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## A Parent's Final Sacrifice: Self-Incrimination in Failure to Protect Cases, 51 J. Marshall L. Rev. 377 (2018)

Maggie Butzen

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# A PARENT'S FINAL SACRIFICE: SELF- INCRIMINATION IN FAILURE TO PROTECT CASES

MAGGIE BUTZEN

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## I. INTRODUCTION

### A. *The Story of Tondalo Hall*

In 2004, Tondalo Hall took her 20-month-old son to the hospital. The doctors were horrified to find that the young boy had suffered several broken ribs and a broken femur.<sup>1</sup> The injury was investigated and Hall's boyfriend, Robert Braxton, was arrested and charged with child abuse.<sup>2</sup> Hall was arrested under Oklahoma's "Failure to Protect" law and made Braxton's codefendant.<sup>3</sup> Braxton had a long history of abusing Hall, so the prosecution called her as a witness and she recounted narrative after narrative of violent attacks.<sup>4</sup> Hall never saw Braxton put his hands on her son, but she hoped her testimony, detailing how he used to choke, punch, and threaten her, would keep him in jail for a long time.<sup>5</sup> That testimony did result in a hefty prison sentence: Hall was sentenced to thirty years for failing to leave her abuser before he could get his hands on her son.<sup>6</sup> Braxton, the man who abused her and her child, plead guilty, was only sentenced to ten years, and ultimately only served two.<sup>7</sup>

Hall's case is hardly an isolated incident. There is no exact count of how many domestic violence victims have been charged under some form of a failure to protect statute, but over the past decade twenty-eight women have been identified in eleven different

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1. See Alex Campbell, *Battered Woman Faces 15 More Years In Prison After Losing Clemency Plea*, BUZZFEED (Sept. 23, 2015), [www.buzzfeed.com/alexcampbell/parole-board-denies-battered-womans-clemencyplea?utm\\_term=.vmB3eeY93r#.cy2411M64J](http://www.buzzfeed.com/alexcampbell/parole-board-denies-battered-womans-clemencyplea?utm_term=.vmB3eeY93r#.cy2411M64J) (discussing the outcome of Tondalo Hall's clemency plea).

2. *Id.*

3. Okla. Stat. tit. 21 § 843.5 (2016); Okla. Stat. tit. 21 § 701.7 (2016); Okla. Stat. tit. 21 § 852.1 (2016).

4. Campbell, *supra* note 1.

5. *Id.*

6. *Id.*

7. See Sarah Kaplan, *A Battered Woman Will Stay in Prison for Failing to Protect Her Kids from Her Abuser. He Was Released 9 Years Ago*, WASH. POST (Sept. 24, 2015), [www.washingtonpost.com/news/morning-mix/wp/2015/09/24/a-battered-woman-will-stay-in-prison-for-failing-to-protect-her-kids-from-her-abuser-he-was-released-9-years-ago/](http://www.washingtonpost.com/news/morning-mix/wp/2015/09/24/a-battered-woman-will-stay-in-prison-for-failing-to-protect-her-kids-from-her-abuser-he-was-released-9-years-ago/) (discussing a woman charged under Oklahoma's failure to protect statutes).

states.<sup>8</sup> Each of these women was sentenced to ten years or more,<sup>9</sup> and each of these women suffered at the hands of their child's abuser.<sup>10</sup>

## B. Comment Overview

"Failure to protect" laws have come under much controversy for a variety of reasons. Most of the controversy stems from the nuanced relationships of the participants: abuser, passive parent, and abused child.<sup>11</sup> In theory, these laws were meant to punish parents who were passive in the face of child abuse.<sup>12</sup> In practice, these laws are overwhelmingly used to punish battered women for not removing their child from an abusive household.<sup>13</sup>

When criminal proceedings commence, the passive parent is forced to choose the lesser of two evils: testify and risk self-incrimination or guard their constitutional right and risk the person who abused them and their child going free.<sup>14</sup> The passive parent exists at a crossroads: defendant, parent, and victim. The main purpose of this Comment is to analyze this crossroads under a Fifth Amendment lens and propose a workable solution to allow these passive parents a way to better navigate these "two evils." To be clear: this Comment's purpose is not to assert whether a passive parent should be held culpable for failing to protect their child or to assert the validity of these laws. The culpability of a defendant does not impact their inalienable rights under the Fifth Amendment, and even the most heinous of defendants are allowed to invoke the right to be free of self-incrimination. When such a right is infringed upon, an analysis is warranted. This Comment strives to provide such an analysis and propose a solution to any infringement.

The Background section will thoroughly explore: Fifth Amendment protections, including immunity and New Mexico's unique use immunity rule; failure to protect laws, including their

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8. Alex Campbell, *Battered, Bereaved, And Behind Bars*, BUZZFEED (Oct. 2, 2014), [www.buzzfeed.com/alexcampbell/how-the-law-turns-battered-women-into-criminals?utm\\_term=.fmLyYYPXyW#.meRLWWD5Le](http://www.buzzfeed.com/alexcampbell/how-the-law-turns-battered-women-into-criminals?utm_term=.fmLyYYPXyW#.meRLWWD5Le).

9. *Id.*

10. *Id.*

11. See Karen D. McDonald, Note, *Michigan's Efforts To Hold Women Criminally And Civilly Liable For Failure To Protect: Implications For Battered Women*, 44 WAYNE L. REV. 289, 300 (1998) (stating, "Feminist scholars claim that the legal system's current treatment of domestic violence victims reflects a harsh, sexist, and unrealistic perception of women as mothers.").

12. *Id.* at 297.

13. Alex Campbell, *These Mothers Were Sentenced To At Least 10 Years For Failing To Protect Their Children From A Violent Partner*, BUZZFEED (Oct. 2, 2014), [www.buzzfeed.com/alexcampbell/these-mothers-were-sentenced-to-at-least-10-years-for-failin?utm\\_term=.otVjddn7jm#.ht7evvQbeR](http://www.buzzfeed.com/alexcampbell/these-mothers-were-sentenced-to-at-least-10-years-for-failin?utm_term=.otVjddn7jm#.ht7evvQbeR).

14. William Wesley Patton, *Rethinking the Privilege Against Self-Incrimination in Child Abuse Dependency Proceedings: Might Parents Be Their Own Worst Witnesses?*, 11 U.C. DAVIS J. JUV. L. & POL'Y 101, 147 (2007).

controversies and incongruent applications; how courts reconcile unique relationships, including familial and spousal; approaches other scholars have proposed to solve the controversies of failure to protect laws; and the gaps in these solutions, mainly self-incrimination infringement. The Analysis section will address the focus of this Comment and then explore each role a passive parent fills: defendant, parent, and victim. This Analysis will balance the incentives and deterrents each role has when a passive parent decides to testify. Finally, this Comment will recommend a workable proposal to reconcile these incentives and deterrents by asserting a national adjustment to immunity statutes, modeled after New Mexico's use immunity rule. This adjustment would permit all parties, including the court, to request use immunity for a defense witness, thereby allowing a passive parent to testify against their co-defendant without hindering their own case with self-incrimination.

## II. THE RISE OF THE CONFLICT: SELF-INCRIMINATION PROTECTIONS AND FAILURE TO PROTECT LAWS

Before exploring how passive parents are uniquely situated, this section will set the stage with a thorough exploration of the Fifth Amendment, including self-incrimination considerations and the use of immunity as a way to circumvent any resulting conflicts. This Fifth Amendment exploration will also explain New Mexico's unique deviation in allowing all parties, including the court itself, to request immunity for a witness. The second part of the background will explain the various failure to protect statutes and the scholarly criticism of these laws. The third part will briefly touch on how courts have balanced competing interests in criminal cases involving familial and spousal relationships. The fourth section outlines how other scholars have approached the controversial applications and consequences of these laws. The Background then concludes by discussing the gap in analysis that this Comment seeks to fill: self-incrimination as another drawback inherent in failure to protect laws.

### A. *Pleading the Fifth: What Does It Really Mean?*

Self-incrimination protections are a constitutionally guaranteed right, codified in the United States Constitution.<sup>15</sup>

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15. U.S. CONST. amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on the presentment or indictment of a grand jury, except

These protections can be traced back to 17th century France and have done nothing but grow in use and strength over time.<sup>16</sup> As the full strength of self-incrimination protections were sketched out over time, the courts had to confront the conundrum of upholding this constitutional protection while simultaneously upholding the government interest in compelling witnesses to testify.<sup>17</sup> As a result, immunity statutes were born.<sup>18</sup> Prosecutors have the option of asking for immunity so that potentially incriminating testimony can be given, free of self-incrimination.<sup>19</sup> This option is codified in state and federal statutes.<sup>20</sup> The constitutionality of immunity statutes has faced scrutiny as they have developed, but the Supreme Court has settled on the provisions necessary to pass constitutional muster.<sup>21</sup> The Court has held that the Fifth Amendment “only guarantees that a witness cannot be prosecuted based on the content of her compelled testimony.”<sup>22</sup>

### 1. Immunity: The Two Types

There are two different forms of immunity: use and transactional.<sup>23</sup> Transactional immunity is less common because the protections it provides are broader and prosecutors might not

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in cases arising in the land or naval forces, or in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor to be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825 (1999).

