

**FINDING FAVOR: A CALL FOR COMPASSIONATE  
DISCRETION IN CASES OF BATTERED MOTHERS WHO  
FAIL TO PROTECT**

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ABSTRACT

*Domestic violence is a complex issue facing millions of families in the United States. The structure of the law (as well as the mechanics of the criminal justice system) frequently penalizes women who are also victims of domestic violence by subjecting them to criminal culpability, along with their abuser, when an abusive partner harms their children. This is because criminal culpability extends to acts of omission on the part of caretakers who observe abuse or have reason to believe that abuse is occurring. As a result, victims become perpetrators when women who experience domestic abuse fail to leave their abusers in time to save their children. Failure to intervene can even result in women being charged with murder for the deaths of their children at the hands of their abuser, even if they did not participate in the acts leading up to death. Yet, women who are experiencing domestic abuse face unique struggles that complicate their ability to leave their abusers or even recognize abuse that may become fatal before it is too late. The law is ill equipped to handle this dilemma, and women are being charged and sentenced along with their abusive partners.*

*This Note explores notable, recent examples of women who were either charged with the failure to protect their children from abuse, or with murder for failing to prevent the deaths of their children. Many scholars, practitioners, and law students have proposed solutions to this issue with varying degrees of success. This Note aggregates and*

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*explores some of those solutions, and argues for greater use of prosecutorial discretion in charging these women as a necessary piece of the puzzle.*

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#### INTRODUCTION: COMPLICIT MOTHERS AND THE HEAVY BURDEN OF BLAME

We all know that child abuse is a crime. When someone harms a child—any child, but especially their own child—we expect the law to hold that person accountable. Although everyone agrees that inflicting harm on children is wrong, what

about a person who observes abuse but fails to intervene? In all but a few states, this is also a crime.<sup>1</sup> Although that conclusion seems anything but controversial, what do we do when the bystander who allowed this to happen is also a victim of the same violence? Individuals who allow their children to be abused can be charged with a crime, even if they never directly participated in the abuse.<sup>2</sup> Further, these individuals are often charged with murder for failing to prevent the deaths of their children, regardless of whether or not they participated in the acts leading up to the child's death.<sup>3</sup> The people in these situations are overwhelmingly women, and the women charged under these laws are disproportionately marginalized women of color.<sup>4</sup> The law often allows affirmative defenses for individuals who commit a wrong if they can prove they were justified,<sup>5</sup> but what kind of justifications could a mother possibly raise to explain why she would fail to protect her child? Moreover—what if proffering a sufficient justification is not the real issue?

In all of the cases outlined in this Note, there was at least some evidence that the mother was a victim of abuse.<sup>6</sup> Sometimes only a limited amount of that evidence was presented to the

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1. See Amanda Mahoney, Note, *How Failure To Protect Laws Punish the Vulnerable*, 29 HEALTH MATRIX 429, 436 (2019); see also Alex Campbell, *States with Specific Failure-to-Protect Statutes*, BUZZFEED NEWS (2014), [https://s3.amazonaws.com/buzzfeed-media/Images/2014/09/buzzfeed\\_new\\_failuretoprotectlaws.pdf](https://s3.amazonaws.com/buzzfeed-media/Images/2014/09/buzzfeed_new_failuretoprotectlaws.pdf); Alex Campbell, *These Mothers Were Sentenced to at Least 10 Years in Prison for Failing To Protect Their Children from a Violent Partner*, BUZZFEED NEWS (Oct. 2, 2014, 9:51 PM), <https://www.buzzfeednews.com/article/alexcampbell/these-mothers-were-sentenced-to-at-least-10-years-for-failin> (providing an overview of recent cases where mothers complicit in child abuse were criminally charged with the failure to protect their children) [hereinafter Campbell, *Failing To Protect*]. For a discussion of mothers who are charged with the murder of their children at the hands of their partner, see the story of Pauline Zile *infra* text accompanying notes 53–82.

2. See 23 PA. CONS. STAT. ANN. § 6303 (b.1) (2020) (including within the definition of “child abuse” any “act or failure to act” which leads to the harm of a child).

3. See *infra* Part I.

4. See Sarah M. Buel, *Effective Assistance of Counsel for Battered Women Defendants: A Normative Construct*, 26 HARV. WOMEN'S L.J. 217, 236 (2003); see also Mahoney, *supra* note 1, at 441.

5. See Mahoney, *supra* note 1, at 459.

6. See *infra* Parts I, V.

jury at trial.<sup>7</sup> Many of these mothers claimed that the abuse they suffered prevented them from seeking help for their children.<sup>8</sup> The narrative of a woman trapped in a cycle of abuse—too afraid to leave, too tired to fight back—is familiar Hollywood fodder.<sup>9</sup> Yet, when these stories are brought to life through real people, a disturbing pattern emerges: the women that we are so eager to recognize as victims in fiction are cast as villains in real life.<sup>10</sup> While many legal solutions to this dilemma have been proposed, women who are victims of abuse frequently face charges along with their abuser.<sup>11</sup> Because the social and psychological issues battered women face are complex and difficult to understand, it is necessary for prosecutors to exercise discretion in these cases.<sup>12</sup> It is possible that the best course of action in many of these cases is to charge with lesser offenses—or not charge at all—lest the cycle of abuse and trauma be perpetuated.

Part I of this Note identifies various cases from 1994 through 2020 to gain an understanding of the challenges faced by women in the midst of domestic violence and how they struggle to protect their children. Part II outlines the origin of the duty to protect and explores some of the underlying statutory

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7. See *infra* text accompanying notes 64–76; see also Buel, *supra* note 4, at 234–35 (discussing “recalcitrant judges” who struggle to apply the law as it stands to battered women, which is frequently a bar to getting evidence into trial).

8. See *infra* Part I.

9. Numerous films, books, and television shows have featured domestic violence as a central plot element. A notable example is the true story of Francine Hughes. After years of abuse, Hughes set fire to the bed where her drunk ex-husband was sleeping, killing him and destroying her home. The case became infamously known as “the burning bed” case. See, e.g., *The Burning Bed* (NBC television broadcast Oct. 8, 1984); see also Buel, *supra* note 4, at 316–17 (explaining the use of the insanity defense in Hughes’s case, which was novel at that time); Evan Stark, *A Failure To Protect: Unravelling “The Battered Mother’s Dilemma,”* 27 W. ST. U. L. REV. 29, 96 n.132 (2000) [hereinafter Stark, *A Failure To Protect*] (describing the abusive situation that led to Hughes’s violent retaliation against her husband).

10. See *infra* Parts I, V.

11. See *infra* Part I; see also Campbell, *Failing To Protect*, *supra* note 1 (providing an overview of recent cases where mothers complicit in child abuse were criminally charged with the failure to protect their children).

12. See *infra* Parts III, V (focusing on psychological nuances and prosecutorial discretion in the Hedda Nussbaum case, respectively).

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framework and legal theory. Part III presents the psychological backdrop of domestic violence and seeks to understand some of the behavior exhibited by battered women, which typically defies explanation. Part IV covers some solutions that have already been presented by other scholars, including affirmative defenses and changing the scope of duty in failure-to-protect (FTP) statutes to reduce the pressure on women to report. And, finally, this Note proposes another solution: employing the tool of prosecutorial discretion used in the famous case of Hedda Nussbaum.

#### I. PROTECTING THEIR YOUNG: STORIES OF THE MOTHERS WHO FAIL

[E]ven animals protect their young. One of the problems that we have in society is that we . . . tend to lay the blame of everything bad that happens to somebody on somebody else; you know, it's not my fault, it's my father's fault or my mother's fault; it's not my fault, it's my husband's fault. Probably the biggest missing link in our society right now is the idea that we each must take some responsibility for our actions. Things may cause us to go in certain directions, but we ultimately have to each be responsible.<sup>13</sup>

Ostensibly, courts seek to allocate the burden of culpability equally between adult guardians when children are maliciously

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13. State Dep't of Hum. Servs. v. Tate, Appeal No. 01-A-01-9409-CV-00444, 1995 Tenn. App. LEXIS 204, at \*2-3 (Tenn. Ct. App. Mar. 31, 1995) (quoting the May 25, 1993 decision by the Circuit Court for Overton County). Wanda Lee Tate had her parental rights terminated due to the severe physical and sexual abuse inflicted on her children by her husband. *Id.* at \*4. While the account of the children's abuse recounted by the court is chilling, Tate also presented evidence that she, too, suffered abuse and was in constant fear of her husband, which she argued explained her complicity. Mahoney, *supra* note 1, at 442. While this evidence was undisputed, the Tennessee Court of Appeals ultimately upheld the termination of her parental rights. *See id.*

harmed.<sup>14</sup> Scholars and lawmakers often call for a fair distribution of blame among all parties.<sup>15</sup> However, a closer look at the realities of domestic violence reveals that the struggle of abused women is not simply a matter of correctly placing blame.<sup>16</sup> In reality, the complex psychological and social pressures facing domestic violence victims, coupled with laws that seek to protect children, and pit mothers and children against each other in court, result in a gross miscarriage of justice.<sup>17</sup> Consequently, mothers and their children are victimized further by an unpredictable system. This forces women to make impossible choices, which often backfire and result in even greater harm to themselves and their families.<sup>18</sup>

Tondalao Hall is one of these mothers.<sup>19</sup> Her live-in boyfriend, Robert Braxton Jr., regularly subjected her to both physical and mental abuse.<sup>20</sup> He isolated Hall from her friends and family and threatened to take away her three children—two of whom Braxton fathered—if she ever tried to leave him.<sup>21</sup> When she did

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14. See *infra* Part II for a more detailed analysis of how laws are constructed, and courts operate, with equality in theory, but great inequality in practice.

