ARTICLES

THE LAW OF MOTHERHOOD IN THE GENDER-DEPENDENT APPLICATION OF CRIMINAL RESPONSIBILITY FOR FAILING TO PROTECT CHILDREN

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ABSTRACT

When a child is injured or killed by an adult in the home, a marked gender division appears in the application of criminal responsibility against the non-abusing parent. States regularly use accomplice liability/accountability theory or statutes criminalizing the failure to protect one's children against mothers for the harm perpetrated by her male partner, but men almost never face charges when the roles are reversed. Although the statutory or common law upon which such prosecutions are based is gender-neutral, the application of the principles is decidedly not.

This Article analyzes and critiques current cultural and legal expectations of mothers that place upon them an increased responsibility for the safety of their children. It analyzes the ways in which the "reasonable person" standard morphs into a "reasonable mother" standard that is implicitly more stringent and punitive than expectations of a "reasonable father." This places disproportionate burdens and punishments on mothers, twists the legal concepts of foreseeability, intent, and parental duty while making them contingent upon the parent's gender, and holds mothers and fathers to disparate standards of care. When the theory is applied against mothers, the standard requirement of criminal intent is sometimes stretched beyond recognition. The absence of overt gender distinctions in the law disguises the fact that the operation of the criminal justice system is deeply informed by and in service to stereotyped social demands of women while it masquerades as a system of neutral, evenhanded justice.

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INTRODUCTION

Donna Duncan of Illinois was in Florida for temporary nursing work in the fall of 1999. Her infant daughter and eight-year-old son Joseph remained at home in Illinois with her partner, Ernst Bruny. On September 28, 1999, Ernst called Donna in Florida and told her that he had beaten Joseph to death. Donna went to the local police in Florida and explained the situation and her concern for her son. They contacted Illinois police, who went to the home for a welfare check. There, they found Joseph's battered and deceased body in a suitcase in a bedroom closet. Ernst admitted to "punishing" Joseph for various infractions and to placing him in the suitcase. He was arrested and charged with first-degree murder, conspiracy to commit murder, aggravated battery of a child, and concealment of a homicidal death. He subsequently pled guilty and was given a life sentence, which was later reduced to sixty years.[1]

As soon as Donna returned to Illinois, she too was arrested. She was charged with first degree murder in the death of her son. It was undisputed that she was not in the same state when Joseph was killed and had no hand in his injuries and death. Neither was it claimed that she had abused him at any other time prior to his death. Her crime, according to the state, was leaving Joseph in Bruny's care. She was culpable, prosecutors claimed, because she knew that Bruny had been abusing her son (a claim which she contested other than a single incidence of Bruny whipping Joseph with an electrical cord). Since this violated Donna's legal duty of care to her son, such knowledge amounted to first-degree murder, they

1. Travis Deneal, *Court Reverses Woman's Murder Conviction*, SOUTHERN ILLINOISAN (May 7, 2004), https://perma.cc/8TQJ-LQG8.

argued. Prosecutors relied on Illinois's Law of Accountability, which is designed for the charging of criminal accomplices who share a common "criminal design" or plan, or where the accomplice purportedly shared the criminal intent of the perpetrator, despite not having actually committed the crime charged. This law was used to argue that Donna shared the "criminal design" of her son's murderer, and that she "should have known" that her son's murder was likely to happen.[2] Donna was convicted of murder, aggravated battery of a child, and concealment of a homicidal death.[3] She was sentenced to twenty-two years in prison,[4] and she served eight and a half years before being released.[5]

Cases like Donna's are not unusual. Similar stories can be found all over the country. Analysis of these cases reveals a disturbing pattern: when a child is injured or killed by an adult in the home, a marked gender division appears in the application of charges against the non-abusing parent. While states regularly prosecute mothers for the harm perpetrated by their male partners, men rarely face the same charges when the roles are reversed. Although the statutory or common law upon which such prosecutions are based is gender-neutral, the application of the principles is decidedly not.

Parents are held to a reasonable standard of care in the upbringing of their children, and the full force of criminal law may be brought to bear upon them when they fail to fulfill that duty. But in practice, "reasonable" appears to mean something quite different for mothers than it does for fathers. Disproportionate burdens, expectations, and legal punishments are placed on mothers, where the legal concepts of foreseeability, intent, and parental duty are twisted and weaponized, wielded differently depending on the parent's gender. The absence of overt gender distinctions in the law disguises the fact that the operation of the criminal justice system is deeply informed by and in service to stereotyped social demands of women while it masquerades as a system of neutral, even-handed justice. As a result, certain actions render mothers significantly and unjustifiably more vulnerable to severe punishment than the same behavior does for fathers.

I. LEGAL OVERVIEW

Generally, United States (U.S.) law imposes no legal duty to rescue a person from harm caused by another, even when doing so poses little to no effort or risk to the savior.[6] States have added such a duty in some narrow circumstances—

2. Justice Voices, *Justice Voices episode 3, part 1: Donna Lomelino*, YOUTUBE, at 1:16:37 (June 16, 2021), https://perma.cc/5A5B-WL7P.

3. *Id*. at 1:19:00.

4. Although the murder conviction was subsequently overturned on appeal due to new state legal precedent holding that conviction of a forcible felony such as aggravated battery cannot serve as the predicate for felony murder, the court determined that the evidence was sufficient for conviction on all charges including murder, and the other convictions remained. Deneal, *supra* note 1. The sentence was reduced from twenty-two years to ten. Justice Voices, *supra* note 2, at 1:20:00.

5. Justice Voices, *supra* note 2, at 1:20:00.

6. *See generally* AM. JUR. 1st *Negligence* (2006).

usually when a person has a special relationship with the injured person that creates a legal duty to act. Examples include business owners and patrons,[7] property owners and guests,[8] vehicle drivers and passengers,[9] and, of course, parents and children.[10]

Greater awareness of, and apparent increases in the incidence of child abuse across the country brought about growing legal responses to the problem. The 1980s saw a number of states enacting statutes known as "failure to protect" laws.[11] Encompassing both child abuse and neglect, such laws were designed to punish a parent's omission or failure to act in the protection of their child, or a child for whom they had a duty of care.[12] These statutes codify an affirmative duty to act to prevent child abuse when the adult has a legal duty of care for the child, the adult was aware of the likelihood of future abuse, and abuse to the child occurred which the adult did not act to prevent.[13] Adults who violate these provisions can be subject to harsh criminal penalties. As a result, parents may be charged not only with neglect when their children are harmed at the hands of another, but also with the murder of their child who died at the hands of another adult in the home.

All states in some way criminalize the failure to protect a child from abuse. Where there is no specific statute prohibiting the omission of protective action, courts have derived it from the common law.[14] Maryland, for example, places upon parents a duty to their children's "support, care, nurture, welfare and education."[15] "Nurture" is defined broadly by courts to include preventing physical injury.[16] As of 1982,[17] Oklahoma, which has one of the strictest failure to protect statutes in the nation, considers the *permitting* of willful or malicious injuring, torturing, maiming, or using unreasonable force to be murder in the first degree.[18] Non-abusing parents can face a life sentence for failure to protect a child in some

7. RESTATEMENT (SECOND) OF TORTS § 341A (AM. L. INST. 1965).

8. *See* 33 A.L.R.3d 301 § 6[a] (1970).

9. *See* 33 A.L.R.3d 301 § 5 (1970).

10. 3 William L. Prosser, *Prosser on Torts* § 54 (1964).

11. S. Randall Humm, *Criminalizing Poor Parenting Skills as a Means to Contain Violence By and Against Children*, 139 U. PA. L. REV. 1123, 1125 (1991).

12. *See* Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 J. LAW & INEQ. 359, 368 (1987); *see generally* Humm, *supra* note 11.

13. *See* Kaley Gordon, *Finding Favor: A Call for Compassionate Discretion in Cases of Battered Mothers who Fail to Protect*, 13 DREXEL L. REV. 747, 762–63 (2021).

14. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 613–614 (1998); Gordon, *supra* note 13, at 760; Jeanne A. Fugate, *Who's Failing Whom? A Critical Look at Failure-to-Protect Laws*, 76 N.Y.U. L. REV. 272, 278–79 (2001); *see, e.g.*, Lane v. Commonwealth, 956 S.W.2d 874 (Ky. 1997) (relying on statutory sources in the majority opinion and common law sources in the concurrence).

15. Md. Code Ann., Fam. Law § 5–203 (West 2021).

16. *See, e.g.*, *Lane v. Comm.*, 956 S.W.2d at 875.

17. *See* 1982 Okla. Sess. Laws c. 279 § 1; Gilson v. State, P.3d 883, 902 (Okla. Crim. App. 2000).

18. Okla. Stat. Ann. tit. 21, § 843.5(B) (West 2021).

states.[19] In *Gilson v. State*, the Oklahoma Appellate Court held that a death sentence was appropriate in such a case.[20] In Illinois, where Donna Duncan was convicted, a person can be guilty of a number of offenses against a child constituting abuse, not just by committing or inflicting abuse, but by allowing abuse to be committed or inflicted.[21] "Blatant disregard" for a child's needs qualifies as neglect,[22] and it applies when "the real, significant, and imminent risk of harm would be so obvious to a reasonable parent or caretaker that it is unlikely that a reasonable parent or caretaker would have exposed the child to the danger. . .."[23] But Donna was prosecuted under Illinois's law of accountability, which is not specific to child abuse. This statute makes a defendant legally responsible for conduct they did not commit if they have a "common criminal design or agreement" with the perpetrator.[24] It is used to convict an accomplice or accessory to a crime. The statute states that a person can be punished if "either before or during the commission of an offense, and with the intent to promote or facilitate that commission, he or she solicits, aids, abets, agrees, or attempts to aid that other person in the planning or commission of the offense."[25] While it is not difficult to imagine such a statute applying to an accomplice such as a lookout or getaway driver, it is much more challenging to understand how it could apply to a person who is out of the state, did not plan, participate, or know of the murder in advance, and called police for help once she learned there was reason for concern. Indeed, were the accountability theory applied to these circumstances with any other crime or any other defendant, a conviction would likely be inconceivable. Consider a husband who leaves the car keys at home when he goes to work. The wife, who had a DUI a year prior, drives the car after drinking, and hits and kills a pedestrian. It would likely never occur to a prosecutor to charge the husband with vehicular homicide for the act of going to work with the keys at home; a jury would be even less likely to convict. Although a parent has a duty to their child where none is owed to their vehicle, duty is irrelevant under accountability theory. That theory holds the defendant responsible as an accomplice to the crime due to some level of participation in or support of it, rather than focusing on their failure to act on their duty to protect a child. To suggest that going to work and leaving a child in the care of a parent constitutes "intent to promote or facilitate" the commission of murder, or that she "solicits, aids, abets, agrees, or attempts to aid" in the murder by doing so, is a perversion of those standards. Yet that is precisely what the prosecutor in Donna's case argued, and the jury agreed. It is an infraction that is almost exclusively levied at mothers.