16. Patton, *supra* note 14, at 105.

17. Witt, *supra* note 15, at 843.

18. *Id.*

19. Patton, *supra* note 14, at 107.

20. See 18 U.S.C. § 6002 (2018) (stating, “but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.”).

21. Andy Scholl, Note, *State v. Belanger And New Mexico's Lone Stance On Allowing Defense Witness Immunity*, 40 N.M. L. Rev. 421, 424 (2010). The Supreme Court first had to analyze the scope and purpose of the Fifth Amendment before analyzing whether state and federal immunity statutes still upheld this scope and purpose. *Id.* at 424. Opinions and decisions have fluctuated overtime, initially requiring statutes to provide broad protections and striking down most statutes. *Id.* Over time, the pendulum has swung the other way, allowing most immunity statutes to pass muster. *Id.* at 428. Presently, the Supreme Court has upheld that most use immunity statutes uphold the scope and purpose of the Fifth Amendment. *Id.*

22. Scholl, *supra* note 21, at 426. See also, *Brown v. Walker*, 161 U.S. 591 (1896).

23. *Id.*

know the full value of the testimony before agreeing to this broad imperviousness.<sup>24</sup> In exchange for the incriminating testimony, the witness is protected from ever being prosecuted for the crimes they disclose.<sup>25</sup>

Use immunity is self-explanatory: the testimony a witness gives cannot be used against them at a later date.<sup>26</sup> A witness can still be prosecuted for anything that might be included in their testimony, but use immunity is upheld so long as the witness and the prosecutor are in a similar position than they would have been had the witness been shielded by the Fifth Amendment.<sup>27</sup> In this way, the Supreme Court solidified the constitutionality of use immunity as a method of maintaining the traditional safeguards of the Fifth Amendment.<sup>28</sup>

a. Immunity Authority and Procedure

Immunity on the federal level is rooted in legislation.<sup>29</sup> Though courts have confronted such statutes in determining their constitutionality, the legislature generally holds authority to dictate the procedure.<sup>30</sup> The federal immunity statute determines that immunity can only be granted upon the request of a United States attorney.<sup>31</sup> Federal courts have repeatedly toyed around with defense witness immunity but only within a very narrow scope. Prosecutorial misconduct and exculpatory evidence are two exceptions where the court is given leave to bestow immunity on a witness with self-incriminating testimony.<sup>32</sup> State courts have tinkered with defense witness immunity even less.<sup>33</sup> This means

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24. Patton, *supra* note 14, at 105.

25. *Id.*

26. *Id.*

27. *Kastigar v. United States*, 406 U.S. 441 (1972) (affirming and solidifying the constitutionality of use immunity statutes and set the procedure for how immunity can be applied for and granted).

28. Patton, *supra* note 14, at 105.

29. *State v. Belanger*, 146 N.M. 357, 362 (N.M. Sup. Ct. 2009).

30. Roderick Ingram, Note, *A Clash Of Fundamental Rights: Conflicts Between The Fifth And Sixth Amendments In Criminal Trials*, 5 WM. & MARY BILL OF RTS. J. 299 at 305.

31. 18 U.S.C.S. § 6003 (stating, “A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General or Deputy Assistant Attorney General, request [an order requiring such an individual to give testimony. . . .]”).

32. *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); The Court has, mostly in dicta, affirmed that the prosecution is the party that can petition immunity for a witness. *Id.* at 228. However, they have also explored when the court or the defense can petition for a grant of immunity. See *United States v. Herman*, 589 F.2d 1191 (3d Cir. 1978); Scholl, *supra* note 21, at 428.

33. Scholl, *supra* note 21, at 428.

that on both the federal and state level, immunity overwhelmingly rests in the benevolent hands of the prosecution.<sup>34</sup>

b. New Mexico's Immunity Deviation: Immunity as a Creature of the Courts

In New Mexico, immunity can be applied for by the “prosecuting attorney, the accused, or the court’s own motion.”<sup>35</sup> Unlike on the federal level, New Mexico derives authority for defense witness immunity from the rules of evidence.<sup>36</sup> New Mexico stands alone in such a procedural flexibility, following a decision by the New Mexico Supreme Court in 2009.<sup>37</sup> The court of appeals initially found improper the notion that a court could grant use immunity, claiming that such authority lies in the legislature.<sup>38</sup> In contrast, the Supreme Court was clear that transactional immunity does in fact derive authority from the legislature, as transactional immunity protects a witness from the state as a whole.<sup>39</sup> Use immunity is merely the protection against testimony being entered into evidence.<sup>40</sup> The Court found that rules of criminal procedure did come under judiciary authority and therefore the Court has the power to adjust the procedure for granting use immunity.<sup>41</sup> Specifically, the Court analyzed the progression of federal use immunity and New Mexico’s use immunity, finding that New Mexico’s use immunity was a “creature of the courts” instead of a statutory entity.<sup>42</sup> The result of this decision was a strict deviation from allowing only the prosecutor from requesting use immunity for witnesses.<sup>43</sup> In this way, New Mexico has revolutionized a judge’s control over their own courtroom and allowed defense witnesses a procedural safeguard in line with their Fifth Amendment rights.<sup>44</sup>

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34. *Id.*

35. N.M. Stat. Ann. § 5-116 (LexisNexis 2016). “If a person has been or may be called to testify. . . in an official proceeding conducted under the authority of a court or grand jury, the district court for the judicial district in which the official proceeding is or may be held may issue a written order requiring the person to testify . . . notwithstanding the person's privilege against self-incrimination. The court may issue an order under this rule upon the written application of the prosecuting attorney, the accused, or upon the court's own motion.” *Id.*

36. *Belanger*, 146 N.M. 357 (N.M. Sup. Ct. 2009) (defendant challenged the rejection of use immunity for a defense witness); N.M. Stat. Ann. § 5-116 (LexisNexis 2016).

37. *See generally, Belanger*, 2009-NMSC-025.

38. *Id.*

39. *Id.* at 361.

40. *Id.*

41. *Belanger*, 146 N.M. at 361.

42. *Id.* at 366.

43. *Id.* at 362.

44. *Id.* at 366.

## B. Failure to Protect Laws: An Overview

The first failure to protect case was tried forty years ago.<sup>45</sup> Failure to protect laws rarely require intent as an element to establish culpability.<sup>46</sup> Presently, twenty-nine states have some version of failure to protect laws and thirty-eight states have some statute that includes the omission of an affirmative duty as it relates to child abuse.<sup>47</sup> These statutes vary in name and can be referred to as any of the following: endangering a child, enabling child abuse, neglecting a child.<sup>48</sup> Some statutes are tailored

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45. Jeanne A. Fugate, Note, *Who's Failing Whom? A Critical Look At Failure-To-Protect Laws*, 76 N.Y.U. L. REV. 272, 278 (2001).

46. Jean Peters-Baker, Note, *Punishing The Passive Parent: Ending A Cycle Of Violence*, 65 UMKC L. REV. 1003, 1018 (1997).

47. Geneva Brown, *When The Bough Breaks: Traumatic Paralysis - An Affirmative Defense For Battered Mothers*, 32 WM. MITCHELL L. REV. 189225 (2005) (stating, "The remaining twelve states have "commission statutes" that punish only willful and intentional conduct of those person who actually commit abuse.").

