NOTES

WHO'S FAILING WHOM? A CRITICAL LOOK AT FAILURE-TO-PROTECT LAWS

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Parents or caretakers may be charged with a form of criminal or civil penalty called "failure to protect" when they do not prevent another person from abusing the children in their care. Although couched in gender-neutral terms, defendants charged with failure to protect are almost exclusively female. In this Note, Jeanne Fugate suggests that the unequal numbers of women facing such charges can be explained by the higher expectations that women face in the realm of parenting and child care. She then offers several changes that should be made to the content and enforcement of failure-to-protect statutes. First, she argues that, to ensure that recent expansions of the duty do not implicate unfairly women, laws and courts should define clearly what actions establish a duty to protect children. Second, to avoid unfair expectations of women's responses to child abuse, failure-to-protect laws should delineate the steps persons must take when they become aware of abuse. Finally, Fugate concludes that every state should adopt an affirmative defense to excuse persons who fear for their safety or the safety of abused children.

INTRODUCTION

When Casey Campbell arrived home from work on June 27, 1995, her live-in boyfriend told her that he had tripped and spilled coffee on Campbell's four-year-old daughter, HC.[1] Campbell knew the burns were serious but did not seek medical care at that time because she was afraid to provoke her boyfriend, Floid Boyer, who had abused her extensively in the past.[2] At about 2 a.m., after Campbell and Boyer returned from playing darts, she took her daughter to the hospital, where the treating physician contacted the police.[3] Campbell was

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[1] Campbell v. State, 999 P.2d 649, 654 (Wyo. 2000) (affirming Campbell's conviction for child endangerment).

[2] Id. at 660. Casey also testified that "she had been abused by her brother since she was seven years old, by her stepfather since a teenager, and by Boyer since she was 16 years old, and Boyer had violently assaulted her with knives and guns on past occasions." Id. at 655.

[3] Id. at 654. Boyer testified that Campbell wanted to take her daughter to the hospital

convicted of felony child endangerment in March 2000.[4] Yet Campbell, who was at work at the time of the abuse, was not in a position to prevent it. And she was too scared of Boyer to obtain immediate medical attention for HC. While Campbell did the best she could for her daughter, it was not enough to satisfy the court; Boyer, the actual abuser, was convicted of only a misdemeanor while Campbell was convicted of a felony.[5] The prosecutor's closing statement in fact suggested that Campbell herself should have been seriously injured before the jury should accept her excuse: "She got slapped, but where were her broken bones? Where were her burns . . . ?"[6]

Casey Campbell's story is not unique. She is one of many mothers who have faced criminal charges because they did not act towards their children when, or in the manner that, a trier of fact determined that they ought to have acted.[7] Such charges, which can carry severe civil or criminal penalties, are commonly called "failure to protect," and arise when parents or caretakers do not prevent another person from abusing the children in their care,[8] or even when they permit these children to watch *them* be abused.[9]

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when she discovered the burns, but that he did not think the burns were serious enough for them to forgo playing darts. Id. at 655. He also testified that he had been physically abusive to Campbell for years and that he thought Campbell agreed to play darts to avoid angering him. Id. In addition, Boyer had abused HC severely in 1992, resulting in her removal from the home and Campbell's conviction for misdemeanor child endangerment. Id. at 654. There is no mention of whether Boyer faced charges for the abuse in the previous incident. See id.

4 Id. at 664.

5 Id. at 655.

6 Id.

7 See infra Part II.B for a discussion of such cases.

8 See infra notes 18-27 and accompanying text.

9 The latest "advance" in failure-to-protect laws is the punishment of persons who are victims of domestic violence and allow their children to observe the abuse. New York courts have based such decisions on a law passed by the state legislature in 1996 to aid domestic violence victims. The law requires courts to consider domestic violence when deciding child custody cases, see N.Y. Dom. Rel. Law § 240(1)(a) (McKinney 1996), and its legislative history includes extensive documentation of the ill effects on children who witness domestic violence, see 1996 N.Y. Laws, ch. 85, § 1.

Considering this legislative history, the Appellate Division, First Department, found a mother guilty of neglect for staying with a batterer in an abusive relationship. In re Lonell J., 673 N.Y.S.2d 116, 116, 118 (App. Div. 1998). Other courts have agreed. See In re Athena M.V., 678 N.Y.S.2d 11, 12 (App. Div. 1998) (finding that "evidence of acts of severe violence between respondents in the presence of their children is sufficient to show 'as a matter of common sense' that the children were in imminent danger of [harm]"); In re Deandre T., 676 N.Y.S.2d 666, 667 (App. Div. 1998) (adopting *Lonell J.* in Second Department).

Nonjudicial response to these decisions has been critical. See, e.g., The "Failure to Protect" Working Group (FTPWG), Charging Battered Mothers with Failure to Protect: Still Blaming the Victim, 27 Fordham Urb. L.J. 849, 849 (2000) ("This approach has the

In the gender-neutral terms of failure-to-protect statutes,[10] the laws seem to be logical responses to an epidemic of child abuse. But the application of failure-to-protect laws is anything but gender-neutral: Defendants charged and convicted with failure to protect are almost exclusively female.[11] As one advocate stated, "'In the 16 years I've worked in the courts, I have never seen a father charged with failure to protect when the mom is the abuser. Yet, in virtually every case where Dad is the abuser, we charge Mom with failure to protect.'"[12] While it is true that more women have custody of their children and thus are more likely to have the duty to protect their children,[13] this fact alone does not explain the discrepancy adequately.[14] The overwhelming prevalence of female defendants can be explained best by the higher expectations that women face in the realm of parenting and child care.[15]

The failure-to-protect case law has expanded its reach in ways that could exacerbate the gender disparity. Within the last decade,

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result of discouraging battered mothers from seeking the services they need to escape domestic violence and often causes further harm to children and families."); see also Audrey E. Stone & Rebecca J. Fialk, Criminalizing the Exposure of Children to Family Violence: Breaking the Exposure of Children to Family Violence: Breaking the Cycle of Abuse, 20 Harv. Women's L.J. 205, 206 (1998) (proposing model statute to criminalize batterer's exposure of children to domestic violence only).

10 See, e.g., W. Va. Code Ann. § 61-8D-2(b) (Michie 2000) (stating:

> If any parent, guardian or custodian shall cause the death of a child under his or her care, custody or control by knowingly allowing any other person to maliciously and intentionally fail or refuse to supply such child with necessary food, clothing, shelter or medical care, then such other person and such parent, guardian or custodian shall each be guilty of murder in the first degree.).

11 Annette R. Appell, Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System, 48 S.C. L. Rev. 577, 585 (1997) ("[F]athers . . . are significantly less likely to be criminally charged with neglect or passive abuse of their children."); Michelle S. Jacobs, Criminal Law: Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes, 88 J. Crim. L. & Criminology 579, 593 n.68 (1998) (pointing out lack of case law involving men who fail to protect children despite high incidence of child abuse by women); Linda J. Panko, Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse, 6 Hastings Women's L.J. 67, 77 (1995) (arguing that fathers are held to lower standard of duty to protect than are mothers).

12 Gregory L. Lecklitner et al., Promoting Safety for Abused Children and Battered Mothers: Miami-Dade County's Model Dependency Court Intervention Program, 4 Child Maltreatment 175, 176 (1999) (quoting advocate in section discussing prevalence of female defendants in failure-to-protect cases). Although a wealth of similar anecdotal evidence exists regarding the scarcity of men charged with failure to protect, see supra note 11, there do not appear to be any empirical data to illuminate these claims. Such a study of failure-to-protect charges and convictions cases would be a useful tool for advocates.

13 See infra notes 54-56 and accompanying text.

14 See discussion infra Part II.A.

15 See infra Part II.B for examples of judicial rhetoric that suggest such gender-based expectations are at play in failure-to-protect cases.

several courts have extended the duty to protect to domestic partners of parents who abuse their children.[16] Although this expansion of duty has affected primarily men heretofore, the cases articulate a gender-neutral duty that implicates partners of both sexes. Though duty to protect statutes always have been facially gender-neutral, women have faced a disproportionate share of arrests and convictions in this area. Under an expanded duty scheme, the assumptions and stereotypes underlying the prosecution of failure-to-protect cases—that women have a greater capacity for nurturing and therefore a heightened duty to protect—will continue to produce a gender disparity between those convicted (women) and those acquitted (men).

In light of these disparities (and recognizing the potential widening of the gender gap), this Note will suggest several changes that should be made to the content and enforcement of failure-to-protect statutes.[17] First, to ensure that recent expansions of the duty do not

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[16] See, e.g., State v. Miranda, 715 A.2d 680, 685, 689, 691 (Conn. 1998) (finding live-in boyfriend guilty of child endangerment and finding duty necessary to uphold assault charges); Leet v. State, 595 So. 2d 959, 962, 964 (Fla. Dist. Ct. App. 1991) (affirming conviction of man who allowed abusive mother and her sons to move into his home and who had some care of victim); Commonwealth v. Kellam, 719 A.2d 792, 796-97 (Pa. Super. Ct. 1998) (affirming live-in boyfriend's convictions for third-degree murder and endangering welfare of child where boyfriend had care and supervision of child); Hawkins v. State, 891 S.W.2d 257, 258-59 (Tex. Crim. App. 1994) (en banc) (finding live-in boyfriend guilty where he had established relationship with mother and children). A Pennsylvania court also extended that duty to a "friend" who allowed a mother and child to move into his apartment, without specifying the relationship. Commonwealth v. Brown, 721 A.2d 1105, 1108 (Pa. Super. Ct. 1998) (affirming man's conviction for endangering welfare of female friend's child).

For a discussion of cases in which courts have found that live-ins had a duty to protect, see infra Part I.B.

[17] Another solution, outside the scope of this Note, is to abolish liability for failure to protect entirely. However, some women's advocates agree that women should face some liability so long as they are not victims of domestic violence or otherwise powerless to stop the abuse and provided that they are "not being scapegoated in hindsight for failing to recognize that abuse might be occurring." Barbara Allen Babcock et al., Sex Discrimination and the Law: History, Practice, and Theory 1359-60 (2d ed. 1996) (stating:

> If neither of these possibilities applies, advocates for both battered women and children would generally support the use of both criminal and civil remedies to protect children from abuse and to punish those who are responsible either for perpetrating such abuse or failing to protect children in their case when they had the capacity to do so.);

see also infra note 127.

Of course, women's activists do not always agree on outcomes in particularly difficult cases. Witness the outcry surrounding the death of six-year-old Lisa Steinberg, beaten to death by Manhattan attorney Joel Steinberg, while his lover Hedda Nussbaum stood by. See Babcock et al., supra, at 1360. This case prompted speculation in the feminist community as to whether Nussbaum, a battered woman who testified "of her infatuation with Joel and psychological disintegration during long years of brainwashing and physical and psychological abuse at Joel's hands," should be seen as a victim or collaborator. Id.; see also Elizabeth M. Schneider, Particularity and Generality: Challenges of Feminist Theory and

implicate unfairly women, laws and courts should define clearly what actions establish a duty to protect children. To avoid unfair expectations of women's responses to child abuse, failure-to-protect laws should delineate the steps persons must take when they become aware of abuse. Finally, every state should adopt an affirmative defense to excuse persons who fear for their own safety or the safety of abused children.

Part I of this Note outlines failure-to-protect statutes and case law, including the recent string of cases holding live-in boyfriends liable. Part II focuses on the gender stereotypes that provide an explanation of why women are held liable for failure to protect more often than men. Part III suggests changes in failure-to-protect laws that would continue to protect children without exacerbating gender disparities.

I
FAILURE-TO-PROTECT STATUTES AND CASE LAW

Failure to protect is a crime of omission where liability attaches for failure to act in certain situations where common law or statute has imposed upon a specified class of persons an affirmative responsibility for another's safety.[18] Thus, one who owes a legal duty to a

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Practice in Work on Women-Abuse, 67 N.Y.U. L. Rev. 520, 551-52 (1992) (presenting thoughtful discussion of this debate).

[18] See 1 Wayne R. LaFave & Austin W. Scott, Jr., Substantive Criminal Law § 3.3 (1986) (discussing exceptions to no-duty-to-rescue rule); Rebecca Ann Schernitzki, What Kind of Mother Are You? The Relationship Between Battered Woman Syndrome and Missouri Law, 56 J. Mo. B. 50, 55 (2000) ("Failure to protect legislation is based on crimes that are committed through omission."). In deciding a failure-to-protect case against a live-in boyfriend, the Connecticut Supreme Court concluded that failure to protect fell within an exception to the traditional no-duty-to-rescue rule:

> Although one generally has no legal duty to aid another in peril, even when the aid can be provided without danger or inconvenience to the provider, there are four widely recognized situations in which the failure to act may constitute breach of a legal duty: (1) where one stands in a certain relationship to another; (2) where a statute imposes a duty to help another; (3) where one has assumed a contractual duty; and (4) where one voluntarily has assumed the care of another.

Miranda, 715 A.2d at 687.

For an historical overview of the affirmative duty to rescue, see Peter M. Agulnick & Heidi V. Rivkin, Comment, Criminal Liability for Failure to Rescue: A Brief Survey of French and American Law, 8 Touro Int'l L. Rev. 93, 94 (1998) (exploring underpinnings of and differences between French and American failure to rescue liability); see also 3 James F. Stephen, A History of the Criminal Law of England 10 (1883) ("A number of people who stand round a shallow pond in which a child is drowning, and let it drown without taking the trouble to ascertain the depth of the pond, are, no doubt, shameful cowards, but they can hardly be said to have killed the child."). The principal case used to introduce law students to the no-duty-to-rescue doctrine involves child abuse while an unrelated woman watches. See Pope v. State, 396 A.2d 1054, 1058 (Md. 1979); see also Sanford H. Kadish &

child may face criminal sanctions if he or she does not act when the child is abused.[19] A finding of failure to protect also may be used in a family court proceeding and may lead to the termination of parental

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Stephen J. Schulhofer, Criminal Law and Its Processes 181 (6th ed. 1995) (describing no-duty-to-rescue doctrine using *Pope*). In *Pope*, the defendant failed to prevent a mother from beating her infant to death and did not seek medical attention. *Pope*, 396 A.2d at 1059. The court absolved Pope because she had only a moral, not a legal, obligation to intervene. Id. at 1067.