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19. Elizabeth Brico, *State Laws Can Punish Parents Living in Abusive Households*, TALK POVERTY (Oct. 15, 2019), https://perma.cc/B277-3LWA.
20. *Gilson*, 8 P.3d 883 at 929.
21. 325 ILL. COMP. STAT. § 5/3 (2022).
22. *Id.*
23. *Id.*
24. 720 ILL. COMP. STAT. § 5/5-2 (2010).
25. *Id.*

Other Illinois cases have taken similar trajectories. Tabitha Pollock's boyfriend Scott English killed her daughter Jami. There was no evidence at all that she knew of any prior abuse; in fact, there was considerable evidence that she did not know and had no reason to suspect it. Yet Tabitha was charged and convicted of murder for allowing Scott "to murder Jami by giving him access and control over Jami when she knew *or should have known* of his abusive nature and danger to Jami."[26] The "should have known" element was critical in the case. Rather than demonstrating an abundance of evidence of abuse that Tabitha ignored, it appears to have meant that she *should* have known simply because she was Jami's mother.[27] The lower court convicted Tabitha of murder and sentenced her to thirty-six years in prison.[28] This meant that where the perpetrator had to have actual intent for his conviction of the murder, the non-abusive mother need not have any intent at all to be prosecuted for the same murder.[29]

II. CASE EXAMPLES

Statistics appear to indicate that mothers are more likely to be responsible for child fatalities than fathers.[30] Given that, logic would suggest that fathers would be the most likely to be prosecuted for failure to act to protect their children from abuse, since they are more likely to be the non-abusing parent. But this could not be further from the truth. Women caretakers are significantly more likely to be charged under failure to protect laws.[31] An in-depth investigation of such cases identified seventy-three cases where a male caretaker harmed a child and the mother was prosecuted and sentenced to ten years or more in prison.[32] At least twenty-eight of those cases also involved history of the man's abuse towards the mother (the true number is likely higher, but that information is not always indicated in court materials).[33] Only four cases could be found where the mother was the abuser and the non-abusing father was sentenced to ten years or more,

26. People v. Pollock, 780 N.E.2d 669, 679 (Ill. 2002) (emphasis added).

27. *See id.* at 688–89.

28. *Id.*

29. *Id.* (The conviction was upheld on appeal but was subsequently overturned by the Illinois Supreme Court due to the prosecution's improper introduction of "should have known" as a standard creating criminal liability in the case, along with the complete lack of evidence of actual knowledge of risk.).

30. *Child Maltreatment*, U.S. DEPT. OF HEALTH & HUM. SERVS., Administration on Children, Youth and Families 62 (2002), https://perma.cc/XXJ7-XLWR (Mothers acting alone account for 29.1% of cases, fathers acting alone account for 14.3%, and mothers and fathers acting together accounting for 23. 1%. However, it is important to scrutinize how this data is compiled. When there is discriminatory law enforcement response to mothers when a father kills a child, this may be then categorized as "acting together," whereas when a mother kills a child, the father is less likely to be blamed, thus skewing the data towards mothers acting alone and mothers and fathers acting together.).

31. Gordon, *supra* note 13, at 761 (citing Geneva Brown, *When the Bough Breaks: Trauma Paralysis–An Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 229 (2005).

32. Alex Campbell, *These Mothers Were Sentenced To At Least 10 Years For Failing To Protect Their Children From A Violent Partner*, BUZZFEED NEWS (Oct. 2, 2014), https://perma.cc/T4VK-79DF [hereinafter Campbell, *These Mothers*].

33. *See id.*

representing just 5% of the total.[34] These numbers are certainly incomplete, as acknowledged by the authors due to limitations of data-gathering techniques, and reinforced by the fact that other known cases were not included in their list.[35] Analysis of some representative cases is revealing.

A. THE NON-ABUSING PARENT WAS PRESENT

A number of cases involve charges against a parent who was present or in the home at the time of the abuse and did not participate in the violence against the child, but typically was aware in some context of what was taking place.

1. Father Was the Abuser

Consider the case of Victoria Pedraza of Arkansas. Her husband Daniel had a history of extensive and violent abuse towards her and her two-year-old daughter Aubriana. "I was scared to death of Daniel," she said.[36] "I felt that if I interfered in a way, like to call law enforcement, it would make things worse. Of course he probably would have [gone] to jail. He probably would have got bonded out and he was coming right back. That's the fear I had."[37] She indicated that Daniel would beat her when she objected to the severe way he disciplined Aubriana. In response to Victoria's objections, he would hit her with a belt, slap, punch, kick, and choke her. He had put a knife to her throat, dragged her by the hair, and hit her in the head with a bat. He forced her and Aubriana to eat from the floor, saying that if they were going to act like dogs he would treat them like dogs. He threatened to kill her multiple times, saying he had nothing to lose by doing so. She had attempted to get away from him previously but was unsuccessful.[38]

On a Friday night in February 2012, Victoria had "looked at [Daniel] wrong," leading to the abuse that caused Aubriana's death. He forced Victoria to strip and he beat her with a belt, forcing Aubriana to watch and telling her, "Bitch, this is how you're going to turn out if you don't do what you're supposed to do."[39] The following Sunday, Daniel punched Aubriana so hard in the stomach that it ruptured her internal organs. Victoria frantically began CPR and asked Daniel for help calling 911. He responded, "If that little bitch dies, I might as well kill you too."[40] Aubriana was later pronounced dead of multiple blunt force injuries. It was clear that Daniel had inflicted the injuries that killed Aubriana. Yet, Victoria was initially charged with capital murder.[41] At her arrest, she was covered in

34. *Id*.
35. *Id*.
36. Alex Campbell, *He Beat Her And Murdered Her Son — And She Got 45 Years In Jail*, BUZZFEED NEWS (Oct. 2, 2014), https://perma.cc/E2US-GKDR [hereinafter Campbell, *He Beat Her*].
37. *Id*.
38. Appellant's Abstract at 606–09, Pedraza v. State, 438 S.W.3d 226 (Ark. 2014) (CR 13-991).
39. *Id*. at 610.
40. Campbell, *He Beat Her*, *supra* note 36.
41. Patty Wooten, *Monticello Couple Faces Capital Murder Charge for Child's Death*, MAGNOLIA REP. (Mar. 2, 2012), https://perma.cc/BNR3-JNWF.

bruises. At trial, she was missing a tooth from Daniel's beating.[42] She ultimately pled guilty to "permitting abuse of a minor" and was sentenced to twenty years in prison—the maximum allowed for that crime.[43] Stunningly, she was also initially required to register as a sex offender when she was first released from prison, despite the fact that no sexual abuse of Aubriana took place.[44] Daniel, however, was not required to register as a sex offender.[45]

Arlena Lindley's story is equally disturbing. She lived with Alonzo Turner and her three-year-old son Titches in El Paso, Texas. Alonzo severely abused Titches under the guise of discipline. The abuse to which Alonzo subjected Titches was horrific and included throwing him against a wall, pushing his face into a bowl of oatmeal, rubbing his face into carpet where he had vomited, picking him up by the neck and putting his face in a toilet, stepping on his chest, kicking him in the stomach, and choking him.

Arlena made multiple attempts to escape; she was gathering Titches's belongings and attempting to leave on October 13, 2006, the day that Alonzo killed him. When she tried to stop Alonzo from hurting Titches, he pushed her to the floor and ordered her to get out of the apartment. She tried to take Titches with her, but Alonzo would not allow it. (On previous occasions when Arlena had been beaten by Alonzo, he had threatened to kill her family if she tried to leave. During one escape attempt, Alonzo threw her into the trunk of his car.)[46] Arlena found a phone and called Alonzo, who told her first that he had taken Titches to the hospital, and then that he would take him to the hospital once Arlena came home. When Arlena returned home, Alonzo ordered her to leave again. When she came back the second time, she found Titches gasping for breath and not blinking, after which he stopped breathing. Titches died from multiple blunt-force injuries. Arlena was charged with "failing to protect him from Alonzo Turner III."[47] Alonzo was convicted of murder and sentenced to life in prison. He was also charged with domestic assault for hitting and shoving Arlena as she tried to stop

42. Alex Campbell, *Jailed When Her Boyfriend Killed Her Son, She Is at Last Free*, BUZZFEED NEWS (Sept. 24, 2016, 8:03 AM), https://perma.cc/M9EN-38BB [hereinafter Campbell, *Jailed*].

43. Joe Burgess, *Mom Gets 20 Year Sentence for Permitting Child's Death – Sentencing Update*, MONTICELLO LIVE (July 11, 2013), https://perma.cc/9P9F-MTTW. She was released on parole in late 2015 after serving four years. Campbell, *Jailed*, *supra* note 42.

44. There was no claim of sexual abuse against Aubriana. Rather, prosecutors argued that permitting abuse of a minor was defined by law as a sex offense under Ark. Code Ann. § 12-12-903(12)(A)(i)(s) (Supp. 2013). As Victoria was convicted of that offense, registration as a sex offender was mandatory, regardless of the facts of the case. The Court of Appeals of Arkansas accepted this claim, rejecting Victoria's contention that the statute was overbroad because it would encompass offenses unrelated to sex abuse. Pedraza v. State, 2015 Ark. App. 205, at 4, 465 S.W.3d 426, 429. Subsequent political pressure resulted in the amending of the statute to add a requirement that the abuse that was permitted must be sexual in nature, which became effective July 22, 2015. Ark. Code Ann. § 12-12-903 (West 2013).

45. Appellant's Abstract at 616, Pedraza v. State, 438 S.W.3d 226 (Ark. 2014) (CR 13-991).

46. Campbell, *Jailed*, *supra* note 42.

47. Lindley v. State, No. 08-08-00149-CR, 2010 WL 1076138, at *1 (Tex. App. Mar. 24, 2010).

him from beating Titches.[48] Nevertheless, Arlena was sentenced to forty-five years in prison for failing in her efforts.[49]

2. Mother Was the Abuser

When the mother is the abuser and the father is present, the cases tend to look very different. Charges against the father are so rare that comparative examples are difficult to locate in legal materials, and instead details must be extrapolated from news stories. Natalia Hitchcock of Wisconsin, for example, was living with her husband and two sons, ages eight and eleven. In April 2022, she strangled her younger son to death and attempted to kill the older one. She was charged with murder and attempted murder. The husband said that Natalia had mental health disorders; that he worried about Natalia's mental state; that she had talked about buying guns and knives; that she "became violent when she was angry and had rage." The husband was not charged with any crime in the death of the boy.[50]

Paula Sims of Illinois admitted to killing her two infant daughters three years apart. One of the bodies was kept in the freezer for several days. The husband was living in the home with her during both deaths. Yet despite this and some suspicious actions and statements on his part, he was not prosecuted for any crime.[51] The lack of law enforcement, media, and public attention to the husband's actions or potential complicity makes it difficult to determine his level of knowledge of the risk to his children, or even whether he was at home when the killings took place. However, he was living at home at the time of the deaths, had expressed extreme displeasure at having daughters rather than sons, and had not been traveling when they were killed, so it is entirely possible that he was also at home when the children were killed. His responsibility to protect his children was evidently not considered.

B. THE NON-ABUSING PARENT WAS NOT PRESENT

It is especially difficult to argue culpability and to justify severe criminal punishments against a parent who was not present when abuse of a child took place. Yet such prosecutions of parents are very common—but only when the parent who was away is the mother. Their crimes are listed in court documents as allowing the abuser to care for the child when the mother "knew or should have

48. Dallas Police Department Arrest Warrant for Alonzo Turner III (Oct. 14, 2006), https://perma.cc/VZ93-AAZB.

49. Alex Campbell, *Woman Sent to Prison for Failing to Protect Toddler Is Up for Parole*, BUZZFEED NEWS (Dec. 30, 2015, 5:48 PM), https://perma.cc/B8YQ-H7XQ. Lindley was granted parole in January 2016 and was released after serving nearly 12 years. Campbell, *Jailed*, *supra* note 42.

