

NOTES

WHAT ABOUT FAILURE TO PROTECT: WHY CURRENT HOMICIDE DOCTRINE FALLS SHORT OF HOLDING PARENTS WHO FAIL TO PROTECT THEIR CHILDREN ACCOUNTABLE

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I. INTRODUCTION

In December 2011, Angela Hanna's boyfriend, Eric Foster, killed Hanna's daughter, Trinity.¹

Hanna had suspected that Foster abused Trinity, and she knew that Foster "had been in trouble with Child Protective Services in the past."² Hanna told detectives that Foster "had a series of accidents with Trinity which always seemed to happen outside of Hanna's view," but that Foster denied hurting Trinity.³ Prior to her death, Trinity had endured a ten-day hospital visit to treat burns, and she had told Hanna that Foster had burned her.⁴ Nonetheless, Hanna ignored the signs of Foster's abuse and continued to give him access to Trinity.⁵

Hanna failed to protect Trinity from Foster's abuse—abuse that led to Trinity's death.⁶ Hanna did not actually inflict the fatal injuries on her daughter; rather, she is a failure-to-protect parent ("FTP parent").⁷ FTP

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1. *Sheriff's Detectives: Taft Mother Had Suspicions of Abuse*, 17 KGET (Feb. 1, 2012, 5:37 PM), <http://www.kget.com/mostpopular/story/Sheriffs-Detectives-Taft-mother-had-suspicious-of/pv1Xv14uz0WBz5A7R54GRg.csp>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *See id.*

6. *Id.*

7. Because many of the cases cited convict a mother for failing to protect her children from a male partner, this Note uses the female pronoun to refer to the FTP parent and the male pronoun for the abusive partner causing death; however, FTP parents and abusive parents may come in any gender.

parents are parents who knew, or should have known, that their intimate partners were abusing their children in a way likely to cause serious bodily injury or death but failed to protect their children from that abuse, resulting in the children's deaths. FTP parents' culpability arises not only because they failed to protect their children from their abusive partners, but also because they knew or should have known that their children were being abused and failed to prevent the fatal injuries. Their culpability arises only in the context of their intimate partner's serious abuse of their children, and so, their culpability is not equal to that of their abusive partners'. Despite clear indications or actual knowledge of abuse, FTP parents choose to deny that anything is wrong. For example, Hanna ignored Trinity's "accidents" and confession that Foster burned her.

This Note will argue that, although FTP parents should be held liable when they fail to protect their children, the current laws and theories of liability used to convict FTP parents of homicide contradict traditional notions of fairness. Current laws incorrectly rely on permissive inferences and broad standards of causation to facilitate conviction of FTP parents for serious crimes that do not punish FTP parents for their actual wrongs. First, this Note will list and explain the current doctrines used to hold FTP parents criminally liable for the death of their children. This Note will primarily examine California laws; however, it will also look at Illinois and Florida as examples. Second, the Note will critically examine how FTP parents are subject to laws and theories of liability that often rely on the use of permissive inferences to prove mental states and expansive definitions of causation to facilitate conviction. Third, this Note will examine why these crimes do not accurately capture FTP parents' guilt and why, consequently, FTP parents are unfairly punished.

Finally, in order to resolve these issues, this Note will propose new legislation that seeks to balance the interests of children and criminal justice. The proposed legislation continues to hold the interests of children paramount—recognizing the importance of affirming the value of children and expressing moral outrage over their deaths—and acknowledges that the FTP parents are liable with respect to their children's deaths. At the same time, the proposed legislation discerns that FTP parents are less culpable than their abusive partners and that, as many courts have suggested, FTP parents are guilty only of the crimes they have actually committed: their failure to protect their children when they had, or should have had, knowledge of abuse by their intimate partners. In addition, the legislation offers defenses that mitigate the culpability of FTP parents who did not

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have a reasonable opportunity to protect their children or who made reasonable efforts to protect their children but failed.