Only eight U.S. states have adopted special legislation, called "good Samaritan" laws, which mandate a duty to rescue outside of the judicial exceptions to the no-duty-to-rescue rule. Jessica R. Givelber, Imposing Duties on Witnesses to Child Sexual Abuse: A Futile Response to Bystander Indifference, 67 Fordham L. Rev. 3169, 3189-93 (1999) (analyzing "good Samaritan" laws in Florida, Massachusetts, Minnesota, Ohio, Rhode Island, Vermont, Washington, and Wisconsin).

Commentators disagree about the merit of such laws. Compare Jennifer L. Groninger, No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street? What Is Left of the American Rule, and Will It Survive Unabated?, 26 Pepp. L. Rev. 353, 377 (1999) ("Although well-intentioned, letting the genie out of the bottle and creating an open-ended duty to rescue rule may cause more harm in the long run."), and Natalie Perrin-Smith Vance, My Brother's Keeper? The Criminalization of Nonfeasance: A Constitutional Analysis of Duty to Report Statutes, 36 Cal. W. L. Rev. 135, 136 (1999) (determining that it is unconstitutional to criminalize nonfeasance), with Sungeeta Jain, How Many People Does It Take to Save a Drowning Baby?: A Good Samaritan Statute in Washington State, 74 Wash. L. Rev. 1181, 1182 (1999) (arguing that good Samaritan statute will do more good than harm).

European countries have embraced good Samaritan laws. The Netherlands and Portugal enacted duty-to-rescue statutes more than 100 years ago, and they have since been joined by Denmark, France, Germany, Hungary, Italy, Norway, Poland, Romania, Russia, and Turkey. Groninger, supra, at 353 n.2. Thus far, Congress has not followed suit, although legislation was introduced in the Senate in 1998 that would have tied federal funding to states' enacting legislation that would require witnesses of child abuse to report the crime to the police. Perrin-Smith Vance, supra, at 135.

[19] Parents have such a legal duty. See, e.g., State v. Williquette, 385 N.W.2d 145, 147 (Wis. Ct. App. 1986) (affirming mother's conviction for two counts of child abuse based on failure to prevent husband from repeatedly sexually abusing and beating son and daughter). But the person need not be the child's parent to have a legal duty. See, e.g., Leet v. State, 595 So. 2d 959, 964 (Fla. Dist. Ct. App. 1991) (affirming live-in boyfriend's convictions for child abuse and third-degree felony murder); Degren v. State, 722 A.2d 887, 888 (Md. 1999) (affirming child abuse conviction of woman who watched her husband have sexual intercourse with unrelated twelve-year-old girl); People v. Carroll, 715 N.E.2d 500, 500 (N.Y. 1999) (determining that stepmother was "acting as the functional equivalent" of victim's parent and affirming conviction for endangering welfare of child).

Although beyond the scope of this Note, tort liability also extends to parents who fail to take steps to protect their abused children. See, e.g., Hite v. Brown, 654 N.E.2d 452, 455, 458 (Ohio Ct. App. 1995) (overturning summary judgment for mother accused in civil suit of failing to protect daughter (and grandchildren) from husband's sexual abuse); Mike Folks, Estate of A.J. Schwarz Sues HRS, Sun-Sentinel (Ft. Lauderdale, Fla.), May 2, 1995, at 3B, 1995 WL 6611523 (reporting that estate of son filed lawsuit against father for failure to protect). For an analysis of assigning tort liability to passive parents in Texas, see Amy L. Nilsen, 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, 287 (2000) ("Parents have a right and a duty to protect their children. . . . Parents breach this duty when they do not protect their children from abuse.").

rights, where the court severs the legal tie between parent and child to protect the child's best interests.[20]

A. *Failure-to-Protect Statutes*

Since the first failure-to-protect case was tried forty years ago,[21] states have codified the duty to protect.[22] Every state has a statute imposing some form of criminal liability for passive child abuse, with classifications ranging from a misdemeanor,[23] or a felony with a maxi-

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[20] See, e.g., In re Alena O., 633 N.Y.S.2d 127, 128 (App. Div. 1995) (holding man liable for failure to protect in termination of parental rights case); In re Rhonda "KK," 620 N.Y.S.2d 541, 542-43 (App. Div. 1994) (affirming termination of parental rights due to failure to protect daughters from son's sexual abuse).

States may impose their own methods for dealing with termination of parental rights in such cases. In Connecticut, for example, the state may offer counseling services and impose restrictive steps, such as eliminating contact with the abuser, before filing for termination. See In re Rayonna M., 2000 WL 195087, at *6 (Conn. Super. Ct. Feb. 9, 2000) (questioning why state did not take alternative steps before terminating rights).

[21] A 1960 Maryland case, Palmer v. State, 164 A.2d 467 (Md. Ct. Spec. App. 1960), is cited as the first to impose a duty upon a parent to prevent the abuse of her child at the hands of another. Lane v. Commonwealth, 956 S.W.2d 874, 879 (Ky. 1997) (Cooper, J., concurring) (referring to *Palmer*).

[22] For a thorough discussion of failure-to-protect laws, see generally Bryan A. Liang & Wendy L. Macfarlane, Murder by Omission: Child Abuse and the Passive Parent, 36 Harv. J. on Legis. 397 (1999). One example, N.Y. Penal Law § 260.10 (McKinney 2000), states:

> A person is guilty of endangering the welfare of a child when:
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> 1. He knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health; or
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> 2. Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten, three and seven of the family court act.
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> Endangering the welfare of a child is a class A misdemeanor.

The National Clearinghouse on Child Abuse and Neglect, at http://www.calib.com/nccanch (last visited Nov. 15, 2000), is also an excellent on-line source of information about child abuse statutes in general. See generally U.S. Dep't of Health & Human Servs., Child Abuse and Neglect State Statute Elements (2000), http://www.calib.com/nccanch/pubs/stats00/define.pdf.

Interestingly, the term "failure to protect" was not coined until after courts (and statutes) created such a duty, and the phrase does not appear in state statutes. See Randy H. Magen, In the Best Interests of Battered Women: Reconceptualizing Allegations of Failure to Protect, 4 Child Maltreatment 127, 128 (1999) (noting that statutes do not use term and citing In re Dalton, 424 N.E.2d 1226, 1232 (Ill. App. Ct. 1981), as first to use it).

[23] See, e.g., Kan. Stat. Ann. § 21.3608 (1999) (class A misdemeanor); Me. Rev. Stat. Ann. tit. 17-A, § 554 (West 1999) (class D crime); Miss. Code Ann. § 97-5-40 (1999) (misdemeanor with not more than one-year sentence, $1,000 fine, or both); Mont. Code Ann. § 45-5-622 (1999) (misdemeanor with not more than six-month sentence, $500 fine, or both); N.H. Rev. Stat. Ann. § 639:3 (1999) (misdemeanor, except for cases involving sexual penetration and child pornography); N.Y. Penal Law § 260.10 (McKinney 2000) (class A

mum sentence of up to five years,[24] to the possibility, in child fatality cases, of a murder or manslaughter charge if the person has the requisite mens rea.[25] Liability for failure to protect usually requires that (1) the defendant had a legal duty to protect the child, (2) the defendant had actual or constructive notice of the foreseeability of abuse, (3) the child was exposed to such abuse, and (4) the defendant failed to prevent such abuse.[26] A few states provide statutory affirmative defenses where the accused fears that any preventative action would cause physical harm to herself or increase the danger for the child.[27]

B. Who Gets Charged

Typical failure-to-protect cases share several characteristics: A woman did not perform her "maternal role" adequately to convince a court that she shielded a child from the abuse of a boyfriend, live-in lover, or spouse,[28] or even someone not in an intimate relationship

misdemeanor); Vt. Stat. Ann. tit. 13, § 1305 (1999) (misdemeanor with not more than one-year sentence, $200 fine, or both); see also Liang & Macfarlane, supra note 22, at 409-10 (noting that some states classify failure to protect as misdemeanor).

[24] See, e.g., Minn. Stat. Ann. § 609.378 (West Supp. 2001) (up to five-year sentence and $10,000 fine if child suffers substantial harm; otherwise misdemeanor); Mo. Ann. Stat. § 568.045 (West 1999) (class D felony); Or. Rev. Stat. § 163.205 (1999) (class C felony); see also Liang & Macfarlane, supra note 22, at 410 n.101 (listing examples of states that classify failure to protect as felony with maximum sentence of up to five years).

[25] If committed intentionally, knowingly, recklessly, or with criminal negligence, a parent's omission may constitute a more serious crime. See, e.g., Ariz. Rev. Stat. Ann. § 13-3623 (West 1999 & Supp. 2000) (class 2 felony); Colo. Rev. Stat. § 18-6-401 (1999) (class 2 felony if death results); Ind. Code. Ann. § 35-46-1-4 (West Supp. 2000) (class B felony); Neb. Rev. Stat. § 28-707 (1999) (class 1B felony if death results); Nev. Rev. Stat. 200.508 (2000) (category B felony, with minimum term of two years and maximum term of twenty years if substantial harm occurs to child); see also Liang & Macfarlane, supra note 22, at 410 (stating possibility of murder or manslaughter charges in failure-to-protect cases).

[26] See United States v. Webb, 747 F.2d 278, 282 n.4 (5th Cir. 1984) (listing elements); Barrett v. State, 675 N.E.2d 1112, 1116 (Ind. Ct. App. 1996) (citing statute and emphasizing state's burden to show "that the accused was *subjectively* aware of a high probability that she placed the dependent in a dangerous situation"); see also Panko, supra note 11, at 68 (describing typical case as one requiring that passive person had notice of foreseeability of abuse and failed to protect). Even when statutes do not hold passive caretakers explicitly liable, those who fail to protect still may be charged under a variety of different theories: murder (including felony murder if child abuse is delineated as the underlying felony, manslaughter if it was committed recklessly, or negligent homicide if it was committed with negligence), failure to intervene, and accomplice liability or complicity. Ryan H. Rainey & Dyane C. Greer, Criminal Charging Alternatives in Child Fatality Cases, Prosecutor, Jan./Feb. 1995, at 16, 16-18. Special state statutes also contemplate situations where the requisite mens rea is lacking by eliminating the need to prove "intent to kill" or by including neglect/endangerment in specialized homicide statutes. Id. at 16-17.

[27] See, e.g., Iowa Code Ann. § 726.6 (West Supp. 2000); Minn. Stat. Ann. § 609.378 (West 2000); Okla. Stat. Ann. tit. 21, § 852.1 (West Supp. 2000); see also Schneider, supra note 17, at 553-54 (discussing affirmative defenses).

[28] See, e.g., Boone v. State, 668 S.W.2d 17, 21 (Ark. 1984) (upholding mother's conviction for second degree murder in connection with death of four-year-old son at hands of

with the mother.[29] Many times the woman is abused herself, and courts may determine that a battered woman is guilty of failure to protect because her abuse at the batterer's hands ought to have alerted her to the batterer's tendency to violence.[30] Such decisions ignore the special circumstances of battered women, which courts have considered in other contexts, such as when women are tried for murdering their abusers.[31]

One concept used to explain the actions of women in these cases is "Battered Woman Syndrome" (BWS), where an expert testifies at trial about concepts of "learned helplessness" to help the judicial system better understand the predicament of women in abusive relationships.[32] Although the use of BWS testimony has prevented the unjust convictions of battered women, many advocates now believe that BWS reinforces negative stereotypes about women's passivity and weakness.[33] In any case, BWS evidence often is deemed inadmissible in the context of failure-to-protect cases.[34]

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boyfriend); Lane v. Commonwealth, 956 S.W.2d 874, 874, 876 (Ky. 1997) (affirming conviction of mother for complicity in committing assault in first degree due to domestic companion's abuse of infant daughter); Bailey v. State, No. 03C01-9207-CR-00226, 1993 WL 480428, at *1 (Tenn. Crim. App. Nov. 22, 1993) (upholding aggravated assault charge of woman who failed to protect four-year-old son from abuse by live-in boyfriend); State v. Williquette, 385 N.W.2d 145, 147 (Wis. 1986) (affirming mother's conviction for two counts of child abuse based on failure to take action to prevent husband from repeatedly sexually and physically abusing son and daughter).

29 See, e.g., In re Rhonda "KK," 620 N.Y.S.2d 541, 542-43 (App. Div. 1994) (affirming termination of parental rights due to parents' failure to protect daughters from sexual abuse by son); State v. Ainsworth, 426 S.E.2d 410, 415 (N.C. Ct. App. 1993) (affirming mother's first-degree rape conviction for rape of son by another woman, under theory that failure to protect constituted mother's aiding and abetting of rapist).

30 See Phelps v. State, 439 So. 2d 727, 734 (Ala. Crim. App. 1983) (finding that jury could conclude that mother "never *made* the opportunity" to leave violent spouse); see also *Webb*, 747 F.2d at 281, 286 (affirming conviction of woman who did not seek medical attention for abused son because of threats made by abusing husband).

31 See State v. Kelly, 478 A.2d 364, 368 (N.J. 1984) (holding that battered woman syndrome (BWS) is "an appropriate subject for expert testimony"); see also Babcock et al., supra note 17, at 1307 (introducing concept of BWS).

32 See Babcock et al., supra note 17, at 1317.

33 See id.; see also Edward Gondolf & Ellen Fisher, Battered Women as Survivors: An Alternative to Treating Learned Helplessness 87 (1988) (criticizing term "learned helplessness" and redefining it as characteristic resulting from failure of social service agencies to help battered women); Rebecca D. Cornia, Current Use of Battered Woman Syndrome: Institutionalization of Negative Stereotypes About Women, 8 UCLA Women's L.J. 99, 101 (1997) (finding that BWS application currently stereotypes women as irrational; this works to their detriment in other aspects of court system).

34 See, e.g., State v. Mott, 931 P.2d 1046, 1048-49, 1055 (Ariz. 1997) (affirming trial court's decision to preclude BWS evidence in failure-to-protect case where mother left two young children with boyfriend); In re Glenn G., 587 N.Y.S.2d 464, 470 (Fam. Ct. 1992) (dismissing child abuse charges against mother on BWS grounds but maintaining strict liability neglect charges where she failed to protect child from father); State v. Wyatt, 489

On the other hand, there is no "typical" failure-to-protect case where the defendant is male, as reported decisions with male defendants are rare.[35] Even in cases of women charged with active child abuse, the opinions may refer to lovers or spouses, yet fail to mention

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S.E.2d 792, 797 (W. Va. 1997) (Workman, J., dissenting) ("While it is a sociological reality that battered women are generally less able to protect children, that tragic phenomenon should not constitute a legal defense to crimes against the children."). But see Barrett v. State, 675 N.E.2d 1112, 1113, 1116 (Ind. Ct. App. 1996) (finding as matter of first impression that trial court erred in not allowing defendant to present BWS evidence).