50. WBAY News Staff, *Complaint: Mother Charged with Killing Son Had "Surges of Rage," Was Agitated by News Coverage from Ukraine*, WSAW-TV (Apr. 5, 2022, 10:06 AM), https://perma.cc/FMT5-X5VW.

51. *Light After Darkness: Robert and Randy Sims Led Christian Life*, TELEGRAPH NEWS (June 27, 2015, 2:28 PM), https://perma.cc/R8X6-H63M.

known" that doing so would place the child at risk.[52] The below cases are illustrative but are by no means exhaustive.

1. Father/Man Was the Abuser and Mother Was Not Present

Donna Duncan's case, discussed in the Introduction above, is one of the more striking examples of a mother's prosecution for the death of her child at the hands of the other parent, despite not being present at the time of the harm. Yet, hers is hardly an anomaly. Donna's case was unusual in the fact that she was not even in the state when her son was killed; more commonly, the mother is at work locally and the father is caring for the child while she's away, for which the mother is punished. For example, the guilty plea statement of Windi Ann Johnson, who received a ten-year sentence for enabling child abuse, reads, "I allowed Cory McGalliard to take care of my son . . . I should have known Cory McGalliard to be a danger . . ."[53] The cases are too numerous to discuss in their entirety. A review of some examples, however, provides a clear picture of consistent trends across multiple states.

In one particularly egregious Illinois case, Barbara Peters was away from home when her child was murdered by her boyfriend. She witnessed no abuse at any point; she had noticed some bruises, but the boyfriend had a reasonable explanation for them. It was undisputed that she was not present during the murder and had performed no act intending to facilitate the murder. When her boyfriend killed her child, she was convicted of murder, aggravated battery of a child, cruelty to a child, and endangering the life of a child, all under the Illinois accountability theory discussed above. She was sentenced to thirty years in prison.[54] The appellate court upheld the conviction and sentence, holding that the prosecution need not demonstrate that she had any intent to facilitate the murder in order to be charged as a principal offender rather than as an accessory. Wisconsin similarly held that a mother who did not participate in any abuse and was never home when it happened could nevertheless be charged as a principal as opposed to an accessory for the child abuse perpetrated by her husband.[55] The mother and father were both convicted of child abuse in this case.[56] In Tennessee, Denise Maupin left her two-year-old son Michael with her partner, Thomas Hale, to go to her first

52. *See*, *e.g.*, Campbell, *These Mothers*, *supra* note 32. (Stephanie Avery's charging document states that she "enabled abuse by 'knowingly authorizing or allowing' Charles Hennessee to care for her child when she knew or reasonably should have known doing so was placing child at risk;" Laura Tustin's charging document states that she "authorized/allowed Jeremy Tustin to care for her child when she knew or reasonably should have known that this would place the child at risk;" Latrice Russel's document says that she "allowed Will Lambert to care for Rachel Lambert, our 6 month old daughter, when I reasonably should have known that our baby would be at risk of being physically abused by Will Lambert her father.").

53. Campbell, *These Mothers*, *supra* note 32.

54. Brief of Appellee, People v. Peters, 1999 WL 33921223 (Ill. 1999).

55. Wisconsin v. Williquette, 385 N.W.2d 145, 152–53 (Wis. 1986).

56. L.A. Times Archives, *Trial for Not Reporting Child Abuse Is Upheld*, L.A. TIMES, https://perma.cc/S4FA-84WK (last updated Apr. 17, 1986); *Williquette*, 385 N.W.2d 145.

day of work. When she returned home, she found the boy beaten to near unconsciousness, which was apparently Thomas's punishment for him wetting his pants. Michael later died at the hospital. Denise—the mother who had been at work—was convicted of aiding and abetting first degree murder and was sentenced to life in prison. Her contention that the mere act of leaving her child home with Thomas was not a "knowing act of child abuse" was rejected by the Tennessee Supreme Court.[57]

In a particularly grating confirmation that mothers are not only held to higher parenting standards than fathers, but that their failure to meet those standards is considered an infraction severe enough to warrant extreme criminal punishment, non-abusing mothers have at times received the same or harsher charges or sentences than the father who injured or killed the child. Casey Campbell left her four-year-old daughter with her boyfriend, Floid Boyer. While she was gone, he gave her daughter second and third-degree burns over 18% of her body. While Floid pleaded guilty to only a misdemeanor, the mother, Casey, was convicted of a felony.[58] Tondalao Hall is perhaps the most extreme example of such disparity. Her boyfriend Robert Braxton Jr. broke her twenty-month-old son's femur and twelve ribs, and also broke her three-month-old daughter's femur, seven ribs, and a toe, in response to Tondalao trying to leave him. She never witnessed any abuse. She was sentenced to thirty years in prison.[59] Robert, who admitted to the abuse of the children, served two years in jail and was released on probation. The children's mother, Tondalao, was ultimately imprisoned for fifteen years.[60] In the words of Megan Lambert, a legal fellow for the ACLU of Oklahoma, "Instead of taking away an abuser from a family and allowing a family to live and grow in peace together, they let the actual abuser back out on the street, failed to protect the children, failed to protect the victim of domestic violence . . . and instead locked her up for not doing enough in the right way at the right time to combat the man who was threatening her life."[61]

Other cases have similar results. Jimmy Don Mackey of Oklahoma pleaded guilty to rape, sodomy, lewd molestation, and forcible sodomy of a child. His sentence was fifteen years. For "permitting" her husband to commit the abuse, his wife Alishia was sentenced to twenty years.[62] In Florida, Pauline Zile was convicted of first-degree murder and aggravated child abuse for her husband's

57. State v. Maupin, 859 S.W.2d 313, 314 (Tenn. 1993). The statute under which she was convicted was later struck down and her murder conviction was reversed. The court held that she could be retried on lesser offenses. *Id.*

58. Campbell v. State, 999 P.2d 649, 655 (Wyo. 2000).

59. Reis Thebault, *She Went to Prison over Her Boyfriend's Child Abuse. Thirteen Years After He Got Out, She's Free.*, WASH. POST (Nov. 8, 2019, 9:46 PM), https://perma.cc/4RZJ-2YAA.

60. *Id.*

61. Darla Slipke, *Groups Take Aim at "Failure-To-Protect" Laws*, OKLAHOMAN (July 14, 2019, 1:05 AM), https://perma.cc/G4BH-L2Z9.

62. D.E. Smoot, *Judge Dismisses Molestation Charges*, MUSKOGEE PHOENIX (Jan. 26, 2007), https://perma.cc/RAE4-5V8A.

beating of her child to death.[63] Both parents received a life sentence.[64] Laura Tustin of Oklahoma received ten years for leaving her child with Jeremy Tustin, who abused him while she was gone. His sentence was also ten years.[65]

Going to work with children at home can subject women to severe penalties if anything goes wrong while she is away. Kimberly Connie went to work on July 18, 1996, and left her four-month-old twin daughters with their father. He killed one of them while she was gone. She was charged and convicted of third-degree murder because she "permitted ongoing abuse to occur and allowed the creation of an environment in which the fatal injury could occur."[66] Lashinna Burger went to work on November 11, 2008, and left her twenty-three-month-old son with his father, Andre Hampton. Andre killed the boy. Both Andre and Lashinna were charged with murder, because Lashinna saw some bruises on the boy the night before his death.[67]

Jason Scott of Oklahoma was home with his five-month-old baby in January 2011 while the baby's mother, Tressie, was at work.[68] The baby was taken to the hospital not breathing.[69] Doctors reported that she had extensive bleeding on her brain and significant retinal hemorrhages that would leave her blind and on a feeding tube for the rest of her life.[70] The baby's father was charged with violently shaking the baby, leading to head trauma.[71] He admitted, to police that he had shaken the baby out of frustration.[72] At his trial, he was found not guilty and released.[73] Tressie, the baby's mother, was charged with "permitting child abuse" for going to work while the baby was with Jason.[74] She was found guilty and was sentenced to eighteen months in prison.[75] While the actual abuser was set free, the mother was sentenced to prison for leaving her baby with the man who was found not guilty.

In a case that received an unusual amount of public attention, Rebecca Hogue's boyfriend beat her two-year-old son to death one night in 2020 when she was at work.[76] The boyfriend subsequently fled and was later found dead after

63. Zile v. State, 710 So. 2d 729, 731 (Fla. Dist. Ct. App. 1998).

64. Nicole Sterghos, *Court Upholds Zile's Murder Conviction*, S. FLA. SUN-SENTINEL (May 20, 1998), https://perma.cc/7EVQ-M5BE.

65. Campbell, *These Mothers*, *supra* note 32.

66. Conine v. State, 752 So. 2d 4, 6 (Fla. Dist. App. 2000).

67. *Mother of Murdered Toddler Speaks*, WBTV (Mar. 20, 2013), https://perma.cc/PG7A-UZER. She ultimately spent 14 months in jail. *Id.*

68. *Tulsa Man Found Not Guilty Of Child Abuse*, OKLA.'S OWN NEWS ON 6, (Feb. 7, 2020, 7:15 PM), https://perma.cc/GWE5-PCHR.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Rebecca Hogue: Mother Jailed for 16 Months After Boyfriend Killed Son,* BBC NEWS, (Feb. 12, 2022), https://perma.cc/P6WN-BZEJ.

having killed himself. While there was no claim that Rebecca had ever abused the boy, nor was there any evidence that she knew about the abuse, prosecutors charged Rebecca with first degree murder under Oklahoma's "failure to protect" law. She was convicted. Stunningly, the jury recommended a life sentence. She was instead sentenced to sixteen months in prison in February 2022. Prosecutors claimed that she knew or should have known of the danger, so she was culpable for simply leaving her son with her boyfriend.[77]

Such cases raise critical questions concerning how much mothers are expected to know and predict. Is a mother's culpability virtually automatic if anyone other than the mother harms the child? She is guilty if she's there when someone abuses her child, and she is guilty if she is not there. Cases suggest the existence of a vigorous desire to both blame and criminally punish mothers for what they did not know, and for not calling in official authorities upon even the slightest evidence of harm.

2. Mother/Woman Was the Abuser and Father Was Not Present

Broad investigations of cases involving prosecution of the non-abusing parent under failure to protect laws reveals that, as anecdotal cases suggest, the prosecuted parent is nearly always the mother.[78] As noted above, given that data reveals a high incidence of child abuse by women, logic would suggest that non-abusing men would be frequently prosecuted for the abuse perpetrated against their children by women. But it is exceedingly difficult to locate examples of cases where fathers were charged for their complicity in failing to act to protect a child or for leaving a child with an abusive mother.[79] One attorney noted the extreme disparity in such cases in their practical experience: "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."[80]

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77. *Id.*

78. *See* 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 non-abusing abuse of their children."); Jacobs, *supra* note 14, at 593 n.68 (pointing out lack of scholarship 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).