15. Debate rages on both sides of the issue regarding failure-to-protect laws and their application to domestic violence, and a full analysis of the countervailing theories governing culpability is beyond the scope of this Note. See, e.g., Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397, 442–43 (1999) (laying out the basic justifications for holding the passive parent criminally liable: “The parent who fails to protect her child must be held accountable for her omission. . . . The law holds much more attenuated parties . . . responsible for not reporting child abuse. Those with the highest duty and the most special relationship to the child should be accountable as well.” (footnote omitted)). See generally ALAN DERSHOWITZ, *THE ABUSE EXCUSE: AND OTHER COP-OUTS, SOB STORIES, AND EVASIONS OF RESPONSIBILITY* (1994) (outlining familiar arguments for a greater application of personal responsibility in criminal law).

16. See *infra* Part III.

17. See *infra* Part II.

18. See *infra* notes 110–14 and accompanying text. The paradox of women who are required to report abuse, even at their own physical peril, is also explored through the stories of the women throughout Part I.

19. Sarah Kaplan, *A Battered Woman Will Stay in Prison for Failing To Protect Her Kids from Her Abuser. He Was Released 9 Years Ago.*, WASH. POST (Sept. 24, 2015, 7:29 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/09/24/a-battered-woman-will-stay-in-prison-for-failing-to-protect-her-kids-from-her-abuser-he-was-released-9-years-ago/>.

20. *Id.*

21. *Id.*

try to leave, Braxton broke her twenty-month-old son's femur.<sup>22</sup> Hall had been out with her father, trying to find a place to live so that she could move away from Braxton.<sup>23</sup> After leaving her children in Braxton's care, when she returned home she noticed her son's leg was swollen and became concerned.<sup>24</sup> When she brought her son to the hospital with her newborn daughter in tow, the medics found injuries in both children: a fractured femur and twelve fractured ribs on her son and several fractured bones on her daughter.<sup>25</sup> Shortly thereafter, both Hall and Braxton were arrested and charged for abuse.<sup>26</sup> Braxton pleaded guilty to two counts of child abuse and was sentenced to ten years in prison.<sup>27</sup> However, his sentence was suspended, and ultimately he served just two years in jail and spent the rest of his sentence on probation.<sup>28</sup> Hall was charged with enabling child abuse and took a "blind plea"—pleading guilty without an agreed upon sentence—making herself vulnerable to the statutory maximum for her charge.<sup>29</sup> She was sentenced to thirty years in prison.<sup>30</sup> Despite her advocates' best efforts, Hall was denied clemency and failed to convince the court to modify her sentence.<sup>31</sup> Finally, in 2019, the Oklahoma Pardon and Parole Board voted to commute Hall's sentence.<sup>32</sup> She was released on November 8, 2019—fifteen years after she began her sentence and thirteen years after her and her children's abuser went free.<sup>33</sup>

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22. Mahoney, *supra* note 1, at 430; Kaplan, *supra* note 19.

23. Mahoney, *supra* note 1, at 430.

24. Kaplan, *supra* note 19.

25. *Id.*

26. *Id.*

27. *Id.*

28. Aimee Ortiz, *Mother Is Freed After 15 Years in Prison for Father's Abuse*, N.Y. TIMES (Nov. 8, 2019), <https://www.nytimes.com/2019/11/08/us/tondalao-hall-oklahoma-commutation.html>.

29. *Id.*; Kaplan, *supra* note 19.

30. Mahoney, *supra* note 1, at 430.

31. *Id.* at 430–31.

32. Sean Murphy, *Oklahoma Board Recommends Release in Failure-to-Protect Case*, ASSOCIATED PRESS (Oct. 8, 2019), <https://ktul.com/news/local/oklahoma-board-recommends-release-in-failure-to-protect-case>.

33. *See* Ortiz, *supra* note 28.

A case like Hall's, in which the battered mother, who ostensibly tolerated abuse of her children receives a sentence equal to or greater than her abuser, is not altogether uncommon. In fact, case law is replete with stories of abused women prosecuted along with their abusers; essentially, these women are charged and imprisoned for failing to protect both themselves and their children.<sup>34</sup> Hall's case is noteworthy in that her sentence was greater than the actual perpetrator of the abuse, but this is not unheard-of.<sup>35</sup> After Wendy Scroggins's live-in boyfriend abused her and both of her children, which resulted in the death of her daughter, she was sentenced to seventy-five years in prison for enabling child abuse—nearly as long as the abuser's sentence of life in prison.<sup>36</sup> Another mother, Casey Campbell, was convicted of felony child endangerment when her live-in boyfriend, Floid Boyer, inflicted second and third degree burns on her four-year-old daughter while she was at work.<sup>37</sup> Campbell did not immediately seek medical assistance for her daughter because she was too afraid of Boyer to take her to the hospital.<sup>38</sup> Campbell was convicted of felony child endangerment, even though she who was not present at

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34. See, e.g., *Lindley v. State*, App. No. 08-08-00149-CR, 2010 Tex. App. LEXIS 2044, at \*8, \*16 (Tex. Ct. App. 8th Dist. Mar. 24, 2010) (mother sentenced to forty-five years confinement for failing to protect child); ARKANSAS STATE POLICE CASE FORM (2012), <https://www.documentcloud.org/documents/1283064-victoria-pedraza-arkansas-state-police.html#document/p3/a176583> (mother charged with permitting abuse of a minor and sentenced to twenty years). BuzzFeed News covered this issue in a short series of articles about the criminalization of women who are also victims of domestic violence, which profiled Tondalao Hall and many other women. See Campbell, *Failing To Protect*, *supra* note 1; Alex Campbell, *He Beat Her and Murdered Her Son—and She Got 45 Years in Jail*, BUZZFEED NEWS (Oct. 2, 2014, 10:00 PM), <https://www.buzzfeednews.com/article/alexcampbell/how-the-law-turns-battered-women-into-criminals>.

35. See, e.g., *Zile v. State*, 710 So. 2d 729, 731 (Fla. Dist. Ct. App. 1998) (No. 95-2252) (woman charged with first degree murder for affirmative act of husband); D.E. Smoot, *Judge Dismisses Molestation Charges*, MUSKOGEE PHOENIX (Jan. 26, 2007), [https://www.muskogeephoenix.com/archives/judge-dismisses-molestation-charges/article\\_8f225537-29e2-5b08-8fba-aaf4630339ae.html](https://www.muskogeephoenix.com/archives/judge-dismisses-molestation-charges/article_8f225537-29e2-5b08-8fba-aaf4630339ae.html) (referencing a related case in which the husband who sexually abused the children received a fifteen-year sentence while the spouse received a twenty-year sentence).

36. Campbell, *Failing To Protect*, *supra* note 1.

37. *Campbell v. State*, 999 P.2d 649, 653–54 (Wyo. 2000).

38. *Id.* at 658; Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-To-Protect Laws*, 76 N.Y.U. L. REV. 272, 272–73 (2001).



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the time her daughter's injuries occurred.<sup>39</sup> Boyer pleaded guilty to a misdemeanor prior to Campbell's trial.<sup>40</sup>

Even in cases where the mother did not inflict the abuse herself, and does not receive a more severe sentence than the abuser, the penalties are still harsh. Sarah Snodie's 17-month-old-son, Drake, was murdered by her then boyfriend, Donnell McKennie.<sup>41</sup> McKennie "torture[d]" and eventually killed Drake in Snodie's presence.<sup>42</sup> Snodie, herself a victim of abuse at Donnell's hands in the months prior to her son's murder,<sup>43</sup> was convicted of felony child neglect and received a ten-year sentence.<sup>44</sup> In fact, Donnell assaulted Sarah twice on the same day that he killed Drake.<sup>45</sup> Yet, the prosecutor stated at her sentencing: "Sarah Snodie is a very violent person and she should receive the maximum prison sentence for her crimes."<sup>46</sup> And even though Sarah claimed that she was a victim of abuse and unable to stop Donnell, the prosecutor all but denied that Sarah had been a victim, stating:

Donnell McKennie is the person who murdered Drake London, but Sarah Snodie was right there with him every step of the way . . . . Even if there was some measure of truth to what is being said by the people who were advancing domestic violence as a defense in this case . . . don't we expect more than [that] from the mothers of this community, from the parents of this community? Wouldn't we expect more on behalf of Drake London than that which was provided to him by

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39. *Campbell*, 999 P.2d at 653; *Fugate*, *supra* note 38, at 273.

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

41. *Id.*

42. *Id.*

43. Geneva Brown, *When the Bough Breaks: Trauma Paralysis—An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 229 (2005).

44. *Id.* at 190.

45. *Id.*

46. *Id.* (quoting Transcript of Sentencing at 5–6, *State v. Snodie*, No. 97CF0046 (Wis. Dist. Ct. Jan. 21, 1997)).

his mother? Even a mother who's being physically abused by a boyfriend or a husband, wouldn't we expect a mother under those circumstances to do something more than turn her head away when her infant son turns pleading eyes toward her looking for some refuge from the terrible violence that this child experienced?<sup>47</sup>

Indeed, Sarah's unusual behavior only added to the confusion. She told investigators that she left the room twice when Donnell was beating Drake because she couldn't bear to look at her son's eyes pleading for help.<sup>48</sup> And, instead of reaching out and asking for help, or trying to stop Donnell, on the day that Drake died, Sarah attempted to distract Donnell with sex to get him to stop the abuse.<sup>49</sup> Donnell stopped in the middle of sexual intercourse to continue beating Drake.<sup>50</sup> This entire series of events led to the death of her son. Though she attempted to explain that she lived in constant fear and felt completely powerless to stop Donnell and protect her son, Sarah was still deemed "a very violent person," despite never raising a hand to her child.<sup>51</sup>

In addition to being charged with neglect when their children are injured or killed, mothers may also be charged with the murders of their children who die at the hands of abusive partners.<sup>52</sup> Pauline Zile is a notorious example of a mother apparently complicit in the murder of her child by her partner.<sup>53</sup> In September of 1994, Pauline's seven-year-old daughter

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47. *Id.* at 229–30 (footnote omitted) (quoting Transcript of Sentencing at 16–17, *Snodie*, No. 97CF0046).