II. CURRENT STATE OF THE LAW

This Note will focus primarily on California law, but will also look at the laws of Illinois for the purpose of comparison and to assist with the explanation of the law. Additionally, this Note will discuss felony murder because it is an alternative law that is used by some states to hold FTP parents liable.

A. CALIFORNIA

In California, a parent who fails to protect her child from abuse that ultimately results in the death of the child may be held equally culpable as her abusive partner who killed her child; that is, culpable for murder.⁸ Three main theories of liability are used: accomplice liability, the natural and probable consequences doctrine, and implied malice murder. The first two theories are forms of derivative liability. Illinois, likewise, employs a similar form of derivative liability for holding FTP parents culpable.

1. Derivative Liability for the FTP Parent

a. Accomplice Liability

One theory of liability used for convicting FTP parents is aider and abettor liability.⁹ Aider and abettor liability—also known as accomplice liability—is a form of derivative liability, meaning the FTP parent's liability is derived from the abusive partner's liability for harming and killing the child.¹⁰

Under California law: "A person who aids and abets the commission of a crime is a principal to that crime."¹¹ In order to convict the FTP parent using accomplice liability, the prosecution must prove:

(a) [T]he direct perpetrator's actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor's mens rea—knowledge of the direct perpetrator's unlawful intent and an intent to assist in achieving those

8. *People v. Rolon*, 73 Cal. Rptr. 3d 358, 362 (Ct. App. 2008).

9. *See id.* California treats anyone who aids and abets a crime as a principal with respect to the crime aided. CAL. PENAL CODE § 31 (Deering 2012).

10. Larry M. Lawrence, II, *Developments in California Homicide Law: VII. Accomplice Liability: Derivative Responsibility*, 36 LOY. L.A. L. REV. 1524, 1525 (2003).

11. *Rolon*, 73 Cal. Rptr. 3d at 362 (citing CAL. PENAL CODE § 31).

unlawful ends, and (c) the aider and abettor's actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.¹²

With respect to the aider and abettor's mens rea, it is clear that the aider and abettor must actually possess two states of mind: (1) the intent to assist the direct perpetrator, in these cases the abusive partner, in his or her criminal offense and (2) “the mental state required for the commission of the offense, as provided in the definition of the substantive crime.”¹³ However, proof of the first mental state—intent to assist—almost always proves the second mental state.¹⁴ Conversely, the absence of proof of the first mental state will usually demonstrate the lack of the second mental state.¹⁵ California courts are split as to whether failure to act, when there is a legal duty to do so, may qualify as the FTP parent's actus reus, the conduct that assists the achievement of the crime.¹⁶ However, this split does not have a significant effect on prosecution because the standard for proving the aider and abettor's actus reus, or that an act was committed that assisted the achievement of the crime, is quite low. Indeed, the prosecution is not required to prove that the conduct actually assisted in achieving the crime.¹⁷ California courts repeatedly emphasize that “[i]t is quite enough if the aid merely renders it easier for the principal actor to accomplish the end intended by him . . . though . . . the end would have been attained without it.”¹⁸

Although the prosecution is technically required to prove the FTP parent's intent to aid the abusive partner, in practice her intent may be inferred from mere presence or knowledge of abuse.¹⁹ This means that, in order to convict an FTP parent using accomplice liability, the prosecution

12. *Id.*

13. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 478 (5th ed. 2009).

14. *Id.*

15. *Id.*

16. *People v. Culuko*, 92 Cal. Rptr. 2d 789, 805 n.7 (Ct. App. 2000).

17. *Lawrence*, *supra* note 10, at 1530.