48. Alaska Stat. § 11.51.100 (LexisNexis 2016), Cal. Penal Code § 273a (LexisNexis 2016), Del. Code § 1102 (LexisNexis 2016), Fla. Stat. § 827.03 (LexisNexis 2016), Hawaii Rev. Stat. § 709-903.5 (LexisNexis 2016), Iowa Code § 726.6 (LexisNexis 2016), Me. Rev. Stat. tit. 17-A (LexisNexis 2016), § 554, Minn. Stat. § 609.378 (LexisNexis 2016), Miss. Code Ann. § 97-5-39 (LexisNexis 2016), Ariz. Rev. Stat. § 13-3623 (LexisNexis 2016), Idaho Code Ann. §18-1501 (LexisNexis 2016), Ky. Rev. Stat. Ann. § 508.100 (LexisNexis 2016), Mass. Gen. Laws ch. 265 (LexisNexis 2016), § 13J, Ark. Code (LexisNexis 2016), Ann. § 5-27-221 (LexisNexis 2016), 720 Ill. Comp. Stat. 150/5.1; 720 Ill. Comp. Stat. 5/12C-5 (LexisNexis 2016), Nev. Rev. Stat. § 200.508 (LexisNexis 2016), N.M. Stat. § 30-6-1 (LexisNexis 2016), N.C. Gen. Stat. § 14-318.4 (LexisNexis 2016), N.D. Cent. Code § 14-09-22 (LexisNexis 2016), Ohio Rev. Code § 2903.15 (LexisNexis 2016), Okla. Stat. tit. 21 § 843.5; Okla. Stat. tit. 21 § 701.7; Okla. Stat. tit. 21 § 852.1 (LexisNexis 2016), S.C. Code Ann. § 16-3-85; S.C. Code Ann. § 16-3-95; S.C. Code Ann. § 63-5-70 (LexisNexis 2016), S.D. Codified Laws § 26-10-30. (LexisNexis 2016), Tenn. Code Ann. § 39-15-401; Tenn. Code Ann. § 39-15-402; Tenn. Code Ann. § 39-13-102 (LexisNexis 2016), Texas Penal Code § 22.04 (LexisNexis 2016), Utah Code § 76-5-109 (LexisNexis 2016), Va. Code Ann. § 18.2-371.1 (LexisNexis 2016), W. Va. Code § 61-8D (LexisNexis 2016), Wis. Stat. § 948.03 (LexisNexis 2016) (state statutes that specifically punish failure to protect in child abuse cases); *see also* Ala. Code § 13A-13-6 (LexisNexis 2016), Colo. Rev. Stat. § 18-6-401 (LexisNexis 2016), Conn. Gen. Stat. § 53-21 (LexisNexis 2016), D.C. Code § 22-1101 (LexisNexis 2016), Ga. Code Ann. § 16-5-70; Ga. Code Ann. § 16-12-1 (LexisNexis 2016), Ind. Code § 35-46-1-4 (LexisNexis 2016), Kan. Stat. Ann. § 21-5601 (LexisNexis 2016), La. Rev. Stat. § 14:93; La. Rev. Stat. 14:92 (LexisNexis 2016), Md. Code, Com. Law § 3-602.1 (LexisNexis 2016), Mo. Rev. Stat. § 568.045; Mo. Rev. Stat § 568.060 (LexisNexis 2016), Mont. Code Ann. § 45-5-622 (LexisNexis 2016), Neb. Rev. Stat. § 28-707 (LexisNexis 2016), N.H. Rev. Stat. Ann. § 639:3 (LexisNexis 2016), N.Y. Penal Code § 260.10 (LexisNexis 2016), Or. Rev. Stat. § 163.200 (LexisNexis 2016), 13 Pa. Cons. Stat. § 4304 (LexisNexis 2016), R.I. Gen. Laws § 11-9-5 (LexisNexis 2016), Vt. Stat. Ann. § 1304 (LexisNexis 2016), Wash. Rev. Code § 9A.42.020; Wash. Rev. Code § 9A.42.030 (LexisNexis 2016), Wyo. Stat. §

narrowly to a parent who is passive in the face of child abuse. Others are broadly written to include a parent who fails to protect their child from any kind of danger – even a faulty electric outlet.<sup>49</sup>

### 1. *Rationale Behind the Laws*

Despite the differing titles and reach of the laws, the rationale is the same: to reaffirm and codify a parent's affirmative duty to their child in cases of child abuse.<sup>50</sup> The government has a compelling state interest to curb child abuse.<sup>51</sup> More than 100 million children are abused and neglected each year.<sup>52</sup> Individuals generally have no duty to help protect a stranger.<sup>53</sup> The standard changes when family members are the ones endangered, especially in a parent-child relationship.<sup>54</sup> Failure to protect laws build off of that duty by codifying a parent's affirmative duty in the face of dangers such as abuse.<sup>55</sup> While the motivation for enacting these state laws was noble, they have come under fire by feminist and domestic violence groups.<sup>56</sup>

### 2. *Controversy Arises from Disparate Impact on Mothers and Fellow Victims of Abuse*

A violent abuser is distinctly different than a faulty electric outlet. Abuse does not exist in a vacuum, whereby only a child in a two-parent household is the victim of abuse. In fact, the link between spousal abuse and child abuse is well established.<sup>57</sup> The majority of passive parents charged under these laws fit into two main groupings: they are the mothers of the abused child and they themselves were victims of abuse at the hands of their child's abuser.<sup>58</sup> Put simply, most defendants in these cases are battered women.<sup>59</sup>

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6-4-403 (LexisNexis 2016) (state statutes that punish a general neglect of a parent's affirmative duty).

49. Brown, *supra* note 47, at 225.

50. *See Id.* (stating, "In every state, 'parents have an affirmative legal duty to protect and provide for their minors.' The state intercedes when the parent fails in his or her duty.").

51. *Id.*

52. *Id.* at 226.

53. *Id.* at 224.

54. Brown, *supra* note 47.

55. *Id.*

56. *Id.*

57. *See* Diana Zuckerman et al., *Linking Spouse and Child Abuse*, NATIONAL CENTER FOR HEALTH RESEARCH (2010), [www.center4research.org/violence-risky-behavior/violence-and-threats-in-the-home/linking-spouse-and-child-abuse/](http://www.center4research.org/violence-risky-behavior/violence-and-threats-in-the-home/linking-spouse-and-child-abuse/) (explaining that when there is evidence of spousal abuse, the likelihood of child abuse is increased by seventy percent).

58. *See* Fugate, *supra* note 45, at 279.

59. *Id.*

a. Failing to Account for the Struggles of the Battered Woman

Failure to protect laws have confronted controversy because they often fail to account for the obstacles battered women inherently face.<sup>60</sup> The cycle of violence, financial control, and social isolation by the abuser all make it difficult for the victim to leave.<sup>61</sup> Anecdotes of abuse are often littered with long periods of reconciliation, coined the “honeymoon” phase, where victims are led to believe that the violent or aggressive outburst was an isolated incident.<sup>62</sup> This makes it difficult for victims to recognize this abuse as a pattern.<sup>63</sup> Abusers often take control of household finances, and in fact escalate their abuse as the victim becomes more reliant on the abuser.<sup>64</sup> Victims are discriminated against in the workplace, making employment and financial independence difficult.<sup>65</sup> When children are involved, these obstacles intensify: the victim might believe the abuse is worthwhile to maintain a two parent household, or they fear losing custody if they leave.<sup>66</sup>

On average, it takes a victim seven times to leave before they finally escape permanently.<sup>67</sup> And even after they leave, the danger still follows. Leaving an abusive partner is usually the most dangerous time for a victim.<sup>68</sup> The abuser no longer has anything

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60. McDonald, *supra* note 11, at 300.

61. See *Understanding Why Victims Stay*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE (last visited Oct. 9, 2016 4:25 PM), [www.ncadv.org/learn-more/what-is-domestic-violence/why-victims-stay](http://www.ncadv.org/learn-more/what-is-domestic-violence/why-victims-stay) (noting that “a victim’s reasons for staying with their abusers are extremely complex and, in most cases, are based on the reality that their abuser will follow through with the threats they have used to keep them trapped.”).

62. Brown, *supra* note 47, at 216. The cycle of violence theory is that in the emotional aftermath of an abusive incident, the abuser usually feels guilty and this leads him to attempt to make amends by being exceptionally loving and attentive to the victim. *Id.* This serves to lull the victim into a sense of security that the abusive incident was isolated, unlikely to repeat, or even normal. *Id.*

63. *Id.*

64. See Danielle Berger, *Grants Help Abused Women Start Over*, CNN (last updated July 19, 2012 4:28 PM), [www.cnn.com/2012/07/19/us/cnnheroes-crawford-domestic-violence/](http://www.cnn.com/2012/07/19/us/cnnheroes-crawford-domestic-violence/) (explaining, seventy-four percent of domestic abuse victims admitted to staying with their abusers for financial reasons).

65. *What is Domestic Violence?*, NATIONAL COALITION AGAINST DOMESTIC VIOLENCE (last visited Oct. 9, 2016 4:25 PM), [ncadv.org/learn-more/what-is-domestic-violence](http://ncadv.org/learn-more/what-is-domestic-violence).

66. *Understanding Why Victims Stay*, *supra* note 61.

67. Kathryn Robinson, *50 Obstacles to Leaving: 1-10*, THE NATIONAL DOMESTIC VIOLENCE HOTLINE (June 10, 2013) [www.thehotline.org/2013/06/50-obstacles-to-leaving-1-10/](http://www.thehotline.org/2013/06/50-obstacles-to-leaving-1-10/).