48. *Id.* at 234–35.

49. *Id.* at 235.

50. *Id.*

51. *Id.* at 190.

52. *See infra* Part II.

53. *See* Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure To Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 579–84 (1998) (summarizing the story of Pauline Zile and the murder of her daughter, Christina Holt).

Christina Holt was beaten to death by her step-father, John Zile.<sup>54</sup> John beat Christina until she convulsed and covered her mouth to stifle her cries until she died, suffocating on her own vomit.<sup>55</sup> Pauline was apparently present during this horror but did little to intervene.<sup>56</sup> Christina's body was hidden in a closet for four days and later buried in the woods behind a Kmart parking lot.<sup>57</sup> To cover up her death, John and Pauline claimed that Christina went missing from a busy flea market bathroom.<sup>58</sup> Pauline appeared on television and tearfully pleaded for the return of her daughter.<sup>59</sup> However, within a week, both parents were charged with Christina's death.<sup>60</sup> The public wondered aloud how on earth a mother could allow this to happen to her child—Christina's death was horrific, and Pauline seemingly did nothing to prevent it.<sup>61</sup>

Pauline was not accused of administering the beating that killed her daughter.<sup>62</sup> Yet, she was still convicted of first-degree murder for failing to intervene, either during or after the crime.<sup>63</sup> Pauline became the object of public ire.<sup>64</sup> The

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54. *Id.* at 580–81; see also Mike Folks, *Zile Murder Trial Winding to a Conclusion*, S. FLA. SUN-SENTINEL (May 14, 1996), <https://www.sun-sentinel.com/news/fl-xpm-1996-05-14-9605130513-story.html>.

55. Jacobs, *supra* note 53, at 581.

56. Stephanie Smith, *Why Was Pauline Zile's Conviction Easier?*, S. FLA. SUN-SENTINEL (Nov. 24, 1996), <https://www.sun-sentinel.com/news/fl-xpm-1996-11-24-9611230246-story.html>; see also Jacobs, *supra* note 53, at 637 n.300. Jacobs points out that one witness at Pauline's trial testified that Pauline attempted to intervene verbally, saying "[t]hat's enough, John," and that "[d]epending on what Pauline observed, it is conceivable that she satisfied her duty [to her daughter] with the statement." *Id.* (citation omitted).

57. Candy Hatcher, *Seeds of Destruction*, PALM BEACH POST, Nov. 20, 1994, at A, 1994 LexisNexis.

58. Jacobs, *supra* note 53, at 579.

59. *Id.*

60. Hatcher, *supra* note 57.

61. See Marego Athans, *2 Pictures Emerge as Slaying Inquiry Focuses on Mother*, S. FLA. SUN-SENTINEL (Nov. 3, 1994), <https://www.sun-sentinel.com/news/fl-xpm-1994-11-03-9411030050-story.html>.

62. Jacobs, *supra* note 53, at 581–82.

63. *Id.*

64. Pauline's behavior was thought to be so heinous that people called for the death penalty. See Jacobs, *supra* note 53, at 583. More than strangers, members of Pauline's own family expressed their rage after Pauline was sentenced to life without parole, saying that she deserved to be beaten to death in prison. *Id.* at 583 n.25.

prosecution painted her as a cold, selfish, mother who chose her new husband over her own flesh and blood.<sup>65</sup> Christina had been living in Maryland with her paternal grandmother and was brought to her mother in Florida only a few months before she was killed.<sup>66</sup> At sentencing, the judge accused Pauline of resenting the financial obligation her daughter brought, suggesting that Pauline wanted to be rid of Christina, even before her death at John's hands.<sup>67</sup> Christina's paternal great-grandfather, Ray Money, said the Ziles deserved to die for what they had done:

"Them people are sick," [Money] said. "They should be put away. They should be put away the same way Christina was—beat to death. I would hang him in a tree and take a club and beat him. Slowly. The way they did her. . . . I want to know the answer to one thing . . . Why? I want to know why them two people did that."<sup>68</sup>

Pauline's failure to intervene on behalf of Christina may have been due to her own abuse by John.<sup>69</sup> However, this was not argued at her trial, despite "readily available" evidence that, outside of the public eye, there was another side to the Zile family.<sup>70</sup> Many who knew Pauline said that she lived under the thumb of her husband.<sup>71</sup> Neighbors stated that the two sons she had with John were not allowed to play with other children and were made to stay indoors at almost all times by their father.<sup>72</sup>

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65. See, e.g., Athans, *supra* note 61; see also Stephanie Smith, *Prosecutor: Doing Nothing Makes Zile Guilty in Death; Rubin Says Pauline Prosecuted Only for Lying to Public on TV*, S. FLA. SUN-SENTINEL (Apr. 4, 1995), <https://www.sun-sentinel.com/news/fl-xpm-1995-04-04-9504040105-story.html>.

66. Athans, *supra* note 61.

67. Stephanie Smith, *Pauline Zile Escapes Death; Sentenced to Life with No Parole*, S. FLA. SUN-SENTINEL (June 8, 1995), <https://www.sun-sentinel.com/news/fl-xpm-1995-06-08-9506070619-story.html>.

68. Hatcher, *supra* note 57 (all errors in original).

69. See Jacobs, *supra* note 53, at 582.

70. *Id.* at 582 n.19.

71. See Athans, *supra* note 61.

72. *Id.*

Her landlord claimed that he was prevented from entering their apartment to perform maintenance because the family was so secretive.<sup>73</sup> Pauline held down more than one job to support the family, while John drifted between jobs, sometimes not working at all.<sup>74</sup> Her friends at work claimed that John always demanded she come home immediately after her shift, and she hardly had a life of her own.<sup>75</sup> However, at trial, only limited evidence was presented to show Pauline's troubled home life.<sup>76</sup> And while Pauline was not the one who delivered the fatal blow to Christina, her trial and sentencing took place expeditiously, and her case was deemed "easier" than John's—even though it was John, not Pauline, who beat Christina to death.<sup>77</sup> Pauline claimed that she was powerless to intervene.<sup>78</sup> In a letter she wrote while in prison awaiting trial, she expressed how deeply she regretted not being able to stop John or call law enforcement in the aftermath of her daughter's death.<sup>79</sup> However, this admission was used against her at trial.<sup>80</sup> The prosecution presented it as evidence that she knew she had a duty to protect her daughter, yet failed to do so.<sup>81</sup> She was convicted of first-degree murder and is currently serving a life sentence.<sup>82</sup>

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73. *Id.*

74. *Id.*

75. *Id.*

76. Jacobs, *supra* note 53, at 583.

77. Smith, *supra* note 56. Legal experts pointed to both John Zile's significantly better funded defense team, and "society's deep-seated madonna [sic] complex" as factors that contributed to the apparent ease of her case in comparison to John's. *Id.* Societal expectations of motherhood and their impact on prosecutions of this nature are discussed *infra* Section II.B.

78. See Marian Dozier, *Mom Says from Prison: "I've Grown Up Now,"* S. FLA. SUN-SENTINEL (May 22, 2001), <https://www.sun-sentinel.com/news/fl-xpm-2001-05-22-0105210546-story.html>.

79. Smith, *supra* note 56; see also Jacobs, *supra* note 53, at 582–83.

80. Jacobs, *supra* note 53, at 583.

81. *Id.*

82. *Id.*

## II. LAYING THE BLAME: FINDING MOTHERS CULPABLE FOR FAILING TO PROTECT CHILDREN FROM ABUSE, INJURY, AND DEATH

For mothers caught in domestic abuse, a lack of violence on their part does not insulate them from blame. Rather than focusing on criminal acts (a *commission* of a crime), prosecutors draw on an omissions theory of culpability, or a *failure* to act, to prove criminal culpability for failure to protect.<sup>83</sup> States can prosecute non-abusing mothers for child abuse or murder committed by the abusive partner based on a parent's common law duty to protect her child.<sup>84</sup> Additionally, many states have adopted statutory schemes, known as the FTP statutes, that criminalize passive conduct on the part of the non-abusing parent.<sup>85</sup> The current state of the law, the social realities that women face as mothers, and the history of the child welfare system all contribute to the unequal burden placed on mothers in the context of domestic abuse.

### A. *The History of the Duty To Protect Children: Child-Savers, the Progressive Era, and Lingering Bias*

The history of FTP statutes began with the development of the child welfare system in the Progressive Era.<sup>86</sup> In the late nineteenth century, crowding and poverty in immigrant communities pushed the issue of child welfare into visibility.<sup>87</sup> These movements were largely female-driven, energized by the philanthropic spirit of feminist reformers.<sup>88</sup> And while much of the leadership of these early movements was male-dominated,

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83. *Id.* at 586–87.

84. *Id.* at 613.

85. See *id.* at 614–15; see also *infra* Section II.B. for an explanation on the statutory basis of FTP.

86. Brown, *supra* note 43, at 224.

87. LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE: BOSTON 1880–1960, at 30 (1988).

88. *Id.* at 32.

these organizations were largely staffed and financially supported by women.<sup>89</sup>

The focus on child welfare emerged to combat the perceived depravity and violence in urban communities, many of them largely comprised of immigrants.<sup>90</sup> The true aim of these organizations was to rescue children from cruelty.<sup>91</sup> However, many of their efforts were bound up with the social concerns characteristic of the time: distrust of emerging immigrant communities<sup>92</sup> and inability to understand the conditions of the working poor.<sup>93</sup> Many of these women were held to standards that were based on white, middle-class mothers.<sup>94</sup> Instead of addressing systemic issues of poverty, “[c]ourts fined and jailed parents and removed [their] children from their homes.”<sup>95</sup>

To this day, women caretakers are generally disproportionately charged and convicted under child welfare statutes.<sup>96</sup> While mothers frequently claim that they are victims of the same abuse their children endured, and they lacked the ability to stop it, they are still charged for their affirmative failure to protect their child.<sup>97</sup> In these instances, the

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89. *Id.* at 35–36.