18. *Id.* at 1529 (citing *State ex rel. Martin v. Tally*, 15 So. 722, 739 (Ala. 1894)). Were the prosecution required to prove causation, it seems unlikely that it would be able to prove that the FTP parent's mere presence at the scene of the abuse, or her failure to protect her child from her abusive partner, caused the death of the child. However, this is a general practice standard with respect to aiding and abetting and is not exclusive to FTP-resulting-in-death cases. *Id.*

19. *See People v. Rolon*, 73 Cal. Rptr. 3d 358, 367–68 (Ct. App. 2008). Although *Rolon*'s intent to aid her abusive partner was inferred from her presence—and not explicitly from her knowledge of her partner's abuse—the court quotes other jurisdictions that do allow intent to be inferred from knowledge to support inferring intent in California. *See id.* For example, the court cites *State v. Willquette*, in which it was concluded that a mother's “knowing failure to intervene . . . supports an inference of an intent to assist the crime.” 370 N.W.2d 282, 285 (Wis. Ct. App. 1985).

must prove only the FTP parent's mens rea: her knowledge of her abusive partner's criminal intent and her intent to assist the abusive parent in committing his crime against her child.²⁰ Here, the FTP parent's intent can be defined as her "purpose, desire, or conscious objective" to assist the abusive parent.²¹ However, in practice, the prosecution is arguably not required to prove the FTP parent's intent.²²

In *People v. Rolon*, the court held that the jury could infer that Sylvia Torres Rolon intended to aid her partner, Anthony Bill Lopez, in his crime of assault resulting in the death of her son Isaac from "her presence at the scene of the crime, her duty to protect [Isaac] and her failure to do so."²³ Simply put, the prosecution had to prove only Rolon's presence and her status as her son's mother and caretaker in order for the jury to infer her intent to aid Isaac's father.

b. Natural-and-Probable-Consequences Doctrine

In California, an FTP parent who "aids" her abusive partner in committing child abuse is responsible for any additional crimes that are the "natural and probable consequence" of that child abuse.²⁴ The natural-and-probable-consequences doctrine is "triggered" when "a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant."²⁵ Under the natural-and-probable-consequences doctrine, the prosecution is not required to prove that the FTP parent harbored any mens rea with respect to the abusive parent's additional crime that resulted in the child's death.²⁶ However, the prosecution is still required to prove the FTP parent's intent to aid the abusive parent's crime of child abuse, which makes her legally responsible

20. *Rolon*, 73 Cal. Rptr. 3d at 362. The crime that the FTP parent intends to aid might be assault resulting in death or child abuse. For example, in courts that require an affirmative act in order to convict the FTP parent using aider and abettor liability, the FTP parent may be held culpable through a conviction of aiding and abetting child abuse, with the natural and probable consequence of the child abuse being death. See, e.g., *Culuko*, 78 Cal. App. 4th 307.

21. DRESSLER, *supra* note 13, at 121.

22. In *Looking Abroad to Protect Mothers at Home: A Look at Complicity by Omission Domestically and Abroad*, 22 B.U. INT'L L.J. 425, 431 (2004), Girish S. Kashyap comes to a similar conclusion. Kashyap points out that many parents are charged under a standard that requires purposeful intent, but by relying on knowledge courts seem to lower the mens rea standard from purpose to knowledge. *Id.*

23. *Rolon*, 73 Cal. Rptr. 3d at 367.

24. *Culuko*, 92 Cal. Rptr. 2d at 802.

25. *Id.*

26. *Id.* at 799.

for both the child abuse and any additional crimes that are natural and probable consequences of the child abuse.²⁷

For example, in *People v. Potter*, Elizabeth Potter was convicted of second-degree murder and felony child abuse resulting in the death of her husband's son, Christopher, on alternate theories, one of which was that Potter aided her husband, Andrew Anthony Cejas, "in committing felony child abuse, and murder was the natural and probable consequence thereof."²⁸ Potter committed three acts that the court reasoned could suffice for conduct assisting her husband.²⁹ First, Potter quieted her son, P., who woke up while her husband was brutally beating his son, Christopher.³⁰ Second, Potter may have "maintain[ed] the façade of normality" by going about her "normal routine" after her husband had beat Christopher.³¹ Third, the court said that the jury "could find that Potter's presence during the prolonged beating encouraged [her husband] to continue the beating."³² The court reasoned that these acts could constitute conduct assisting her husband and that these acts combined with her intent were sufficient to make her liable as an accomplice.³³ Potter's aiding and abetting triggered the natural-and-probable-consequences doctrine, which made her liable for her husband's subsequent murder of Christopher as well.