68. GAVIN DE BECKER, *THE GIFT OF FEAR: AND OTHER SURVIVAL SIGNALS THAT PROTECT US FROM VIOLENCE*, (2010). A restraining order is often the catalyst that incites fatal violence in intimate partner relationships. *Id.* at 2414. The risk of death or injury to a victim is greatest when leaving an abusive

left to lose and local communities often lack the resources to keep abuse victims safe.<sup>69</sup> If the abuser is denied full or joint custody, the victim still has reason to fear that the abuser will be granted visitation with little to no supervision.<sup>70</sup>

b. The Gender Imbalance: Women Targeted as the Passive Parent

Besides neglecting to account for issues battered women face, these laws have also come under controversy because they unequally target women as the passive parent.<sup>71</sup> All failure to protect laws are written using gender neutral language.<sup>72</sup> Yet, most failure to protect cases are women who failed to protect their children, step-children, or even just children in their household from their spouse, ex-spouse, or live-in significant other.<sup>73</sup> Mothers are more likely to kill their children, compared to fathers or the two parents working together; and yet it is rare for a father to be charged for failing to protect his children.<sup>74</sup> The rationale behind this imbalance is often rooted in gender norms and societal ideas of what a mother should be willing to sacrifice for her children.<sup>75</sup> In this way, these laws have come under controversy because of their failure to account for the nuanced complications between abuser, passive parent, and the abused child. Instead, they cut a clear line inside a vacuum, one in which a battered woman is either a criminal or a victim, but never both.

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relationship or shortly thereafter. *Id.* at 3167. Often, the abuser feels they have nothing left to lose or they escalate the violence in an attempt to reassert control over the victim. *Id.* at 3232. See also *Domestic Violence Facts and FAQs*, DELAWARE COALITION AGAINST DOMESTIC VIOLENCE (last visited Sept. 4, 2018), <https://dcadv.org/domestic-violence/what-you-should-know-about-domestic-violence.html> (noting that one in five homicide victims with restraining orders are murdered within two days of obtaining the order and one-third are murdered within the first month).

69. *Understanding Why Victims Stay*, *supra* note 61.

70. *Id.*

71. Fugate, *supra* note 45, at 273.

72. *Id.* at 274.

73. *Id.*

74. Child Welfare Information Gateway, *Child Abuse and Neglect Fatalities 2014: Statistics and Interventions*, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, CHILDREN'S BUREAU (2016). Mothers acting alone account for twenty-eight percent of child fatalities. *Id.* In comparison, fathers acting alone account for fifteen percent of child fatalities, while almost twenty-two percent of child fatalities are committed by parents working together. *Id.* Non-parents account for about sixteen percent of child fatalities. *Id.* Therefore, mothers are the mostly likely to kill their own children.

75. Fugate, *supra* note 45.

c. Punishment Variation: State Lines Mean the Difference  
Between a Misdemeanor or Life in Prison

In addition, each of the thirty-eight states with some form of failure to protect law vary in what constitutes passivity and how severely a passive parent is punished.<sup>76</sup> Depending on the state, being a passive parent in the face of child abuse could result in no criminal repercussions, being charged with a misdemeanor, or being charged with a felony.<sup>77</sup> The range is huge and inconsistent.<sup>78</sup> For example, Oklahoma is one of the harshest in punishing passive parents.<sup>79</sup> The punishment is the same as affirmatively abusing a child: life in prison.<sup>80</sup> Conversely, Illinois only treats failure to protect as a misdemeanor unless the child dies and the passivity is the proximate cause of the child's death.<sup>81</sup> As a result, failure to protect laws have also come under controversy because they disproportionately punish passive parents on a state-by-state basis.<sup>82</sup>

C. *Unique Relationships and How the Law Makes  
Exceptions for Them*

This is hardly the first time the law has had to strike a balance between complicated extenuating circumstances and criminal justice.<sup>83</sup> In order to protect the privilege between a party in a civil or criminal case, certain communications are privileged: doctor and patient, lawyer and client, and husband and wife, for example.<sup>84</sup> Spousal privilege developed from sexist roots but supported the compelling interest that forcing spouse to testify against spouse would not ensure frank and free communication.<sup>85</sup> Scholars have

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76. Alex Campbell, "Enabling Child Abuse" And Why Oklahoma Imprisons So Many Women, BUZZFEED (Dec. 15, 2014), [www.buzzfeed.com/alexcampbell/enabling-child-abuse-and-why-oklahoma-imprisons-so-many-wome?utm\\_term=.mtQN22mAN8#.yteZ00VvZ7](http://www.buzzfeed.com/alexcampbell/enabling-child-abuse-and-why-oklahoma-imprisons-so-many-wome?utm_term=.mtQN22mAN8#.yteZ00VvZ7).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. 720 Ill. Comp. Stat. 150/5.1 (2016); 720 Ill. Comp. Stat. 5/12C-5 (2016).

82. Campbell, *supra*, note 76.

83. Dan Markel and Ethan J. Leib, *Criminal Justice And The Challenge Of Family Ties*, 2007 U. ILL. L. REV. 1147, 1168 (2007).

84. *See* Markel and Leib, *supra* note 83, at 1153 (noting a wide variety of communications are privileged: attorney, physician, spouses; all with the intention of preserving the sanctity of the attorney-client, physician-patient, and husband-wife relationships).

85. *Id.* at 1168 (pointing out that spousal privilege originated from old English common law whereby a wife was not allowed to testify against her husband). Now, the rule is gender-neutral and spouses are allowed to testify at

also repeatedly argued in favor of extending these same privileges to parent and child relationship.<sup>86</sup> Once again, this is with the aim to preserve domestic bonds.<sup>87</sup> Fourteen states prohibit family members from being charged for harboring a fugitive.<sup>88</sup> The legal system understands that certain relationships create complications that might unfairly prejudice a party in a case.<sup>89</sup> Therefore, the law creates exceptions.<sup>90</sup>

In addition, the court often takes account of whether neutral third parties are harmed by their decisions, with the neutral third parties often being family members of the defendant.<sup>91</sup> When a defendant has an extenuating circumstance, such as the role of a primary caretaker or has close family ties, some sentencing judges have discretion.<sup>92</sup> The landscape of judicial discretion varies, but exceptions for familial relationships are available at the federal level and in some states.<sup>93</sup>

#### D. *Fixing the Failure to Protect Shortcomings*

To combat the controversies embroiled in failure to protect cases, defenses and exceptions have been argued. Usually these defenses draw heavily from traditional battered women justifications, including “learned helplessness.”<sup>94</sup> The use of duress as an affirmative defense has been explored and generally discounted, as duress involves a sense of immediacy that failure to protect cases rarely contain.<sup>95</sup> The advocacy of a new affirmative defense that hinges on the complex relationship between abuser, passive parent, and abused child has been proposed.<sup>96</sup> This affirmative defense takes into account the nuanced way an abuser can gain and keep control of a victim, even when the victim is not

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one another’s trials if they so choose. *Id.* However, a person cannot be compelled to testify against their spouse, even if they are not at risk for self-incrimination. *Id.*

86. Markel, *supra* note 83.

87. *See Id.* at 1168 (clarifying, “In contrast to the spousal privileges, federal courts tend not to provide any similar protection for a parent-child, brother-sister, or other intrafamilial relationships . . . A parent-child privilege is the one most often claimed . . .”).

88. *Id.* This exemption is regardless of the crime or the closeness of the family. *Id.* at 1159. In four other states, there is still liability for harboring a familial fugitive, but the liability is reduced compared to non-familial fugitives. *Id.* There is no federal law, but in dicta courts have mentioned the conflict of interest family members would face in this situation. *Id.*

89. Markel, *supra* note 83.

90. *Id.*

91. *Id.*

92. Markel, *supra* note 83, at 1171.

93. *Id.*

94. Brown, *supra* note 47, at 223.

95. *Id.* at 224.

96. *Id.*

in immediate danger of violence.<sup>97</sup> But generally speaking, solutions that have been proposed have failed to effectively right the major drawbacks in the applications of these laws.<sup>98</sup>

### E. *Self-Incrimination as an Uninvestigated Controversy*

The complicated relationships between the parties in failure to protect cases has been approached as the driving theory for defending the battered woman, as an excuse to uphold the best interests of the child, and as a motive for instituting these laws in the first place.<sup>99</sup> The defendant's role as both the passive parent and a victim of abuse has been thoroughly analyzed.<sup>100</sup> However, this exploration has only existed in the realm of defending the passive parent or pointing out the flaws inherent in the statutes.<sup>101</sup>

This previous scholarly exploration has worked to confront issues in the abstract as opposed to the technical application in terms of criminal proceedings.<sup>102</sup> In the actual application of these laws, trials occur for either the abusive defendant or the passive defendant.<sup>103</sup> Witnesses are called to testify.<sup>104</sup> The passive parent is, without a doubt, the best witness to fully detail the child abuse that occurred.<sup>105</sup> In fact, the passive parent is often the only person besides the abuser and the child that was privy to what happened within the home, behind closed doors.<sup>106</sup> And yet, any testimony the passive parent gives inevitably builds a case against them.<sup>107</sup>

The unique position of a passive parent and how these roles impact their Fifth Amendment self-incrimination protections has not yet been investigated. Therefore, it is necessary to analyze these roles to uncover how a passive parent might be able to safe guard their constitutional right.