79. Examples of such cases include *People v. Beltran*, 2015 WL 5996763 (Ill. App. 1st 2015) (man convicted of aggravated battery of a child when he knew of abuse but failed to take adequate measures to protect her from injury by her mother or seek medical care); *State v. Miranda*, 715 A.2d 680, 683 (Conn. 1998) (live-in boyfriend knew of injuries and was aware of risk of abuse but failed to act and was convicted of risk of injury to child and first degree assault), *rev'd on reconsideration*, 864 A.2d 1 (Conn. 2004), *overruled in later appeal*, 878 A.2d 1118 (Conn. 2005) (live-in boyfriend cannot be convicted of first-degree assault for failing to protect his girlfriend's child, but can be convicted of risk of injury to child); Abel Wolf of Oklahoma was convicted of enabling child abuse at the hands of the child's mother Denise Wolf, and sentenced to life in prison. Campbell, *These Mothers*, *supra* note 32.

80. Fugate, *supra* note 14, at 274.

As discussed in the sections above, in many cases of abuse committed by the mother, it is difficult to even determine the father's level of knowledge of possible risk and thus culpability, because no investigation or attention appears to be paid to that issue when the mother is the abuser.

For example, compare the above cases with that of *State ex rel. S.A.*[81] In that case, the mother was home alone with the couple's infant son. The father came home from work and found the baby in apparent distress. The baby had retinal hemorrhaging, brain injury, and brain swelling so severe that he was removed from life support.[82] The reported facts—in both news and the courts—are completely silent about how much the father knew regarding any prior abuse, the mother's mental state, or the amount of risk the child was in; evidently little to no attention was paid to that question. There was no indication of an actual investigation into what the father knew or did not know, and no charges were filed.

Similarly, when Susan Smith drove her car with her two sons into a lake and drowned them, there was no discussion of the husband's culpability, even though he had himself admitted to prior physical abuse of Susan. There was evidence that Susan had been abusive in the past as well, but that fact was not used as evidence that the father should have known she was dangerous to the children.[83]

The same facts that support convictions and severe sentences against mothers generally are not likewise used to justify prosecutions of fathers. Lesli Jett of Illinois was sentenced to seventy-five years in prison for the murder of her boyfriend's son. There appeared to have been repeated abuses taking place while the father was at work, but he stated that he didn't know it was happening. Yet at the time of his death, the boy had 260 bruises, contusions, and abrasions, some of which took place days before he died and would have been visible, including scratches, lacerations, and a bruise near his eye.[84] The articles detailing the case say nothing about whether the father knew or should have known his son was at risk. He was not charged with any crime.[85] Similar evidence of visible injury is regularly used to demonstrate culpability on the part of non-abusing mothers.

Other cases illustrate the disparity further. Odette Joassaint had a "tumultuous" relationship with boyfriend Frantzy Belval. There were multiple police calls over the course of a year.[86] He was arrested for aggravated battery in 2019 and was

81. State *ex rel.* S.A., 37 P.3d 1172 (Ut. App. 2001).

82. *Id.* at 1174.

83. Jesse J. Holland, *Tearful Ex-Husband Recalls Susan Smith's Behavior, His Grief*, AP NEWS (July 25, 1995), https://perma.cc/4MYP-HG33.

84. Mike Smith & Shabnam Danesh, '*Manipulative, Dishonest, Untrustworthy,' 75 Years in Prison for East Peoria Child Murderer*, CENT. ILL. PROUD (Sept. 18, 2021), https://perma.cc/3R2H-3C97.

85. *Id.*; Brie Stimson, *Illinois Woman Gets 75 Years for Murder of Boyfriend's Son, 4; Judge Calls Her 'Horrible Pseudo-Parent'*, FOX NEWS (Sept. 19, 2021, 6:02 AM), https://perma.cc/CY3Y-EXZS; Shabnam Danesh & Gretchen Teske, *Illinois Woman Convicted in Murder of 4-Year-Old*, FOX 2 NOW (July 12, 2021, 5:15 PM), https://perma.cc/ZE9H-U8SY.

86. Marisela Burgos & Tavares Jones, *Father of 2 Children Found Dead in Miami Apartment Describes Rocky Relationship with Mother Charged in Their Murder*, NEWS MIAMI (Apr. 13, 2022), https://perma.cc/ZS5Q-VDL6.

issued a stay-away order.[87] On the day Odette killed her two children, she called Frantzy, saying odd things and talking about death. She then tried to call him a few hours before the children died, but he did not answer. Later he blamed her for not clearly indicating in her attempt to contact him that it was an emergency.[88] In news stories about the case, he is portrayed simply as a grieving father rather than a negligent parent who failed to act to protect the children from harm. On the other hand, when Cecilia Vasquez's partner called her at work to say her son wasn't doing well (the partner then killed the boy), she was sentenced to eighteen years in prison for his death.[89]

Similarly, Jessica Schwarz was convicted of abusing and ultimately killing her ten-year old stepson, A.J.[90] She had previously discussed her hatred of the child;[91] seventeen witnesses testified that she had abused him previously;[92] and evidence suggested the abuse was obvious and long-term.[93] Child Protectives Service had a case with the family due to prior abuse reports.[94] Yet when Jessica eventually killed A.J., the child's father, David, claimed he hadn't noticed any abuse.[95] He was not charged with a crime. Jessica was sentenced to life in prison.[96]

Perhaps one of the most notorious cases of child murder by a mother is that of Andrea Yates. She had a long history of severe mental illness, of which her husband Rusty was well aware. She attempted suicide twice after having her fourth child, and experienced severe postpartum psychosis.[97] Doctors cautioned the couple about the risks of having any more children, stating that her postpartum psychosis was very likely to return. Despite the warnings, Andrea became pregnant again, reportedly at Rusty's urging. After the birth of their fifth child, Rusty said that Andrea's depression returned and got worse, failing to improve after treatment.[98] She was the primary caregiver of the children and homeschooled the older ones as well. On June 20, 2001, Rusty left Andrea home with the five

87. Terrell Forney, *Records Show Checkered Past Between Parents of 2 Children Allegedly Killed by Their Mother*, LOCAL10 (Apr. 14, 2022, 11:16 PM), https://perma.cc/LS3L-4QYC.

88. Burgos & Jones, *supra* note 86.

89. Campbell, *These Mothers*, *supra* note 32.

90. Schwarz v. State, 695 So.2d 452, 453 (Fla. Dist. Ct. App. 1997).

91. *Id*. at 454.

92. *Id*.

93. Amanda Mahoney, *How Failure to Protect Laws Punish the Vulnerable*, 29 HEALTH MATRIX 429, 443 (2019), https://perma.cc/3FXE-SGPE (citing Mike Folks, *A.J. Case Haunts Father*, SUN SENTINEL (July 17, 1995)).

94. *Brief Life of A.J. Schwarz Filled With Violence, Custody Problems*, SUN SENTINEL (Sept. 4, 1994), https://perma.cc/98X4-GKFZ.

95. Mahoney, *supra* note 93.

96. *Id*. (citing Jacobs, *supra* note 14, at 584).

97. *Prosecutors Mull Case Against Russell Yates,* ABC NEWS (Mar. 15, 2002), https://perma.cc/CC8C-62K7.

98. *Id*.

children. She drowned each of them in the bathtub.[99] Prosecutors were asked to "look into" whether Rusty was culpable.[100] They questioned why he left his wife alone with the children when he knew that she was mentally unstable.[101] He stated that he believed she "would be fine." The conclusion of the District Attorney: there was no crime and Rusty was "not responsible," because "[i]t's not necessarily criminal to be a bad husband."[102] Instead of harboring any responsibility, Rusty was "a victim."[103] In *Jakubczak v. State*, by contrast, where the parental roles were reversed, a mother who left her child with her mentally ill husband was convicted of child abuse and sentenced to seven years when he abused the child.[104]

Courts often charge a non-abusive mother as a principal actor in the crime, rather than an aider and abetter. In other words, mothers are often charged with first-degree murder, rather than accessory to murder, even when they had no hand in the abuse. In the uncommon instances where fathers are charged for failure to protect, they are more likely to be charged with lesser offenses. A California father, for example, was in the home when a newborn's mother stabbed and slashed him with the baby thirty times.[105] He failed to call for help for two hours and disposed of the weapon. He was not charged with attempted murder, as the mother was. He was instead charged with the lesser offenses of child endangerment and accessory.[106]

Likewise, in *Leet v. State*, the mother was the abuser.[107] There were many repeated indications of abuse and obvious injuries that the father would have been aware of. He did not seek medical care or encourage the mother to do so. The child was in the man's sole care on the last day of the child's life, after the abuse had taken place, and despite severe injuries that ultimately killed the child, the father did not seek medical attention for the child. He was not charged for depriving the child of medical treatment, even though he had the sole care of the child on the child's last day of life and the child had already sustained the injuries that would kill him.[108] Where the mother was charged with first-degree murder and sentenced to life in prison,[109] the father was not charged as a principal. He was instead charged with lesser offenses of child abuse and third degree felony murder.[110] The non-abusing father in *State v. Rundle* was also charged and

99. *Id.*

100. *DA: Russell Yates Not Responsible for Deaths*, GREENSBORO NEWS & RECORD, https://perma.cc/ELK5-MQM2 (last updated Jan. 23, 2015).

101. *Id.*

102. *Id.*

103. *DA: Russell Yates Not Responsible for Deaths*, *supra* note 100.

104. Jakubczak v. State, 425 So. 2d 187, 188 (Fla. Dist. Ct. App. 1983), *citing* Leet v. State, 595 So. 2d 959, 964 (Fla. Dist. Ct. App. 1991).

105. *In re* J.C., 2007 Cal. App. Unpub. LEXIS 499, at *2 (Jan. 23, 2007).

106. *Id.*

107. *Leet*, 595 So.2d at 962.

108. *Id.*

109. Nancy Weil, *Man Gets 7 Years in Death of Boy*, TAMPA BAY TIMES (Oct. 16, 2005), https://perma.cc/EHR2-36NZ.

110. *Leet*, 595 So.2d at 959.

convicted of aiding and abetting child abuse, rather than as a principal.[111] Yet the appeals court overturned even that conviction because the evidence apparently didn't meet the standards of aiding and abetting, despite the fact that the father was present for some of the abuse and had even had conversations about it with others.[112]

III. THE REASONABLE MOTHER AND CRIMINAL NONCOMPLIANCE WITH MATERNAL IDEALS

In state statutes and in court cases applying common law, the standards being applied in failure to protect cases are gender-neutral. In theory, fathers can be just as culpable as mothers for their omissions that result in harm to their children. Indeed, any official standard which placed disproportionate burdens on one parent over the other would run afoul of constitutional and equal protection guarantees. Yet even a cursory look at the cases reveals a problem in the application of these laws.

A. THE GENDER-SPECIFIC 'REASONABLE PERSON'

The laws sometimes refer to a "reasonable person," such that the duty to act is based on what a hypothetical reasonable person would do under the same circumstances. Abundant evidence suggests, however, that views of what a reasonable mother should do are quite different from those of a reasonable father. A powerful idealized "myth of motherhood" is central to women's identity in the U.S.[113] Research documents the stereotypes applied to mothers and the disparate social views of motherhood and maternal responsibility compared with fathers. Mothers are faced with an all-or-nothing good versus bad categorization: if they are not superhuman in their nurturing, then they are the nurturer's antithesis: cold and rejecting.[114] The so-called "ideal mother" is a skilled child nurturer and homemaker, exercising great care in the domestic sphere and not working outside the home.[115] At the same time, mothers are increasingly viewed as posing risks to their children due to persistent gender stereotypes.[116] These views of motherhood are tied to the historical view of women heading the private, family sphere, and men, the public, political and social sphere.[117]

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111. State v. Rundle, 500 N.W.2d 916, 916–17 (Wis. 1993).