Academic response to these cases has been largely critical. For an excellent treatment of this issue, see V. Pualani Enos, Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children, 19 Harv. Women's L.J. 229, 229-30 (1996) (arguing against strict liability in failure-to-protect prosecutions); see also Bernardine Dohrn, Bad Mothers, Good Mothers, and the State: Children on the Margins, 2 U. Chi. L. Sch. Roundtable 1, 8 (1995) ("Juvenile courts must begin to recognize that the best way to make children safe is to make their mothers safe."); Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 3 (1991) ("[L]itigation and judicial decisionmaking in cases of severe violence reflect implicit or explicit assumptions that domestic violence is rare or exceptional."). Courts also have recognized the difficulty battered women may face in trying to protect their children. See Elder v. State, 993 S.W.2d 229, 231 (Tex. App. 1999) (Stone, J., concurring) ("When the mother herself is a victim of domestic violence, she is victimized further with criminal prosecution."). Yet others disagree. See Mary E. Becker, Double Binds Facing Mothers in Abusive Families: Social Support Systems, Custody Outcomes, and Liability for the Acts of Others, 2 U. Chi. L. Sch. Roundtable 13, 21 (1995) (noting:

> The assumption should be that the adult who was not literally a hostage—not literally coerced at every available second—*could* have acted to end abuse.... No matter how weak the mother, she is in a much better position than the child to prevent abuse and owes a duty of care to her children.);

Liang & Macfarlane, supra note 22, at 442 (decrying use of BWS as defense against charges of failure to protect in child fatality cases); Tobin P. Richer, Note, Placing Proper Limits on Battered Woman Syndrome in Areas Beyond Self-Defense: An Argument Against Admission in Child Abuse and Neglect Cases, 1 DePaul J. Health Care L. 855, 906 (1997) (warning that extending use of BWS to child abuse cases will decrease its credibility in self-defense cases).

[35] In many cases, male defendants plead guilty before trial. See, e.g., State v. Walker, 768 P.2d 290, 292 (Kan. 1989) (noting that father pled guilty and testified against wife charged with two counts of aggravated criminal sodomy and two counts of endangerment because she forced stepsons to perform oral sex on her); State v. Pearson, 723 A.2d 84, 86 & n.3 (N.J. Super. Ct. App. Div. 1999) (mentioning in mother's case that father pled guilty to one count of aggravated manslaughter); State v. Wyatt, 482 S.E.2d 147, 151 n.2 (W. Va. 1996) (reporting that defendant's boyfriend testified that he pled guilty only because his counsel said "no jury would convict him of anything less than the charges to which he pled guilty").

Alternately, if parties are not charged or are found innocent at the trial level, no opinion will be written and the fact of a lack of charges or a man's acquittal may enter the public realm only through another trial, if at all. See, e.g., Hubbard v. State (In re W.H.), 872 P.2d 409, 410 (Okla. Ct. App. 1994) (referring in termination of parental rights case to fact that male defendant was not charged in connection with girlfriend's daughter's death, while girlfriend received life in prison without parole for first-degree murder conviction); Mike Folks, Two South Florida Women Convicted on Tuesday in the Murders of Children, Sun-Sentinel (Ft. Lauderdale, Fla.), Apr. 12, 1995, at 1A, 1995 WL 6607701 (noting that father was never charged in connection with death of son).

whether the men faced charges.[36] A recent string of cases, however, has expanded liability to include live-in boyfriends.[37] The easiest case for assigning a legal duty arises in a parent-child relationship, particularly if the parent has custody.[38] The cases involving live-in boyfriends focus on whether they assumed a similar duty.[39]

In one of the first cases to punish a man for his girlfriend's murder of her child, *Leet v. State*,[40] the court looked to evidence that Leet allowed the mother and child to move into his home, shared expenses

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[36] See, e.g., State v. Burgess, 518 S.E.2d 209, 210-11, 213 (N.C. Ct. App. 1999) (affirming mother's conviction for felony child abuse and second-degree murder while mentioning existence of spouse but not whether he faced charges); State v. Reed, No. 89-CR-029, 1991 WL 95227, at *1-*12 (Ohio Ct. App. May 31, 1991) (affirming stepmother's conviction but not discussing father's culpability for son's death); Rosales v. State, 932 S.W.2d 530, 532, 541 (Tex. Ct. App. 1995) (upholding fifty-year sentence of mother for death of daughter without reference to whether father, who also participated in abuse, faced punishment). An electronic search for cases in the same districts involving these defendants' male companions did not turn up any related child abuse charges.

Even more egregiously, sometimes only the *passive* mother appears in the record, particularly in cases where the abusing man does not have a legal relationship to the child as a result of an administrative practice of placing child protective cases in the mother's name only. Appell, supra note 11, at 584 ("[T]he vast majority of parents involved in the child protective system are mothers. Men are rarely brought into court, held accountable, or viewed as resources for their children."); Jeffrey L. Edleson, Responsible Mothers and Invisible Men: Child Protection in the Case of Adult Domestic Violence, 13 J. Interpersonal Violence 294, 295 (1998) (noting that child abuse cases are usually tracked under mother's, not abuser's, name); see also Schernitzki, supra note 18, at 55 (recounting story of battered woman convicted of first degree murder for husband's abuse of child while husband was never convicted).

[37] See, e.g., Hawkins v. State, 910 S.W.2d 176, 178 (Tex. App. 1995) (en banc) (finding that live-in boyfriend "implicitly concede[d]" his duty to children because he did not challenge it); see also Liang & Macfarlane, supra note 22, at 399 ("There is, however, no logical or legal reason for failing to charge all parents, guardians, or caretakers with murder when they know of the abuse yet fail to protect their children."). But see State v. Wilson, 987 P.2d 1060, 1071-72 (Kan. 1999) ("We have not attempted to exhaust all the decisions from other states, but our limited readings do not show convictions for mere inaction on one who is not a parent, not acting in a parental role, or one who is not a caregiver.").

[38] See 59 Am. Jur. 2d Parent and Child § 14 (1987) (stating that "[i]t is the . . . duty of parents under the law of nature as well as the common law and the statutes of many states to protect their children, to care for them in sickness and in health, and to do whatever may be necessary for their care, maintenance and preservation"); see also State v. Miranda, 715 A.2d 680, 687 (Conn. 1998) ("[T]he status relationship giving rise to a duty to provide and protect that has been before the courts more often than any other relationship and . . . that courts most frequently assume to exist without expressly so stating, is the relationship existing between a parent and a minor child."); Commonwealth v. Kellam, 719 A.2d 792, 796 (Pa. Super. Ct. 1998) ("'[A] parent has the legal duty to protect her child, and the discharge of this duty requires affirmative performance.'" (quoting Commonwealth v. Howard, 402 A.2d 674, 676 (Pa. Super. Ct. 1979))).

[39] See infra notes 40-47.

[40] 595 So. 2d 959, 960 (Fla. Dist. Ct. App. 1991) (affirming convictions for child abuse and third-degree felony murder after death of girlfriend's son). In interpreting the state felony child abuse statute, the court determined that Leet could be held criminally liable because of the expansive nature of the statute, but did not specify the limits of the statute.

with the mother, and was responsible for some child care, such as bathing the boy and tending him while the mother was away.[41] The court concluded that Leet temporarily had assumed responsibility by establishing a "family-like relationship with [the child] and the mother for an extended and indefinite period."[42] Significantly, the court did not consider it dispositive that Leet would not have owed his girlfriend child support had they separated, that he had not created an in loco parentis relationship, and that he likely could not order medical treatment for the child.[43] In a more recent case, *State v. Miranda*,[44] the Connecticut Supreme Court, which deemed its holding narrow and fact-specific,[45] explicitly excluded such factors in determining whether a nonparent owed a duty of care to an abused child.[46]

The *Miranda* court, in holding a live-in boyfriend liable for passive abuse, suggested a hypothetical to show the problems of an opposite result: If a man cohabitates with a mother and her children and

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See id. at 962 (finding that jury reasonably could determine boyfriend had duty under statute).

[41] Id. (noting that mother had primary responsibility for child care, but that boyfriend shared in child care duties and had sole care of child on last day of child's life).

[42] Id. at 963; see also Commonwealth v. Brown, 721 A.2d 1105, 1108 n.6 (Pa. Super. Ct. 1998) ("By showing that the adult played with the child, bathed the child, ate with the child, babysat the child, or otherwise interacted with the child, the prosecution can prove that the adult was supervising the child . . . ."). Other courts have assessed the level of responsibility owed by nonparents using similar evidence. See, e.g., Hawkins v. State, 891 S.W.2d 257, 259 (Tex. Crim. App. 1994) (en banc) (Clinton, J., concurring) (finding that defendant assumed responsibility when he referred to girlfriend as "my old lady" and treated her children as his own, providing food, shelter, and discipline). But see, e.g., People v. Myers, 608 N.Y.S.2d 544, 545 (App. Div. 1994) (stating:

> That a party has taken some part in meeting the child's daily needs is not enough; a "full and complete . . . interest in the well-being and general welfare" of the child is necessary, as is the intent to fully assume a parental role, with the concomitant obligations to support, educate, and care for the child on an ongoing basis.

(quoting Rutkowski v. Wasko, 143 N.Y.S.2d 1, 5 (App. Div. 1955))).

[43] *Leet*, 595 So. 2d at 962.

[44] 715 A.2d 680 (Conn. 1998).

[45] Id. at 688-89.

[46] Id. at 689. The *Miranda* court recognized that a reasonable duty could be imposed upon a nonparent who established a familial relationship with his partner's children. The court resisted finding that such a relationship would be contingent upon factors such as the defendant's ability to regulate the mother's discipline of the victim, whether the defendant had exclusive control of the victim when the injuries occurred, whether the defendant may be required to provide child support, or whether in loco parentis had been established. Id.

On remand at the intermediate appellate level, the court found a constitutional bar to imposing a duty to act on a live-in boyfriend, claiming that the new imposition of such a duty violated his Fourteenth Amendment due process rights. State v. Miranda, 742 A.2d 1276, 1279 n.5, 1281 (Conn. App. Ct. 2000) (reversing six counts of first-degree assault). The court nonetheless held Miranda responsible on the lesser count of child endangerment, id. at 1285, which statutorily extends to "any person," rather than requiring that it be a person with a legal duty to protect the child, see Conn. Gen. Stat. § 53-21 (2000).

eventually has a child with the mother, he would assume a duty of care for the last child. The court found it ludicrous that he could allow his girlfriend to abuse her other children but face severe charges if she did the same to the child they shared.[47]

While the recent expansion of the duty to protect has resulted in more male defendants, the widening of the failure-to-protect net is likely to affect women disproportionately for gender-specific reasons. Several jurisdictions no longer require a blood or marital tie to assign failure to protect to those who passively permit their lovers to abuse the children in their homes. Given an increasing number of nontraditional family arrangements,[48] courts likely will face more cases involving domestic partners.[49] Yet live-in girlfriends will carry the heavier burden of gender stereotypes: They ought to do more for and know more about children.[50] Without reforms in current failure-to-protect law, these gendered notions[51] will continue to ensure that a disproportionate number of women will be convicted.

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47 *Miranda*, 715 A.2d at 689 n.19. Indeed, in an earlier case involving a similar fact pattern, the man escaped criminal charges in the death of his girlfriend's child, of whom he was not the father. Yet, because he allowed such abuse to take place, his parental rights over the child he and his girlfriend shared were terminated. Hubbard v. State (In re W.H.), 872 P.2d 409, 409-10 (Okla. Ct. App. 1994) (noting lack of criminal charges and girlfriend's conviction for first-degree murder and life sentence in termination of parental rights case).

48 See *Miranda*, 715 A.2d at 690 (noting increase in alternative family arrangements); Commonwealth v. Brown, 721 A.2d 1105, 1107 (Pa. Super. Ct. 1998) ("In an age when nontraditional living arrangements are commonplace, it is hard to imagine that the common sense of the community would serve to eliminate adult persons residing with a noncustodial child from the scope of the statute protecting the physical and moral welfare of children.").

49 See *Miranda*, 715 A.2d at 690 (suggesting conflict between public policy of protecting children and judicial distinction between children "based upon whether their adult caregivers have chosen to have their relationships officially recognized"); Commonwealth v. Kellam, 719 A.2d 792, 796 (Pa. Super. Ct. 1998) ("In this age where children reside in increasingly complex family situations, we fail to understand why criminal liability should be strictly limited to biological or adoptive parents."); Hawkins v. State, 891 S.W.2d 257, 262 (Tex. Crim. App. 1993) (en banc) (Campbell, J., concurring) ("Live-in partners of abusive adults can no longer sit idly by while defenseless children—or adults—are abused and injured. Those who do violate our law and deserve our condemnation and scorn.").

50 See infra Part II.B. Indeed, the live-in boyfriends found guilty of failing to protect had assumed, to varying extents, tasks normally delegated to women: feeding, bathing, and playing with the abused children. See supra note 42 and accompanying text for these examples. Given the stereotypes that women can and ought to do more for children (whether the children are theirs or their lovers'), see infra Part II.B (describing stereotype), this expansion of duty likely will implicate more women than is fair.

51 See infra Part II.B.

II

THE LADY IS A TRAMP: EXPLORING THE GENDER DISPARITY IN FAILURE-TO-PROTECT CONVICTIONS

It would be disingenuous to suggest that courts deliberately set out to convict scores of women for failure to protect.[52] Two factors do work, however, to ensure the gender disparity. First and most pragmatically, the social reality—itself a product of society's gender divide—that more women desire and obtain custody of their children[53] increases the likelihood that women will be in situations where they could fail to protect their children.[54] Second and more insidiously, all women face greater scrutiny for their parenting efforts, as suggested by the gender stereotyping that courts have employed in failure-to-protect cases.[55]

A. The Numbers (Kind of) Have It: Demographics

Demographics partly explain why so many women face failure-to-protect charges. In 1998, single parents headed 11,948,000 of the almost thirty-eight million households with children. Single mothers headed eighty-two percent of those households, with fathers responsible for the remaining 2,120,000 families.[56] These demographics sug-

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[52] See generally Ian F. Haney Lopez, Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination, 109 Yale L.J. 1717, 1723 (2000) (reconciling "statistical evidence of judicial discrimination with the judges' insistence that they never intended to discriminate").