## III. THE CROSSROADS OF A PASSIVE PARENT

In most failure to protect cases, defendants exist at a crossroad of conflict. They are simultaneously a defendant, a parent, and a victim. Each instance of abuse the passive parent witnessed, but

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97. *Id.*

98. Brown, *supra* note 47, at 224.

99. *Id.*

100. Peters-Baker, *supra* note 46, at 1020.

101. *Id.*

102. Brown, *supra*, note 47.

103. Campbell, *supra*, note 13.

104. *Id.*

105. Zuckerman, *supra* note 57.

106. Campbell, *supra*, note 13.

107. *Id.*

did nothing to prevent, is another instance that they neglected their affirmative duty as a parent.<sup>108</sup> Perhaps any other defendant, in any other type of case, would be able to sit snugly behind their Fifth Amendment protections and let the prosecution worry about keeping a violent criminal behind bars. Unlike these defendants, passive parents are simultaneously tasked with defending themselves from the accusation of enabling child abuse, with managing their own trauma as a victim at the hands of their codefendant, and with finding a balance between protecting their child and reuniting with them.<sup>109</sup> The conflict amongst these tasks leaves little opportunity for the passive parent to safeguard their self-incrimination protections.<sup>110</sup> In fact, some of these tasks incentivize doing away with that protection completely.<sup>111</sup>

With the stage set, this Comment can now analyze the multiple roles a passive parent fills. The first section of analysis addresses the focus of this Comment and argues that no matter how sympathetic or criminally culpable readers find a passive parent, these determinations are irrelevant because the Fifth Amendment protects all defendants. Then, the second section analyzes the incentives and deterrents a passive parent considers as a defendant in their own failure to protect case. The third section analyzes a passive parent's struggle to reconcile the incentives and deterrents of testifying as a parent attempting to protect their traumatized child from further abuse. The fourth section analyzes how the passive parent's role as a victim of their child's own abuser effects the incentives and deterrents to testifying. Finally, the section ends with a broad conclusion about how these different roles inherently conflict in way that infringes on the passive parent's self-incrimination protections.

#### A. *Culpability is Irrelevant to Self-Incrimination Protections*

It is important to clarify the focus of this Comment. At the most simplistic level, these laws are meant to be a vehicle for good.<sup>112</sup> The

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108. *Id.*

109. McDonald, *supra* note 11, at 304.

110. See *State v. Portigue*, 125 N.H. 352, 481 A.2d 534 (1984) (noting that convicting the defendant of misdemeanor endangering a child after he made statements to the hospital that he had seen his wife beat his son and he did nothing to stop the beatings). The statements were admissible and used against him in court. *Id.*

111. *Id.*

112. Amy L. Nilsen, Comment, *Speaking Out Against Passive Parent Child Abuse: The Time Has Come To Hold Parents Liable For Failing To Protect Their Children*, 37 HOUS. L. REV. 253 (2000); see also, Lissa Griffin, "Which One Of You Did It?" *Criminal Liability For "Causing Or Allowing" The Death Of A Child*, 15 IND. INT'L & COMP. L. REV. 89 at 89 ("In the United States, the statistics on child abuse and homicide are absolutely staggering. Homicide is

applications of any legislation in our society can have unintended consequences and this Comment has touched on some of these.<sup>113</sup> Other scholars have pointed out that these unintended consequences are worth the furthering of the state's interest to protect children.<sup>114</sup> Such an analysis is beyond the scope of this Comment. The culpability of a passive parent is not relevant to this analysis. Regardless of culpability, each citizen has a guaranteed right to be free of self-incrimination.<sup>115</sup> This right is not adjusted for innocence or based on any justification or excuse a defendant might have.<sup>116</sup> This Comment acknowledges both the incongruent application of these laws and the need to protect the most vulnerable demographic of our society. But, this Comment asserts that regardless of whether a passive parent should be criminally sanctioned for their passivity or whether these laws are fulfilling their initial purpose of curbing child abuse, they have an inalienable right to not self-incriminate. How a passive parent is uniquely situated and how that role impacts this right requires a more in-depth analysis.

*B. The Multiple Roles of the Passive Parent: Defendant, Parent, Victim*

Battered women in failure to protect cases assume the role of defendant when they are charged with enabling the child abuse.<sup>117</sup> Like all defendants in criminal proceedings, they have the option to refrain from testifying on their own behalf or testifying adversely against their codefendant, the child abuser.<sup>118</sup> Attorneys carefully weigh the decision of whether to put the defendant on the stand.<sup>119</sup> Defendants have a constitutional right not to testify and thereby

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the leading cause of death for children under one year of age, and at least five children die each day from abuse and neglect by those who are obligated to protect them.”).

113. Brown, *supra* note 47; Pualani Enos, *Recent Development: Prosecuting Battered Mothers: State Laws' Failure To Protect Battered Women And Abused Children*, 19 HARV. WOMEN'S L.J. 229, 244 (1996).

114. Nilsen, *supra* note 112 at 264-65.

115. U.S. CONST. amend. V.

116. *Id.*

117. McDonald, *supra* note 11, at 297.

118. Jeffery Bellin, *Improving The Reliability Of Criminal Trials Through Legal Rules That Encourage Defendants To Testify*, 76 U. CIN. L. REV. 851 (2008).

119. Jonathan D. Glater, *For Defendants, Testifying Can Be a Big Gamble*, N.Y. TIMES (Apr. 28, 2005), [www.nytimes.com/2005/04/28/business/for-defendants-testifying-can-be-a-big-gamble.html](http://www.nytimes.com/2005/04/28/business/for-defendants-testifying-can-be-a-big-gamble.html) (explaining the careful balancing tests attorneys must go through when deciding the merits of having a defendant take the stand).

avoid self-incrimination or to testify and aid their own defense.<sup>120</sup> For the average failure to protect defendant, these options are not as clear-cut.

### 1. *Passive Parents as a Defendant*

A passive parent faces criminal charges and is, by definition, a defendant. Like all defendants, the passive parent has options galore: plead guilty or plead not guilty, be tried by a jury of their peers or be tried by a single judge, testify on their own behalf or invoke their right to remain silent. However, the deterrents tend to greatly outweigh the incentives when a passive parent is making the decision to testify.

#### a. Forgoing the Fifth: An Average Defendant's Choice to Testify

Only about half of all criminal defendants in all cases opt to testify in their own trials.<sup>121</sup> A big reason is because defendants have gained more protections that ensure they do not have to testify and the jury cannot infer adverse interpretations simply because the defendant failed to testify.<sup>122</sup> While testifying allows an individual to tell his or her own side of the story, taking the stand can be risky for the average defendant.<sup>123</sup>

Giving any testimony under oath opens the door to risks because a defendant who takes an oath to tell the truth and lies under that oath, is guilty of perjury and can be punished as a result.<sup>124</sup> Further, a defendant that takes the stand runs the risk of implicating themselves in criminal activity.<sup>125</sup> This is true when a passive parent testifying against their codefendant, without

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120. Bellin, *supra* note 118.

121. *Id.* at 825.

122. *See Id.* “[o]ne reason defendants decline to testify is that over the past two centuries, the courts have constructed an elaborate jurisprudence vigorously protecting the right not to testify, and an equally elaborate jurisprudence permitting numerous burdens to be placed on the right to testify.” *Id.* “This case law has no unifying legal principle, but a common practical effect - encouraging defendants to remain silent at trial.” *Id.*

123. Glater, *supra* note 119.

But conventional wisdom holds that a defendant who keeps quiet is usually safer than one who testifies. After all, lawyers said, a defendant who stays silent does not run the risk of falling apart when questioned by prosecutors, of tripping over details, of alienating the judge or annoying members of the jury..

*Id.*

124. Bellin, *supra* note 118 (suggesting that a defendant who takes the stand opens his or herself up to being impeached on prior convictions and to being cross-examined on otherwise inadmissible evidence).

125. *Id.* at 863.

immunity, inherently implicates themselves in a crime – the crime they have been accused of committing.<sup>126</sup>

b. The Impossible Position of Passive Parents as Defendants

A passive parent who takes the stand against their codefendant does so most often with the intention of bolstering the prosecution's case.<sup>127</sup> This passive parent is brought forth to corroborate the abuse the child suffered, whether this is the victim's own claims or the physical evidence later collected.<sup>128</sup> This corroboration comes in various forms and none are beneficial to the passive parent.<sup>129</sup> Some passive parents take the stand to describe incidents of abuse they witnessed between the defendant and the child.<sup>130</sup> In doing so, they admit under oath that they saw the abuse and failed to report the abuser.<sup>131</sup> Some passive parents take the stand to describe incidents of abuse they experienced at the hands of the child abuser.<sup>132</sup> The purpose of this testimony is to establish a habit of violence by the child abuser.<sup>133</sup> But in doing so, the passive parent admits that they had knowledge the abuser was prone to violence and there was a high probability that that violence would spread to the children in the household.<sup>134</sup> In describing the terror these children faced, the passive parent in turn paints a compelling narrative of neglect these children faced at their own hands.<sup>135</sup> It is impossible for passive parents to testify against their codefendant without implicating themselves in criminal behavior.<sup>136</sup>

2. *Parents of the Harmed Children*

A failure to protect case, by definition, involves a parent and child relationship.<sup>137</sup> While not all passive parents are domestic violence victims, all passive parents are a parent.<sup>138</sup> This role comes

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126. *Id.*

127. Campbell, *supra* note 76.

128. Enos, *supra* note 113.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See generally* Phelps v. State, 439 So. 2d 727 (Ala. Crim. App. 1983). (describing “a parent who testified adversely against her codefendant.”)