90. Brown, *supra* note 4e, at 224; GORDON, *supra* note 87, at 27–31.

91. GORDON, *supra* note 87, at 30.

92. For example:

Many of Boston’s earlier residents believed that the immigrants had brought these disasters with them to the new country. Indeed, the MSPCC, like many of Boston’s private charities, did not distinguish the problems of its clients from the clients themselves. As in William Ryan’s analysis of victim-blaming, the immigrant poor often became the problem, rather than people burdened by problems.

*Id.* at 31.

93. Author Linda Gordon notes:

The fit between child-saving and other social anxieties was an historical fact, not a causal explanation. Their concern about children was not merely a mask for intervention whose “real” purposes were other—such as labor discipline. The child protectors were primarily motivated to rescue children from cruelty. However, their own values and anxieties made that cruelty more visible and disturbing than it had once been.

*Id.* at 30.

94. Brown, *supra* note 43, at 224.

95. *Id.*

96. *See id.* at 225–28.

97. *See id.*

intervention by the state does not take into account the background of domestic abuse.<sup>98</sup> While they take steps to remove children from the harmful situation, the courts do nothing to address the abuse to the mother, who is now not only a victim of abuse, but has also experienced the termination of her parental rights.<sup>99</sup> While some states include an affirmative defense for individuals who fear greater harm if they were to intervene, the majority of FTP statutes do not contemplate the reason why an individual might fail to protect a child in his or her care.<sup>100</sup>

### B. Failure To Protect: Unraveling the Statutory Scheme

FTP statutes create an affirmative duty on the part of a caretaker to report or prevent instances of child abuse.<sup>101</sup> All states have enacted some kind of legislation creating this duty, usually included with broader legislation regarding child abuse.<sup>102</sup> The justification behind these laws is clear: children, entirely dependent on adults tasked with their care, deserve to be sheltered from dangerous situations, and the adults who fail to care for them should be held accountable.<sup>103</sup> Ideally, these laws should encourage caretakers to report child abuse and protect children in dangerous situations.<sup>104</sup>

Typical FTP laws will impose liability where: “(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.”<sup>105</sup> Today, all fifty states have some kind of law criminalizing the failure to protect a

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98. *See id.*

99. *See id.* at 233–34.

100. Ricki Rhein, Note, *Assessing Criminal Liability for the Passive Parent: Why New York Should Hold the Passive Parent Criminally Liable*, 9 *CARDOZO WOMEN’S L.J.* 627, 629, 643 (2003).

101. *Id.* at 629.

102. Fugate, *supra* note 38, at 278–79.

103. *See id.* at 273.

104. *Id.* at 302.

105. *Id.* at 279 (footnote omitted).



child from abuse.<sup>106</sup> Thirty-eight states have laws listing the omission of a duty to protect as punishable under their abuse statutes.<sup>107</sup> The remaining states punish willful and intentional conduct on the part of the abuser, but all states impose onto parents “an affirmative legal duty to protect and provide for their minors.”<sup>108</sup>

While the aim of FTP legislation is noble, the tragic reality is that women are disproportionately prosecuted under these laws.<sup>109</sup> Society’s views surrounding motherhood greatly contribute to this inequality in the law.<sup>110</sup> Women are generally expected to be ideal parents, and anything short of perfect self-sacrifice is scrutinized harshly.<sup>111</sup> And “[d]espite recent changes in the structure and economics of family life, the burdens of raising children still fall primarily on women.”<sup>112</sup> Additionally, these statutes emphasize action (or the lack thereof) on the part of the mother but fail to recognize the perils faced by mothers who report abuse under the current state of the law — especially the likelihood that reporting abuse will result in the removal of children from the home and the permanent loss of custody.<sup>113</sup> Additionally, to escape abuse, mothers may risk their very lives by seeking outside help.<sup>114</sup>

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106. *Id.* at 278–79.

107. Brown, *supra* note 43, at 225.

108. *Id.* (quoting V. Pualani Enos, *Prosecuting Battered Mothers: State Laws’ Failure To Protect Battered Women and Abused Children*, 19 HARV. WOMEN’S L.J. 229, 236 (1996)). See generally GORDON, *supra* note 87 (tracing the development of the child welfare system, as well as the social awareness of family violence).

109. Jacobs, *supra* note 53, at 619.

110. *Id.* at 590–93.

111. See *id.*

112. *Id.* at 592.

113. See *id.* at 611–12; see also Fugate, *supra* note 38, at 290–292, 291 n.81 (“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.”) (citing State Dep’t of Hum. Servs. v. Tate, Appeal No. 01-A-01-9409-CV-00444, 1995 Tenn. App. LEXIS 204 (Tenn. Ct. App. Mar. 31, 1995)).

114. Jacobs, *supra* note 53, at 588 (“The unspoken assumption may be that the mother can end the abuse by simply picking up the phone and calling the police. Such assumptions ignore the realities of violence by the significant other. By making such assumptions, the courts are in fact requiring that mothers risk serious bodily injury or death before their duty to act is satisfied.”).

III. WHAT WAS SHE THINKING? EXPLORING THE PSYCHOLOGY OF ABUSE THROUGH BATTERED WOMAN SYNDROME AND COERCIVE CONTROL

This legal backdrop illuminates the plight of many women: the law creates a duty to affirmatively protect children from abuse, and this centers on the mother's ability to act in a way *that courts recognize* as sufficient.<sup>115</sup> However, those caught in the midst of domestic abuse often appear to be complicit in the abuse of their children.<sup>116</sup> At her trial for felony child endangerment, Casey Campbell testified that she left her children alone with her abusive boyfriend, Floid, despite fearing for their safety:

Q. You told Crystal Spaulding yourself that you were afraid to leave [your daughter] alone with Floid because you knew that someday he would hurt her?

A. I may have said that.

Q. Yet you still allowed her to come in contact with Floid. Is that true?

A. Yes, I did.

Q. You don't see anything wrong with that?

A. Yes, I do.<sup>117</sup>

On appeal, the Supreme Court of Wyoming was acutely aware of the disconnect between Campbell's fear for her daughter's wellbeing and her actions, noting:

Despite these fears, Campbell did leave [her daughter] alone with Boyer on the day that Boyer burned the child, and then permitted Boyer's

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115. *See id.* at 651.

116. *See Campbell, Failing To Protect, supra* note 1 (reporting on the prosecution of mothers whose children died from child abuse).

117. *Campbell v. State*, 999 P.2d 649, 659 (Wyo. 2000).

further abuse of [her daughter] by agreeing with him that she would not seek medical care. Inaction, complicity, or permitting child abuse constitutes child endangerment for failing to protect a child from a dangerous situation, and Campbell's testimony establishes she knew that her conduct was prohibited.<sup>118</sup>

In order to understand why a mother in Campbell's situation would behave in this way, this Part explores the psychological backdrop of domestic violence. Although theoretical underpinnings of domestic abuse continue to evolve, this Part addresses two prevailing constructs: Battered Woman Syndrome and the theory of coercive control.

*A. Familiar Constructs: Battered Woman Syndrome, the Cycle Theory of Violence, and Learned Helplessness*

First proposed by Dr. Lenore Walker in *The Battered Woman*, Battered Woman Syndrome (BWS) is a cluster of characteristics which are commonly found in domestic violence situations.<sup>119</sup> BWS is arguably the most familiar construct used to explain domestic violence.<sup>120</sup> Walker identifies BWS<sup>121</sup> as a subset of

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118. *Id.*

119. LENORE E. WALKER, *THE BATTERED WOMAN SYNDROME* 3 (4th ed. 2016) [hereinafter WALKER, BWS]. In her book, Dr. Walker expands on theories first developed in her prior book. See LENORE E. WALKER, *THE BATTERED WOMAN* (1979) [hereinafter WALKER, BATTERED WOMAN].

120. BWS has become a widely-used and oft-discussed concept even outside academic domestic violence scholarship. It has been written about on popular online medical sites, studied by Congress as part of the Violence Against Women Act, and even portrayed in mainstream media. See Zawn Villines, *Battered Woman Syndrome and Intimate Partner Violence*, MED. NEWS TODAY (Dec. 3, 2018), <https://www.medicalnewstoday.com/articles/320747>; Ana Gotter, *Battered Woman Syndrome*, HEALTHLINE (July 5, 2017), <https://www.healthline.com/health/battered-woman-syndrome>; NAT'L INST. OF JUST., *THE VALIDITY AND USE OF EVIDENCE CONCERNING BATTERING AND ITS EFFECTS IN CRIMINAL TRIALS: REPORT RESPONDING TO SECTION 40507 OF THE VIOLENCE AGAINST WOMEN ACT (1996)*; *Law & Order: Blue Bamboo* (NBC television broadcast Oct. 5, 1994) (depicting a defendant asserting BWS as a defense to homicide charges).

121. Even though psychologists' understanding of BWS has shifted and expanded, Walker's work is frequently cited in discussions of domestic violence. Most of the sources about BWS cited herein use Walker's BWS model to understand the behavior of women in domestic

Post-Traumatic Stress Disorder (PTSD).<sup>122</sup> PTSD develops out of exposure to trauma and can result from a single catastrophic experience or repeated traumatic events.<sup>123</sup> Four out of seven of the criteria for BWS overlap with the DSM-5 criteria for PTSD,<sup>124</sup> but Walker carefully clarifies that the psychological symptoms that emerge from victims who experience trauma and violence within an intimate relationship differ from the symptoms experienced by individuals who experience trauma from more external sources.<sup>125</sup> Walker explains the general “fight or flight” response seen in patients with PTSD:

The “fight or flight” response to danger can be seen in each of the different types of trauma responses. . . . [T]he person taking a walk sees a lion, becomes physiologically aroused and wants to protect himself or herself, and if possible, runs away. . . . The response to traumatic events is similar. We call events that can evoke this response in people “trauma triggers.” . . . [T]hey continue to cause the trauma response long after they were present; they are reexperienced in the person’s mind with all the same emotions, as if they were reoccurring.<sup>126</sup>

In BWS, the domestic violence perpetrated by the batterer triggers the fight or flight response of an abused person.<sup>127</sup>

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violence (DV) situations. Those that do not subscribe to BWS as the dominant model still acknowledge Walker’s work as seminal. *See, e.g.,* Buel, *supra* note 4, at 223; Michael Dowd, *Dispelling the Myths About the “Battered Woman’s Defense:” Towards a New Understanding*, 19 *FORDHAM URB. L.J.* 567, 567 (1992); Brown, *supra* note 43, at 197 (using BWS as the paradigm for understanding DV). *But see, e.g.,* Liang & Macfarlane, *supra* note 15, at 431–33 (criticizing Walker’s BWS theory and its application in the context of criminal culpability, but still acknowledging the theory’s dominant place in explaining the behavior of women experiencing DV).