[53] Naomi Cahn, Policing Women: Moral Arguments and the Dilemmas of Criminalization, 49 DePaul L. Rev. 817, 824 (2000) ("The reality is that women are primarily responsible for children. . . . Women are encouraged (or coerced) by our culture to this role . . . ."); see also Babcock et al., supra note 17, at 1281 (noting that mothers generally remain primary caretakers of their children after divorce); Karen Czapanskiy, Volunteers and Draftees: The Struggles for Parental Equality, 38 UCLA L. Rev. 1415, 1415-16 (1991) (conceptualizing women as "draftees" to parenthood, with extensive duties, and men as "volunteers," with limited duties).

[54] See Interview with Linda Holmes, Staff Attorney, Family Law Unit, South Brooklyn Legal Servs., in Brooklyn, N.Y. (Mar. 31, 2000) (notes on file with the *New York University Law Review*). Holmes, a member of the Failure to Protect Working Group of the Child Welfare Committee of the New York City Inter-Agency Task Force Against Domestic Violence, focuses on family court cases involving failure to protect. Thus far, all of her clients have been women, although one man, whose case was declined, sought assistance. Id.

Indeed, mothers tend to be the focus of cases involving allegations of child abuse and neglect as a whole, while men are rarely present. See supra note 36; see also Jane C. Murphy, Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law, 83 Cornell L. Rev. 688, 709 (1998) ("One long-time child advocate recently suggested that we rename juvenile court 'mothers' court' because of the absence of fathers from child welfare proceedings.").

[55] See infra Part II.B.

[56] U.S. Bureau of the Census, All Parent/Child Situations, by Type, Race, and Hispanic Origin of Householder or Reference Person: 1970 to Present (Dec. 11, 1998) (citing 1998 data), at http://www.census.gov/population/socdemo/hh-fam/htabFM-2.txt. The Census

gest that more women face the possibility of being charged with failure to protect. The reality that women are disproportionately convicted of failure to protect, even considering these numbers, suggests that prejudice is at work.[57]

In addition, these numbers are not inviolate. Single, separated, and divorced mothers may bring a new male partner into their homes; if the woman harms her children—female abusers are not uncommon[58]—that man theoretically could be held as responsible as would a

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Bureau statistics also break down the families by race. Women head 91.9% of single-parent black households and 83.8% of single-parent Hispanic households. Id.

Children of single mothers are also much more likely to be poor and (often as a side effect of this poverty) neglected or abused. See Children with Single Parents—How They Fare, Census Brief (Econ. & Statistics Admin., U.S. Dep't of Commerce), Sept. 1997, at 1, 1 (Sept. 1997) ("Nearly six of 10 children living with only their mother were near (or below) the poverty line . . . [while] [c]hildren living with their father (particularly if he was divorced) were more likely to be part of a family with a higher median income. . . ."), http://www.census.gov/prod/3/97pubs/cb%2D9701.pdf; Andrea J. Sedlak & Diane D. Broadhurst, U.S. Dep't of Health & Human Servs., Executive Summary of the Third National Incidence Study of Child Abuse and Neglect (1996) ("Children from families with incomes below $15,000 . . . were over 22 times more likely to experience som [sic] form of maltreatment that fit the Harm Standard and over 25 times more likely to suffer some form of maltreatment as defined by the Endangerment Standard."), http://www.calib.com/nccanch/pubs/statinfo/nis3.htm.

Failure-to-protect case law masks the impact of race and poverty. Because it is impossible to identify race and income level from case law alone, this Note does not address it specifically. However, prejudices based on race and class most likely produce unjust effects in failure-to-protect convictions.

[57] See infra Part II.B.

[58] See Nat'l Clearinghouse on Child Abuse & Neglect Info., Child Abuse and Neglect National Statistics (2000) ("Three-fifths (60.4%) of the perpetrators were female . . . . The most common pattern of maltreatment was a child neglected by a female parent with no other perpetrators identified . . . ."), at http://www.calib.com/nccanch/pubs/factsheets/canstats.htm; Sedlak & Broadhurst, supra note 56 ("Children were somewhat more likely to be maltreated by female perpetrators than by males . . . . Of children who were mistreated by their birth parents, the majority (75%) were maltreated by their mothers . . . ."); see also Babcock et al., supra note 17, at 1358 (noting that "children do suffer and die at the hands of their mothers"); Jeffrey L. Edleson, The Overlap Between Child Maltreatment and Woman Battering, 5 Violence Against Women 143 (1999) (stating that women comprise more than half of abusers); Sandra K. Beeman et al., Case Assessment and Service Receipt in Families Experiencing Both Child Maltreatment and Woman Battering (Jan. 10, 2001) (unpublished manuscript) (finding in case study that 65.9% of 167 abuse reports involved female perpetrators), at http://www.mincava.umn.edu/link/caseases.asp. In a recent British study, more than half of the perpetrators of child abuse resulting in fatalities were mothers, and in almost half of those cases the fathers were present in the household. See Peter Reder & Sylvia Duncan, Lost Innocents: A Follow-Up Study of Fatal Child Abuse 24-28 (1999) (providing statistics for cases of child abuse).

The fact that women do abuse children is one with which feminist writers are not necessarily comfortable. See Marie Ashe & Naomi R. Cahn, Child Abuse: A Problem for Feminist Theory, in The Public Nature of Private Violence 166, 190-91 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) ("It is impossible for feminism to continue to ignore the numbers of women who are abusive to their children. They appear too fre-

father.[59] Similarly, the growing number of single fathers raising their children[60] may live with abusive girlfriends or new spouses, just as single mothers do.[61] Finally, two-parent families have their share of abuse as well.[62]

But despite the not insignificant percentage of single fathers taking care of their children and the multitude of situations in which a male "father" figure assumes a caregiver role, the fact remains that there are few cases where these men are prosecuted under failure-to-protect statutes.[63] Because demographics alone do not explain the disparities, it is necessary to look beyond them.

B. Gender Stereotypes

Studies of state courts reveal an additional cause for the disparities: "substantive gender bias problems" in abuse proceedings.[64] A

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quently for us to label them as aberrational, or for us to claim that they do not represent 'women.'").

[59] See, e.g., State v. Miranda, 715 A.2d 680, 689 (Conn. 1998) (affirming liability of live-in boyfriend for failure to protect girlfriend's child); Commonwealth v. Brown, 721 A.2d 1105, 1108 (Pa. Super. Ct. 1998) (same).

[60] The number of single fathers increased twenty-five percent over a three-year period, from 1.7 million in 1995 to 2.12 million in 1998, while the number of single mothers remained steady during that same period. Kalpana Srinivasan, Census: Greater Number of Single Parents Are Fathers, Seattle Times, Dec. 11, 1998, at A6 ("[C]hanges in the way custody is granted and increased acceptance of single parenting by fathers may be reasons for the trend.").

[61] See, e.g., State v. Stevens, 797 P.2d 1133, 1135 (Utah Ct. App. 1990) (affirming termination of father's parental rights for failure to prevent abuse of child by stepmother). Indeed, once a child has been placed with her natural father, child protective services may work to keep her there, despite evidence pointing to the need for the child's removal. See, e.g., Mike Folks, Worker Indicted, HRS Hit in Abuse Case, Sun-Sentinel (Ft. Lauderdale, Fla.), Dec. 15, 1993, at 1A, 1993 WL 3993758 ("There appeared to be an overwhelming drive by [HRS] to keep [the son] with his natural father, even when the Child Protective Team, staff meetings, and other documented information showed this was not in his best interest.").

[62] See, e.g., United States v. Webb, 747 F.2d 278, 280 (5th Cir. 1984) (affirming conviction of mother who failed to prevent father's abuse); In re Dalton, 424 N.E.2d 1226, 1227, 1234 (Ill. App. Ct. 1981) (affirming termination of father's parental rights given extended abuse that took place in two-parent home); People v. Dixon (In re Dixon), 401 N.E.2d 591, 599 (Ill. App. Ct. 1980) (determining that termination of father's parental rights was in best interest of children and that abusive environment in two-parent home was detrimental to growth of children); see also Reder & Duncan, supra note 58, at 24 tbl.2.2 (listing fourteen cases of child fatalities where both mother and father were present); Sedlak & Broadhurst, supra note 56 ("[S]ome children were maltreated by both parents.").

[63] See supra notes 11-12 and accompanying text.

[64] Karen Czapanskiy, Domestic Violence, the Family, and the Lawyering Process: Lessons from Studies on Gender Bias in the Courts, 27 Fam. L.Q. 247, 248-49 & 249 n.7 (1993) (recording problem of gender bias in number of criminal proceedings and citing state court reports); Kathleen E. Mahoney, The Myth of Judicial Neutrality: The Role of Judicial Education in the Fair Administration of Justice, 32 Willamette L. Rev. 785, 786 (1996) ("[I]n Canada, the United States, and other countries, numerous studies, commissions, task

trial judge's preconceptions about gender can limit a woman's ability to receive a fair trial, yet these assumptions often do not manifest themselves in the record in any form of reversible error.[65] The fact that the judiciary is overwhelmingly white, male, and privileged[66] may lead courts to empathize more readily with male defendants (or have difficulty sympathizing with female defendants).[67] Thus, gender ste-

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forces, research papers, and statistical data have revealed that, despite the good intentions of the judiciary, unconscious and pervasive biases permeate the judicial system."); see also Elder v. State, 993 S.W.2d 229, 231 (Tex. App. 1999) (Stone, J., concurring) (noting many commentators' "[c]harges of gender bias against women" in cases of mothers charged with failure to protect).

65 See Megan G. Mayer, Note, *In re Marriage of Iverson*: Dubious Benefits in Reducing Judicial Gender Bias, 3 UCLA Women's L.J. 105, 108-10 (1993) (discussing case in which judge's clear gender bias against female litigant, whom he both called "a lovely girl" and analogized to milk cow, led to reversal, but noting that in most cases such gender bias operates covertly and does not result in reversal); see also Edwin J. Peterson, The Oregon Supreme Court Task Force on Racial Issues in the Courts: A Call for Self-Examination, 32 Willamette L. Rev. 609, 614 (1996) ("[S]ubtle biases enter the deliberative process . . . [and i]n an individual case, there may be no apparent evidence of bias.").

66 Richard Delgado, Rodrigo's Committee Assignment: A Skeptical Look at Judicial Independence, 72 S. Cal. L. Rev. 425, 434 (1999) ("Most judges are white, male, middle-class, able-bodied, and moderate in their social and political views. No one considers this an affront to judicial independence, although it has a tremendous influence on how cases are decided."); see also Appell, supra note 11, at 585 ("In contrast to the largely poor and disproportionately African-American families who constitute the main recipients of child protective services, the judges, caseworkers, and attorneys are mostly middle-class and white.").

One study found that only 3.8% of all state court judges are African-American. Sherrilyn A. Ifill, Judging the Judges: Racial Diversity, Impartiality, and Representation on State Trial Courts, 39 B.C. L. Rev. 95, 95, 98-99 (1997) (arguing that Fourteenth Amendment requires judicial structural impartiality, which exists when judiciary is comprised of "judges from diverse backgrounds and viewpoints . . . foster[ing] impartiality by diminishing the possibility that one perspective dominates adjudication"); see also Cahn, supra note 53, at 824-25 (discussing "racism and sexism of the criminal justice system" that leads to uneven criminalization of behaviors of single mothers and mothers of color); Lopez, supra note 52, at 1813 ("Substantial evidence demonstrates that people treat others whom they perceive as like themselves far more favorably than they treat persons whom they consider socially distinct."); Tineke Ritmeester & Ellen Pence, A Cynical Twist of Fate: How Processes of Ruling in the Criminal Justice System and the Social Sciences Impede Justice for Battered Women, 2 S. Cal. Rev. L. & Women's Stud. 255, 260 (1992) (noting that judicial process "is designed to appear fair, objective, and oblivious to the gender, race, and class of the parties. Yet, its function is to maintain the social order, which is grounded in gender, race, and class privilege.").

67 Practitioners in family court perceive hostility toward their clients and themselves. When Are Battered Women Negligent Mothers?, 27 Fordham Urb. L.J. 565, 590-91 (2000) ("It seemed that everyone, particularly in the abuse and neglect cases, saw the clients as almost demonized. Case workers were hostile, family court judges seemed hostile, law guardians were hostile. Nobody wanted to talk to me when I came to court . . . ." (remarks of Leah A. Hill)).

Courts are often ill-equipped to deal with battered women's special circumstances. For instance, courts often do not recognize "[t]he wearing, repetitious labor of motherhood," or that "[t]he constant demands of children, especially in an unstable relationship,

reotypes may have greater influence on the state judiciary, particularly when cases involve domestic violence victims.[68] In addition, to the extent that these stereotypes are inculcated in society as a whole, all persons in the court system—prosecutors, defense counsel, jurors—may be influenced by them more or less.

Three stereotypes in particular appear in failure-to-protect cases: the All-Sacrificing Mother,[69] the All-Knowing (and thus All-Blamed) Mother,[70] and the Nurturing Mother/Breadwinning Father.[71] As demonstrated through judicial rhetoric,[72] these stereotypes require much of women, while often relegating men to a supporting role.[73] Moreover, like other invidious dichotomies, they allow judges—and society—to place women into neat categories of "good" and "bad"

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may prove exhausting." Mahoney, supra note 34, at 21. Male-created rules of evidence require a woman to speak in terms of discrete events, separated from her feelings and opinions, instead of telling her story in the sort of context required to understand it. Id. at 36. Additionally, criminal law does not deal effectively with moral ambiguity. See Becker, supra note 34, at 16 (stating that battered women—who can be both victims and partially responsible parties—do not easily fit into categories of "entirely culpable for, or entirely innocent of[,]" crime). At times, however, the problem boils down to a judge's inability to imagine himself in the same situation. A woman who sought a protective order after her husband threatened her with a gun reported that the judge, who did not believe her, said:

> The reason I don't believe it is because I don't believe anything like this could happen to me. If I was you and someone had threatened me with a gun, there is no way I would continue to stay with them. There is no way that I could take that kind of abuse from them. Therefore, since I wouldn't let that happen to me, I can't believe that it happened to you.

Czapanskiy, supra note 64, at 252 (internal quotation marks omitted); see also Babcock et al., supra note 17, at 1353 (noting "tendency of judges to discount mothers' allegations of fathers' violence, either toward the mothers or toward the children, as 'mudslinging' and not credible" (citing Joan Meier, Speech at the American Association of Law Schools Family and Juvenile Law Section Meeting (Jan. 7, 1994))).