c. Supplemental Example: Derivative Liability in Illinois

By deriving FTP parent liability from abusive parents, Illinois, like California, also holds FTP parents guilty as aiders and abettors.³⁴ Illinois holds FTP parents guilty as aiders and abettors under its accountability statute.³⁵ Also, like California, Illinois FTP parents convicted under the law

27. *Id.*

28. *People v. Potter*, Nos. C052634, C053349, 2007 WL 4305547, *4 (Cal. Ct. App. Dec. 10, 2007).

29. *Id.* at *8–9.

30. *Id.* at *9.

31. *Id.*

32. *Id.*

33. *Id.* The court reasoned that Potter could not have been convicted without the jury finding the requisite intent to aid because "the instructions did not allow for murder liability 'without a finding of any mental state.'" *Id.* at *10. However, the court did not expand on how the jury might have inferred Potter's mental state or what was required to prove Potter's intent. *See id.* Potter claimed both to the police and at trial that she was "paralyzed into inaction by her fear of Cejas." *Id.* at *8. Her "defense was that she had suffered years of abuse from Cejas and was unable to oppose his will or seek help for Christopher, raising theories of duress, battered woman's syndrome (BWS) and posttraumatic stress disorder (PTSD)." *Id.* at *2.

34. *People v. Stanciel*, 606 N.E.2d 1201, 1204, 1209 (Ill. 1992).

35. *Id.* at 1209.

of accountability are charged as principals and held equally as culpable as the abusive parent.³⁶ Under Illinois's accountability statute:

A person is legally accountable for the conduct of another when:

...

(c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees, or attempts to aid, such other person in the planning or commission of the offense.³⁷

Because the FTP parent's liability derives from the abusive parent's liability, the prosecution must prove that the abusive parent committed an offense resulting in the child's death. "For this purpose, it is sufficient to show that the defendants voluntarily and willfully committed an act, the natural tendency of which is to destroy another's life. Intent may be inferred from the character of the defendant's acts as well as the circumstances surrounding the commission of the offense."³⁸ The prosecution must also prove that the FTP parent had knowledge of the abusive parent's intent to commit an act inherently dangerous to human life and that she intended to facilitate or promote such an act.³⁹ When there is a parental duty to protect a child, failure to protect the child may suffice as conduct that aids the abusive parent.⁴⁰

Under Illinois's law of accountability, the FTP parent's "intent to promote or facilitate a crime may be shown by evidence that the [FTP parent] shared the criminal intent of the principal or by evidence that there was a common criminal design."⁴¹ In practice, intent may be inferred from various scenarios, such as presence during the crime or knowledge of abuse. For example, in the case of Violetta Burgos, her intent to aid her abusive partner, Elijah Staniel, was inferred through her refusal to break ties with Staniel after he abused her daughter, her authorization of his role

36. *Id.* at 1211. "Individuals are not charged with the offense of accountability. Instead, they may be charged, as here, with murder, with their guilt established through the behavior which makes them accountable for the crimes of another." *Id.*

37. 720 ILL. COMP. STAT. 5/5-2 (2013).

38. *Staniel*, 606 N.E.2d at 1209 (internal citations omitted).

39. *See id.* at 1210, 1212.

40. *Id.* at 1211. Under common law and statutory law, parents have an affirmative duty to protect and care for their children at all times. *Id.*; Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397, 406-07 (1999).