122. WALKER, BWS, *supra* note 119, at 3, 49–50.

123. *Id.* at 51.

124. *Id.* at 50.

125. *Id.* at 51.

126. *Id.*

127. *Id.* at 51–52.

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However, instead of *outwardly* fleeing, the battered woman flees “psychologically.”<sup>128</sup> That is, she engages in avoidant behaviors to deny or minimize the violence that is occurring.<sup>129</sup> As Walker explains:

[T]he typical fear or trauma response of the battered woman triggers her to become hyperaroused and then to psychologically escape using a variety of methods, *including minimization or denial of the danger from the particular incident*, depression, dissociation, or even repression and forgetting. . . . [T]hese are avoidance responses that protect the woman from experiencing the full-blown trauma response. The trauma responses are . . . not consciously employed . . . . In repeated traumas, such as domestic violence or child abuse, where the person does not believe he or she can escape, a pattern is established that permits coping with a minimum of emotional pain.<sup>130</sup>

These avoidant behaviors may partly explain why the women outlined above do not “escape” in predictable ways. Under this theory, they *are* escaping, but in an outwardly invisible way.<sup>131</sup> These women are escaping inward, either to avoid the reality of what is happening or to offer themselves as a shield for their children to placate their abuser.<sup>132</sup>

Further, Walker identifies the significant disruption in personal relationships experienced by battered women; notably, the isolation that they face at the hands of their

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128. *Id.* at 52.

129. *Id.*

130. *Id.* (emphasis added).

131. *Id.*

132. *See supra* text accompanying note 48; *see also* Brown, *supra* note 43, at 239. Snodie’s attempt to use her sexuality as a distraction was an attempt to protect her child; albeit an unconventional one. Brown writes, “[b]attered women do not lack agency, but are limited by their circumstances to fully undertake the means necessary to operate as society expects.” *Id.*

abusers.<sup>133</sup> Abusers socially isolate the victim by controlling the victim's movements or contact with others and threatening violence.<sup>134</sup> Walker recounts the stories of many women who experienced a variety of control tactics from their abusers—from brandishing weapons and threatening to harm themselves or others, to random fits of violence in response to unpredictable triggers.<sup>135</sup> Importantly, many women in these stories reported that their abusers threatened to take away their children as a means of control.<sup>136</sup> Abusers threatened to take the children to a place they would never be found or to call authorities and claim the mothers were unfit parents.<sup>137</sup> The threats and escalating control led to further isolation in the relationship, as the women lost ties to those on the outside who could help her.<sup>138</sup> Further, if the abuser threatened to appeal to an authority, like law enforcement or CPS, the women might be hesitant to reach out and report their own abuse.<sup>139</sup>

### 1. *The cycle theory of violence*

This cycle of violence posits why a woman might be lulled into enduring the abuse in the relationship over a period of time. Many outside the relationship struggle to understand why women stay with their abusers and continually subject themselves (and, often, their children) to dangerous and harmful situations.<sup>140</sup> However, these relationships almost never start out overtly abusive.<sup>141</sup> In fact, they are often initially characterized by extreme love and devotion.<sup>142</sup> This loving

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133. WALKER, BWS, *supra* note 119, at 70; *see also supra* text accompanying notes 69–75. Social isolation is frequently a major component of abusive relationships. *See infra* text accompanying notes 233–43.

134. WALKER, BWS, *supra* note 119, at 70.

135. *Id.* at 71.

136. *Id.*

137. *Id.*

138. *Id.* at 72.

139. *Id.*

140. *Id.* at 30.

141. *Id.* at 94.

142. *Id.*

behavior often turns to stalking and control after a time; but, by that point, the woman has committed to the relationship, and the cycle of abuse begins.<sup>143</sup>

The cycle of violence occurs in three stages: (1) tension building, where the abuse is anticipated, (2) the acute battering incident, where the tension breaks and the abuse occurs, and (3) the loving contrition phase, where the batterer apologizes for his actions and seeks to restore himself to the victim.<sup>144</sup> In this last step of the cycle, but still in the early stages of an abusive relationship, the abuser often claims that the incident of violence was an aberration, never to be repeated.<sup>145</sup> It is not uncommon for couples to separate at this point, only for the abuser to beg for the woman to return, promising to never again become violent.<sup>146</sup> Yet, once the couple reconciles, the cycle resumes.<sup>147</sup> Walker notes that the women in these relationships typically believe that the behavior shown by their partners in Phase 3—the loving contrition phase—is their partner’s true nature.<sup>148</sup> Thus, they are motivated to stay in the relationship and change their behavior “so the *real man* [can] emerge[] once again.”<sup>149</sup>

The women in these relationships often operate under the belief, and subsequent pressure, that they are to blame for separating their families.<sup>150</sup> Additionally, the women fleeing these domestic violence situations may find that their children are taken away from them once the abuse is discovered, even if they are attempting to escape the violence.<sup>151</sup> Further, in this

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143. *Id.*

144. *Id.* at 94–98; Brown, *supra* note 43, at 200.

145. Brown, *supra* note 43, at 201.

146. *Id.*

147. *Id.*

148. WALKER, BWS, *supra* note 119, at 105.

149. *Id.*

150. *Id.*

151. Jannette Brickman, *Victims of Domestic Violence Need Greater System Support*, VERA INST. JUST. (Oct. 28, 2016), <https://www.vera.org/blog/victims-of-domestic-violence-need-greater-system-support>. Brickman outlines the numerous issues faced by women attempting to flee domestic violence. *Id.* She highlights the alarming fact that once CPS becomes involved, the

final stage, women may also minimize earlier stories of abuse or completely recant them.<sup>152</sup> Thus, a woman often accepts responsibility for abuse inflicted on her children, even when she did not cause the injuries.<sup>153</sup> This pressure, coupled with the abuser's apparent contrition, often entices women to return to and remain in the violent relationship.<sup>154</sup>

## 2. *Learned helplessness*

Learned helplessness, a theory developed by Dr. Martin Seligman, theorizes how the cycle of violence keeps victims in abusive relationships.<sup>155</sup> Seligman's theory arose from his experiments subjecting dogs in cages to electrical shocks.<sup>156</sup> The dogs, when subjected to an electric shock on one side of their cage, fled to the other side.<sup>157</sup> Some dogs were exposed to an electrical shock they could not control; both sides of the cage were electrified, and thus those dogs could not escape.<sup>158</sup> The dogs in that group became despondent; once they learned that they could not escape the shock, they simply curled up in their cages and whimpered until the shock ceased.<sup>159</sup> The dogs who were exposed to the uncontrollable shock seemed to lose all desire to avoid it; in fact, when they were presented with a new cage, in which they could flee to the other side and escape the

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woman attempting to flee may lose her children, regardless of whether or not abuse against the children has been directly reported. *Id.* ("Child Protective Services (CPS) can open a case against a victim of domestic violence if they hear of violence occurring in the home, including through a protection order. So even if a mother does not allege abuse against her children, a case could be opened and her parenting, relationship, etc. could be investigated as a case of child neglect." (emphasis added)).

152. Stark, *A Failure To Protect*, *supra* note 9, at 46.

153. See Kaplan, *supra* note 19. Tondalao Hall recanted earlier testimony that she had inflicted injuries on her child, claiming that she originally admitted to causing her son's injuries in order to protect her boyfriend. *Id.*

154. WALKER, BWS, *supra* note 119, at 105.

155. Dowd, *supra* note 121, at 572.

156. *Id.* at 573.

157. *Id.*

158. Martin E.P. Seligman, Steven F. Maier, & James H. Greer, *Alleviation of Learned Helplessness in the Dog*, 73 J. ABNORMAL PSYCH. 256, 257 (1968).

159. Martin E.P. Seligman, *Learned Helplessness*, 23 ANN. REV. MED. 407, 407 (1972).



shock, they declined to do so.<sup>160</sup> Seligman also replicated similar results in other animal groups and in humans.<sup>161</sup>

Walker applied this theory to explain why battered women do not, and cannot, leave their abusers.<sup>162</sup> Applying this dynamic to abusive relationships, Walker concluded that victims trapped in the cycle of abuse come to believe there is nothing they can do to escape the violence.<sup>163</sup> Women in these situations will often take great measures to change their behavior in an attempt to control their abusive partner's behavior.<sup>164</sup> However, once the cycle of abuse has run through a few times, they feel trapped in a pattern they cannot escape.<sup>165</sup> At this point, as the theory goes, the women will cease their efforts to avoid abuse and resign themselves to the pattern.<sup>166</sup> Much like the dogs subjected to an uncontrollable shock in their cages, the women living through a cycle of abuse will not seek to escape—even when it appears (to those outside the relationship) that they can leave.<sup>167</sup>

### 3. *Limitations and criticisms of the BWS model*

In the years since *The Battered Women* was published, Walker's theory has endured a variety of criticisms.<sup>168</sup> Some critics take issue with categorizing the pattern of behavior as a "syndrome," noting that this suggests there is something wrong with the battered woman, as opposed to recognizing the issue

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160. *Id.* at 410.