[68] See Deborah Epstein, Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System, 11 Yale J.L. & Feminism 3, 39 (1999) ("Most judges come to the bench with little understanding of the social and psychological dynamics of domestic violence and, instead, bring with them a lifetime of exposure to the myths that have long shaped the public's attitude toward the problem.").

[69] See infra Part II.B.1.

[70] See infra Part II.B.2.

[71] See infra Part II.B.3.

[72] Language importantly reveals empathy and underlying patterns of belief. See Odeana R. Neal, Myths and Moms: Images of Women and Termination of Parental Rights, 5 Kan. J.L. Pub. Pol'y 61, 67 (1995) (noting that "judges use language that evokes emotional responses" and "often give information that appeals to the reader on a non-rational level" based on shared, internalized myths about definitions of "good and bad mothers"); see also Karen Czapanskiy, Babies, Parents, and Grandparents: A Story in Two Cases, 1 Am. U. J. Gender & L. 85, 86 (1993) (analyzing choice of language, among other things, to support hypothesis that "the trial and appellate courts were influenced by the sex, gender roles, class, and, to the degree the factor can be viewed, the race" of parties).

[73] For descriptions of failure-to-protect cases in which men were seen to have a lesser role in child care, see, for example, infra note 100 and accompanying text.

mothers without regard for the messiness of moral ambiguities.[74] And bad mothers—as Western culture teaches—deserve to be punished.[75]

1. *The All-Sacrificing Mother*

The most revered form of love, a mother's love for her child, is expected to overcome "all physical, financial, emotional and moral obstacles,"[76] including, in the realm of failure-to-protect laws, any victimization at the hands of another.[77] Courts wrongly assume first that a mother *can* leave the abuser and, second, that a threat of imprisonment will encourage her to act to protect her children when she otherwise would not.[78] Courts demand that women, in contrast to men,[79]

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[74] See Schernitzki, supra note 18, at 51 (noting that good mothers "are available to their children, spend quality time with them, love and care for them physically and emotionally, and are responsible for the purity of the home environment .... The bad mother is selfish, preoccupied with her own desires and needs, and neglectful of her children's well-being."). This trend is evident in the popular media, with its glowing portraits of "celebrity moms" on one hand, and negative portrayals of "welfare queens" on the other—with little reality in between. See Susan Douglas & Meredith Michaels, The Mommy Wars, Ms., Feb./Mar. 2000, at 62, 65 (noting that celebrity mom "is everything that you—poor, stupid, incompetent slob—are not .... She is never furious, hysterical, or uncertain. She is never a bitch. She is June Cleaver with cleavage and a successful career.").

[75] Schernitzki, supra note 18, at 51 ("Society can easily advocate the position that bad mothers deserve to be punished when they 'allow their children to be abused' at the hands of another."); see also Murphy, supra note 54, at 713 ("[C]riminal laws often focus on punishing a woman's behavior when she deviates from her role as mother, rather than on preventing harm to the child.").

[76] Panko, supra note 11, at 74 ("Where such obstacles actually do limit a woman's ability to protect her child, they are not recognized as 'obstacles' and thus not considered relevant or legitimate factors in adjudicating guilt for failure to protect.").

[77] See id. at 92; see also V. Pualani Enos, Counter-Response to Kathryn L. Quaintance, 21 Harv. Women's L.J. 315, 317 (1998) ("[B]attered mothers are expected 'to do something' that will (somehow) deter or restrain a powerful and dangerous abuser. Precisely what battered mothers are 'to do' remains undetailed and ambiguous."); Schernitzki, supra note 18, at 50 ("Society believes that the maternal instinct bestows upon women a superior ability to protect. If a child is harmed, the public regards the mother as culpable, even if the mother is unable to restrain the source of harm."); When Are Battered Women Negligent Mothers?, supra note 67, at 618 ("We have devastatingly low expectations of fathers. We hear that it is the mother's obligation to make the environment safe for children. We never hear that it is the abuser's or father's obligation to ensure a safe environment for children." (remarks of Catherine Hodes)).

[78] A battered woman may do more to protect her child by doing nothing than by attempting to stand up to a batterer. See Magen, supra note 22 ("[D]omestic violence is unlike other acts of omissions, such as failure to provide medical care, because the probability of a successful outcome–protecting the children from witnessing further abuse–may be relatively low."); see also Panko, supra note 11, at 92 (noting courts' misguided expectations of battered women); Schneider, supra note 17, at 555 (discussing "tension between victimization and agency" that complicates battered woman's decision to remove herself and her children from batterer).

[79] See, e.g., People v. Brown (In re Brown), 410 N.E.2d 486, 491 (Ill. App. Ct. 1980), rev'd, 427 N.E.2d 84, 87 (Ill. 1981). In this case, the appellate court reversed the trial court's finding of a father's unfitness, asserting that he was not culpable of failure to pro-

must sacrifice their safety, including standing up to the men who beat *them*, in order to save their children and fulfill their "maternal instinct":[80]

> [T]he Court finds that even animals protect their young. . . . Now, [the defendant] may have well been afraid of her husband. There were times when he was gone and even if she was afraid if she had the natural maternal instinct that any mother should have, that maternal instinct should have overcome her fear if she is to be a fit mother and she failed to do that.[81]

Indeed, in an early failure-to-protect case, the court snidely described the mother's fear of her husband as a "defense,"[82] despite "numerous threats"[83] from her husband, whom she knew had murdered at least two women.[84] At least one court has recognized that the legal system expects "perfection" of mothers and deems it inex-

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tect his daughter from her new, "violent" stepfather, in part because "any approach by [the father] by way of self-help would have led to reprisals of a demoniac variety." Id.

In another case involving the termination of a father's rights, the court noted that the question of a parent's inability to protect, including because of mental illness or physical disability, has received little judicial attention. In re Glenn G., 587 N.Y.S.2d 464, 468 (Fam. Ct. 1992) (dismissing child abuse charges against mother who suffered from BWS but finding her criminally neglectful under strict liability statute); see also Hawkins v. State, 891 S.W.2d 257, 259-60 (Texas Crim. App. 1993) (en banc) (Clinton, J., concurring) (noting that Hawkins claimed he did not know how to contact authorities).

Indeed, one judge based his concurrence on, among other horribles, the fact that boyfriends who attempt to remove children could be charged with kidnapping due to lack of legal ties. Leet v. State, 595 So. 2d 959, 964-65 (Fla. Dist. Ct. App. 1991) (Patterson, J., concurring) ("Mr. Leet holds no . . . legal authority in his own right which he could exercise over Joshua or the child's mother. . . . [He] could not, *by himself*, legally prevent the abuse and, therefore, in like manner, could not have permitted it to occur."). Judge Patterson noted that paramours' recourses were narrowed to contacting the authorities. See id.

[80] See infra notes 86-95 and accompanying text. The focus on women's culpability when in abusive relationships masks that of the actual batterer. See Betty Weinberg Ellerin, Introduction to Symposium, Women, Children and Domestic Violence: Current Tensions and Emerging Issues, 27 Fordham Urb. L.J. 569, 569 (2000) ("Too often, still, the question asked is: 'Why didn't she stop him or get the children out of the way or leave?' instead of: 'Why did he threaten, hit or punch her?'").

[81] Tenn. Dep't of Human Servs. v. Tate, No. 01-A-01-9409-CV-00444, 1995 WL 138858 (Tenn. Ct. App. Mar. 31, 1995) (affirming termination of parental rights of defendant to ten of her twelve children); see also FTPWG, supra note 9, at 854 ("There are still strong prejudices against women who do not leave their batterers, and the players in the child welfare system routinely blame the victims of domestic violence for the harm to the children.").

[82] In re Dalton, 424 N.E.2d 1226, 1232 (Ill. App. Ct. 1981) (affirming termination of mother's parental rights).

[83] Id. Karen Dalton testified that, on at least one occasion, her husband put a gun to her son's head and that he threatened to kill her son if she did not stay with him. Id. at 1229.

[84] Id.

cusable if a mother does not protect her children from harm at all costs.[85]

This expectation plays out in many ways. First, a court may not even consider what steps women have taken to leave abusive relationships.[86] Or, any steps women have taken may be deemed "inconsistent and ineffectual."[87] Women may even be held *more* liable because of a partner's violence, because the tendencies should have warned her that he could also abuse her children.[88]

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[85] See Elder v. State, 993 S.W.2d 229, 231 (Tex. App. 1999) (Stone, J., concurring).

[86] In a recent line of New York cases, courts ignored the steps that women in battering relationships took:

> The *Lonell J.* court looked at the history of domestic violence without evaluating the reasons why the mother may have stayed in the home. Nor did the court, in assessing whether the mother endangered her children, consider the steps taken by the mother to protect her children from the batterer. In fact, the mother made repeated calls to the police, obtained an order of protection and made an attempt to leave by going to her mother's house.

FTPWG, supra note 9, at 852.

[87] Commonwealth v. Cardwell, 515 A.2d 311, 316 (Pa. Super. Ct. 1986) (finding that mother's actions to protect child from stepfather's abuse were not sufficient to avoid endangering welfare conviction); see also United States v. Webb, 747 F.2d 278, 280-81 (5th Cir. 1984) (affirming conviction even though woman sought help in vain from authorities from battering husband; husband killed her son and then threatened violence to woman and her family if she reported murder); Campbell v. State, 999 P.2d 649, 653-55 (Wyo. 2000) (affirming mother's conviction for child endangerment, despite her fear of abusive boyfriend, because she did not seek medical attention for her daughter until seven hours after she discovered injuries). A sharply worded concurrence suggests that the *Cardwell* court may have been more sympathetic to the dynamics of the situation:

> It does not follow from the holding in this case that a parent will be made a criminal merely because he or she has been unsuccessful in preventing the abuse of a child by the parent's spouse. The criminal law should not be allowed to reach out in response to public outcry against child abuse and criminalize a parent who in good faith has attempted but has failed to confront successfully the terrible dilemma of being required to live in a family relationship with both an abused child and the abuser.

Cardwell, 515 A.2d at 316-17 (Wieand, J., concurring).

Courts seldom bother to separate four types of "doing nothing": (1) being absent and not knowing about the abuse; (2) knowing about the abuse but being unable to do anything about it; (3) attempting to do something unsuccessfully; and (4) knowing about the abuse and not caring. See Jacobs, supra note 11, at 651 (urging courts to focus on applying criminal liability in only fourth case).

[88] Compare Juvenile Officer v. T.S. (In re T.S.), 925 S.W.2d 486, 488-89 (Mo. Ct. App. 1996) (reversing trial court's termination of father's custody because mother's flaring temper was not adequate notice of future abuse), with Phelps v. State, 439 So. 2d 727, 731, 734-35, 737 (Ala. Crim. App. 1983) (upholding mother's conviction in death of son and finding that mother should have known of husband's propensity for violence toward children because he beat her). The *Phelps* court determined that the jury could have found that Phelps, a battered woman, "never *made* the opportunity," rather than, as she testified, "never got the opportunity," to leave her abusive boyfriend. *Phelps*, 439 So. 2d at 734; see also supra notes 33-34 (discussing cases involving BWS).

An Illinois court emphasized twice that the boyfriend of a mother charged with failure to protect was a large man, at six feet, three inches tall. See People v. Bernard, 500 N.E.2d

In *United States v. Webb*,[89] June Webb, frequently beaten by her partner Keith Webb over the course of several years, was convicted of two counts of injury to a child after she waited almost a month to report the death of her son Steve at Keith Webb's hands.[90] Keith had threatened to kill her, her other children, and the rest of her family if she contacted the authorities.[91] Despite these threats, she told Keith another man had raped her in order to speak to the police outside of his presence.[92] The court nonetheless held her accountable for not having prevented her son's death, regardless of what her violent partner—who threatened a massacre if she even reported the death—would have done to her and the rest of her family had she tried to intervene.[93]

Ironically, as Webb's case indicates, women with abusive partners are often unable to leave or to take other preventative actions because of the greater danger such action would entail.[94] This danger is compounded for domestic violence victims by the lack of shelter space and permanent housing, lack of financial or other support, little protection from the criminal or family court system, and fear of the batterer seeking unsupervised visitation and custody.[95]

1074, 1075, 1078, 1083 (Ill. App. Ct. 1986) (affirming conviction of aggravated battery and sentence of seven years). Yet the attacker's size was seen as more damning to the mother's case, because of the great deal of damage he could do to the children, rather than exculpatory, because of the great deal of damage he could do to the woman. See id. at 1078 (emphasizing that six feet, three inches tall, "225-pound boyfriend had repeatedly struck the 23-month-old baby" and kicked defendant's "5-year-old daughter").

89 747 F.2d 278 (5th Cir. 1984).

90 Id. at 280-81 (affirming conviction). At that time, a pregnant June Webb was supporting Keith, his legal wife Robin Webb, Robin's four children, and June's own two children by Keith. Id. Keith had been beating June almost since the beginning of their relationship, and although June reported this abuse to the authorities, Keith never faced prosecution for it. Id. at 280.

91 Id. at 281.

92 Id.

93 See id. at 281-83.

94 Experts warn: "A woman's attempt to separate from the batterer often increases the incidence and level of his violence . . . [such] that the woman may be in greatest danger when she takes action to remove herself from the batterer's control." Babcock et al., supra note 17, at 1319.

95 See FTPWG, supra note 9, at 858 ("There is little understanding of the fact that leaving itself is dangerous and there is a lack of social support, resources, and safe options for women and children attempting to flee. Battered mothers' attempts to protect themselves and their children are routinely minimized and dismissed."); see also Schernitzki, supra note 18, at 53 ("The decision to end an abusive relationship, and the courage and ability to leave, is difficult for any battered woman. For a battered mother, the benefits of leaving with her children must be weighed against the consequence of departure.").

2. *The All-Knowing (and Blamed) Mother*

Mothers are assumed to be all-knowing when it comes to their children[96] and as a result face harsher scrutiny[97] and are more likely to be blamed if anything goes wrong.[98] Men, who are not seen as the best/primary caretakers,[99] can claim ignorance much more easily.[100] This stereotype is particularly damaging in failure-to-protect cases,

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[96] See Neal, supra note 72, at 64 ("Mothers are seen as being better equipped—physically, psychologically, emotionally, and mentally—to take primary responsibility for raising their children. This is so even though the only thing that, post-birth, a mother can do that a father cannot is lactate."); see also Enos, supra note 34, at 229 ("Legislatures and courts have unreasonable expectations of mothers.").