41. *Staniel*, 606 N.E.2d at 1210 (citing *People v. Terry*, 460 N.E.2d 746, 513 (Ill. 1984)).

as her child's disciplinarian, and the extent and severity of injuries to her daughter.⁴²

Similarly, in the case of Barbara Peters, the court found that Peters's intent was shown through "the continued arrangement of [her partner's] control over [her] child," which "sufficiently satisfie[d] the common criminal design standard."⁴³ Peters was not present when her partner, Kenneth Jacobsen, beat her son to death,⁴⁴ however, Peters regularly left her son in Jacobsen's care while she worked.⁴⁵ Additionally, she was aware that her son was frequently injured—although she believed Jacobsen's explanations for her son's injuries and thought the injuries "were never very serious."⁴⁶

2. Implied Malice Murder

In California, implied malice murder is another law used to hold FTP parents accountable.⁴⁷ Unlike accomplice liability, which derives the FTP parent's liability from the abusive partner's liability, implied malice murder holds the FTP parent accountable as an independent principal.⁴⁸

Implied malice murder allows the prosecution to imply the FTP parent's malice with respect to the killing.⁴⁹ "Murder is the unlawful killing of a human being . . . with malice aforethought."⁵⁰ Malice may be implied "when the circumstances attending the killing show an abandoned and malignant heart."⁵¹ Essentially, implied malice murder facilitates conviction of a defendant who deserves to be held guilty because she acts so depraved with respect to human life that "it might be fairly said that [she] 'as good as' intended to kill [her] victim."⁵²

The California Jury Instructions define implied malice murder, a form of second-degree murder, as:

[T]he unlawful killing of a human being when:

42. *Id.* at 1209.

43. *Id.* at 1210–11. Also, the court reasoned that Peters aided her abusive partner by placing her son in her partner's custody when her partner clearly abused her son. *Id.*

44. *See id.* at 1207.

45. *Id.*

46. *Id.*

47. *See* CAL. PENAL CODE §§ 187–188 (Deering 2012).

48. *See id.*

49. *Id.* § 188.

50. *Id.* § 187.

51. *Id.* § 188.

52. DRESSLER, *supra* note 13, at 520.

1. The killing resulted from an intentional act . . . ;
2. The natural consequences of the act . . . are dangerous to human life, and
3. The act . . . was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When the killing is the direct result of such an act . . . it is not necessary to prove that the defendant intended that the act . . . would result in the death of a human being.⁵³

Because FTP parents have a legal duty to act, an intentional omission or intentional failure to act will suffice for “an intentional act.”⁵⁴

Under California law, to prove the element of causation, which requires that a killing result from an intentional act, it is enough that “the conduct of two or more persons *contributes concurrently as the proximate cause of the death*” of a victim.⁵⁵ The conduct of a defendant is a proximate cause of a death if the conduct was a “substantial factor contributing to” the death.⁵⁶ To be considered a “substantial factor” contributing to the death, the act or omission’s contribution cannot be “insignificant or merely theoretical.”⁵⁷ The conduct concurrently contributed to the death if “it was operative at the time of the death and acted with another cause to produce the death.”⁵⁸ In sum, “as long as the jury finds that without the criminal act [or omission] the death would not have occurred when it did, it need not determine which of the concurrent causes was the principal or primary cause of death.”⁵⁹

An FTP parent’s failure to act is technically a proximate cause of her child’s death because her failure to act concurrently contributed to her child’s death—it was “operative at the time of the death” and acted in conjunction with her abusive partner’s acts to result in the death.⁶⁰ In addition, her failure to act is technically a proximate cause if the

53. CALJIC No. 8.31 (2009).

54. *People v. Staniel*, 606 N.E.2d 1201, 1211 (Ill. 1992) (internal citations omitted); Liang & Macfarlane, *supra* note 40, at 406–07. *See also* *People v. Rolon*, 73 Cal. Rptr. 3d 358, 363 (Ct. App. 2008).

55. *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010).

56. *Id.*

57. *Id.*

58. *Id.*

59. *People v. Catlin*, 26 P.3d 357 (Cal. 2001).

60. *Jennings*, 237 P.3d at 496.

prosecution can prove that, but for the FTP parent's failure to act, the death would not have occurred. In other words, the prosecution will be successful if it can show that, had the parent acted to save her child, the child would not have died.

