. The possibilities of obtaining a change of custody would be remote” (p. 491). The father’s failure to protect the child thus excused his failure to provide for the child.

Last, relying on the fact that the stepfather had murdered a child, the court pointed out that the stepfather “appears to have been a violent man and any approach by [the father] by way of self-help would have led to reprisals of a demoniac variety” (p. 491). After all, the court concluded, the legal standard is that it is the father’s “efforts to carry out [his] parental responsibilities, and not [his] success by which fitness is to be determined” (p. 491).

The legal standards enunciated by *Dalton* and *Brown* are diametrically opposed. Failure trumps efforts in *Dalton*, whereas efforts trump failure in *Brown*. It is difficult not to interpret the difference as a double standard for mothers and fathers. Selective application of a no-fault standard of parental fitness to mothers suggests that what no-fault really means is that the mother is always at fault. If courts sympathize with men who cannot face up to a violent child abuser, they ought to sympathize with women who are abused themselves. On the other hand, if they truly believe in a no-fault system of child protection, then blameless fathers ought to be found unfit.

**Unwarranted Assumptions That the Abusive Relationship Will Be Repeated**

One of the most common assumptions regarding battered women is that they are drawn toward abusive relationships. In support of such an
assumption, one might point to the statistics on battered women who return to their abusive spouses. Reviewing the literature, Strube (1988) concluded that "about half of all women who seek some form of aid for spouse abuse can be expected to return to their partners" (p. 238). Strube found the rate particularly striking considering that many battered women seek help only when the abuse is life threatening. Moreover, given the brief follow-up periods used by most research, the actual rate of return is likely even higher. If women commonly exhibit a pattern of leaving and then returning, it seems reasonable to assume that a woman who has left her abuser is still likely to return to him, putting her children at future risk of further harm.

The problem with such reasoning is that it selectively ignores reasons why women seeking help at shelters (who make up the majority of battered women studied by researchers) ultimately return to the abuser. Although expressions of love and feelings of commitment predict return (Strube & Barbour, 1983, 1984), equally if not more important are economic and practical considerations, such as whether the woman is capable of establishing a separate residence after her stay at the shelter expires (Pfouts, 1978; Strube & Barbour, 1983, 1984). If a woman does establish a separate residence, this clearly evinces her economic and practical ability to remain apart from the abuser. Moreover, such a move is also stronger evidence than a shelter stay of her emotional commitment to permanent separation.

It is also unfair to point to the rates of battered women returning to their abusers to justify an assumption that a battered woman, once out of one abusive relationship, will enter another. It is one thing to predict return to a particular spouse and quite another to predict involvement with another abuser. Equating the two assumes that battered women suffer from a personality defect that renders them susceptible to abusive relationships.

One encounters such an assumption in the courts. In In re Sunshine Allah V (1982), a New York appellate court overturned continued removal of a child in a case in which the mother had obtained an order of protection against the father, had not seen him for 2 years, and "indicated that if he returned she would call her family and the police" (p. 522). The lower court's opinion was founded on the fact that the mother "was equally submissive to her new husband" (p. 522), though there was no evidence he was abusive. In In the Interest of A. V (1987), a Pennsylvania appellate court upheld the termination of a mother's parental rights whose husband
had abused both her and her 6-month-old infant. The majority did not submit an opinion explaining their action. A dissent noted that the mother never witnessed abuse, that the explanations for the child's bruises were plausible, and that she was "now living separate and apart from her husband, and the evidence does not suggest that she is unable or unwilling to provide proper parental care or control for her daughter" (p. 781). Apparently, termination was justified on the basis of a psychologist's opinion that the mother had a "passive personality" (p. 781).

Courts might assume that abusive relationships frequently recur because reabuse is not uncommon among the cases they are asked to review (In re Interest of M. H., 1985; In the Matter of Dawn C., 1994; In the Matter of Ettinger, 1996). For example, in Adoption of Paula (1995), the Supreme Court of Massachusetts upheld the termination of a mother's parental rights to seven children despite the fact that she had successfully left the father. The reason? Her new companion (with whom she had an eighth child) was allegedly abusing his own children.