133. Enos, *supra* note 113, at 244.

134. Phelps, 439 So. 2d. at 727. Phelps gave testimony about her husband and how he beat her and her father to the point that he had to go to the hospital. *Id.* Phelps was later convicted of neglecting to protect her son from her husband because she was found to have had knowledge about abuse. *Id.*

135. Enos, *supra* note 113, at 241.

136. *Id.*

137. Fugate, *supra* note 45.

138. Nilsen, *supra* note 112.

with its own set of complications if a passive parent chooses to testify against their codefendant.<sup>139</sup> At the same time, not testifying leaves the passive parent in a precarious position.<sup>140</sup> The main rationale for testifying or not testifying is usually the passive parent's hope to get home as soon as possible and to reunite with their child.<sup>141</sup>

a. Passive Parent's Incentive to Testify

A passive parent has multiple incentives to testify against their codefendant. The crime itself derives from a parent's failure to protect their child.<sup>142</sup> Taking the stand and helping to put their child's abuser away is an extension of this parental expectation.<sup>143</sup> For a parent who might not have had many options while in the home, the passive parent finally has an opportunity to stand up to their child's abuser in a court of law.<sup>144</sup>

In addition, a passive parent may believe that aiding the prosecution will result in a more lenient sentence when it comes their turn to stand trial.<sup>145</sup> However, without an explicit granting of immunity, there is no guarantee that the testimony will not rebound on the passive parent.<sup>146</sup> Without a clear understanding of the legal process and the protection only immunity can give them, a passive parent could easily and unintentionally implicate themselves.<sup>147</sup>

Arlena Lindley lost her three-year-old son at the hands of her abusive boyfriend, Alonzo Turner.<sup>148</sup> Turner beat the young boy to

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139. *Id.*

140. *Id.*

141. See Jean Peters-Baker, *supra* note 46 at 1021.

The battered passive parent often must defend against losing custody of her children, making the children wards of the state. Battered passive mothers most frequently lose custody of their children while serving time for failing to protect the child or fighting back against her abusive mate. The battered passive mother also may face criminal penalties.

*Id.*

142. Nilsen, *supra* note 112 at 263.

143. *Id.*

144. Lesley E. Daigle, *Empowering Women to Protect: Improving Intervention with Victims of Domestic Violence in Cases of Child Abuse and Neglect; A Study of Travis County, Texas*, 7 TEX. J. WOMEN & L. 287 (1998).

145. Campbell, *supra* note 1. Hall believed that the prosecution would be lenient because she was helping her case. She was wrong. *Id.*; see also McDonald, *supra* note 11, at 302 (noting that there are assumptions that prosecutors will be sensitive to the plight of battered women in failure to protect cases). In practice, prosecutors often lack an understanding of the obstacles battered women face and so their fate should not be left in the hands of the prosecution's discretion. *Id.*

146. Scholl, *supra* note 21, at 427.

147. *Id.*

148. Campbell, *supra* note 8.

death and shoved Lindley to the ground when she tried to intervene.<sup>149</sup> Her son stopped breathing and was later pronounced dead at the hospital.<sup>150</sup> Deep in grief, Lindley cooperated with the police by giving multiple statements to the detectives about Turner's abuse.<sup>151</sup> At no point did it occur to her that she was also a suspect.<sup>152</sup> And at no time did law enforcement warn her that each statement she made to against her son's murder could later be used against her.<sup>153</sup>

Even passive parents who have been advised of their rights may choose to testify and bear the unknown risks.<sup>154</sup> A passive parent who testifies does so to bolster the prosecution's case against the abuser.<sup>155</sup> The abuser is often the child's other parent.<sup>156</sup> A passive parent may fear that the other parent will have the charges dismissed, win their trial, or receive a shorter sentence than their own.<sup>157</sup> Depending on the outcome of the case, the abusive parent might be able to legally seek custody or unsupervised visitation of the child.<sup>158</sup> Even if the abusive parent has all parental rights and privileges terminated, they have more access to the child than if they were incarcerated.<sup>159</sup>

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149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Campbell, *supra*, note 13.

155. Campbell, *supra* note 8. Victoria Pedraza testified against her husband after the death of her two-year-old daughter. *Id.* She was promised that her life sentence would be reduced if she helped put her husband in jail. *Id.*

156. Enos, *supra* note 113, at 229. "The 'failure to protect' doctrine expects a mother to protect her child from the abusive acts of any third party, including the father or father figure, a person who has equal access to and responsibility for the child." *Id.*

157. Campbell, *supra* note 8. The use of plea deals can make it more likely that the abuser serves less time than the passive parent. *Id.* Alisha Mackey fought her charges and was sentenced to twenty years for failing to protect her son. *Id.* Her ex-husband pled guilty to raping a child and received only fifteen years. *Id.* Tondalo Hall is serving thirty years and her parole was recently denied, while her ex-boyfriend only served two and is currently free. *Id.*

158. Mary J. Cavins, *Physical Abuse of Child by Parent as Ground for Termination of Parent's Right to Child*, 53 A.L.R.3d 605. Physical abuse is grounds for termination of parental rights. *Id.* However, most of the grounds require a component of conviction in a court of law for the abuse. *Id.* A parent that is found not guilty has a high likelihood of retaining their rights. *Id.*

159. James Martin Truss, Comment, *The Subjection Of Women . . . Still: Unfulfilled Promises Of Protection For Women Victims Of Domestic Violence*, 26 ST. MARY'S L. J. 1149, 1182 (1995). When a domestic violence victim seeks an order of protection, their children are included in that order. *Id.* at 1184. A guardian can also seek a protective order for a minor. *Id.* However, like most protective orders, the coverage is minimal and can often incite more violence. *Id.*

At the very least, the passive parent runs the risk of the abusive parent being free to continue to abuse the child while the passive parent remains in jail.<sup>160</sup> Adversely testifying against their codefendant at the risk of self-incrimination might make sense to the passive parent, if it means keeping the abuser locked up.<sup>161</sup> A passive parent facing criminal charges has very few options left to protect their child, but testifying against the child's abuser is one remaining option.

b. Passive Parent's Incentive to Plead the Fifth

On the other hand, a passive parent has a wide variety of reasons to abstain from testifying against their codefendant. Generally the reasons previously discussed align with a passive parent's decision to abstain from testifying, including self-incrimination, opening themselves up to the risk of perjury, or bolstering a case against them.<sup>162</sup> Like any other defendant, the passive parent hopes to win a directed verdict or the trial as a whole.<sup>163</sup> Being found innocent comes with its own rewards.<sup>164</sup> For a passive parent, a verdict of not guilty gives them their freedom and opens the door to reclaim custody of their child.<sup>165</sup>

The passive parent is overwhelmingly the legal and biological parent of the abused child.<sup>166</sup> The child abuser can range from the other parent, the stepparent, or the live-in significant other.<sup>167</sup> Generally though, the child abuser has assumed a quasi-parental role in the child's life.<sup>168</sup> When both of these individuals are incarcerated at the same time, the child's custody has to be adjusted.<sup>169</sup> A child in this situation can be placed into the care of other relatives or of the state.<sup>170</sup>

Most incarcerated parents worry about the care of their child while they make their way through trial, sentencing, and serving time.<sup>171</sup> A passive parent also worries about the child abuser

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160. Campbell, *supra* note 8.

161. *Id.*

162. Bellin, *supra* note 118.

163. *Id.*

164. *Id.*

165. See *People v. Stanciel*, 225 Ill. App. 3d 1082, 589 N.E.2d 557 (1st Dist. 1991) (explaining that a mother got custody of her child after the child was abused by her boyfriend). The court granted her custody only on the condition that she refrained from seeing the boyfriend again. *Id.* at 559.