For example, in *People v. Rolon*, mentioned above, the defendant, Rolon, was held culpable for murder based on two alternative theories of liability: aider and abettor liability and an implied malice theory.⁶¹ In April 2003, Rolon's partner Lopez killed her son.⁶² On the evening of April 20, 2003, Lopez "immersed [Rolon's son] in a tub of water and unspecified chemicals and then threw him against a wall, in [Rolon's] presence."⁶³ The next day, in the early morning hours, Rolon's son awoke crying.⁶⁴ After being fed, he continued to cry and Lopez punched him in the chest.⁶⁵ Rolon did not inflict any of the fatal injuries on her son.⁶⁶ Under implied malice murder, her failure to protect her son was considered a proximate cause of his death because, but for her failure to protect her son, he would not have died.

Likewise in *People v. Potter*, Elizabeth Potter was convicted of second-degree murder and felony child abuse resulting in death.⁶⁷ The jury was instructed on both the aiding and abetting and implied malice murder theories of second-degree murder.⁶⁸ Potter's husband killed her stepson, Christopher, by severely beating him.⁶⁹ In *Potter*, the court believed that the jury most likely predicated Potter's liability on implied malice murder.⁷⁰ In order to affirm why the jury could have concluded Potter was a proximate cause of Christopher's death and guilty of implied malice murder, the court reasoned that "the jury could have concluded that Potter had a duty to seek medical care for a child under her care and that she made a conscious decision not to act, that such failure to act was inherently

61. *People v. Rolon*, 73 Cal. Rptr. 3d 358, 360 (Ct. App. 2008).

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *See id.*

67. *People v. Potter*, Nos. C052634, C053349, 2007 WL 4305547, at *1 (Cal. Ct. App. Dec. 10, 2007).

68. *Id.* at *5.

69. *Id.* at *2. Although Potter did neglect and fail to stop her husband from continuously abusing Christopher, she did not actively participate in his final beating. *See id.* at *1–2. Christopher's cause of death was the brutal beating by his father, which resulted in a bruised brain, torn liver, broken ribs that punctured his lung and displaced his heart, and a swollen groin. *Id.* at *2.

70. *Id.* at *7.

dangerous to human life, and deliberately done with conscious disregard for life.”⁷¹ The court used this reasoning to prove Potter’s role as a proximate cause of death and validate her conviction.

B. ANOTHER APPROACH: FELONY MURDER

Some states also employ felony murder statutes to convict FTP parents for the death of their child.⁷² The traditional formulation of felony murder doctrine allows a defendant to be found guilty of murder “if a death results from conduct during the commission or attempted commission of any felony.”⁷³ Modern felony murder statutes “provide that a death that results from the commission of a specifically listed felony (such as arson, rape, robbery, or burglary) constitutes a first-degree murder If a death results from the commission of an unspecified felony, it is second-degree murder.”⁷⁴ Felony murder holds the FTP parent accountable regardless of her mental state with respect to the homicide.

In Florida, felony murder can be predicated on child abuse and aggravated child abuse.⁷⁵ By utilizing felony murder, the prosecution is not required to prove the FTP parent’s mental state with respect to the homicide. Therefore, the FTP parent is held equally as culpable as the abusive parent, although she may lack the requisite intent with respect to the homicide. For example, in *Zile v. State*, Pauline Zile was convicted of felony murder predicated on aggravated child abuse.⁷⁶ Zile’s acts of child abuse consisted of her failure to protect her daughter from her husband’s physical abuse.⁷⁷ Zile was present during the fatal beating of her daughter, during which her husband beat her daughter until she lost consciousness.⁷⁸

71. *Id.* at *6.

72. *See, e.g.*, IOWA CODE § 707.2(1)(e) (2013); ARIZ. REV. STAT. ANN. § 13-1105 (2009); ARK. CODE ANN. §§ 5-10-102, 5-27-221 (2012). *See also* *Zile v. State*, 710 S.2d 729 (1998) (upholding a conviction of felony murder for a mother who failed to protect her child from the mother’s husband’s beating of the child).