The research literature on spouse abuse emphasizes the extent to which battered women, once out of abusive relationships, are not likely to be abused again. Researchers who have documented the psychological effects of battering, whereby battered women remain with the abuser, emphasize that the ill effects are specific to the abuse relationship and not reflective of the victim's personality (Dutton & Painter, 1981, p. 144; Walker, 1979). Most women who have escaped abusive relationships do not then encounter further abuse (Hoff, 1990 [nine battered women who had been in shelter; 5-year follow-up found none abused by new partner]; Walker, 1979, p. 28 [120 battered women; few had more than one violent relationship]; Walker, 1984 [403 battered women, 75% of whom had left the batterer; "battered women were less likely to go into another relationship and, when they did, it was rarely another violent one," p. 148]). Moreover, most women currently in abusive relationships were not previously abused (Rounsaville, 1978, p. 16 ["Only 13% had been physically abused in a previous adult relationship"]). Although these limited data are based on unrepresentative samples and potentially biased self-reports, they suggest that the courts should be careful not to make general assumptions based on their limited experience with women who encounter a series of abusive partners.

On the other hand, if a woman has had a series of such relationships, fears of future abuse appear warranted. If the woman's latest relationship
is abusive, it is unnecessary to speculate about her personality to conclude that her children are at risk. Reasonable conclusions regarding risk are sometimes obscured by critical legal commentary advocating greater rights for battered mothers. Enos (1996) cites In re Interest of C. P. (1990) as a case documenting society's failure to protect abused women and the reasonableness of a mother's decision to leave her child with the father despite her knowledge of the father's abusiveness. Before the child had turned 4 years of age, the mother had observed the father beating the child about the face and head with his fists and hitting the child with a stick, board, and belt. The mother had been severely abused by the father as well and had tried to leave with the child, only to see the child abducted by the father. The child was brought to the attention of the authorities when the father fatally abused her 18-month-old stepbrother.

Enos (1996) criticizes the Nebraska Supreme Court for slighting the mother's testimony that after separating from the father, she had attempted to obtain custody of the child by calling Child Protective Services and the police. Moreover, Enos argues that the court was insufficiently sympathetic to the mother's claim that the abuse prevented her from helping her child. The court's skepticism is more reasonable, however, when one reads that the mother had not visited her daughter for a year and that her justification for failing to visit was that she had remarried. The man she had remarried had since physically abused her other children.

A more difficult case presents itself when the mother has been involved in other abusive relationships but appears to have successfully extricated herself from the current abusive relationship and appears to be making progress in therapy at the time of the termination hearing. In In the Matter of Farley (1991), the Michigan Supreme Court refused to hear the appeal of an abused mother whose parental rights had been terminated due to her failure to protect her three children against physical and sexual abuse by the father. According to an opinion dissenting from the denial of review, the physical abuse had occurred when the mother was not at home, and the children had been told by the father not to tell. When told of the sexual abuse allegations, the mother initially expressed disbelief, but the following month asked the father to leave the home. At an evaluation session 5 months after the allegations surfaced, the mother held hands with the father, and either she or the father repeated a statement made by the child suggesting someone other than the father was the perpetrator. Nevertheless, she filed for divorce the following month (the divorce was finalized the following year, 2 months after the termination hearing).
At the time of the hearing, the mother had been living apart from the father for almost a year, had visited the children regularly, and had taken all the parenting classes required by social services. Her court-appointed therapist found that she had improved in therapy (as documented in part by her scores on the Minnesota Multiphasic Personality Inventory), that she was motivated, and that she was not at risk of abusing her children. The major reason for termination was the prognosis given by her therapist, as well as the concerns of two other mental health professionals, that she would return to her ex-husband or "might enter another abusive relationship and permit her children to be abused by that third party." The case is complicated by facts not mentioned in the dissent: The mother had been abused by the father for 8 years and had been in other abusive relationships before her marriage (Phillips, 1992, p. 1570). The difficult issue presented by Farley is whether a battered woman's progress is better measured by recent improvements or by more remote difficulties. As Phillips points out, the mother had never received counseling for domestic violence in the past. Her progress in therapy and her apparent success in independent living argue for giving her history of abuse less weight.

One might argue that the mother's year of independence from the father does not compare with her 8 years of abuse, justifying the assumption that her separate living arrangement is only temporary. However, such an assumption would lead to the termination of battered women's parental rights in many, if not most, of the cases in which children are removed from the mother's custody, because parents are given only 12 to 18 months to rehabilitate and reunify with their children. Termination decisions are necessarily made on the basis of short-term improvements in the parent's situation. Because a decision not to terminate parental rights does not mean immediate return of the children to the parents' custody, short-term improvements can be monitored while placement continues.