[97] See Panko, supra note 11, at 77 ("[W]omen are adjudged by the harsh standard established for 'good mothers,' while men who fail to protect their children benefit from a much lower standard. While mothers are expected to devote themselves to their children, fathers who do so are considered rather extraordinary, going beyond the call of duty."); see also Deborah L. Rhode, Speaking of Sex: The Denial of Gender Inequality 189-92 (1997) (discussing such expectations in child custody cases).

[98] See Marie Ashe, The "Bad Mother" in Law and Literature: A Problem of Representation, 43 Hastings L.J. 1017, 1019 (1992) (pointing to Greek literary figures such as Medea, Agave, and Jocasta, and "bad" mothers characterized in tale of Solomon's judgment, as examples in Western literature and culture of women "whose neglectful, abusive, reckless, or even murderous behaviors" harm their children); Becker, supra note 34, at 15 (noting that motherblaming has "deep roots"); Dohrn, supra note 34, at 8 (noting that "[a]ttorneys, judges, and caseworkers still frequently blame women for their victimization" and assume that woman is bad or inadequate mother; this may lead state to remove children in order to protect them even when no child abuse is present). Dohrn comments:

> Juvenile court judges have castigated mothers for wearing pants or being angry. In their view, the perfect party will plead guilty, attend every appointment the court orders, be pleasing, feminine, and drug-free forever. But the litany of parenting classes, counseling, drug testing, and psychological evaluations the court orders, ignores the mother's needs for housing, child care, drug treatment, employment, or mental health services.

Id. at 9; cf. Jan Breckinridge & Eileen Baldry, Workers Dealing with Mother Blame in Child Sexual Assault Cases, 6 J. Child Sexual Abuse 65, 72-75 (1997) (attacking rationales supporting beliefs that mother is to blame in incest cases).

Indeed, women are blamed when problems, such as "crime, drug and alcohol abuse, truancy, teenage pregnancy, suicide and psychological disorders," are attributable to fatherless households. Stephen Baskerville, Is Court-Ordered Child Support Doing More Harm Than Good?, Wash. Times, Aug. 2, 1999, at 24 (stating that mother is to blame for forcing father away).

Even children blame their mothers for suspected lapses in parenting, without similarly blaming fathers who commit similar acts. See Elizabeth Becker, On the Path to the Army's Highest Ranks, Women Face a Detour Called Motherhood, N.Y. Times, Nov. 29, 1999, at A1 (observing of Army daughter at mother's absence during important times that, "while she missed both parents when they were away from home, she saved her ire for her mother, not her father").

[99] The "tender years preference," shaped in the nineteenth century, has encouraged this notion. See Babcock et al., supra note 17, at 1221, 1223 n.2. This view presumed that a woman was the best caretaker for children of "tender years" unless a court found her to be unfit. Id. at 1221. For the most part, joint custody is now the most frequent arrangement. See id. at 1276 n.1 (noting that in some states, joint legal custody represents 80% of custodial arrangements).

since the prosecution must prove that a defendant has actual or constructive knowledge about abuse.[101] The fact that women are expected to know about their children in an almost preternatural way facilitates this finding.[102] Women must discern what bumps and bruises mean and must see through their partners' lies about the causes of those injuries, even if they were not there to witness the abuse.[103] By contrast, absence during the actual abuse has proven exculpatory for men.[104] In addition, with the benefit of hindsight, courts

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Even so, fathers' rights groups claim bias against men in custody cases that result in women getting the children (and child support). See Joseph Lieberman's "Deadbeat Dad" Statement Deplored by the National Congress for Fathers and Children, NFCC NETWORK Newsl. (Nat'l Cong. for Fathers & Children, Beverly Hills, Cal.), Aug. 18, 2000, http://www.ncfc.net/networkx.html (arguing that "the Family Court System . . . heavily favors the automatic placement of children with mothers"); Fathers' Manifesto, The Father's Rights Manifesto (Aug. 17, 1995) ("The present feminist concept of women's 'independence' really means a government-enforced entitlement to be paid for the rewards of being a mother, without the responsibilities that go with it: to men, to children especially, and ultimately to the world at large."), at http://www.fathers.ourfamily.com/manifest.htm.

100 Rarely are men held accountable in the child protective system. See Appell, supra note 11, at 584-85 ("Men are rarely brought into court, held accountable, or viewed as resources for their children. When fathers are involved in the hearings, they are usually subject to lower expectations and are significantly less likely to be criminally charged with neglect or passive abuse of their children.").

In State v. Miley, 684 N.E.2d 102 (Ohio Ct. App. 1996), for example, the court determined that the circumstantial evidence that Miley and his girlfriend were the only ones who spent time with the abused child did not warrant Miley's child abuse conviction. Id. at 106. The court analyzed at great length the nature of the child's crying, noting the lack of proof that she had cried enough to alert the father to the abuse: "[W]e . . . cannot assume that Jessica's crying was longer or louder than normal." Id.

101 For a summary of a prima facie case of failure to protect, see supra text accompanying note 26; see also In re M.C.A.B., 427 S.E.2d 824, 824-25 (Ga. Ct. App. 1993) (affirming termination of father's parental rights because he "did not protect the child from the physical and emotional abuse of the mother even though he knew she was prone to violence and had harmed the child in the past"); State v. Portigue, 481 A.2d 534, 544 (N.H. 1984) ("Testimony at trial established that the defendant was aware of the beatings . . . and, indeed, observed some of the beatings. The child's injuries . . . were numerous in extent and obvious in degree. We are left with the inescapable conclusion that the defendant must have discovered the injuries.").

102 See infra notes 103-05 and accompanying text.

103 See People v. Peters, 586 N.E.2d 469, 470, 478-79 (Ill. App. Ct. 1991) (affirming thirty-year sentence for murder, aggravated battery of child, cruelty to child, and endangering life of child on theory of accountability); State v. Morrison, 437 N.W.2d 422, 424-25 (Minn. Ct. App. 1989) (affirming conviction of mother who left daughter alone with boyfriend while she worked and believed him when he said that daughter had been bruised in fall); see also P.S. v. State, 565 So. 2d 1209, 1210 (Ala. Crim. App. 1990) (finding mother guilty of failure to protect although injuries occurred when she was in other room from live-in boyfriend); id. at 1212-13 (quoting trial court's statement: "The Court is perplexed as to your lack of knowledge as to your own infant child in that you cannot explain these things that obviously happened to it . . . .").

104 See Juvenile Officer v. T.S. (In re T.S.), 925 S.W.2d 486, 487-88 (Mo. Ct. App. 1996) (reversing parental rights termination of man who was not in room at time of abuse); State v. R.W.H. (In re M.H.), 859 S.W.2d 888, 890, 896 (Mo. Ct. App. 1993) (excusing man in

may see an obviousness of abuse that mothers, caught up in day-to-day living, cannot.[105]

For example, a court upheld Barbara Peters's thirty-year sentence for her boyfriend's murder of her son even though she never had witnessed any abuse.[106] Although she had noticed some injuries, she testified that she believed her boyfriend when he told her that her son was clumsy.[107] The court did not question how convincing the boyfriend's lie might have been, how susceptible Peters might have been

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different room than where abuse occurred); see also Cardwell v. State, 461 So. 2d 754, 756, 761 (Miss. 1984) (finding that stepfather's absence during some of abuse warranted reversal of his murder conviction even though he took part in some of abuse and his seven-year-old stepson weighed just twenty-seven pounds, had large bump on side of his head, and had multiple bruises on his face).

Some uncontrovertible evidence of abuse may compel convictions, however, despite absence at the time of actual abuse. See Leet v. State, 595 So. 2d 959, 960 (Fla. Dist. Ct. App. 1991) (noting child services investigation and extensive abuse); State v. Adams, 557 P.2d 586, 587 (N.M. Ct. App. 1976) (pointing to second hospitalization); State v. Scully, 513 N.Y.S.2d 625, 626-27 (Crim. Ct. 1987) (stating that father took child twice (once covered in blood) to neighbor for protection); In re N.H., 373 A.2d 851, 853-54 (Vt. 1977) (stating that father attempted to take custody of abused child away from mother before instant proceeding).

Similarly, witnessing abuse constitutes actual knowledge. In Hawkins v. State, 891 S.W.2d 257 (Tex. Crim. App. 1994) (en banc), the defendant live-in boyfriend witnessed the mother beat her infant on four different occasions, including the final attack where she swung the infant by its feet, striking its head against the couch and causing permanent brain damage. Id. at 258; cf. Castro v. State (In re Castro), 628 P.2d 1052, 1052, 1056 (Idaho 1981) (affirming termination of father's parental rights because he acquiesced in daughter's physical abuse and failed to take preventative measures); In re Darla B., 331 S.E.2d 868, 870, 873 (W. Va. 1985) (affirming termination of father's parental rights, even though he was not direct participant in abuse, because he was present when abuse occurred).

105 Even though a mother and her boyfriend tested negative for gonorrhea, a court found that a jury reasonably could conclude that the mother should have know that her boyfriend was sexually abusing her eight-year-old daughter, who tested positive for the sexually transmitted disease. See Comm'r of Soc. Servs. v. Esther J. (In re Tania J.), 543 N.Y.S.2d 47, 51 (App. Div. 1989) (reinstating Social Services Commission's petition alleging mother's abuse of child). Because Tania recovered rapidly from the disease, the court reasoned, her mother ought to have known that the boyfriend also could have a similarly quick recovery–thus explaining his negative test. See id. For a more stringent standard regarding notice, see Elder v. State, 993 S.W.2d 229, 229 (Tex. Ct. App. 1999) (overturning mother's conviction for failure to protect). The *Elder* court, which had expressed an understanding of the problems generated by failure-to-protect laws, see supra note 34, found that a man's probation for indecency with a sixteen-year-old did not put a mother on notice. Id. at 230. It did not matter that the mother had signed a form acknowledging that she would be criminally responsible and prosecuted if her boyfriend did engage in inappropriate sexual conduct with her children. Id. at 229-30; cf. Cherney v. State (In re L.C.), 962 P.2d 29, 34 (Okla. Ct. Civ. App. 1998) (finding that mother did not fail to protect child from sexual abuse because she could not have known about it and rejecting State's claim based on alleged "retrospective awareness" of abuse).

106 *Peters*, 586 N.E.2d at 470, 477.

107 Id. at 473.

to his deceit, or even if Peters was too scared not to believe him; the only question was whether she failed in her duty.[108]

In contrast, a court found insufficient evidence to show that Kevin Berg ought to have sought medical attention for his girlfriend's daughter.[109] Berg attributed the child's injuries to accidents involving a pool cue, a fall down the stairs, bumps into pool and coffee tables, and cat scratches.[110] The court did not question why he did not inquire when the child's toenails dropped off and clumps of hair fell out, but instead supported Berg's story with others' testimony that the child was "clumsy."[111] Had "Kevin" been "Karen," the court might not have been so lenient.

3. *The Nurturing Mother/Breadwinning Father*

According to the third stereotype, women raise children while men earn money for the family.[112] This is true even when both men and women in two-parent households work.[113] Thus, judges have

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108 See id. at 477.

109 People v. Berg, 525 N.E.2d 573, 576 (Ill. App. Ct. 1988).

110 Id. at 574-75.

111 Id. at 575. Similarly, another court noted that a father believed that his daughter's "contusion of the right hemisphere, bruises and seizures" were caused by an older brother throwing a toy at the girl. State v. R.W.H. (In re M.H.), 859 S.W.2d 888, 890-91 (Mo. Ct. App. 1993). But see State v. Adams, 557 P.2d 586, 587-88 (N.M. Ct. App. 1976) (affirming father's conviction because he should have known about abuse of daughter although he attributed many of her injuries to rough play with her brother).

112 See Neal, supra note 72, at 71 n.1 ("[A] father's expected responsibilities are generally financial [so that a] father who spends little time with his children, but who provides for them financially, is not seen as a bad father in the same way that a mother who did the same would be."); see also Ellen Goodman, Horror Story in Mommy Wars, S.F. Chron., Oct. 28, 1997, at A19 (analyzing public reaction to au pair's shaking death of child as "a horror story about what can happen when you leave your child in someone else's care" and reciting cries on radio talk show for mother to face murder charges). Indeed, when men perform *any* of the traditionally "female" functions, courts may consider them praise-worthy. See Rhode, supra note 97, at 189-90 ("Fathers get 'extra points' for care that is taken for granted when women provide it. Courts applaud a man who picks his children up from daycare or prepares their breakfast by himself; by contrast, they sometimes penalize a mother who even uses daycare."). Although Rhode speaks of custody cases, her comments also apply to criminal charges that revolve around ideas of men's and women's failure to act.

In contrast, most current policy initiatives expect a father to contribute to his child's economic well-being, rather than to undertake any child care commitment. Tamara Halle et al., What Policy Makers Need to Know About Fathers, 56 Pol'y & Prac. of Pub. Hum. Servs. 21, 21-22 (1998) (urging that "father's contribution to his child's well-being doesn't begin or end with his wallet").

113 Linda Kelly, The Fantastic Adventure of Supermom and the Alien: Educating Immigration Policy on the Facts of Life, 31 Conn. L. Rev. 1045, 1048 (1999) ("[D]espite all the progress made, women have retained primary responsibility for child care."); Mahoney, supra note 34, at 43-44 ("During marriage, women are usually primary caregivers for children, even when both father and mother work full time."). Women have internalized this

found that working women who "abandon" their children to a male companion during their shifts lack a legitimate excuse for any resulting violence.[114] Yet many women cannot afford to stay at home with children or to pay the high costs of child care.[115]

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notion. See, e.g., Neal, supra note 72, at 64 ("[M]others who provide only materially for their children are seen as having deprived their children of the care and attention they need."); Becker, supra note 98, at A1 (reporting that women tend to leave military career tracks because of families, while men tend to stay, citing pay, job security, enjoyment, and similar pragmatic concerns); id. ("Senior women officers who are mothers are strained beyond the limits. Whether it is genetic or cultural, women are more bonded to their children than men. They are caught in a double bind.").

In fact, "the faster women's lives change the more ossified and stereotyped the dominant representations of motherhood have become. These stress self-abnegation, unalloyed pleasure in children, and intuitive knowledge of how to nurture." Brid Featherstone, Mothering and the Child Protection System, in The Violence Against Children Study Group, Children, Child Abuse, and Child Protection: Placing Children Centrally 51, 56 (1999).