73. DRESSLER, *supra* note 13, at 521. Interestingly, this traditional formulation of felony murder doctrine was abolished in England in 1957, and it never existed in France or Germany. *Id.* Although the rule is “richly criticized” in the United States, “the rule, at least in limited form, ‘still thrives’ in the United States, and is retained in some form in nearly every state.” *Id.* at 521–22.

74. *Id.* at 522.

75. *Zile*, 710 So. 2d at 732; *Leet v. State*, 595 So. 2d 959, 961 (Fla. 1991).

76. *Zile*, 710 So. 2d at 731–32, 736.

77. *Id.*

78. *Id.*

Additionally, witnesses testified “that abuse had been taking place in the home for some time.”⁷⁹

III. CRITICAL ANALYSIS OF THE CURRENT STATE OF THE LAW

As demonstrated in the previous section, FTP parents are often held liable for the death of their children through the use of various laws and theories of accountability, but there are numerous problems with their application. As applied, California’s use of complicity and the natural-and-probable-consequences doctrine, and Illinois’s use of accountability, ease the prosecution’s burden in proving the FTP parent’s mental state because juries are allowed to infer intent from knowledge.⁸⁰ Implied malice murder creates expansive liability by expanding the legal definition of proximate cause and implies the FTP parent’s malice with respect to the death of the child. Additionally, felony murder disregards the FTP parent’s mental state and fails to deter FTP parents.⁸¹ Overall, the manner in which these laws and theories of liability are applied is problematic because it results in expansive liability and facilitates conviction of FTP parents for crimes that do not fit their actual culpability, which goes against traditional notions of fairness and justice.⁸²

A. LEGAL ISSUES

“The broad purposes of the criminal law are, of course, to make people do what society regards as desirable and to prevent them from doing what society considers to be undesirable.”⁸³ Thus, “[t]he protections afforded by the criminal law to the various interests of society against harm generally form the basis for a classification of crimes in any criminal code,” including “protection from physical harm to the person.”⁸⁴ However, the tenet that punishment should fit blameworthiness is also fundamental to our system of criminal law.⁸⁵ In situations in which FTP parents are found guilty of murder, they are being held liable for crimes

79. *Id.* at 735.

80. *See also* Kashyap, *supra* note 22, at 431–32 (reaching a similar conclusion that, as practically applied, mens rea thresholds are lowered from purposeful intent to knowledge).

81. Dressler, *supra* note 13, at 523–26.

82. Kashyap, *supra* note 22, at 446–47.

83. 1 WAYNE R. LAFAVE, *SUBSTANTIVE CRIMINAL LAW* § 1.5 (2d ed. 2012).

84. *Id.*

85. Audrey Rogers, *Accomplice Liability for Unintentional Crimes*, 31 *LOY. L.A. L. REV.* 1351, 1379 (1998).

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that do not fit their blameworthiness, violating the fundamental tenet of fairness.

1. Derivative Liability

a. Complicity

The problem with California's aider and abettor liability is that the jury is allowed to infer the FTP parent's intent to aid the abusive parent. Intent can be inferred from mere presence or knowledge.⁸⁶ Permitting these inferences eases the prosecution's burden of proving intent and results in expansive liability that facilitates conviction of FTP parents, violating essential notions of fairness.⁸⁷

Although the prosecution is technically required to prove the FTP parent's intent to aid the abusive parent beyond a reasonable doubt, in practice, his or her intent may be inferred from mere presence or knowledge of abuse.⁸⁸ In order to convict an FTP parent using accomplice liability, the prosecution must prove, beyond a reasonable doubt, the FTP parent's mens rea, the FTP parent's knowledge of the abusive partner's criminal intent, and the FTP parent's intent to assist the abusive parent in committing a crime against the child.⁸⁹ Here, the FTP parent's intent to aid can be defined as a "purpose, desire, or conscious objective" to assist the abusive parent.⁹⁰ However, in practice, the prosecution is not required to prove the FTP parent's intent beyond a reasonable doubt—it is sufficient for the prosecution to prove presence or knowledge, from which intent can be inferred. This is an unfair leap, and is one that violates important tenants of criminal law.⁹¹