166. Fugate, *supra* note 45, at 282.

167. *Id.* "A recent string of cases, however, has expanded liability to include live-in boyfriends. The easiest case for assigning a legal duty arises in a parent-child relationship, particularly if the parent has custody. The cases involving live-in boyfriends focus on whether they assumed a similar duty." *Id.*

168. *Id.*

169. Cavin, *supra* note 158.

170. *Id.*

171. Nancy G. La Vigne et al., *Broken Bonds: Understanding and*

gaining legal care of their child if the passive parent remains incarcerated longer than the abuser.<sup>172</sup> More specifically, the passive parent would abstain from testifying in hopes to return their child as soon as possible.<sup>173</sup> Testifying strengthens both cases but a passive parent has the incentive to weaken both of the prosecutions cases.<sup>174</sup> A passive parent has incentive to prioritize their own freedom in order to return to their role as a parent.<sup>175</sup> Therefore, they have an incentive to rely on traditional strategies to prevent being found guilty, including abstaining from testifying without the granting of immunity.<sup>176</sup>

### 3. Victims of Domestic Violence

Not all passive parents in failure to protect cases are battered women, but most of them do have that role.<sup>177</sup> The connection between child and spousal abuse is clear, and therefore, most of the passive parents share an abuser with their child.<sup>178</sup> This relationship between the passive parent and their codefendant as a victim and an abuser is the driving force for why a passive parent might choose to testify or might abstain from testifying.<sup>179</sup>

#### a. Victim's Incentive to Testify

Failure to protect laws seek to punish the abuser for their violent acts against the child but fail to seek justice for the passive parent.<sup>180</sup> Therein lies the main rationale for why a passive parent

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*Addressing the Needs of Children with Incarcerated Parents*, URBAN INSTITUTE (Feb. 12, 2008).

Children typically display short-term coping responses to deal with their loss, which can develop into long-term emotional and behavioral challenges, such as depression, problems with school, delinquency, and drug use. Although a variety of associated risk factors could explain the coping behaviors common to these children, recent research indicates that parental incarceration exerts a unique influence on child outcomes.

*Id.*

172. Campbell, *supra* note 8.

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. Brown, *supra* note 47, at 195.

178. Enos, *supra* note 113, at 234. “[a]busers may injure the children of their female victims purposely in order to hurt and control the abused women or may hurt children because they try to defend their mothers.” *Id.*

179. Campbell, *supra* note 8.

180. Enos, *supra* note 113 at 244. “Courts often ‘note’ or ‘acknowledge’ the fear of a battered woman but refuse to consider the reasonableness of these fears when determining the woman's culpability with regard to her duty to

might seek to testify against their codefendant even at risk of self-incrimination.<sup>181</sup> A passive parent might be sitting in jail, but they are finally out of reach of their abuser and they finally have a clear path to justice.

Most domestic violence victims have few avenues to protect themselves, and those that do often face a path riddled with obstacles.<sup>182</sup> Leaving an abuser requires overcoming psychological hindrances such as learned helplessness.<sup>183</sup> Threatening or attempting to leave often incites more violence.<sup>184</sup> Police are often unresponsive or hesitant to investigate what they believe to be a domestic, interpersonal situation.<sup>185</sup> Orders of protection or restraining orders are often ineffective.<sup>186</sup> Shelters do not have sufficient space.<sup>187</sup>

In fact, it is the passive parent's history as a domestic violence victim that often results in their decision to overlook the child abuse.<sup>188</sup> Victims who witness child abuse might not intervene because their intervention is likely to result in more aggression from the abuser.<sup>189</sup> The passive parent's instinct to refrain from intervening in child abuse might prevent more violence, but legally results in criminal charges.<sup>190</sup>

These instincts can be abandoned as soon as both the abuser and the passive parent are arrested.<sup>191</sup> The prosecution has already charged the abuser with the crime of child abuse, and therefore, unresponsive law enforcement is no longer a factor.<sup>192</sup> A passive

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protect her children." *Id.*

181. *Id.*

182. *Understanding Why Victims Stay*, *supra* note 61.

183. Truss, *supra* note 159, at 1172 (describing how the cycle of violence leaves a psychological impact on the victim). "As these cycles continue, the victim becomes more passive and compliant; eventually, she convinces herself that she cannot escape." *Id.*

184. *See Id.* (stating, "As the abuser's web of control over his victim begins to unravel, he becomes more desperate and violent than ever before.")

185. *Id.* at 1161. "Law enforcement officers often treat violence against women lightly by focusing attention on the woman as provocateur, refusing to confront the abuser as a criminal and avoiding outright their responsibility to keep the peace."

186. *Id.*

187. Enos, *supra* note 113, at 246 (noting that "shelters are often unable to fulfill all of the woman's needs, since they may have no vacancy or refuse to accept children of a certain age or gender.")

188. Brown, *supra* note 47, at 217 (clarifying that "the power imbalance and intermittent abuse elements of traumatic bonding explain why women do not leave abusive relationships and may use unconventional strategies to protect themselves or their children as they remain in the relationship . . . The periods of reconciliation give the impression to an abused woman that the partner will not continue to be abusive.") *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. *See Becker*, *supra* note 68 at 3232 (explaining, in fact, it is often recommended that instead of relying on an Order of Protection, a battered

parent finally has the ear of the court.<sup>193</sup> The obstacles holding a passive parent back from pursuing justice are severely lessened.<sup>194</sup>

Victoria Pedraza testified about the events that led up to her daughter's death.<sup>195</sup> Daniel, Victoria's husband, violently lashed out at both her and her daughter.<sup>196</sup> The daughter died from her injuries.<sup>197</sup> Both Victoria and David were arrested on capital charges but the prosecutor offered to drop the capital charges against Victoria and only charge her for "permitting child abuse" if she testified truthfully against her husband.<sup>198</sup> The prosecutor was so concerned that Daniel would try to exert influence on Victoria, despite them both being imprisoned awaiting trial, that he moved Daniel to another county while he built his case.<sup>199</sup> Daniel was sentenced to life in prison because of Victoria's testimony.<sup>200</sup> But during Victoria's sentencing hearing, the prosecutor confronted Victoria about earlier lies she had told the police.<sup>201</sup> Victoria explained that she did not feel like she could safely tell the truth until she was in jail, she was so scared of Daniel.<sup>202</sup>

The passive parent has an incentive to testify against their own abuser, both for their own safety and their own justice. Fear is a huge factor for a victim seeking to testify against their abuser.<sup>203</sup> A passive parent might seek to bolster the case against the abuser in order to ensure that the abuser stays incarcerated long after they have since served their sentence and been released.<sup>204</sup> The desire to extend the abuser's sentence outweighs the victim's sense of self-

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woman should press charges against her abuser for specific infractions). An abuser dislikes their victim having control over them and will view an Order of Protection as the victim controlling their conduct. *Id.* Pressing charges introduces a third party in a position of authority and removes part of the blame from the victim, in the abuser's eyes. *Id.*

193. Truss, *supra* note 159, at 1161.

194. *Id.*

195. Campbell, *supra* note 8.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. Campbell, *supra* note 8.

201. *Id.*

202. *Id.*

203. Enos, *supra* note 113, at 244.

204. *Id.*

The risk of violence that increases after separation requires many women to go into hiding. In order to leave the abuser and stay safe, these women must completely relocate. This may mean giving up one's job and home, the children's school, family, friends, church, and support network in exchange for a new life in an unfamiliar place, so that the batterer will be less able to track the family down.

*Id.*

preservation.<sup>205</sup> A passive parent has an incentive to testify because the traditional obstacles they face as a victim of domestic violence are no longer applicable after they and their abuser have been arrested.<sup>206</sup> Testifying can lengthen the abusers sentence, potentially giving the victim the ability to live without the threat of violence for that much longer.<sup>207</sup>

b. Victim's Incentive Not to Testify

While fear is a motivator in encouraging the passive parent to testify against their abuser, fear is also a reason the passive parent might refrain from testifying.<sup>208</sup> Abusers can spend years instilling a sense of helplessness in their victims and their control over their victims can persist even while they remain behind bars.<sup>209</sup> The prosecutor in Victoria Pedraza's case admitted that he thought Daniel Pedraza "dominated Victoria's every move."<sup>210</sup> A passive parent might believe that testifying would be more dangerous than refraining from testifying.<sup>211</sup> In addition, the fear that the abuser might have the charges dismissed, succeed at trial, or receive a shorter sentence would incentivize the passive parent to prioritize winning their own case first and foremost.<sup>212</sup>

C. *The Constitutional Conflict: Too Many External Incentives to Waive the Fifth*

The passive parent has many motivations to either testify and risk self-incrimination or refrain from testifying and prioritize the success of their own case.<sup>213</sup> A failure to protect defendant does not leave their multiple roles behind when they enter a courtroom. Because of these roles, the passive parent has little choice but to abandon their Fifth Amendment protections if they want to prioritize their safety or child's safety, including regaining custody of their child. There must be a middle ground to both maintain a passive parent's constitutionally protected rights and allow the passive parent to use the court of law to their advantage to protect themselves and their child from a violent person.

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205. *Id.*

206. *Id.*

207. Enos, *supra* note 113, at 244.

208. *See* Campbell, *supra* note 1 (noting, the sentencing judge in Tondalo's case specifically pointed out that she seemed afraid of Braxton).