161. *Id.* at 410–11.

162. Brown, *supra* note 43, at 198; *see also* Dowd, *supra* note 121, at 573.

163. Dowd, *supra* note 121, at 573.

164. *Id.* at 574.

165. "Our research argues that the women trade away their escape skills in order to develop the good coping strategies and, [until they break] the learned helplessness, they will not be able to leave the relationship psychologically." WALKER, BWS, *supra* note 119, at 79.

166. Dowd, *supra* note 121, at 574; *see also* Brown, *supra* note 43, at 198.

167. Brown, *supra* note 43, at 199.

168. *See* Stark, *A Failure To Protect*, *supra* note 9, at 46. It should also be noted that the empirical and statistical foundation of Dr. Walker's work has come under scrutiny in the years since it was first published. *See, e.g.*, Brown, *supra* note 43, at 203.

with the perpetrator of the abuse.<sup>169</sup> Additionally, because the model relies heavily upon the dynamic of learned helplessness, it presents problems for the defense when trying to explain instances of battered women retaliating against their abusers.<sup>170</sup> Others critique that emphasizing the helplessness of the mother can negatively impact the court's perception of her in custody cases where the mother's ability to break ties with her abuser is called into question.<sup>171</sup> In addition, the BWS lens has been criticized for carrying a considerable amount of implicit racial bias<sup>172</sup> and relying heavily on gendered language and sex stereotypes.<sup>173</sup>

Walker herself has responded to these criticisms over the years and acknowledges the advances in the field but ultimately defends her conclusions as sound.<sup>174</sup> She has expanded her research to include studies of domestic violence between partners of various genders and sexual orientations<sup>175</sup> and in families of various nationalities and cultural backgrounds.<sup>176</sup> Walker's cross-cultural domestic violence studies include both women in the United States and residing internationally.<sup>177</sup>

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169. Dowd, *supra* note 121, at 577.

170. *Id.*

171. See Stark, *A Failure To Protect*, *supra* note 9, at 47–51. Stark cites *In re Betty J.W.*, 371 S.E.2d 326 (W. Va. 1988), in which the Supreme Court of Appeals of West Virginia found that a mother failed to protect her children from her husband despite reporting the abuse to the appropriate agency on one occasion, and interceding at the cost of her personal safety on another occasion.

172. See Buel, *supra* note 4, at 235–40.

173. See *id.* at 238–40.

174. See WALKER, BWS, *supra* note 119, at 8. Notably, Selgman and the other doctors who pioneered the study of learned helplessness on which BWS relies have updated their story. They now posit that passivity in the face of trauma is a default reaction, not a learned response. See Steven F. Maier & Martin Seligman, *Learned Helplessness at Fifty: Insights from Neuroscience*, 123 PSYCH. REV. 28–29 (2016). Their new theory does not defeat learned helplessness as it applies to BWS, but Seligman's later research stresses a forward-looking model that focuses on future control of stimuli rather than past trauma, *id.* at 27–29; a theory of “learned optimism.” WALKER, BWS, *supra* note 119, at 76.

175. WALKER, BWS, *supra* note 119, at 76. Walker acknowledges that the nature and structure of domestic violence varies outside of heterosexual relationships, however the basic pattern—using abuse as a means to gain dominion and control over an intimate partner—still persists.

176. *Id.* at 63–73.

177. See *id.*

Despite its critiques, BWS still provides a helpful framework for understanding domestic violence. The basic construct—a pattern of abuse that impacts the victim’s ability to discern reasonable standards of behavior—is frequently utilized.<sup>178</sup> Ultimately, women caught in the throes of domestic violence face unique challenges, and these challenges are exacerbated when children are present.<sup>179</sup> Because the battered woman is already struggling to protect herself—and doing so in a way that is difficult for outsiders to understand—it is no surprise that she struggles even more to protect her children.

*B. Another Construct: Coercive Control and Tangential Spousal Abuse*

An alternative framework, offered by sociologist Evan Stark, focuses on the abusive partner’s “pattern of coercion and control” and its effect on the psychology of the victim, rather than the abuser’s violent acts.<sup>180</sup> Unlike BWS, which focuses on the trauma of the victim, coercive control focuses on the victim’s agency.<sup>181</sup> This model homes in on the behavior of the abuser and his systematic deprivation of the abused partner’s liberty.<sup>182</sup> Stark emphasizes the tactics of coercion and control employed by batterers in order to subjugate their partners, such as stalking, threats, isolation, and controlling material resources.<sup>183</sup> Whereas BWS is often based on the escalation of physical violence, coercive control allows for an examination of domestic violence in situations where the record of physical harm might be thin or nonexistent.<sup>184</sup> This model does not emphasize the

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178. See generally Seligman, Maier & Greer, *supra* note 158; Seligman, *supra* note 159; Maier & Seligman, *supra* note 174; WALKER, BWS, *supra* note 119.

179. See Brickman, *supra* note 151.

180. Evan Stark, *Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control*, 58 ALBANY L. REV. 973, 975–76 (1995) [hereinafter Stark, *Coercive Control*].

181. *Id.* at 975.

182. See *id.* at 986.

183. *Id.* at 983.

184. *Id.* at 985–86; see also Stark, *A Failure To Protect*, *supra* note 9, at 57–58. Stark explains that the escalation of physical violence in battering situations is often poorly documented, and

inability of the battered mother to cope with her situation or respond effectively.<sup>185</sup> Instead, it presents her as someone overcoming the severely limited scope of choices available to her and acting to the best of her ability in a situation she cannot control.<sup>186</sup> “The court is not offered a victim, but asked to imagine what it took to reduce this strong, intelligent, independent woman to the sorry state in which she was found.”<sup>187</sup>

Coercive control eases the difficulty of explaining domestic violence experienced by women who do not appear as stereotypical victims.<sup>188</sup> Women who are not easily explained under BWS are better represented by viewing domestic violence through a lens that emphasizes the coercive tactics used to control them, and not their own victimhood.<sup>189</sup> Stark describes how, historically, models used to describe battering were a poor fit for women who “openly flaunted social convention”<sup>190</sup>—including women of color, and the working class.<sup>191</sup> These dilemmas in representation carry through in the current application of BWS to women who do not fit the desired stereotypes of an abused mother.<sup>192</sup> Because BWS and learned helplessness emphasize passivity in the victim, any aggressive behavior on the part of the mother—either before or during the abuse—threatens to defeat the narrative.<sup>193</sup> Coercive control frames domestic violence as more akin to kidnapping or domestic servitude, and emphasizes the “hostage-like”

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frequently consists of comparatively less severe physical acts. *Id.* BWS applied to this context “often penalizes battered women because the court may deem domestic violence irrelevant to their behavior or because, where the less tangible facets of coercion are key, a mother’s behavior (or the child’s fear) may seem ‘exaggerated’ or inexplicable given little or no documented instances of severe abuse.” *Id.* at 58.

185. Stark, *A Failure To Protect*, *supra* note 9, at 99.

186. Stark, *Coercive Control*, *supra* note 180, at 975.

187. Stark, *A Failure To Protect*, *supra* note 9, at 99.

188. Stark, *Coercive Control*, *supra* note 180, at 976.

189. *See id.*

190. *Id.* at 994.

191. *Id.*

192. *See id.* at 1000.

193. *See id.* at 999.

deprivation of the battered woman's human rights on the part of the abuser.<sup>194</sup>

One of the most helpful aspects of the coercive control model is that it re-frames the abuse of children in these relationships as a form of "tangential spouse abuse."<sup>195</sup> Abusers seek to control their victims in all areas; where the relationship includes children, motherhood is often "a primary arena for [the mother's] sense of selfhood" and is thus a target for subjugation and control.<sup>196</sup> The BWS framework exacerbates the court's perception that a woman who experiences abuse has a diminished capacity to parent.<sup>197</sup> By framing the abusive relationship as a cycle of violence and escalating helplessness, one in which the mother will inevitably fail to protect her children, it encourages the court to intervene with increasingly paternalistic strategies.<sup>198</sup> This heightens the risks associated with seeking help: admitting that she is a victim substantially increases the possibility that she will lose her children.<sup>199</sup> The framework of tangential spousal abuse instead emphasizes the abuser's attempts to control the mother through all avenues—including her children—and does not rely on diminishing the mother's capacity to parent.<sup>200</sup> Thus, "the child's safety and the mother's capacity to protect the child are compromised by the same source, the coercive strategies employed by the batterer."<sup>201</sup>

Overall, coercive control seeks to mitigate the "inaccurate, reductionist, and potentially demeaning representation of

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194. See Evan Stark, *Looking Beyond Domestic Violence: Policing Coercive Control*, 12 J. POLICE CRISIS NEGOTS. 199, 207–08 (2012).

195. Stark, *A Failure To Protect*, *supra* note 9, at 54–55.

196. *Id.* at 100–01.

197. Stark, *Coercive Control*, *supra* note 180, at 1007–08.

198. See *id.* at 1008.

199. See *id.* at 1008–09.

200. See Stark, *A Failure To Protect*, *supra* note 9, at 100.

201. *Id.* at 110. Stark is careful to emphasize that the coercive control and tangential spousal abuse models do not eliminate culpability on the part of the mother. "The coercive control model neither minimizes the psychological effects of battering on victims nor the personal responsibility that women . . . must bear for behaving shamefully with those they love." *Id.*

woman battering” presented by BWS.<sup>202</sup> As “a broadened application of the duress standard,” coercive control presents a woman struggling to exercise her agency within an extremely limited range of choices, rather than a victim paralyzed and unable to act.<sup>203</sup> Instead of focusing on the mother’s inability to parent effectively, as explained by learned helplessness, coercive control places more emphasis on the range of choices available to the mother, seeking to show that “when she was denied the basic liberties essential to personhood, the battered woman was rendered incapable of making the best possible choices to protect herself and her children.”<sup>204</sup> For many, it is simply a matter of time before the atmosphere of violence results in severe harm.