112. *Rundle*, 500 N.W. 2d at 918–19 (Wis. 1993).

113. Lawrence H. Ganong & Marilyn Coleman, *Content of Mother Stereotypes*, 32 SEX ROLES 495, 496 (1995), *citing* N.E. Russo, *Overview: Sexroles, Fertility and the Motherhood Mandate*, PSYCH. WOMEN QUARTERLY, 4, 7–15 (1979).

114. *Id.*

115. *See*, *e.g.*, Emily Winograd Leonard, *Expecting the Unattainable: Caseworker Use of the "Ideal" Mother Stereotype Against the Nonoffending Mother for Failure to Protect from Child Sexual Abuse Cases*, 69 N.Y.U. ANN. SURV. AM. L. 311, 324 (2013).

116. Linda C. Fentiman, *Are Mothers Hazardous to Their Children's Health?: Law, Culture, and the Framing of Risk*, 21 VA. J. SOC. POL'Y & L. 295, 298 (2014).

117. *See* Kim Shayo Buchanan, *The Sex Discount*, 57 UCLA L. REV. 1149, 1157–60 (2010).

B. HISTORICAL DEVELOPMENT OF THE MYTH OF MOTHERHOOD IN LAW

Sarah Singh's analysis of failure to protect laws in the United Kingdom traces some of the roots of modern expectations of maternal responsibility. The eighteenth century saw a shift in public views of mothers as primarily responsible for the care and welfare of children, with increasing privatization of modern systems of care leading to expectations of "intensive mothering, which re-emphasize the demand for maternal omnipresence and selflessness."[118] The resulting system is one in which mothers are blamed when things go wrong for their children.[119]

The U.S. legal system—including the U.S. Supreme Court—officially utilized these societal maternal expectations as relevant in legal decision-making.[120] The Court has since formally rejected the utilization of arbitrary gender distinctions in the law,[121] yet they are nevertheless salient within social and political systems in informal ways and continue to influence courts and others within the legal system. Caroline Rogus identifies multiple contexts in which traditional concepts of women's roles have continued to influence Supreme Court decisions on issues such as citizenship and abortion.[122] Family law is infused with empirically problematic presumptions about the ideal role of mothers as at-home caretakers as well.[123]

The notion of the "ideal mother" is particularly pervasive in its reach and acutely powerful in its application against women with children.[124] This idealized view of mothers results in them being held nearly exclusively responsible for their children,[125] which places primary blame on mothers when things go wrong—even when the wrongdoer was someone else. Such differences are revealed even in the English lexicon. The verb "mother" is defined in the Oxford English Dictionary as "to protect, as with maternal care," and "to bring up, take care of, or protect as a mother; to look after in a (sometimes excessively) kindly and protective

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118. Sarah Singh, *Punishing Mothers for Men's Violence: Failure to Protect Legislation and the Criminalisation of Abused Women*, 29 FEM. LEG. STUD. 181, 184 (2021).

119. *Id.*

120. *See*, *e.g.*, Bradwell v. Illinois, 83 U.S. 130, 141 (1872) ("The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.") (Bradley, J., concurring).

121. Reed v. Reed, 404 U.S. 71, 76 (1971) (arbitrarily preferencing one sex over the other violates the Equal Protection Clause of the Fourteenth Amendment); Price Waterhouse v. Hopkins, 490 U.S. 228, 256–58 (1989) (employment discrimination on the basis of sex stereotyping constitutes sex discrimination under Title VII).

122. Caroline Rogus, Note, *Conflating Women's Biological and Sociological Roles: The Ideal of Motherhood, Equal Protection, and the Implications of the* Nguyen v. INS *Opinion*, 5 U. PA. J. CONST. L. 803, 804–15 (2003).

123. Jane C. Murphy, *Legal Images of Motherhood: Conflating Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 688, 690 (1998).

124. *See* Rogus, *supra* note 122, at 819; *see also* Christa J. Richer, *Fetal Abuse Law: Punitive Approach and the Honorable Status of Motherhood*, 50 SYRACUSE L. REV. 1127, 1138 (2000) ("Through strictly defined sex roles and power distributions, a concept of the 'ideal mother' has emerged and been adopted in many arenas, including but not limited to: education, politics, and even the legal system."); April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 103–04 (2001).

125. Ganong & Coleman, *supra* note 113, at 496.

way."[126] Yet no comparable definition can be found for "father" that addresses protection or caring; instead the primary meanings focus on some version of begetting or bringing into existence.[127] An analysis of criminal cases nationwide bears out the existence of these stereotypes and expectations.

C. THE IDEAL MOTHER IN THE CRIMINAL PROCESS FROM INVESTIGATION TO SENTENCING

Gender stereotypes are prevalent at every level of the criminal system, from law enforcement officers and prosecutors' offices to judges and juries. The permeation of these stereotypes in the legal system is an issue of serious concern because they result in significant and concrete negative consequences for women. Indeed, implicit bias "infects the very institution that we depend upon for fairness and the just resolution of disputes: the courts."[128] Child protection workers approach their work within the context of the "ideal mother" with striking results: Professor Rebecca Bolen found that mothers are identified by child protective services as offenders at 880 times their actual rate of sexual abuse.[129] Law enforcement officers scrutinize the actions of women and are inclined to be critical of their parenting and judgment, even in the face of clear evidence that the man was the abuser.[130] It does not occur to officers to look at a non-abusing father's actions with the same critical eye as they do mothers, indicating a substantial difference in parental expectations of mothers versus fathers.[131] The effects, however, are significant and concrete.

News coverage of incidents of abuse reveal similar tendencies. Mothers who fail to protect are punished.[132] Stories ostensibly about severe abuse of children often focus on the mother's fulfilling of her maternal duties in contexts unrelated to the abuse. The cleanliness of the home and children, socio-economic status, quality and occupants of the building of residence, and whether the mother works in or out of the home are all factors considered when determining whether a mother has satisfied her duties.[133] "Signs of imperfection in her children or even

126. *Mother*, OED ONLINE, https://perma.cc/S8SY-9SZC (last visited Dec. 12, 2022).

127. *Father,* OED ONLINE, https://perma.cc/CHW8-NLWX (last visited Dec. 12, 2022).

128. Hon. Maite D. Oronoz Rodríguez, *Gender Equality and the Rule of Law*, 95 N.Y.U. L. REV. 1599, 1610 (2020) (quoting Theodore McKee, *Preface* to ENHANCING JUSTICE: REDUCING BIAS v–vi (Sarah E. Redfield ed., American Bar Association, Judicial Division 2017)).

129. Rebecca M. Bolen, *Nonoffending Mothers of Sexually Abused Children: A Case of Institutionalized Sexism?*, 9 VIOLENCE AGAINST WOMEN 1336, 1337 (2003) (finding that although mothers comprise 44% of all identified abusers, mothers commit only 0.05% of all retrospectively reported abuse).

130. *See id.* (citing David Finkelhor & Gerald T. Hotaling, Sexual Abuse in the National Incidence Study of Child Abuse and Neglect: An Appraisal, Child Abuse & Neglect 8, 22–33 (1984)).

131. *See* Murphy, *supra* note 123, at 751, 756, 761.

132. Kareem Fahim, *Mother Gets 43 Years in Death of Child, 7*, N.Y. TIMES (Nov. 12, 2008), https://perma.cc/T7XU-PQ9X (Prosecution says, "Being held accountable for what you do and don't do are one and the same under the law.").

133. Dorothy E. Roberts, *Mothers Who Fail to Protect Their Children: Accounting for Private and Public Responsibility*, *in* Mother Troubles: Rethinking Contemporary Maternal Dilemmas 31, 36–42 (Julia E. Hanigsberg & Sara Ruddick eds., 1999).

signs that she may have goals beyond motherhood (e.g., career, a better marriage) can cause her to fall rapidly from the pedestal."[134] Such focus on arguably legally irrelevant factors suggests that a mother's apparent failures in the ordinary and mundane expectations of her role also indict her in questions relating to her culpability for violence against her children. If she cannot keep a clean house, then she is not a good mother, and she probably is not doing what she should to protect her children either. The effects of these biases tend to fall disproportionately on non-white mothers. White motherhood and the actions assumed to be attendant thereto are the default standard by which others are measured for deficiencies, making the ideal mother standard inherently unreachable for many.[135]

Prosecutorial decisions further exacerbate the unequal application of the law for women. Prosecutors have a dominant role in the criminal justice system and are granted vast discretion in determining whether to bring charges, against whom, what charges to bring, whether to offer a plea bargain, and what type of plea to offer. Such decisions determine first whether a person is at risk of losing their liberty or their life,[136] and they sometimes pre-determine outcomes altogether.[137] The prosecutor is granted almost complete deference in these decisions by the judiciary,[138] while their choices have a "greater impact and more serious consequences than those of any other criminal justice official."[139] While there are compelling arguments in favor of the need for that discretion,[140] actual decisions of prosecutors are not free of common biases and stereotypes. When a person is tasked with making a "gut call" on an issue, the resulting decisions are impossible to divorce from the personal views of the decision-maker, including their views on motherhood and maternal responsibility. Discretionary decisions can appear to be neutral but are actually influenced by unconscious and "deeply internalized biases" that infect the decision-making process.[141] This tremendous amount of prosecutorial discretion, with no corresponding rules, regulations, or oversight,

134. Ganong & Coleman, *supra* note 113, at 496.

135. Roberts, *supra* note 133, at 41–42; *see also* Cherry, *supra* note 124, at 110; Rogus, *supra* note 122, at 818.

136. *See* Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 24 (1998).

137. *Id.* at 18 (noting that "much of the discriminatory treatment of defendants and victims may be based on unconscious racism and institutional bias rather than on discriminatory intent.").

138. *See* Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978) ("[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.").

139. Angela J. Davis, *The Power and Discretion of the American Prosecutor*, 49 DROIT ET CULTURES 55, para. 1 (2005).

140. These are primarily centered on efficiency. Expansive discretion in the case of filing charges allows the prosecutor to forgo prosecution if the evidence is not sufficient, or in the case of plea bargaining, to mitigate the expense and time of a trial through more expedient case resolution. *See id.* at ¶ ¶ 21, 27.

141. Davis, *The Power and Discretion*, *supra* note 139, at ¶ 20.

can result in widespread discrimination against certain groups.[142] This is particularly true with respect to the imposition of an idealized standard of motherhood that is unfailingly nurturing and selfless.[143] When such skewed standards come into play in the criminal justice system, women almost exclusively end up held to account and criminally punished for failing to measure up to the ideal.

Studies have demonstrated that prosecutors may use their discretion to punish "unladylike" women for breaking laws in order to reinforce traditional gender roles.[144] Gender bias can result in harsher stricter penalties aimed at keeping women in more traditional, submissive roles. Thus, women who are perceived to have violated gender-role expectations may be treated more harshly in the criminal justice system than their male counterparts.[145] For instance, when a prosecutor believes a particular case against a mother who has failed to protect her child is serious in nature they may invest more time and effort into investigating the mother's involvement, which will yield more evidence against her than against the similarly situated father of whom no similar evidence was ever sought.