[114] Schernitzki, supra note 18, at 51 ("[I]f a man abuses a child, the mother is blamed for not being present or for allowing others to care for the child while she works."). The case law supports this hypothesis. Compare State v. Morrison, 437 N.W.2d 422, 424, 426 (Minn. Ct. App. 1989) (affirming mother's sentence of 210 months for daughter's death while in sole care of boyfriend during mother's work shift at nursing home), with Archie v. Commonwealth, 420 S.E.2d 718, 719 (Va. Ct. App. 1992) (affirming girlfriend's conviction for death of boyfriend's daughter while he was at work and she was at home with his child). For similar examples of working women held liable, see People v. Peters, 586 N.E.2d 469, 473, 478-79 (Ill. App. Ct. 1991) (finding that mother failed to protect twenty-month-old son from boyfriend's abuse even though she was at work during some incidents of abuse and away on evening when fatal injury occurred); People v. Bernard, 500 N.E.2d 1074, 1076, 1079, 1083 (Ill. App. Ct. 1986) (affirming verdict as "not so improbable, unsatisfactory or unreasonable as to warrant reversal," and finding sentence "not an abuse of discretion" because even though mother was absent during abuse due to job-hunting and work, she "continued to leave her children with her boyfriend for long periods of the day despite" purported knowledge of abuse); Campbell v. State, 999 P.2d 649, 654, 664 (Wyo. 2000) (affirming conviction where injuries took place while mother was at work). But see State v. Maupin, No. 272, 1991 WL 197420, at *1, *3, *9 (Tenn. Crim. App. Oct. 7, 1991) (granting new trial to mother who left two-year-old child with abusive boyfriend while she worked at local restaurant).

Even women performing stereotypically "gender-appropriate" activities may be sanctioned for their absence. For instance, a court affirmed a mother's conviction for failing to protect her son, whom she had left with her husband while she spent about a week tending to her hospitalized daughter. Phelps v. State, 439 So. 2d 727, 730-31, 737 (Ala. Crim. App. 1983).

In contrast, courts appear reluctant to terminate fathers' parental rights in cases where men are absent when abuse occurs because of job-related activities. Compare Nash-Putnam v. McCloud, Appeal No. 01-A-01-9407-CV00348, 1995 WL 1692, at *1 (Tenn. Ct. App. Jan. 4, 1995) (affirming trial court's approval of custody for foster parents where mother failed to protect daughter from father's sexual and physical abuse that occurred while she was at work), with State v. R.W.H. (In re M.H.), 859 S.W.2d 888, 891, 897 (Mo. Ct. App. 1993) (allowing father to retain parental rights where "life-threatening" injuries resulting from multiple events occurred while father was looking for work and mother was caring for child).

[115] When mothers must return to work without adequate child care, abuse is facilitated. See Jo Ann C. Gong et al., Child Care in the Postwelfare Reform Era: Analysis and Strat-

In *State v. Morrison*,[116] the court determined that Gloria Morrison, although working at a nursing home at the time of the abuse, should have sought medical care after noticing her daughter's injuries.[117] After the injuries occurred, however, Morrison had called home from her job to inquire about her daughter's condition, and her boyfriend had assured her that the injuries were minor.[118] In affirming her conviction, the court implicitly blamed Morrison for not being home with her child to see that her injuries were worsening. Such a view hardly comports with working women's need to support their families. It also punishes Morrison despite the fact that she was a good enough parent to notice the injuries: A "worse" parent who did not see them might have been better off (unless, of course, that parent was expected, as discussed in Part II.B.2, to know intuitively that something was wrong).

At the same time, this myth of men's financial role diminishes the "family-like" nature of a man's relationship to his partner's children, without which courts will not find a legal duty to protect.[119] For example, in *State v. Myers*,[120] the court found that Christopher Myers could not be held responsible for failing to protect his girlfriend's children from her abuse because his role in the household was merely financial.[121] For the six months prior to the baby's death, Myers lived with the family, contributed a monthly sum toward expenses, babysat,

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egies for Advocates, 32 Clearinghouse Rev. 373, 373 (1999) (noting importance of child care in helping women obtain adequate work). But see Margaret Stapleton, The Unnecessary Tragedy of Fatherless Children: Welfare Reform's Opportunities for Reversing Public Policies That Drove Low-Income Fathers Out of Their Children's Lives, 32 Clearinghouse Rev. 492, 493 (1999) (suggesting need to focus on policies less hostile to including low-income fathers in children's lives).

116 437 N.W.2d 422 (Minn. Ct. App. 1989).

117 See id. at 424-26.

118 See id. at 424.

119 Compare State v. Wyatt, 482 S.E.2d 147, 152-54 (W. Va. 1996) (upholding law that holds live-in girlfriend to be responsible as not unconstitutionally vague), with State v. Myers, 608 N.Y.S.2d 544, 545 (App. Div. 1994) (deeming live-in boyfriend's relationship not "familial" enough to warrant liability). Although the *Wyatt* court reversed and remanded the case due to improper jury instructions, it found that the live-in girlfriend could be considered a "custodian" to her boyfriend's two sons, one of whom was allegedly beaten to death by his father. See *Wyatt*, 482 S.E.2d at 151, 152 n.5, 153 (citing W. Va. Code § 61-8D-2 (1988)).

120 608 N.Y.S.2d 544 (App. Div. 1996) (finding that boyfriend had not assumed responsibility for children).

121 Id. at 545. The line between a "financial" and a "familial" role appears to be a fine one in New York. Following *Myers*, several other decisions—while distinguishable—have suggested that certain actions, such as marrying a parent or calling a child one's "stepchild," may be enough to trigger liability. See People v. Carroll, 715 N.E.2d 500, 500 (N.Y. 1999) (finding that "evidence supported an inference that [defendant stepmother] was acting as the functional equivalent of [deceased child's] parent"); People v. Sheffield, 697 N.Y.S.2d 269, 270 (App. Div. 1999) (holding evidence sufficient to establish that live-in

bought food, took care of administrative tasks, and was reported in the household for food stamp purposes.[122] Despite this laundry list of family-like activities, the court focused on the fact that Myers never characterized himself as the children's father, nor entertained the notion of having responsibility for them.[123]

Although this Note has divided the failure-to-protect case law into three general stereotypes, in reality these gendered expectations often merge together, rendering a woman all the more blameworthy for not sacrificing everything, not knowing enough about her children, and leaving her children while she works. Casey Campbell was working at the time of her daughter's injuries and was too scared to seek immediate assistance for fear of her boyfriend's violent tendencies.[124] But a good mother, it seems, should have been at home with her children in the first place, and then certainly should have left her boyfriend to get immediate care. Because these stereotypes meld together and work beneath the surface, it is necessary to focus efforts for change on ways to eliminate undue judicial discretion, which perpetuates these stereotypes, as well as to raise awareness about the special contexts of women living with abusive partners.

III
HEAVY DUTY: EXPANDING AND CONTRACTING LIABILITY

This Note proposes several measures to improve upon failure-to-protect laws, suggesting an increase in the scope of duty under failure-to-protect statutes (an increase that would comport with the already expanding scope of duty under such laws).[125] Such changes would eliminate some of the judicial discretion that allows gendered expecta-

boyfriend, who took mother and child into his apartment and referred to child as his "stepdaughter," had assumed responsibility for child's care).

122 *Myers*, 608 N.Y.S.2d at 545.

123 See id.; cf. People v. Berg, 525 N.E.2d 573, 575-76 (Ill. App. Ct. 1988) (reversing boyfriend's conviction for endangering welfare of child because "[h]e stated that the minor was [the mother]'s child and that he left her care up to her"); People v. Lilly, 422 N.Y.S.2d 976, 983 (App. Div. 1979) (Simons, J., dissenting) (finding that live-in boyfriend with "sincere good intentions" did not assume duty by living with mother, sharing expenses, or even hoping to adopt child some day, because "mother was present to care for her, she had sought medical attention for her in the past and was fully capable of obtaining care for her before she died").

124 See supra notes 1-6 and accompanying text.

125 While broadening the duty might seem to result in more judicial discretion, providing legislative guidance to the judiciary through statute will narrow that discretion. A broader scope of duty should hold more men responsible, while a narrower list of expectations should ameliorate the gender-specific burdens on women.

tions to flourish as well as make for a more just law by allowing an affirmative defense for all defendants.

Predictable rule-based regimes aid in eliminating gender disparities by curtailing courts' discretion.[126] Thus, statutes should spell out specifically and narrowly what conduct is required of a covered person. Legislatures should broaden the scope of the duty in failure-to-protect statutes to reflect the growing number of nontraditional families, delineate what actions must be taken when a person becomes aware of abuse, and consider providing an affirmative defense.

A. Expansion of the Duty to Protect

Failure-to-protect statutes that include a narrow definition of persons who may be held liable for passive child abuse should be broadened.[127] Instead of limiting such duty to legal custodians of children,[128] statutes should employ language such as "persons who are placed in control and supervision of a child."[129] This language would allow courts to interpret more freely whether persons without an established legal relationship to the child have assumed responsibility

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[126] See Becker, supra note 34, at 22 ("[L]ess discretionary standards are better than discretionary standards to the extent they provide protection for a group against whom judges are likely to be biased."). But cf. Czapanskiy, supra note 64, at 273 ("Eliminating discretion totally will not eliminate gender-based discrimination, however, because statutes cannot be written that control or pre-determine every credibility issue or interpretative possibility.").

[127] See Becker, supra note 34, at 21 ("Vis-à-vis a child, all adults in the child's household should be responsible civilly, criminally, and morally."); Schernitzki, supra note 18, at 51 ("In general, the adult in a household should be responsible for injury to the child if they knew or should have known about the abuse."). But see Jonathan J. Cordone, Note, Protecting or Handicapping Connecticut's Children: *State v. Miranda*, 32 Conn. L. Rev. 329, 330 (1999) ("While the court may have had good intentions in creating [a] new duty [to protect children from abuse], its ruling creates more problems than solutions.").

Courts have found that the reality of family life requires a broader scope of duty. The court in People v. Carroll, 715 N.E.2d 500 (N.Y. 1999), interpreted the New York statute to hold responsible "any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child," a definition the court deemed specifically intended to include paramours. Id. at 502. The court suggested that this expanded standard "takes into account the modern-day reality that parenting functions are not always performed by a parent," and acknowledged that "a person who is not a child's biological parent can play a significant role in rearing the child." Id.

[128] Failure-to-protect statutes target only those persons with a legal duty to the child. As discussed earlier, see supra note 37, a parent, stepparent, or other legal guardian clearly has that duty. Statutes should include language broad enough to include those who have taken on the care of and responsibility for a child even where no in loco parentis relationship has been created.

[129] Commonwealth v. Kellam, 719 A.2d 792, 796 (Pa. Super. Ct. 1998) (holding live-in boyfriend responsible for death of girlfriend's daughter because she was placed under his "control and supervision").

for that child.[130] Judicial interpretation of such language should not be too broad, however. Such limitless duty could dissuade those persons who are in the best position to know about child abuse from reporting it for fear of criminal or civil liability.[131]

In interpreting the statutes, courts should downplay tasks that traditionally fall to women—such as changing diapers, cooking, and cleaning—in determining who has assumed responsibility for the child, as such considerations could perpetuate gender disparities. Some important factors for nonparents might be (1) cohabitation for a certain period of time,[132] (2) time spent with the child without the parent present, and (3) whether another adult with a closer relationship to the child (besides the abuser) has knowledge of the abuse.[133] Such a line of questioning would place responsibility on the shoulders of a live-in lover who accepted a duty to the child by choosing to spend time alone with the child when no other adult was there to provide assistance. It would not, however, implicate neighbors or roommates or one-night stands. Although this suggestion would expand the number of persons (and thus the number of women) who *could* be held liable, the remaining suggestions focus on ways to ensure that

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130 See Commonwealth v. Brown, 721 A.2d 1105, 1107 (Pa. Super. Ct. 1998) (rejecting interpretation of duty under which "stepparents, grandparents, adult siblings, adult roommates, [and] life partners . . . *could not* be prosecuted for endangering the welfare of a child").

131 State v. Miranda, 715 A.2d 680, 693 (Conn. 1998) (McDonald, J., concurring in part and dissenting in part). Justice McDonald feared that failure to protect would extend beyond cases where a live-in lover failed to intervene in gruesome abuse and into cases where that person merely failed to seek medical attention or to report suspected child abuse to the authorities. Id.

Such a wide scope of liability could cause more harm than good. It could discourage persons who are in the best position to know whether a child has been abused from informing appropriate authorities and could also discourage persons from acting like caretakers in order to avoid liability. Id. at 694, 700 (Berdon, J., dissenting); see also State v. Wilson, 987 P.2d 1060, 1072 (Kan. 1999) (refusing to extend duty of care to "every circumstance which would arguably protect children" because "[i]f we carry the State's requested interpretation of the statute in this case to its logical extension, anyone without any authority, custody, or control over a child or its abuser is criminally liable for failing to attempt to stop or report known abuse").

132 Cohabitation does not require a romantic relationship in this scheme. If such a duty included the subsequent two factors, it would obviate concerns about expanding the liability too far.

133 This third factor might lessen the necessity of the cohabitant taking on the duty. One court noted in dicta that a nonabusing parent had a greater responsibility to prevent such abuse because he or she is the "only advocate for the child" in the household. Muehe v. State, 646 N.E.2d 980, 984 (Ind. Ct. App. 1995) ("Due to the added problems inherent in a parent-child abuse situation, the nonabusing parent, as the only advocate for the child, has a greater responsibility to prevent such abuse when it becomes or should have become evident to that parent.").

women are not overrepresented due to gender stereotypes or as a result of failure to act due to dangerous situations.

B. Delineation of What Actions Must Be Taken

Failure-to-protect laws should list measures that persons should take when they become aware that a child to whom they have a duty is being abused.[134] Such a list would prevent factfinders from placing heavier expectations on women than on men and would serve as notice to defendants. A person should not be expected to do the impossible or the foolhardy: The state should not regulate the strength of "maternal instinct" or the lengths to which such mythic force will drive women. Plausible measures include promptly notifying authorities of injuries, seeking medical care for a child, and removing a child from the abusive circumstances and future abuses if possible.[135] Nonetheless, courts should recognize that even these steps may not be possible if a person is in an abusive relationship and fears for her own or her children's safety.