209. Brown, *supra* note 47, at 217.

210. Campbell, *supra* note 8.

211. *Id.*

212. *Id.*

213. *Id.*

#### IV. PROPOSING A NEW IMMUNITY RULE AS A FIFTH AMENDMENT SAFEGUARD

In order to protect the Fifth Amendment rights of passive parents, the courts must acknowledge the conflicts inherent in being a passive parent in a failure to protect case.<sup>214</sup> Of course, the state has a valid interest in curbing child abuse, but the state must also protect a passive parent from what is often an impossible situation.<sup>215</sup> In addition, the state has a greater interest in prosecuting an affirmatively abusive parent than a parent who is passive in the face of abuse.<sup>216</sup> Any solution that is implemented must balance these interests. The adoption of automatic immunity in failure to protect cases would simultaneously aid the state in curbing child abuse while also allowing a passive parent the ability to protect themselves, their children, and their rights.

This proposal will discuss the benefits of adopting a national use immunity rule similar to New Mexico's as well as some of the drawbacks and challenges to establishing this rule at a national level. In addition, the proposal will conclude with other considerations courts must consider that exist outside the scope of this Comment.

##### A. *Modeling After New Mexico: Allowing All Parties to Request Immunity*

A narrowly tailored procedural shift is most appropriate to address the competing roles a passive parent faces in light of their self-incrimination protections. While battered women are statistically the largest demographic of passive parents, not all passive parents are women or domestic violence victims.<sup>217</sup> Any solution that involves blanket protection to a passive parent will invariably apply to these individuals. Lawmakers and the judiciary might hesitate to institute any statute or precedent-setting decision that would include this kind of universal protection because it would inadvertently aid parents who were not uniquely situated.<sup>218</sup> Solutions including automatic immunity or even the granting of transactional immunity would be too broad to address all competing

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214. *Id.*

215. Nilsen, *supra* note 112, at 259.

216. *Id.*

217. *Id.*

218. See Nilsen, *supra* note 112, at 293 (noting that while failure to protect laws have fallen under scrutiny, other scholars applaud the laws and in fact advocate that there should be a civil solution for children to sue the passive parent for the abuse they have suffered).

interests.<sup>219</sup> In order to quell that hesitation, a more flexible solution is necessary. Specifically, there needs to be a solution that can be applied on a case-by-case basis and allows for all parties to petition for use immunity if they recognize that the case involves a passive parent who might face conflicts in testifying.

Presently, the prosecutor holds the power to ask for immunity.<sup>220</sup> It is entirely up to the prosecutor whether or not to extend that offer.<sup>221</sup> As previously discussed, New Mexico is alone in allowing all parties the option to request defense witness immunity.<sup>222</sup> A defense counselor in New Mexico who is representing a passive parent has the option to petition the court to grant use immunity to their client.<sup>223</sup> Adopting a similar stance on immunity nationally would allow the court to weed out those passive parents that will truly need the immunity. A defense attorney could ask the court on their client's behalf to grant the passive parent the immunity they need and the state would still have the ability to argue that such immunity would go against their governmental interest. Modeling a federal rule after New Mexico's use immunity rule allows for a very personal, narrowly tailored safeguard for their Fifth Amendment rights. The court, on a case-by-case basis, is in the best position to recognize a passive parent struggling to reconcile their unique position and all the conflicts that accompany it.

The granting of immunity would of course make the prosecution's case against the passive parent significantly more difficult. While the state can still move forward with any charges, it would be unable to use any information gleaned from the passive parent's testimony.<sup>224</sup> The state would have to build its case without such testimony. While the government does have a compelling interest in seeing justice, this proposal would not significantly hinder such an interest.<sup>225</sup> The court in *Kastigar v. United States*,

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219. *Kastigar*, 406 U.S. at 453.

Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege. The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted.

*Id.*

220. Scholl, *supra* note 21, at 431; *Belanger*, 2009-NMSC-025.

221. See Campbell, *supra* note 1 (explaining that sometimes this power can be abused). In Tondalo Hall's case, the prosecution enlisted her help to prosecute her child's abuser. *Id.* Hall believes that the prosecutor grew frustrated with her when Hall failed to cite specific instances of child abuse. *Id.* The prosecutor ultimately cut a deal with Braxton and went after Hall. *Id.*

222. Scholl, *supra* note 21, at 431; *Belanger*, 2009-NMSC-025.

223. *Id.*

224. *Kastigar*, 406 U.S. at 441; See generally, *Belanger*, 146 N.M. 357; Scholl, *supra* note 21; 18 U.S.C.S. § 6003 (1994).

225. *Kastigar*, 406 U.S. at 441.

made it clear that use immunity does not hinder the prosecution's position.<sup>226</sup> Essentially, the state is in the same position it would have been had the witness merely invoked Fifth Amendment protections and refused to testify.<sup>227</sup> While a passive parent might have the previously discussed incentives to testify, and is therefore in a better position having been granted use immunity instead of invoking the Fifth, the betterment of a passive parent's position hardly puts the state in a worse one. Coerced testimony incentivized by fear and dread should hardly be the state's main evidence.

In addition, other safeguards would be in place to ensure the interests of both parties are maintained. Such use immunity should also be confined to the balancing test established by the New Mexico Supreme Court in *State v. Belanger*.<sup>228</sup> A prosecutor would still be able to protest the courts granting of use immunity, if they felt such a granting was improper.<sup>229</sup> The passive parent would still have the initial burden to demonstrate that: "the proffered testimony is admissible, relevant and material to the defense and that without it, his or her ability to fairly present a defense will suffer to a significant degree."<sup>230</sup> After that burden is met, the passive parent's need for the testimony will be balanced against the government's interest in opposing the immunity.<sup>231</sup> Therefore, a prosecutor still has an avenue to protest the granting of use immunity and the court is able to once again balance all competing interests.

### B. *Further Considerations: Procedure Will Vary*

Modeling a national use immunity rule allowing all parties to request immunity would go far in protecting passive parents, but there are other considerations this proposal must address. Initially, adjusting use immunity rules at a level that will aid passive parents will likely not mirror how New Mexico established its use immunity rule. Currently, the Congress establishes federal use immunity.<sup>232</sup> New Mexico's Supreme Court made clear distinctions between the federal statute and New Mexico's rules of criminal procedure, finding that the court had the power to make adjustments only because use immunity in New Mexico originated in the courts.<sup>233</sup> Any adjustment to the federal procedure would therefore have to

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226. *Id.* at 457.

227. *Id.*

228. *Belanger*, 2009-NMSC-025 at 367.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*; 18 U.S.C.S. § 6003.

233. *Belanger*, 2009-NMSC-025, at 366.

originate in Congress.<sup>234</sup> Amending the statute is the only path to federal adjustment of use immunity.<sup>235</sup> And that is only at the federal level. As previously mentioned, there are thirty-eight states that have some form of failure to protect laws.<sup>236</sup> If those states have immunity statutes, the state judiciary's hands will be tied in asserting a new immunity rule because immunity is not a "creature of the courts" the way it was in New Mexico.<sup>237</sup> Any changes to how a state approaches immunity will be solely at the discretion of the state legislature.<sup>238</sup> Therefore, while the language and balancing test should be modeled after New Mexico's rule, the path to making such a change at the scale that would most benefit a passive parent will not mimic New Mexico's.

In addition, use immunity does not solve all self-incrimination conflicts for a passive parent because a passive parent might still fear their abuser enough to hesitate to testify against them.<sup>239</sup> There is also a chance that even if all the parties have the power to ask for immunity, they might not use that power. Domestic violence is still deeply misunderstood and each situation is nuanced to the point that even the defense counsel might not recognize a conflict infringing on their client's Fifth Amendment rights.<sup>240</sup> However, this is still a step in the right direction to safeguarding the passive parent's rights.

## V. CONCLUSION

Failure to protect laws are meant to punish a parent who is passive in the face of child abuse, but these parents are often abuse victims themselves. When it comes time to testify against their child's abuser, they most often end up incriminating themselves in their own cases. A passive parent is simultaneously a parent, a victim, and a defendant, and these roles create a huge conflict in how a passive parent can safeguard their constitutional rights. However, immunity holds the answer. A more flexible approach is most effective. It would be best to model an immunity process after New Mexico, which allows all parties to petition for immunity for a witness or the defendant. In this way, a passive parent would be able to safeguard their own constitutional rights while also bolstering the state's case against their own abuser. When a passive

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234. *Id.* ([b]ased on the federal model, and without much analysis or discussion, that prosecutorial control over the immunity process could not be altered absent constitutional or statutory authority.”).

235. *Id.*

236. See Campbell, *supra* note 76.

237. *Belanger*, 2009-NMSC-025.

238. *Id.*

239. Campbell, *supra*. note 1. During her sentencing, the judge specifically noted that Tondalo Hall still seemed fearful of her abuser. *Id.*

240. Truss, *supra* note 159, at 1153.

parent testifies against their co-defendant it is usually a parent's final sacrifice, one last protection they can give their child before they go to prison. Giving the passive parent immunity would make that sacrifice worth it.