Prosecutor comments support the existence of gender stereotypes for parents. Consider this prosecutor's statement in Victoria and Daniel Pedraza's case:

> She says because she was terrified of him. I find that to be a pitiful excuse. Pitiful. As I pointed out, he can't be awake 24 hours a day. He's got to sleep sometime. . . . I think you know what would happen with most mamas. I know what the mama of my children would have done. I would have woken up with an ice pick sticking out of my eye or my kneecap blown off. Didn't happen . . . But does that make him any less guilty? Does her dereliction of her duty, her complete abandonment of her natural God-given role to protect her child, make him any less guilty? No.[146]

The emotional reference to what "most mamas" would do, combined with the claim that her maternal duties to selflessly protect her child despite any risk in doing so were "natural" and "God-given," clearly demonstrate the presence of stereotypes surrounding idealized motherhood. The statement also entirely ignores the fact that women who take such actions against abusive partners are typically prosecuted for murder and receive harsher sentences than other murder

142. *See*, *e.g.*, Stacey J. Bosick, *Racial Disparities in Prosecutorial Outcomes*, COLO. EVALUATION & ACTION LAB, UNIV. DENVER (Mar. 2021) (finding that in an analysis of over two thousand cases, multiple significant racial and ethnic disparities exist at stages of prosecution that involve prosecutorial discretion, including case dismissal, deferred judgments, and admission into drug court).

143. *See, e.g.*, Rogus, *supra* note 122, at 820.

144. *See, e.g.*, Victor L. Streib, *Death Penalty for Female Offenders*, 58 U. CIN. L. REV. 845, 878–79 (1990).

145. K.B. Turner & James B. Johnson, *The Effect of Gender on the Judicial Pretrial Decision of Bail Amount Set*, 70 FED. PROBATION 56, 58 (2006).

146. Patty Wooten, *Jury: Pedraza Undeserving of Second Chance*, SEARK TODAY (Jun. 5, 2013), https://perma.cc/W597-FHPR.

defendants.[147] The national average sentence for a woman who kills her male partner, most often in self-defense, is fifteen years, compared with two to six years for men who kill their female partners.[148]

Similarly, Tabitha Pollock's prosecutor said in her trial:

> She should have known. She should have done something. Because any loving, reasonable, caring parent would have seen it; they would have done something about it. But not Tabitha Pollock. All she did was continue to allow Scott English to have control over Jami. She continued to give him access . . . And for that, she's as guilty as Scott English of murder and aggravated battery of a child.[149]

This notion that a mother who has failed to act in accordance with societal expectations is *just as guilty* as the abusing man shows up in other cases. In the case of Donna Duncan, who was out of state when her partner murdered her child, the prosecutor said, "I feel the actions of this defendant were as heinous as if she had struck the final blow."[150] As a result, a mother's failure to protect her child can result in charges well beyond those of "permitting" child abuse or accessory thereto; as we have seen, charges of first-degree murder are not uncommon.

Further, the expectation of the ability to predict all future harm—as well as to always be present to prevent it and capable of doing so—is also one that applies only to mothers. The existence of so many criminal cases against mothers who were at work when a child's father harmed or killed them exemplifies this phenomenon. Her venturing outside of the home is not just a moral failing, but a criminal one.[151] Singh notes that the avoidance of risk to a mother's children is an element of idealized motherhood, where the responsibility is not only to care for children, but also to "avoid and manage male violence."[152] When harm befalls children at the hands of men, it signifies a failure of the mother to predict, manage, and stop that violence.[153] Gender biases permeate the decision-making process of judges as well. When judges make legal decisions that are influenced by a defendant's identity traits, legal outcomes are tied to legally irrelevant factors such as gender. Members of disadvantaged groups, including women and people

147. Erin Liotta, *Double Victims: Ending the Incarceration of California's Battered Women*, 26 BERKELEY J. GENDER L. & JUST. 253, 257 (2011) (citing Elizabeth Dermody Leonard, CONVICTED SURVIVORS: THE IMPRISONMENT OF BATTERED WOMEN WHO KILL 60, 125 (2002)).

148. Ashley D. Brosius, *An Iowa Law in Need of Imminent Change: Redefining the Temporal Proximity of Force to Account for Victims of Intimate Partner Violence Who Kill in Non-Confrontational Self-Defense*, 100 IOWA L. REV. 775, 798 (2015).

149. People v. Pollock, 780 N.E.2d 669, 680 (Ill. 2002).

150. *Woman Sentenced to 22 Years in Son's Beating Death*, AP STATE & LOCAL WIRE, Apr. 24, 2001.

151. Singh, *supra* note 118, at 184.

152. *Id.*

153. *Id.* at 184–85.

of color, are particularly likely to be impacted by judicial bias.[154] Studies reveal a particular problem with gender bias in abuse proceedings,[155] where gender roles come to the forefront of the issues in dispute. Such biases potentially have a significant impact on cases but are nevertheless typically not direct enough to constitute reversible error. It is exceedingly difficult to establish that a given defendant was treated worse due to her gender than an otherwise identical male defendant would have been. Societal views about the role of mothers and what the "reasonable mother" should be expected to think and do all serve to skew a decision-maker's perspective.

Fugate identifies three main stereotypes that appear in failure to protect cases: the All Sacrificing Mother, the All-Knowing (and thus All-Blamed) Mother, and the Nurturing Mother.[156] Each places additional burdens on women in the judicial system while conceiving of men as taking a secondary role,[157] and thus having lesser responsibilities and culpability. "Who takes responsibility for the infant? The mother, if the mother's the only person available," said the judge when sentencing Tabitha Walrond, who was charged with manslaughter in the death of her infant when she did not realize that her breast milk was not meeting his needs.[158] Yet the mother was not actually the only person available; the infant's father was involved and had visited the baby, even noticing that he seemed emaciated.[159] But prosecutors did not consider him culpable in the infant's death, and he faced no charges or criticism.[160]

Evidence of jury susceptibility to gender stereotypes is less common, largely because jury deliberations are confidential and there is minimal available data to study. Yet evidence (as well as common sense) suggests that juror values—rather than simply case facts—contribute to their interpretation and weighing of evidence.[161]

Anecdotal evidence corroborates such a conclusion. A juror in Tabitha Walrond's case said, "No matter what, she was the mother. She was failed [by the health care system], but she should have been strong enough to do more."[162] Skewed juror expectations of mothers versus fathers is stunningly explicit in the case of Cesar Rodriguez, who killed his stepdaughter. He admitted to beating the

154. Rodríguez, *supra* note 128, at 1612.

155. Fugate, *supra* note 14, at 287.

156. *Id*. at 289.

157. *Id*.

158. Tara George, *Mom Gets Probation in Baby Starve,* N.Y. DAILY NEWS, Sept. 9, 1999, at 4.

159. Sandra Chung, *Mama Mia! How Gender Stereotyping May Play a Role in the Prosecution of Child Fatality Cases*, 9 WHITTIER J. CHILD. & FAM. ADVOC. 205, 213 (2009).

160. *Id*. at 214.

161. *Id*. at 212–13 (citing MARK COSTANZO, PSYCHOLOGY APPLIED TO LAW 135 (Vicki Knight ed., 2004)).

162. Nina Bernstein, *Bronx Woman Convicted in Starving of Her Breast-Fed Son,* N.Y. TIMES (May 20, 1999), https://perma.cc/JSS4-FXP9.

seven-year-old daily for weeks and doing so severely on the night she died.[163] Yet jurors nevertheless believed that she was "the bigger villain because a mother has a higher duty to protect her children."[164] Another juror stated that the mother was "more guilty" than he was, because she "carried that child in her for nine months," and when the stepfather threw her to the floor, the mother "just left her there. What kind of mother does that?"[165] The statements prompted a reporter to suggest that the jurors "despised the girl's mother . . . more than they hated [the defendant]."[166] At the mother's subsequent trial, one prospective juror stated that "[t]he biggest part of being a mother is protecting the child from the world," indicating that she may be held to a more stringent duty than the father figure who actually killed the girl.[167] The prosecutor in the mother's case told the jury that she was the child's "last and only hope. Her mother."[168] Both parents were convicted of first-degree manslaughter, but prosecutors added four lesser charges to the mother's case related to the same incident, so she was sentenced to up to forty-three years, while the father—who prosecutors themselves acknowledged had struck the fatal blow—only received up to twenty-nine.[169] When the prosecutor was asked why they did not also charge the stepfather with the lesser assault charges that were levied at the mother, despite the father's admission of daily beatings, the answer was "different evidence."[170]

Gender disparity in sentencing is also clear. While Ashlee Christian received a ten-year sentence for "enabling child abuse," the actual abuser received twelve.[171] Tressie Scott, discussed above, was found guilty of permitting Jason Scott to abuse her child and received eighteen months after Jason was found not guilty of abuse and released.[172] Tondalo Hall, also discussed above, served fifteen years for failure to protect her child from her partner, who served two.[173] Traci Switch received sixty-five years in prison for enabling child abuse, while the abusive partner received just twenty years—less than a third of the non-abusing mother's

163. Andy Newman & Annie Correal, *Subtleties in the Language Made it Murder, or Not,* N.Y. TIMES (Mar. 20, 2008), https://perma.cc/56K7-SV5Z.

164. *Id*.

165. Scott Shifrel, Mike Jaccarino, & Tracy Connor, *Guilty - But Not Punished Enough. Lawyer on Jury Led Vote Against Murder*, N.Y. DAILY NEWS, Mar. 19, 2008.

166. *Id*.

167. Andy Newman, *Jury Selection Begins in Murder Trial of 7-Year-Old Brooklyn Girl's Mother,* N.Y. TIMES (Sept. 16, 2008), https://perma.cc/BE9S-RR5.

168. Andy Newman, *At Trial, Mother as Victim or Catalyst in Girl's Death,* N.Y. TIMES (Sept. 19, 2008), https://perma.cc/D4CV-FBC5.

169. Fahim, *supra* note 132. The conviction of second-degree assault was overturned on appeal, while the first-degree manslaughter conviction was upheld. People v. Santiago, 87 A.D.3d 707 (N.Y. S.2d 2011). Ms. Santiago's sentence was reduced by seven years, still resulting in a higher sentence than the stepfather. Oren Yaniv, *Monster Ma Sentence Cut*, N.Y. DAILY NEWS, Aug. 27, 2011, at 21.

170. Fahim, *supra* note 132.

171. Campbell, *These Mothers*, *supra* note 32.

172. OKLA.'S OWN NEWS ON 6, *supra* note 68.

173. Campbell, *These Mothers*, *supra* note 32.

sentence.[174] Mothers have received sentences as high as seventy-five years for failing to protect their children from abuse.[175] At least one mother, Tye Shafer, was sentenced to life in prison for "permitting child abuse murder."[176]

The legal standard applied in determining culpability for a non-acting parent is therefore clearly distinct for mothers and fathers. For mothers, it amounts to an all-knowing, self-sacrificing, and perfectly nurturing mother.[177] There are so few cases against men that it is difficult to determine whether there is actually a cognizable standard applied. If there is, it would arguably be more stringent than even gross negligence, falling closer to a requirement of both knowledge and presence while failing to intervene. Yet in the rare event that charges are filed in those cases, the charges are less severe than for similarly situated women.[178] In essence, women who are accused of failure to protect are tried not as individuals, but rather as *mothers*. Their guilt is determined, in other words, "according to their adherence to maternal ideology, rather than their actions and omissions."[179]

D. DOMESTIC VIOLENCE AGAINST THE MOTHER

The legal system at every level fails to consider or account for a male abuser's violence against the mother in cases where the mother is accused of failure to protect. The majority of state failure to protect statutes do not consider the reasons why the parent failed to intervene, even if intervention would have created significant risk to themselves or increased harm to the child.[180] Yet even in cases where the mother did attempt to intervene but was unsuccessful, she is often still criminally punished.[181] When a man is abusive towards a child, he is also often abusive toward the mother; conversely, children whose mothers are abused are significantly more likely to be abused.[182] Battering of children is also often a method used to exert control over the mother. The woman's attempts to resist the abuser's control or his violence often result in worse abuse of the children,[183] and women often choose what they view as the least dangerous option under the circumstances.[184] Brittany Stinnet of Tennessee, for example, suffered "daily and ongoing" abuse

174. *Id*.