#### IV. WELL-WORN PATHS: A BRIEF HISTORY OF PROPOSED DEFENSES AND REFORMS

The complex realities of living in domestic violence have not escaped notice. Various solutions have emerged, which usually center around affirmative defenses for women who are survivors of domestic abuse when their children are harmed by their abusers,<sup>205</sup> or expansions of the scope of duty to individuals who aren’t directly involved in the household.<sup>206</sup> Many of these strategies rely on the familiar-but-imperfect BWS construct, and are defeated by more progressive explanations of domestic violence.<sup>207</sup> Despite the effort in this field, no perfect solution has emerged.

Most defenses use the BWS framework.<sup>208</sup> BWS is typically brought forth in the context of self-defense for battered women

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202. Stark, *Coercive Control*, *supra* note 180, at 975.

203. Stark, *A Failure To Protect*, *supra* note 9, at 98–99.

204. *Id.* at 107.

205. *See infra* text accompanying notes 211–12.

206. *See infra* text accompanying notes 208–10.

207. *See infra* text accompanying note 219.

208. *See Brown*, *supra* note 43, at 195. *See generally* Buel, *supra* note 4 (discussing various legal challenges under the BWS framework).

who fight back against their abusers.<sup>209</sup> It has achieved less success as a defense to mitigate culpability when women are charged under failure to protect statutes or with aiding their abusers in the death of their children.<sup>210</sup> However, BWS and learned helplessness are still put forward as an affirmative defense to FTP or other similar charges by arguing for a downward departure in the reasonableness standard with regard to the actions, or inaction, of the mother.<sup>211</sup> Similar to the more familiar application of BWS to self-defense, the affirmative defense theory argues that a woman living in domestic violence is not experiencing the same perceptions as the typical reasonable person—especially with regard to imminence, and the possibility of escape.<sup>212</sup> The battered mother should be allowed to present her actions from the standpoint of a reasonable battered mother, not a reasonable person living in non-abusive circumstances.<sup>213</sup> The unique psychology of the abused mother—especially learned helplessness and Walker’s cycle theory of violence—plays an instrumental role in this theory, explaining why a mother living in constant danger would commit inexplicable acts, like failing to move out of an abusive home, or leaving her children alone with their abuser for extended periods of time.<sup>214</sup> However, there are limits to this proposed solution. First, while many women rely on BWS to explain their behavior at trial, the usage of such evidence is not necessarily standard or uniform, and it is still widely misunderstood.<sup>215</sup> Second, women facing these charges are often working with court-appointed counsel or public defenders, and have limited funds to proffer the experts

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209. See Buel, *supra* note 4, at 225.

210. See *id.* at 288–95; see also *infra* note 171 and accompanying text.

211. Brown, *supra* note 43, at 234.

212. *Id.* at 239.

213. *Id.* at 240–41.

214. *Id.*

215. For an in-depth analysis of the plight of battered women seeking justice, see generally Buel, *supra* note 4 (detailing various struggles endured by survivors and proposing various solutions to the challenges battered women face in the criminal justice system).

necessary to mount a sufficient defense under this theory.<sup>216</sup> Further still, this theory requires that a woman already has cognizance of her own abuse—something that may not happen until well after legal proceedings have already concluded.<sup>217</sup> This would require that women (and legal counsel) have the wherewithal to identify the signs of abuse, and construct a defense that explains the woman's behavior.<sup>218</sup> Additionally, this defense relies heavily on BWS and learned helplessness, and may not succeed in situations where the BWS model is a poor fit.<sup>219</sup>

To counteract the unequal prosecution of women under FTP, some have proposed an expansion of the scope of the duty to protect to encompass caretakers more broadly, so that the responsibility to report abuse does not fall solely on the women who are also being victimized.<sup>220</sup> This may include redefining what constitutes taking responsibility for children.<sup>221</sup> Instead, individuals that have a close relationship with the child and the parents could be held accountable, or individuals who spend a significant amount of time alone with the child apart from parents.<sup>222</sup> In order to circumscribe a potentially overbroad circle of responsible parties, laws would need to be clearly drafted, and affirmative defenses should be available for those who fear substantial bodily harm for reporting abuse.<sup>223</sup> However, the past violence in these situations is often poorly documented, and women who have no record of physical injuries will have tremendous difficulty accessing this kind of a defense.<sup>224</sup>

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216. *Id.* at 241–42.

217. *See supra* Section III.A.1.

218. Buel, *supra* note 4, at 265–66.

219. *See supra* Section III.A.

220. *See Fugate, supra* note 38, at 301–02.

221. *See id.* at 302.

222. *Id.*

223. *See id.* at 303–04.

224. *See supra* notes 184–87.



Additionally, expanding the scope of liability will likely further implicate groups that are already vulnerable to criminal prosecution.<sup>225</sup> While broader judicial education could combat “the more egregious examples of bias,” acceptance of the collateral impact on these groups is implicitly required.<sup>226</sup>

#### V. THE WAY FORWARD: PROSECUTORIAL DISCRETION AND THE STORY OF HEDDA NUSSBAUM

It is clear that the battered woman trying to protect her children faces a difficult dilemma. On the one hand, the law requires that she stand up to her abuser and either report his violence or leave with her children, but due to the psychological effects of being in an abusive relationship—and the very real threat of violence as reprisal on the part of the abuser—both of those options are untenable.<sup>227</sup> And if the woman stays in the abusive relationship where her children are subject to harm, she has limited legal defenses at her disposal.<sup>228</sup> While the woman may seem relatively powerless in this situation, there is one entity that can exercise a vast amount of power on behalf of the woman: the prosecutor. Calls for prosecutorial discretion on the part of abused women are nothing new,<sup>229</sup> but they generally call for more “evenhanded” prosecution among men and women to alleviate the gender disparity, not for overall prosecutorial restraint.<sup>230</sup>

More so than legal scholars and defense attorneys, the prosecutors who make charging decisions regarding the women in these scenarios have a vast amount of latitude

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225. Fugate, *supra* note 38, at 307 (“Any extension of liability in a field already unduly affected by [race, class, and gender discrimination] 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.”).

226. *Id.*

227. *See supra* Section III.A.1.

228. *See supra* notes 85 & 97 and accompanying text.

229. *See Jacobs, supra* note 53, at 657–58.

230. “The absence of cases against fathers, step-fathers and boyfriends indicates that prosecutors do not consider men to have the same legal obligation toward children that women have.” *Id.* at 658.

regarding which charges they pursue.<sup>231</sup> If it is clear from the outset that the women in these situations can do very little to help themselves and their children, it might be necessary for those with the power to charge to exercise restraint. For instance, take Hedda Nussbaum, an author and domestic violence survivor whose abusive domestic partner, Joel Steinberg, killed their six-year-old adoptive daughter, Lisa.<sup>232</sup>

Hedda's story starts like many other women's: a young, shy girl met a dashing stranger, and they quickly fell in love.<sup>233</sup> Hedda does not immediately fit the profile of what some might expect out of a woman who fell into such a tumultuous relationship: bright, middle class, full of promise, and from a good family.<sup>234</sup> She described her close-knit Jewish family as loving and supportive, if not a bit overprotective.<sup>235</sup> She had a steady career as a children's book editor.<sup>236</sup> Joel was unassuming: he was a practicing criminal defense attorney in Manhattan, and the two met at a party.<sup>237</sup>

Early on, Hedda described Joel as helping to build up her self-esteem.<sup>238</sup> He encouraged her to seek out overdue job promotions, and coached her on how to be more outgoing at parties and be at ease with herself in social situations.<sup>239</sup> In Hedda's own words:

I was very, very shy at [the beginning of the relationship]. And he started building me up, helping me to come out of my shell, which I liked. . . . Almost every night, he would work

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231. See Note, *The Paradox of "Progressive Prosecution,"* 132 HARV. L. REV. 748, 752–53 (2018).

232. Stark, *A Failure To Protect*, *supra* note 9, at 31.

233. *Larry King Live: Interview With Hedda Nussbaum* (CNN broadcast June 16, 2003), <http://transcripts.cnn.com/TRANSCRIPTS/0306/16/lkl.00.html> [hereinafter *Larry King I*].

234. See *id.*

235. *Larry King Live: Interview With Family of George Smith; Interview With Hedda Nussbaum* (CNN broadcast Dec. 13, 2005), <http://transcripts.cnn.com/TRANSCRIPTS/0512/13/lkl.01.html> [hereinafter *Larry King II*].

236. *Larry King I*, *supra* note 233.

237. *Id.*

238. *Id.*

239. *Id.*

with me almost like a therapist. And it started to actually work . . . . I started coming out of the wallpaper. . . . [W]hen we'd go to parties . . . he would critique me afterwards. . . . [H]e'd say, You should have said this, You should have done that. And as I said, it really started to work, so I thought he was the greatest.<sup>240</sup>

While Joel's influence seemed to be positive, he was slowly encouraging Hedda to build her world around him; and because the influence appeared to be beneficial, no one thought to intervene.<sup>241</sup> Hedda explained that she became entirely dependent on Joel, believing all of her success could be counted to him and his influence.<sup>242</sup> The abuse started three years into their relationship.<sup>243</sup>

The first time Joel hit Hedda, she thought it was a "fluke."<sup>244</sup> Believing that it was a one-time event that would never happen again, she decided to move on.<sup>245</sup> In doing so, she echoed the sentiment of so many women before her, "I was shocked and he seemed shocked. He took me in his arms. . . . [T]he way I think of it now is I put it in a drawer in the back of my mind and closed the drawer."<sup>246</sup> The abuse did not stop; in fact, it escalated.<sup>247</sup> Joel's beatings became so severe that Hedda's face was disfigured by the end of their relationship—to the point that she needed reconstructive surgery.<sup>248</sup> In addition to the

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240. *Id.* As described by Walker in *The Battered Woman*, this may mark the beginning of laying the groundwork for dependency and control. See *supra* notes 141–44 and accompanying text.