**The Child's Need for Permanence:**

**Insufficient Attention to the Mother-Child Relationship and the Adoptability of the Child**

The rationale for termination after a relatively short period of reunification attempts is the child's need for permanence in her relationships with her caretakers. Foster parents attempt to avoid strong attachments with their foster children, even if they would like to adopt, lest reunification
succeed and the children are returned to their parents’ custody. If reunification efforts drag on too long, children suffer from the uncertainty of temporary placement and become too old to be attractive for adoption.

Was the children’s need for a permanent parent-child relationship the motivating force in *Farley*? It is surprising that the opinion is silent regarding what would happen to the children post-termination. The children were 6, 9, and 13 years of age at the time of the termination hearing, and nothing was said regarding their adoptability should their mother’s rights be terminated. Nor was anything said regarding the mother’s relationship with the children other than the fact that she had faithfully exercised her right to visitation. Indeed, discussion of the mother-child relationship is notably absent from most of the termination cases I have reviewed here.

If a child is adoptable at the time termination is considered and the parent’s rehabilitation is not complete, the child’s need for permanence is thought to outweigh the benefits of maintaining the parent-child relationship. However, if the child is not adoptable, termination puts the child at risk of foster-care drift. Guggenheim (1995) has documented that legal reforms leading to an increase in the termination of parental rights have not led to a corresponding increase in the number of adoptions. Furthermore, if maintenance of the parent-child relationship is not harmful to the child, then the benefits of termination are unclear. Children form pathologically strong bonds to abusive parents (van der Kolk & Greenberg, 1987), paradoxically strengthened by the intermittent phases of affection and violence in the relationship. This is precisely the dynamic used to explain battered women’s traumatic bonding to their abusive spouses (Dutton & Painter, 1981, 1993). It is possible that terminating a child’s relationship with an unrepentant, maltreating parent is desirable, independent of the alternative long-term relationships immediately available. On the other hand, a mother who has never maltreated her child but was victimized by the same man as her child may not pose the same risks. The mother and child have lived through a shared trauma, much like a child and her maltreated sibling. The mother’s affirmative steps to separate from the abuser are positive signs for the child. Although the relationship may be far from perfect, termination would sever the most fundamental, and often the only, long-term relationship the child has.

In *In the Interest of S. O., B. O., E. O., & C. B.* (1992), the Iowa Supreme Court upheld a trial court’s termination of a mother’s rights to her four children, ages 9, 8, 6, and 2. The father had abused the mother and sexually
and physically abused the children. Although the mother had divorced the father, she "continued a pattern of sporadic cohabitation and visitation with him" (p. 603). Moreover, she had not fulfilled the goals of her case plan. Clearly, the mother had not taken the necessary steps to regain custody of her children.

However, given the mother-child relationship and the children’s adoptability, the termination decision was necessarily a search for lesser evils. The intermediate court had held that the trial court should not have terminated the mother’s rights to the 8-year-old and 9-year-old children, and the Iowa Supreme Court reversed. The court acknowledged that the children exhibited a “strong bond” with their mother: “Both children express their desire to rejoin their mother. They look forward to visits with her” (p. 604). The court dismissed the children’s desires by pointing to expert testimony that the bond was unhealthy. A social worker noted that “an abused child may take on a parental protective role with the nonabusing parent” (p. 604). A therapist testified that the bond “had an intensity that is fueled by anger towards their mother” (p. 604).

One could quibble with the assumption that a child who is protective has thus formed a pathological bond with the nonabusive parent. Attachment through anger is clearly unhealthy, but abused children frequently express such anger at nonabusive mothers, even when the mothers take protective action (Herman, 1981). Nevertheless, one would be comfortable with such second-guessing of explicit preferences if there were an adoptive parent waiting in the wings, ready to form a healthier attachment with the children. There was not, and the experts could not agree whether the children were in principle “adoptable.” The 8-year-old and 9-year-old had not even found a suitable temporary placement, having been removed from their foster homes due to behavioral problems. The court conceded, in an understatement, that they “may be difficult to place for adoption” (p. 604). Hence, the choice was between a bond of questionable quality and possibly no bond at all.