175. Wendy Scroggins of Oklahoma. *Id*. The murderer received life without parole. *Id*.

176. *Id*. (The abusive partner received life without parole.).

177. *See* Fugate, *supra* note 14, at 294 (mothers are expected to "be all-knowing when it comes to their children and as a result face harsher scrutiny and are more likely to be blamed if anything goes wrong.").

178. *Id*. at 274.

179. Singh, *supra* note 118, at 184.

180. Gordon, *supra* note 13, at 761–62.

181. *See*, *e.g*., Lindley v. State, No. 08-08-00149-CR, 2010 WL 1076138, at *2–3 (Tex. App. Mar. 24, 2010) (mother who attempted to stop abuse and was thrown to the floor was sentenced to 45 years); State v. Walden, 293 S.E.2d 780, 783, 787 (N.C. 1982) (mother who tried to intervene in father's abuse was repeatedly struck in the face had failed in her duty to protect children).

182. Roberts, *supra* note 133, at 36.

183. *Id*. at 38–40.

184. Singh, *supra* note 118, at 197.

from her partner, who had isolated her and the children from others.[185] She said that she was willing to be abused in the belief that she could deflect his attention from the children. When her partner murdered her daughter, she was charged with aggravated child neglect and was sentenced to eighteen years in prison for failing to protect her child.[186]

Family violence impacts both the real and perceived options of the mother in protecting her children from abuse. She may legitimately fear retaliation for any action she takes, thus further imperiling both her and the children. Her failure to leave the environment may in fact represent an attempt to keep them from being murdered.[187] A mother's attempts to leave are also dismissed by prosecutors, judges, and juries. In Arlena Lindley's case, the fact that she was seeking help and attempting to leave her abuser on the day he killed her son was not considered in the case against her.[188] Nor was the fact that her partner assaulted her when she attempted to stop him from hurting her son.[189] She was sentenced to forty-five years for her abuser's murder of her son.[190] When a mother is punished for the man's violence against the children, it amounts to punishing her for her resistance to his control and violence.

Dealing with violence in a home will often create serious practical considerations in addition to escalations in violence, including economic concerns, family or legal pressures, fear of losing the children, or issues related to immigration documentation and threats on the part of the abuser. These challenges have concrete impacts on a mother's agency, her assessment of options, and her calculation of risk in the circumstances. Women are often faced with few viable choices when they and their children are both being abused by an intimate partner. Yet courts uniformly fail to consider any of these factors in determining the mother's culpability. The focus in cases of abuse of the mother is instead centered on questioning why she did not leave—equating that action with a failure to protect. The courts are concerned about family violence when it is perpetrated against children, but that concern appears to vanish when the victim is that child's mother. Most relevant context is absent from court narratives.

Mothers who bring up the abuser's violence against them often see it used against them in court. They find themselves accused of lying and manipulating in

185. Campbell, *These Mothers*, *supra* note 32.

186. *Id.*

187. Danae Robinson, *Battering Mothers for Their Abuser's Crimes*, 52 U.S.F. L. REV. 149, 172 (2018) ("Many victims face a significantly greater risk of being killed after leaving their abuser. When a mother fails to protect her child by leaving the abusive environment, it may be an attempt to simply keep them both alive.").

188. *See, e.g.*, *Lindley v. State*, No. 08-08-00149-CR, 2010 WL 1076138, at *1–2 (Tex. App. Mar. 24, 2010).

189. *Id.* at *2.

190. *Id.* at *3.

an attempt to gain some sort of advantage in the case.[191] Yet even when believed, women who have been victims of violence are considered *more* culpable for failing to keep their children from harm when the mother herself has been abused.[192] Prosecutors may use evidence of the man's violence towards the mother as evidence that she should have been aware of the risk to the child: the worse the abuse she suffered, the more culpable she is. The prosecutor of Alisha Faith Mackey in Oklahoma told the jury in his opening statement, "You'll hear evidence that [her abusive partner] wasn't just abusing [her son] sexually, he was abusing her, too, physically, emotionally, and things of that nature. She made the decision to stay."[193] In other words, his abuse of her simply provided further ammunition against her. She must have known of his violent tendencies, so his violence means her guilt if she hasn't successfully managed to leave.

Prosecutors often minimize or dismiss the salience of domestic violence claims. Casey Campbell's prosecutor suggested that the violence against her was not severe enough to matter, telling the jury, "She got slapped, but where were her broken bones? Where were her burns . . .?"[194] In rejecting the salience of the domestic violence claims of Sarah Snodie when her abuser murdered her son, the prosecutor said during her sentencing, "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. . .?"[195] A Tennessee Court of Appeals stated that "even animals protect their young" and discussed women's expected "maternal instincts," which are supposed to supersede any fear of her abuser, with legal sanctions if they do not.[196] The defendant "may have well been afraid of her husband," said the court in upholding the termination of the mother's parental rights to her children, but "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."[197] Any action that contravenes judicial views of a mother's required "maternal instincts," then, makes her unfit, a lower creature even than the imagined animal protecting her young.

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191. *See*, *e.g.*, Geneva Brown, *When the Bough Breaks: Traumatic Paralysis-an Affirmative Defense for Battered Mothers*, 32 WM. MITCHELL L. REV. 189, 229–30 (2005) (citing Transcript of Sentencing at 16–17, State v. Snodie, No. 97CF0046 (Wis. Dist. Ct. Jan. 21, 1997)).

192. Singh, *supra* note 118, at 190 (citing Alissa P. Worden & Bonnie E. Carlson, *Attitudes and Beliefs about Domestic Violence: Results of a Public Opinion Survey: Beliefs about Causes*, 20 J. INTERPERSONAL VIOLENCE 1219–43 (2005)).

193. Campbell, *These Mothers*, *supra* note 32.

194. Campbell v. State, 999 P.2d 649, 664 (Wyo. 2000).

195. Brown, *supra* note 191, at 230 (citing Transcript of Sentencing at 16–17, State v. Snodie, No. 97CF0046 (Wis. Dist. Ct. Jan. 21, 1997)). Snodie pled guilty to neglect of a child resulting in death. *Mom Pleads Guilty in Son's Death*, WIS. STATE J., Feb. 11, 1998, at 3C.

196. *Tenn. Dep't of Hum. Servs. v. Tate*, No. 01-A-01-9409-CV-00444, 1995 WL 138858, at *1 (Tenn. Ct. App. Mar. 31, 1995).

197. *Id.* (affirming termination of parental rights of defendant to ten of her twelve children).

While prosecutors at times minimize the relevance of abuse against a non-abusive defendant mother, in other cases they actually use such evidence against her. In *Johnson v. State*, a Florida mother pleaded no contest to manslaughter after her boyfriend beat her daughter to death.[198] The state presented evidence in its case against her that he also abused the mother.[199] Despite additional evidence of a loving relationship with her daughter and the lack of evidence that she abused the child in any way, the prosecution recommended a sentence of three to seven years for the mother.[200] The judge instead exceeded sentencing guidelines and gave her a sentence of fifteen years for failing to protect her daughter, which was upheld on appeal.[201]

Dorothy Roberts argues that power relationships are at the root of family violence rather than mothers' failures.[202] Yet, as Fugate notes, it is women and not men who are required to save their children, even when it means jeopardizing their safety by resisting the men who abuse them.[203] They are forced to "make impossible choices, which often backfire and result in even greater harm to themselves and their families."[204] When the abuse against the mother is severe, or when intervening is likely to increase the harm, or when her own life is in danger, or when she does in fact try to leave or intervene, charges are nevertheless brought and sentences are harsh against these mothers.

Mothers are thus forced by the legal system into a binary categorization of bad mother or good mother. If they don't meet the accepted standards of the good mother, which are informed by bias and stereotypes, then they are necessarily a bad mother. Once a mother is viewed in this way, then any nuances of her specific situation are often ignored or dismissed.[205] Relevant details in her circumstances, her beliefs, or her resources are ignored. "The law isolates each woman's maternal duties from other facets of her life," notes Roberts, where "motherhood is supposed to subsume a woman's identity and transcend her social situation."[206] Failure to protect laws therefore often punish women for the violence perpetrated by men against both them and their children, in effect rendering them criminals for the fact of being abused. The results further victimize mothers and children and result in gross miscarriages of justice.

In a strong sense, the crime of "failure to protect" is inherently female. If it is beyond the expected scope and duty of fatherhood to serve as the nurturing protectors of their children, and as a result fathers are very rarely charged and even

198. Johnson v. State, 508 So.2d 443, 444–45 (Fla. Dist. Ct. App., 1987).
199. *Id*. at 444.
200. *Id*. at 444–45.
201. *Id*. at 445.
202. Roberts, *supra* note 133, at 36.
203. Fugate, *supra* note 14, at 290–91.
204. Gordon, *supra* note 13, at 752.
205. *See* Suzanne D'Amico, *Inherently Female Cases of Child Abuse and Neglect: A Gender-Neutral Analysis*, 28 FORDHAM URB. L.J. 855, 856 (2001).
206. Roberts, *supra* note 133, at 36–37.

then only in the most egregious cases, yet charges against mothers are commonplace, then it is necessarily a crime that can only be committed by mothers. The data bears this out. Mothers who "act alone" are charged alone. Fathers who "act alone" result in mothers being charged along with them.

E. INTERSECTIONAL CHARACTERISTICS

While prosecutions under failure to protect laws clearly demonstrate a massive inequality in their almost exclusive impact on women, it is important to note that certain groups of women are particularly vulnerable. Gender, combined with race, class, and income disadvantages, places some women at heightened risk of injustice.[207] Ample research demonstrates the existence of bias and differential criminal outcomes based on race.[208] Black and Latina/o defendants are overrepresented in prisons, collectively accounting for 29% of the overall population and 57% of the prison population; they are also more likely to be charged with crimes carrying heavier sentences.[209] White defendants are over 25% more likely than Black defendants to have their most serious charge dismissed in a plea bargain,[210] while Black defendants with multiple prior convictions are 28% more likely to be charged as "habitual offenders" than white defendants with similar criminal records.[211] Inherent structural inequalities in the court system further disadvantage those without financial resources.[212] These well-known discrepancies in the system brought about by both structural inequalities and individual biases create

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207. Low-income parents are more likely to be the subject of child protection proceedings, for instance. Candra Bullock, *Low-Income Parents Victimized by Child Protective Services*, 11 AM. U. J. GENDER SOC. POL'Y & L. 1023, 1024 (2003).