241. *Larry King II*, *supra* note 235; *Larry King I*, *supra* note 233.

242. *Larry King II*, *supra* note 235; *Larry King I*, *supra* note 233.

243. *Larry King I*, *supra* note 233.

244. *Id.*

245. *Id.*

246. *Id.* This is consistent with Walker's findings that women in battering situations often cope through minimization, denial, or disassociation. See WALKER, BWS, *supra* note 119, at 52.

247. *Larry King I*, *supra* note 233.

248. Corey Kilgannon, *IN PERSON: Hedda Nussbaum, Starting Over*, N.Y. TIMES, Apr. 7, 2002 (§ WC), at 14.

assaults, Joel tightened control.<sup>249</sup> He pressured Hedda into two illegal adoptions when their own attempts to have children were unsuccessful.<sup>250</sup> Hedda and Joel illegally assumed responsibility of baby Lisa after Joel told Lisa's birth mother that he would assist her in finding an adoptive family.<sup>251</sup> Hedda attested that she knew that the adoption was never official, but she never pursued legal means to rectify it for fear of angering Joel or losing custody of Lisa forever.<sup>252</sup> Joel orchestrated a similar illegal adoption for a second child, a son, and both children continued to live in the household, parented by Joel and Hedda.<sup>253</sup> The boy was eventually returned to his birth mother; Lisa, unfortunately, was not able to escape.<sup>254</sup>

On November 1, 1987, six-year-old Lisa was beaten to death by Joel in their Manhattan apartment.<sup>255</sup> Hedda seemingly stood by and did nothing;<sup>256</sup> she claims she was in another room.<sup>257</sup> Joel brought the child to her, limp and unconscious.<sup>258</sup> Joel had begun using crack cocaine that he obtained from his clients, and he required Hedda to use it with him.<sup>259</sup> During these spats of drug use, Joel began convincing Hedda that he had the ability to control her, as well as supernatural healing powers.<sup>260</sup> By this time, Hedda had lived through many cycles of abuse with Joel, and almost nothing about Hedda's thoughts or actions would make sense to those on the outside.<sup>261</sup> Joel went out to dinner

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249. See *Larry King I*, *supra* note 233.

250. *Id.*; *Larry King II*, *supra* note 235.

251. *Larry King I*, *supra* note 233.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. See Francine Russo, *The Faces of Hedda Nussbaum*, N.Y. TIMES, Mar. 30, 1997 (§ 6), at 26.

257. *Larry King I*, *supra* note 233.

258. *Id.*

259. *Id.*

260. *Id.*

261. See Kilgannon, *supra* note 248.

and left Lisa with Hedda, insisting that he would wake her up when he got back.<sup>262</sup>

Lisa did not wake up. Hedda called an ambulance; but by that time, it was nearly twelve hours after Joel hit Lisa.<sup>263</sup> Four days later, Lisa died in the hospital.<sup>264</sup> Hedda was also hospitalized because the last beating from Joel left her leg so injured it had become septic.<sup>265</sup> A guard stood outside her door, according to her, for her own protection.<sup>266</sup> From the time that the ambulance was called to their Greenwich Village apartment until Hedda took the stand against Joel at his trial, lurid details continued to emerge about the couple's fraught relationship, and the extreme abuse Hedda endured at Joel's hands.<sup>267</sup>

Joel initially claimed Hedda was the one who had hit Lisa; he insisted he was out of the house when the fatal blow occurred.<sup>268</sup> At first, they were both charged with the murder of Lisa.<sup>269</sup> Prosecutors ultimately chose to withdraw the murder charges against Hedda, which drew the ire of the public (and which remains controversial today).<sup>270</sup> Assistant district attorney John McCusker said at the time, "after a thorough investigation, it was determined that the fatal blows that caused Lisa's death were not struck by Miss Nussbaum."<sup>271</sup> Later, the district attorney further stated that it was determined that due to the physical and psychological abuse Hedda had endured, she could not be held criminally culpable for what happened to Lisa.<sup>272</sup>

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262. *Larry King I*, *supra* note 233.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. Stark, *A Failure To Protect*, *supra* note 9, at 32.

271. Ronald Sullivan, *Judge Dismisses Murder Charge For Nussbaum*, N.Y. TIMES (Oct. 27, 1988), <https://www.nytimes.com/1988/10/27/nyregion/judge-dismisses-murder-charge-for-nussbaum.html>.

272. Russo, *supra* note 256.

In spite of the district attorney's decision, public opinion surrounding Hedda and her involvement with Lisa's death has been largely negative.<sup>273</sup> YouTube comments of her interviews are laden with calls for punishment: "[T]hey both should [have] been in prison," writes one commenter.<sup>274</sup> Another one writes: "Hedda Nussbaum and Joel Steinberg cared more about coke than they did about being decent human beings."<sup>275</sup> However, some recognize Hedda's plight.<sup>276</sup> Many victims of abuse see themselves in her, while still questioning her actions (as well as their own response to abuse).<sup>277</sup> Joel was eventually convicted of manslaughter for the death of Lisa.<sup>278</sup> He was sentenced to twenty-five years in prison, but was paroled ten years early in 2004.<sup>279</sup> In the years since her daughter's murder, Hedda has devoted herself to victims' advocacy, both through working in domestic violence shelters, and through sharing her story in select interviews.<sup>280</sup> The difference between Hedda's story and the other women is stark: while many other women face steep punishment for succumbing to the control and intimidation of their abusers and allowing their children to be harmed, Hedda was able to have a life after abuse. In the years since Lisa's death, Hedda has written a book about her experience.<sup>281</sup> She has also dedicated her life to working with victims of domestic abuse.<sup>282</sup> According to Hedda, it wasn't until a year after Lisa's death and after receiving intense psychiatric treatment that she broke free of the hold that Joel had on her.<sup>283</sup> Hedda claims that

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273. See Sara Sherbill, *Thirty Years Later, Can We Finally Forgive Hedda Nussbaum?*, SLATE (Oct. 24, 2018, 9:00 AM), <https://slate.com/human-interest/2018/10/hedda-nussbaum-joel-steinberg-abuse-trial-anniversary.html>.

274. Comment to *Hedda Nussbaum, Joel Steinberg, & Lisa Steinberg—“Larry King Live,”* 2005 [191], YOUTUBE (Dec. 2, 2016), <https://www.youtube.com/watch?v=3CfwWV-XVuY&t=621s>.

275. *Id.*

276. See Sherbill, *supra* note 273.

277. See *id.*

278. Kilgannon, *supra* note 248.

279. Sherbill, *supra* note 273.

280. See Russo, *supra* note 256; see also Sherbill, *supra* note 273.

281. See Sherbill, *supra* note 273.

282. *Id.*

283. *Larry King I*, *supra* note 233.

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she channeled the rage and guilt she felt into working with other victims, in the hopes that they would be able to avoid her fate.<sup>284</sup>

Many explanations have been posited as to why such a favorable exercise of discretion was carried out in Hedda's favor, not the least of which being that Hedda agreed to testify against Joel at trial.<sup>285</sup> Additionally, Hedda, a wealthy white woman, easily fit the stereotypical picture of a battered woman.<sup>286</sup> Still, Hedda's story raises vital questions about the complicity of women living in domestic violence, and Hedda's work shines a light on life after abuse. While the public outrage about Hedda's involvement in Lisa's death has never fully subsided,<sup>287</sup> Hedda has used her freedom to dedicate her life to helping women escape domestic abuse, and to hopefully prevent other children from succumbing to a fate like Lisa's.<sup>288</sup> Hedda's story is evidence that prosecutorial restraint could result in a net public benefit and a greater administration of justice than punishment alone can accomplish.

## CONCLUSION

What was stated at the beginning of this Note is still true: child abuse is a crime. The issue remains, however, as to how to determine who is culpable when children are victimized and how to pursue justice. Searching for justice in cases of domestic abuse often raises more questions than answers. In fact, it is still not well understood how women stand by and watch their children fall victim to heinous acts of violence, and the law

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284. *See id.*

285. Stark, *A Failure To Protect*, *supra* note 9, at 32.

286. *See id.* at 32 n.7. Stark points out that skepticism of the prosecution's motives was rampant, further instigated by the case of Abigail Cortez, which was prosecuted at the same time and did not garner such a favorable exercise of discretion. *Id.* at 32. Stark points to "[k]ey differences" between the women, "includ[ing] the fact that while Hedda fit the stereotype of the battered victim, Cortez was a poor, uneducated, Latina woman on welfare who 'knew nothing but living from man to man.'" *Id.* at 32 n.7.

287. *See* John T. McQuiston, *Hedda Nussbaum Cancels Speech After Protest at College*, N.Y. TIMES, Apr. 8, 2000 (§ B), at 5.

288. Kilgannon, *supra* note 248.

continues to struggle to administer justice that also balances the needs of all victims involved—both the mothers and children.

Leading theorists help achieve bright spots of clarity in the confusion. Through models like BWS, it might be possible to make sense of the actions—or inaction—of these women. In understanding the coping mechanisms produced by BWS, learned helplessness, and the cycle theory of violence, it is clear that inaction and complacency are often a woman's best attempt to cope with living in the midst of trauma and violence. As social awareness spreads to all areas of the law, lawmakers and prosecutors should take into account the perspective of all victims involved, even when some of those victims become perpetrators. Much ink has been spilled over defenses that can be raised and laws that may be passed, but the time has come to evaluate the enforcers of the law and focus on informing their perspectives and practices.

Society must strive to protect both women and children from domestic abuse. While children are, and always will be, the ultimate victims in this scenario, zealous advocacy of children's rights should not come at the expense of the women who were also victims of violence. Women caught in domestic violence are attractive scapegoats; as much as they are receptors for their abusers' violence, so, too, they are receptors for society's collective rage. In the pursuit of justice, society should have an eye toward all victims, even the ones whose actions will never be understood.