If termination is supposed to be about the interests of the child and not the fault of the parent, then the parent-child relationship and adoptability ought to be part of every termination decision. The assumption that the child does not benefit from continuing contact with an unrehabilitated parent is less compelling when that parent is attempting to overcome the continuing effects of the same kind of victimization that the child has suffered.
While ambivalence may manifest itself behaviorally in battered women, most professionals would support the view that such women experience very strong emotional states post-traumatically, and that these states serve to push her out or pull her back into the battering relationship. (p. 146)

Expressions of love for the abuser understandably increase courts’ willingness to terminate battered mothers’ parental rights. Legal commentators arguing for greater deference to the parental rights of battered mothers (Davidson, 1995; Enos, 1996) often understate the extent to which battered women attribute their behavior to positive feelings for the offender. Perhaps they do so because acknowledgment of the positive feelings battered women often express for their abusers undercuts the assumption that battered women’s failure to leave the abuser is solely motivated by fear.

In *In re Interest of J. B. and A. P.* (1990), the mother’s 18-month-old child had been fatally abused by her male companion. The mother witnessed the man’s abuse of her children and delayed seeking medical care for their injuries. The mother had left the man once due to the abuse, but because of his promises that he would no longer abuse the children, she returned. The court acknowledges that “there is some evidence that [the mother] is mildly retarded and was abused by, and fearful of, her husband. She claims this prevented her from protecting her children or leaving with them” (p. 482). It is this aspect of the case that Davidson (1995) emphasizes, and he points out that batterers frequently threaten to kill their spouses and their children if the spouse attempts to leave the relationship. Yet as
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Davidson (1995) also acknowledges, and as the court emphasizes, “even as her 18-month-old child lay comatose at the hospital, [the mother] stated she would not leave her husband because she loved him” (p. 482).

In *In re Interest of C. D. C.* (1990), the Nebraska Supreme Court upheld the termination of the parental rights of the mother of a 7-month-old child who had been physically abused by the father and had suffered an unexplained skull fracture. The court acknowledged that the mother had “complied substantially with the plan prescribed for her, having cooperated in the various programs offered to her and having maintained very regular visitations with the child” (p. 806). Nevertheless, the court held that she had not maintained a safe environment, because of her continuing abuse by the father:

> The record establishes that the father continually moved in and out of the mother’s life and that when he resided with her, he physically abused her. According to the evidence, on various occasions, the father had kicked the mother, given her a black eye, hit her in the chest, threatened her with a knife, burned her by throwing a cup of hot coffee on her, and caused bruises on her legs . . . On another occasion, . . . he had dragged the mother by her hair across a parking lot. (p. 807)

Enos (1996) criticizes the court in *C. D. C.* for failing to refer to the abusive incidents in attempting to understand the mother’s failure to remain separated from the father. She notes that the court “found that her inability to provide her child with a violence-free environment demonstrated a willful failure to meet the demands of her parental responsibilities” (p. 242 [italics added]). Yet what surely convinced the court that the failure was willful were the mother’s statements to a rehabilitation counselor “that she was aware that she was choosing the father over her son” and her ability to recognize the father’s abusiveness only when he was temporarily out of her life (p. 808).

Stronger evidence of the sometimes strong attachment between abuse victims and abusers can be found in cases in which battered women pursued relationships with their abusers even after the abusers had been imprisoned. In *In re Interest of Joshua M.* (1996), the father was convicted for sexually abusing two children, one of them the mother’s child. The mother argued that she could not sever contact with the father because of his threats and abuse, which had led to her hospitalization at least once.
However, the court noted that she had attempted to visit the father in prison with all five of her children, in violation of the court order, and that she had written him letters "which make it clear she was desiring increased contact with him and expressing frustration because he did not want to see her any more" (p. 360).

Similarly, in *In the Interest of J. L. S.* (1990), the mother testified she had witnessed the father beat her infant child "about the head with his fists, biting her extremities, and force-feeding her scalding-hot formula" (p. 81) from the time the child was 3 months old to her removal at 9 months old. She testified that the father would beat her if she attempted to protect the child and that her fears of the father similarly prevented her from leaving him or reporting the abuse. Despite her claims that she had not contacted the father since his imprisonment, the State proved that she had sent the father photographs of the child, "which bore a loving message in [the mother's] handwriting," and that she had hitchhiked to visit the father in the penitentiary (p. 83).