208. *See* Rodríguez, *supra* note 128, at 1611 (citing Theodore McKee, *Preface* to ENHANCING JUSTICE: REDUCING BIAS, at vi–vii (Sarah E. Redfield ed., 2017)); Pamela M. Casey, Roger K. Warren, Fred L. Cheesman II, & Jennifer K. Elek, *Nat'l Ctr. for State Courts, Helping Courts Address Implicit Bias 1-4*, B-7 (2012); *see also* Radley Balko, *21 More Studies Showing Racial Disparities in the Criminal Justice System*, WASH. POST. (Apr. 9, 2019), https://perma.cc/3A4P-6HQD (compiling dozens of studies demonstrating racial disparities in the criminal justice system, even after accounting for differences in crime rates).

209. *See Report of The Sentencing Project to the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia, and Related Intolerance: Regarding Racial Disparities in the United States Criminal Justice System*, SENTENCING PROJECT 6–7 (2018).

210. Carlos Berdejo, *Criminalizing Race: Racial Disparities in Plea-Bargaining*, 59 B.C. L. REV. 1187, 1191, 1215 (2018) (explaining that white defendants are more than 25% more likely than Black defendants to have their most serious charge dismissed in a plea bargain).

211. Matthew S. Crow & Kathrine A. Johnson, *Race, Ethnicity, and Habitual-Offender Sentencing: A Multilevel Analysis of Individual and Contextual Threat*, 19 CRIM. JUST. POL'Y. REV. 63, 72–73 (2008) (noting that Black defendants with multiple prior convictions are 28% more likely to be charged as "habitual offenders" than white defendants with similar criminal records).

212. *See* SENTENCING PROJECT, *supra* note 209, at 8 (noting that indigent defense programs are typically severely underfunded, with public defenders carrying "crushing" caseloads); *see also* Avital Mentovich, J.J. Prescott, & Orna Rabinovich-Einy, *Are Litigation Outcome Disparities Inevitable? Courts, Technology, and the Future of Impartiality*, 71 ALA. L. REV. 893, 912 (2020); s*ee generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974).

a system of severe injustice against women of color in cases of failure to protect laws.

IV. ANALYSIS OF POTENTIAL APPROACHES

Failure to protect laws have been the subject of increasing public scrutiny and criticism. In practical terms, they are ineffective at deterring child abuse crimes.[213] The laws serve to make reporting of a partner's crimes more risky and therefore less likely.[214]

Few areas of the legal system are so clearly rife with gender disparity and gross injustice. Punishments are often disproportionate to the crime, especially when the mother is not present for the abuse. This runs the risk of the crime of failure to protect being a crime of status (motherhood, especially non-ideal motherhood) rather than conduct,[215] where convictions result not from conduct but from adherence to gender roles.[216]

It is necessary to reconsider the concept of motherhood, revisiting the ideal, theoretical and nonexistent archetypal version, and acknowledging the ways in which motherhood stereotypes infiltrate every aspect of the criminal system. The simple fact of gender-neutral statutes does nothing to remediate these issues. An increased awareness of intersectional concerns is also critical in these efforts.[217] However, such changes are necessarily incremental and exceedingly difficult to accomplish, in part because they are often founded upon unconscious biases and assumptions prevalent in society writ large, impacting the culture as a whole rather than a discrete element of it. Therefore, more concrete measures are necessary in order to alleviate the most severely gender-discriminatory aspects of these laws.

Although statistics on prosecution for failure to protect by gender are damning and suggest a serious problem of gender discrimination that implicates constitutional rights, a constitutional court challenge is unlikely to succeed either on an individual or collective basis. The Supreme Court has held that even in the face of clear statistical evidence of extreme race disparity in criminal justice outcomes, a litigant has no viable claim without concrete evidence of purposeful unconstitutional discrimination in their own individual case.[218] The same concept would likely apply to a claim of gender disparity in failure to protect cases. The required evidence of purposeful and individualized discrimination is naturally nearly impossible to come by, as there is so rarely an available "smoking gun" indicating that the defendant was treated worse because of her race or gender.

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213. Mahoney, *supra* note 93, at 451–52.

214. *Id*. at 453.

215. *See id*. at 449.

216. Singh, *supra* note 118, at 197.

217. *See*, *e.g*., Robinson, *supra* note 187, at 170.

218. McCleskey v. Kemp, 481 U.S. 279 (1987) (holding that statistical evidence that Black murderers are more likely to receive a death sentence is insufficient to show unconstitutional race discrimination absent evidence of individualized discriminatory purpose).

A few options focus on the problem from a broader or systemic perspective. One such approach is to address the vast prosecutorial discretion that results in some of the disparity. There is virtually no recourse when such discretion is exercised in problematic ways. Angela Davis argues that prosecutor self-regulation is nonexistent and that judicial precedent has made prosecutors largely immune to scrutiny.[219] Bruce Green argues for increased public attention and discussion concerning prosecutorial discretion, especially where it concerns decisions about when to bring charges and of what type.[220] He acknowledges, however, that the lack of clear decision-making standards generally, and the inability to determine specific rationales in individual cases, both make such scrutiny challenging. Absent the elimination of such discretion altogether in favor of some other more mechanical approach to prosecutorial decisions—which would be both problematic and nigh impossible to implement—an increased public focus on prosecutorial discretion, while important, is likely to have a limited impact on the problem.

Another way to address pervasive gender bias in the criminal system is to promote judicial and prosecutor education. Training programs can help those who serve as the backbone of the criminal system to identify their implicit biases and their potential impacts on decision-making and approach to cases, which enables self-correction. Hon. Maite Oronoz Rodríguez emphasizes the importance of bringing a gender perspective to adjudication, arguing that "the importance of the judiciary and state courts as change agents toward gender equality cannot be overstated."[221] Such an argument likewise applies to prosecutors' offices nationwide. Such programs may also have limited practical impact, particularly if education programming is voluntary rather than mandatory.

Other options employ a more technical focus and involve amendments to failure to protect laws. Some legal reforms have been attempted in recent years. The most extreme option would be to repeal failure to protect laws altogether. However, these laws arguably serve a laudable purpose in attempting to protect children from harm and codify the duty to take reasonable steps to prevent abuse when it is within one's power to do so. There are undoubtedly some cases where charges are warranted and just. Children ought to be protected from violence and danger, and the adults in whose care they find themselves should be held accountable for their safety. In theory, these laws should support the protection of children and encourage the reporting of abuse of vulnerable children. Yet as we have seen, it is the implementation of these laws where problems arise.

In lieu of repealing the laws, then, one possibility is to reduce the maximum sentence for such crimes. In Oklahoma—a state with perhaps the most extreme usage of failure to protect in the country—state Representative Tammy West introduced a bill that would have reduced the maximum penalty for such a charge

219. Davis, *Prosecution & Race*, *supra* note 136, at 21.

220. Bruce A. Green, *Prosecutorial Discretion: The Difficulty and Necessity of Public Inquiry*, 123 DICK. L. REV. 589 (2019).

221. Rodríguez, *supra* note 128, at 1612.

to four years.[222] However, that legislation failed to pass.[223] Another change—also included in Representative West's failed bill—would be to allow an affirmative defense to the charge if attempting to intervene was likely to result in substantial harm to the person or the child.[224] A few states already include affirmative defenses in their failure to protect laws, including Minnesota[225] and Iowa,[226] when the defendant had a "reasonable apprehension" that attempting to stop the abuse would result in substantial bodily harm to the person or the child. Expanding this defense to other states is necessary, for it is not reasonable or just to demand that a mother imperil her child's life and her own to avoid criminal punishment, and such an expectation does not apply in other contexts where there exists a duty of care.

Another statutory option is to add a specific mens rea requirement to failure to protect laws. This would largely eliminate charges in situations where the non-abusing parent was not aware of prior abuse or did not know how to stop the abuse.[227] Given that the commission of aggravated battery of a child, for example, requires intent on the part of the perpetrator, so too should the crime of failure to protect a child from the same crime. Otherwise, the abuser could be convicted only if he intended to commit aggravated battery, while the mother could be convicted under a failure to protect law with no intent at all. In many case examples, prosecutors, judges, and juries appear to impute intent on the part of the non-abusing parent where none exists. Where only general intent is required under failure to protect statutes, the requirement is only that the parent intended to do the act itself (the failure to protect or intervene) rather than intending the abuse or its results. That intent is then inferred from the failure to act itself. The logic is rather circular, in effect stripping the law of any meaningful intent requirement at all. It is difficult to argue, for example, that Donna Duncan intended the murder of her son when she left him in her partner's care so that she could travel out of state for work. But she did intend to leave her son with her partner. From that, a guilty general intent to fail to protect him was inferred, and from that, she was found guilty of murder despite a lack of intent to murder. Therefore, adding a specific intent requirement into failure to protect statutes would limit prosecutions to cases where the defendant actually intended to commit the act and intended to cause a particular result (i.e., the abuse) when doing so. This would also limit charges to cases where the mother knew of the abuse, rather than when she "should have known." The latter, even when true, is simply negligence and should not be sufficient to establish specific criminal intent for a crime such as murder.

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222. Slipke, *supra* note 61.

223. *Bill Watch: At a Dead End*, OKLA. POL'Y INST., https://perma.cc/WA4P-V42X (last updated Mar. 18, 2019).

224. Slipke, *supra* note 61.

225. Minn. Stat. Ann. § 609.378 (West).

226. Iowa Code Ann. § 726.6 (West).

227. *See*, *e.g.*, Robinson, *supra* note 187, at 171–72.

Similarly, non-abusing parents should never be prosecuted as a principal agent in the crime. For example, Donna Duncan was not actually charged with permitting child abuse or failing to protect her son. Rather, she was charged as an agent in his murder as if she had committed the crime herself. Allowing such charges against a parent who never raised a hand against their child results in grave injustices in the system. Limiting such charges to failure to protect, and restricting maximum sentences under those statutes, is necessary to achieve justice. Accomplice liability, or accountability law, should never be applied to cases where the non-abusing parent was not present, and even where they were present, it should be limited to cases where it cannot be determined which parent actually harmed the child. Failure to protect charges should also be limited to these case types. This could be accomplished either via changes in charging procedures or via statutory amendments, the latter of which would, of course, be more consistent in its application and results. Such a change would serve to punish parents when they clearly acted together with another person in some meaningful fashion in harming the child, either implicitly or explicitly participating in the abuse. Singh proposes this approach in order to avoid unjust prosecutions against mothers, while also avoiding the necessity of dropping charges when it cannot be definitively determined which person was the active perpetrator.[228]

CONCLUSION

The record makes clear that drastically different standards are applied to mothers than to fathers when the other parent harms a child. What a "reasonable person" can be expected to do in an effort to protect a child depends in practice on whether that person is a mother or not. In effect, the standard is more one of a "reasonable mother," where what is reasonable for any given mother is intrinsically tied to idealized societal stereotypes and biases regarding the duties of motherhood. Traditional legal concepts of foreseeability and intent become twisted beyond recognition and weaponized against women, who are held to legal criminal standards of being all-knowing, all-sacrificing, and all-nurturing. No remotely similar demands are placed upon similarly situated men.

The gender-neutral language of the law does nothing to alleviate or disguise the vast discriminatory practices that render "failure to protect" in essence a crime that only a mother can commit. The fact that the disparity is perpetuated by multiple factors and actors in the system makes it all the more challenging to address. Nevertheless, a number of possible measures are likely to improve the situation. A system of justice that creates such blatantly gendered requirements and punishments is indefensible and cannot be ignored.

228. Singh, *supra* note 118, at 185.