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134 Because of the special problems raised in this country by imposing affirmative duties, commentators suggest that the issue of how much one is supposed to do in response to a threat, such as child abuse, is best left for legislators rather than judges. See Paul Robinson, Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States, 29 N.Y.L. Sch. L. Rev. 101, 104 (1984) (suggesting that legislature is appropriate body to determine, in cases of imposing affirmative duties on persons, how much society expects from such persons); see also *Miranda*, 715 A.2d at 694, 699 (Berdon, J., dissenting) (calling for courts not to decide by "judicial fiat" difficult matters with which legislature ought to deal, including what steps paramour must take before liability is invoked where live-in boyfriend faces failure-to-protect charge). In addition to the issue of institutional competency, a defined set of measures will prevent overly broad judicial discretion.

135 See *Miranda*, 715 A.2d at 700-01 (quoting discussion around failed passage of bill related to failure to protect that suggested possible duties could include range of activities from "reporting a risk of abuse to the department of children and families" to "more active measures, such as concealing a child from a custodial parent if necessary . . . or . . . withholding a child from a parent suspected of abuse" (internal quotation marks omitted)); see also Becker, supra note 34, at 21 ("Adults in a household should be responsible . . . if they . . . could have taken steps to prevent the abuse by leaving with the children or reporting the abuse to the authorities."); Schernitzki, supra note 18, at 51 ("The adult could leave the home with the children, report the abuse to the proper authorities, or obtain a restraining order or divorce from the perpetrator.").

Of these suggestions, it is important to impose reasonable requirements, such as those suggested in the text, rather than more stringent requirements. More stringent requirements would encourage those who are in the best position to be aware of child abuse to do nothing for fear that their attempted actions would not be "good enough" to avoid either losing their children or facing criminal liability. See infra note 152.

C. *Affirmative Defenses*

Failure-to-protect laws should not punish persons with a reasonable belief that any action would be more dangerous than inaction.[136] All states should codify affirmative defenses so courts may look into the special circumstances of each case.[137] The states that already have affirmative defenses employ simple language. The Iowa failure-to-protect statute states: "[I]t is an affirmative defense to this subsection if the person had a reasonable apprehension that any action to stop the continuing abuse would result in substantial bodily harm to the person or the child or minor."[138] This language is adequate, but quibbles could arise over the meaning of "reasonable apprehension." One of the difficulties battered women face in the court system is that they are not seen as reasonable.[139] An interpretation that looks to a "reasonable battered woman" could eliminate this problem and allow courts the opportunity to focus on the entire context of a woman's situation.[140] Because it may be difficult for judges to put themselves

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136 For a discussion of the intersection between failure to protect and BWS, see supra note 30 and accompanying text.

137 For examples of such affirmative defenses, see supra note 27 and accompanying text; see also, e.g., FTPWG, supra note 9, at 866 (advocating that New York State Legislature adopt "battered woman defense").

138 Iowa Code Ann. § 726.6 (West 2000). The Oklahoma and Minnesota statutes are similar. See Minn. Stat. Ann. § 609.378 (West 2000); Okla. Stat. Ann. tit. 21, § 852.1 (West 2000).

An unsuccessful amendment to New York's failure-to-protect statute, proposed to the New York State Legislature in 1994, had a more expansive defense, excusing persons with "a reasonable expectation, apprehension or fear that acting to stop or prevent such abuse would result in substantial bodily harm to parent or other person legally responsible for the care of the child." A. 11870, 208th Sess. (N.Y. 1994).

139 See supra note 67 and accompanying text. As one commentator noted: "The reasonable person standard views the world from the eyes of the middle-class, white male, a person often equated with power. The typical victim . . . is a poor, minority, and often powerless woman." Deborah Zalesne, The Intersection of Socioeconomic Class and Gender in Hostile Housing Environment Claims Under Title VIII: Who Is the Reasonable Person?, 38 B.C. L. Rev. 861, 864-66 (1997) (proposing alternative standard to reasonable person—or reasonable woman—standard for Title VIII claims).

140 A lengthy debate has centered on the idea of reasonableness, focusing on whether to consider conduct from the perspective of the reasonable person (a hypothetical average person), the reasonable woman (a typical woman who may react differently to situations than most men would, but whose reactions are comparable to those of other women), or the reasonable battered woman (a typical battered woman, dealing with the special context of abuse). See, e.g., Martha Chamallas, Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation, 1 Tex. J. Women & L. 95, 102-03 (1992) (reviewing debate surrounding reasonable woman standard); Mary Ruffolo Rauch, Rape—From a Woman's Perspective, 82 Ill. B.J. 614, 618 (1994) (addressing reasonable woman standard in rape cases); Lynn Dennison, Note, An Argument for the Reasonable Woman Standard in Hostile Environment Claims, 54 Ohio St. L.J. 473, 473-74 (1993) (addressing standard in hostile work environment claims); Steffani J. Saitow, Note, Battered Woman Syndrome: Does the "Reasonable Battered Woman" Exist?, 19 New Eng. J. on

in women's situations, these legislative changes also require an effort on the part of the judiciary to become better educated about—and more sympathetic to—these special contexts.

D. *Increasing Awareness*

Numerous judicial task forces have recommended that judicial education can be a powerful force for eliminating any lingering biases and educating judges about the dynamics of domestic abuse.[141] Such education can help judges understand how gendered stereotypes and societal notions affect their thinking about decisionmaking.[142] One such program, for example, spent two days discussing three general topics:

> (1) an exploration of the principles of equality in the substantive law, (2) an investigation of the systemic social and economic conse-

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Crim. & Civ. Confinement 329, 354-56, 366-70 (1993) (addressing standard in domestic violence claims); see also Babcock et al., supra note 17, at 1321 (discussing debate in feminist community about whether to use modified standards of self-defense).

Some commentators argue against the use of a reasonable person standard, even as modified to focus on the perspective of a woman or a battered woman. See Holly Maguigan, Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals, 140 U. Pa. L. Rev. 379, 444-45, 447 (1991) (noting that standard "invites courts to prevent the fair trials of women who are not 'good' battered women" and that it "is not likely to guarantee fair trial or good outcomes" in cases of battered women who kill); Zalesne, supra note 139, at 864 (suggesting that reasonable woman standard essentializes women and ignores differences based on class and race); Misty Murray, Note, *People v. Humphrey*: The New Rules of Self-Defense for Battered Women Who Kill, 27 Sw. U. L. Rev. 155, 156 (1997) (arguing against "subjective" standard of reasonable battered women in nonconfrontational situations, such as those involving sleeping victims, as it "cannot be legally justified").

This topic merits a lengthy discussion of its own, outside the scope of this Note. For now, it is important for advocates first to seek affirmative defenses and then to determine whether their application suggests the need for a different standard of reasonableness.

141 See, e.g., Report of the Missouri Task Force on Gender and Justice (1993), reprinted in 58 Mo. L. Rev. 485, 523 (1993) [hereinafter Missouri Report] ("[T]he gains that can be made with good training are so substantial that regular, in-depth training for [judges, prosecutors, court personnel, and law enforcement officials] is one of the most significant steps that can be taken."); Report of the Oregon Supreme Court Task Force on Racial/Ethnic Issues in the Judicial System (1994) [hereinafter Oregon Task Force], reprinted in 73 Or. L. Rev. 823, 898 (1994) (recommending that Oregon State Bar require as part of mandatory Continuing Legal Education requirement that all lawyers certify completion of at least three hours of cross-cultural diversity training during each reporting period); see also Epstein, supra note 68, at 44 (recounting examples of success of required formal training for judges on intimate abuse); Ellen S. Podgor, Lawyer Professionalism in a Gendered Society, 47 S.C. L. Rev. 323, 344 (1996) (pointing to problems of gender bias in system and suggesting professionalism seminars to ease it); Mayer, supra note 65, at 111 ("Gender bias task forces for state and federal courts have concluded that judicial education is the most vital and effective tool for correcting gender bias.").

142 See Mahoney, supra note 64, at 814 ("Deeply held cultural attitudes and beliefs about the 'proper' roles for women and men must be examined and challenged when they interfere with the fair and equitable administration of justice.").

quences of sex discrimination, particularly in terms of violence and poverty, and (3) an exposé of the consequences individuals experience because of gender inequality and gender bias in the courts.[143]

It is only by understanding women's lives that those in the legal system can judge fairly what a woman ought to have done. Such training also will encourage courts to be more aware of the influence of stereotypes and police themselves accordingly.[144] When cases implicate stereotypes—such as the race, class, and gender stereotypes inherent in one's notion of a "good mother"[145]—courts must be taught to be wary.

CONCLUSION

Failure-to-protect law is flawed. This Note suggests some ways to ease the problematic enforcement of this law against women. Yet the suggestions may raise some problems of their own. First, although legislators can create a duty where it otherwise would not exist, expanding the reach of any affirmative duty—particularly when it creeps into family life—is controversial.[146] But the expansion of duty suggested above does not mean that "all adults residing with minor children are *automatically* criminally liable,"[147] but rather that they are

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[143] Id. at 816. Another suggestion is for judges to have "cross-cultural competence," including

> (a) the capacity to understand and appreciate different values, languages, dialects, cultures and life styles;
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> (b) a capacity for empathy that transcends cultural differences;
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> (c) avoidance of conduct that may be perceived as demeaning, discourteous, or insensitive to persons from other cultural groups; and
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> (d) a critical understanding of stereotyped thinking and a capacity for individualized judgment.

Suellyn Scarnecchia, State Responses to Task Force Reports on Race and Ethnic Bias in the Courts, 16 Hamline L. Rev. 923, 935 (1993) (discussing judicial, staff, and attorney training in response to state court reports of racial and ethnic bias).

[144] See, e.g., Missouri Report, supra note 141, at 523 (recommending "more frequent and more effective training" on domestic violence for judges in order to make judges more sensitive to problems domestic violence victims face); Peterson, supra note 65, at 616 ("[Elimination of racial bias may be achieved b]y *education, education, and more education*. By education of judges . . . to make them aware of, and sensitive to, the manifold ways in which bias or lack of cross-cultural understanding creeps into conduct." (quoting Oregon Task Force, supra note 141, reprinted in 73 Or. L. Rev. 823, 845 (1994))).

[145] See supra Part II.B.

[146] See S. Randall Humm, Comment, Criminalizing Poor Parenting Skills as a Means to Contain Violence by and Against Children, 139 U. Pa. L. Rev. 1123, 1145 (1991) ("[A] governmental order to act is considered far more intrusive than a demand to refrain from engaging in proscribed conduct. When the duty concerns family relationships, the degree of intrusiveness is even greater.").

[147] Commonwealth v. Brown, 721 A.2d 1105, 1108 (Pa. Super. Ct. 1998).

not outside the scope of failure-to-protect laws per se.[148] In addition, the limits suggested above should avoid any problems of vicarious liability attaching to neighbors, one-time visitors, and those in an ever-widening circle of acquaintances.[149]

A more difficult problem is that the persons to whom the duty will be stretched may not be able to help the abused children.[150] The delineation of how to fulfill one's duty could solve this problem if it is made clear that a legal impediment to action is just as recognizable as the physical impediment of a batterer and a woman's fear of leaving him.

Society has yet to squelch race, class, and gender discrimination. Any extension of liability in a field already unduly affected by such beliefs likely will result in less fair trials for persons of color, persons of lower socio-economic status, and women—no matter how strictly a law is formulated.[151] Increasing the awareness of those in the criminal justice system about the pernicious effects of race, class, and sex stereotypes should help prevent the more egregious examples of bias.

A final and perhaps intractable problem is the debate over whether the criminalization of failure to protect is the best route to ensuring child safety,[152] in light of the fact that women who fear criminal prosecution (or a family court proceeding severing ties with their children) may not take the positive steps of reporting abuse, seeking medical care, or pursuing civil or criminal remedies to stop the

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148 The prosecution still would have to establish that the adults knew of the abuse, had the duty of care, and neglected to fulfill that duty without a good reason.

149 To some extent, however, if persons are aware of abuse—regardless of their relationship to a child—it is not unfair to expect them, at the very least, to inform the authorities of the abuse. See supra note 130 and accompanying text.

150 See Hawkins v. State, 891 S.W.2d 257, 263 (Tex. Crim. App. 1994) (en banc) (Miller, J., dissenting) ("The majority's decision imposes unfair and unrealistic responsibilities on persons without giving them any legal recourse."); see also Leet v. State, 595 So. 2d 959, 965 (Fla. Dist. Ct. App. 1991) (Patterson, J., concurring) (noting that live-in boyfriend "could not, *by himself*, legally prevent the abuse").

151 See supra notes 66-67 and accompanying text.

152 Cahn, supra note 53, at 826-27 ("Where there really is abuse, then perhaps the criminal justice system really needs to get involved. Where neglect is involved, we should, perhaps, move to decriminalization, relying instead on civil remedies and actions . . . [including] provid[ing] sufficient financial support so that women can escape abusive situations with their children."). In response to a commentator's criticism of a failure-to-protect trial she oversaw, prosecutor Kathryn L. Quaintance admitted that criminalization might not be the best answer: "I agree . . . that it would be far preferable to intervene in a dysfunctional family unit such as this one at an earlier stage. I agree that the system should assist a battered woman in protecting her children." Kathryn L. Quaintance, Response to V. Pualani Enos's "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children," Published in Volume 19 of the Harvard Women's Law Journal, 21 Harv. Women's L.J. 309, 312 (1998).

abuse.[153] At the very least, society should devote resources to eradicating the factors that lead to abuse, such as by providing better social and financial support for families designed to prevent abuse.[154] Until society chooses to give such preventative support, however, advocates should work to make a flawed law better.

Clearly delineating the duty to protect, and who has that duty, will reduce the discriminatory way in which the failure-to-protect law is applied. Additionally, an affirmative defense will result in greater consideration for the unique situations many women face. By improving failure-to-protect laws, we can ensure that adult caregivers of both sexes assume responsibility for children, while not expecting an unfair and unreasonable effort from half of them.

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153 See Murphy, supra note 54, at 722 ("Prosecuting mothers for abuse is not the most effective way to protect children.").

154 See id. at 722-23 (arguing for decriminalization in all but most extreme cases of abuse). A highly publicized case in New York underscores the problem. In May 2000, a five-year-old girl was found dead in her apartment despite "a long history of complaints to the city's child protective services." Nina Bernstein, Girl's Death Underscores Complexity of Child Welfare, N.Y. Times, May 21, 2000, § 1, at 37. Despite the initial public outcry, the case was described as "more typical of thousands of needy children in the agency's purview who are at risk not because their parents are bad, but because they are overwhelmed." Id. One problem is the agency's "failure to mobilize its preventive services program to help such families cope with their burdens and to stand ready to step in if assistance does not work." Id.