That battered women often express strong feelings for their abusers should not be denied. To the extent that such feelings influence a mother’s behavior, they are clearly relevant in the decision whether to terminate the mother’s parental rights. However, an understanding of learned helplessness and traumatic bonding as potentially influencing battered women’s motives and desires could enable courts to recognize cases in which a woman’s explanation for her actions was the product of the situation rather than reflecting a long-standing attitude. If the courts can doubt a child’s expressions of love for a parent on the grounds that the attachment is the unhealthy product of repeated abuse, they ought to treat a woman’s prior statements with equal sophistication. When a woman has taken concrete steps to extricate herself from an abusive situation, prior statements should be given less weight than current actions.

A case that exemplifies the limited relevance of prior statements in light of affirmative actions by the mother is *In re D. K. W* (1980), in which the Pennsylvania Supreme Court upheld the termination of a battered woman’s parental rights. The court could have justified termination on the grounds that the mother had herself abused the child and had neither completed counseling nor exercised all her visitation rights. However, what most impressed the court was her failure to successfully separate from the abusive father, who had both abused the child and left the mother "covered from head to toe with bruises" (p. 71). The court was unpersuaded by her
claims that her move out of the household and away from the father was sufficient:

[The mother] further testified that she had done everything within her power to stay away from him, but it is clear that she has not rid herself of him or his violence. By appellant’s own testimony at the May, 1979 hearing, [the father] continues to follow her, threaten her and fight with her. He also has broken into her home on several occasions and has waited for her many times while she was out. Thus, despite her recognition of and asserted attempts to remedy the problem, she has not succeeded. Though appellant may have moved away from [the father] for the purpose of improving her situation and regaining custody of her child, she clearly did not move far enough. (p. 72)

The court was influenced by the mother’s statement that “she had experienced much violence in her own family while growing up, and, consequently, did not feel that she deserved anything better” (p. 72, n. 4). The mother’s failure to move “far enough” was thus attributed to lacking motivation rather than the fanatical attempts of the abusive spouse to maintain contact. However, when a woman moves out and establishes a separate residence, that reflects a commitment to escape the abusive relationship. If the woman does not seek out contact with the abuser, his attempts to maintain contact with her may justify continued placement for the safety of the child but should be given less weight in determining whether her parental rights should be permanently severed. The courts should recognize that both previous failures to escape and statements justifying failure are often the products of the abuse.

CONCLUSION

I have argued that the courts should be more sympathetic to battered women whose children are also abused. Nevertheless, I do not advocate major changes in the law regarding the temporary custody of abused children whose mothers fail to protect. Removal and temporary placement of children should continue to be based on the safety of the child, regardless of the parents’ fault or lack thereof. In this respect, I disagree with much
of the legal commentary appearing in the past few years, which criticizes a "no-fault" approach to child protection.

However, I suspect that many commentators, were they to squarely face the issue, would not recommend return of a child to a battered woman's custody when the woman, despite her best efforts, could not keep a child-abusing spouse out of the home. They would advocate greater enforcement of restraining orders and the like (proposals with which I fully agree) but would acknowledge that the child's immediate safety is the first priority. In a perfect world, faultless mothers should always have custody of their children. In the real world, it is often more effective to remove the child than the abuser from the home.

Greater sympathy for battered women should affect judgments regarding the termination of parental rights. Understanding that the battered woman's continuing attachment to the abuser is a product of the abuse, her economic dependence, and her inability to find anywhere else to go enables one to reject stereotypes that suggest "once a battered woman, always a battered woman" (*In the Matter of Farley*, 1991, p. 998). When a woman finds a job and establishes a separate residence, this is evidence that she has largely overcome the forces that drive so many battered women back to their spouses. Moreover, concrete actions render previous professions of love for the abuser suspect, given the bonds attributable to trauma. Rather than seek out new abusive mates, women who have survived abuse most often choose their new mates with special care, aware of the entrapment that abuse creates. The courts should therefore treat apparent success in separation as such, particularly because to do so in a termination hearing does not place the child at risk of reabuse but allows the parent-child relationship to continue, pending potential return of the child to the mother's custody. Last, the courts should always consider the alternatives facing the child should termination occur; the mother-child relationship may be less than perfect but better than foster-care drift.

If my recommendations were adopted, I doubt that a large percentage of child protection cases involving spouse abuse would be resolved differently. In general, most cases in which children are removed for abuse or neglect end in the reunification of the child with his or her parents (Watkins, 1995). I would guess that most battered mothers are similarly reunited with their children. But although the relative number of cases in which battered mothers' parental rights are permanently severed may be small, the significance of such cases is substantial. A step as significant as termination should not be based on misconceptions and misplaced blame.
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