In *People v. Rolon*, the California Court of Appeals held that the jury could infer that Rolon intended to aid her partner in his crime of assault, which resulted in her son's death, from "her presence at the scene of the crime, her duty to protect [Isaac] and her failure to do so."⁹² By allowing the jury to infer Rolon's intent from that evidence, the prosecution's burden was lowered because it had to prove very little in order to provide the jury

86. See Kashyap, *supra* note 22 at 431–32 (reaching a similar conclusion with respect to Illinois's law, which is similar to California's system for holding FTP mothers culpable for murder).

87. *Id.*

88. See *People v. Rolon*, 73 Cal. Rptr. 3d 358, 367–68 (Ct. App. 2008).

89. *Id.* at 362.

90. DRESSLER, *supra* note 13, at 121.

91. See Rogers, *supra* note 85, at 1379.

92. *Rolon*, 73 Cal. Rptr. 3d at 367.

with enough evidence to infer Rolon's intent to aid Isaac's father. First, the prosecution had to prove Rolon's presence during the crime.⁹³ Second, the prosecution had to prove her status as Isaac's mother, which proved her legal duty to protect Isaac.⁹⁴ Third, the prosecution had to prove Isaac's death, which proved her failure to protect Isaac. Simply put, the prosecution had to prove only Rolon's presence and her status as her son's mother and caretaker in order to prove her intent to aid Isaac's father.⁹⁵

Allowing Rolon's intent to be inferred from so little evidence is unfair because the evidence proves nothing beyond her presence and status as a mother. There are many reasons, beside intent, why Lopez might have been present but failed to intervene. In general, an FTP parent might not intervene or stop an abusive partner because she is in denial of the abuse; she is fearful of reprisal against her or her child if she interferes; she fears the abuse will escalate if she interferes; she is coerced by the abuser into not interfering; she does not understand the risk to her child; she is high; or she fears reporting the abuse to authorities will result in her losing her children.⁹⁶ Given the many possible reasons for presence and failure to intervene, it is unfair to infer intent from such little evidence.

By allowing the jury to infer intent from presence or knowledge combined with a parental duty and failure to protect, liability for aiding and abetting is effectively expanded, and the prosecution's burden to prove the element of intent is eased. Traditionally, an aider and abettor's liability is derived from the direct perpetrator's liability because the aider and abettor is equally culpable—she possesses the same requisite mens rea as the direct perpetrator for the crime he committed—and her intent to aid is considered sufficient to prove that she possesses the requisite mens rea with respect to the direct perpetrator's crime.⁹⁷ By allowing intent to be inferred, the FTP

93. *Id.*

94. *Id.* at 364.

95. In fact, Sylvia attempted to strike Isaac's father at least once and reprimanded him when he punched Isaac, which seems to contradict her intent to aid and abet Isaac's father. *Id.* at 369.

96. V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229, 249–60 (1996). See also Diane DePanfilis, *Child Neglect: A Guide for Prevention, Assessment and Intervention Chapter 4 Risk and Protective Factors*, U.S. Department of Health & Human Services (2006), <https://www.childwelfare.gov/pubs/usermanuals/neglect/chapterfour.cfm>; J. Goldman, M.K. Salus, D. Wolcott K. Y. A. Kennedy, *Coordinated Response to Child Abuse and Neglect: The Foundation for Practice Chapter 5: What Factors Contribute to Child Abuse and Neglect?*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES (2003), <https://www.childwelfare.gov/pubs/usermanuals/foundation/foundatione.cfm>.

97. DRESSLER, *supra* note 13, at 477–78.

parent is held equally as culpable as the abusive parent, but the prosecution has not proved that the FTP parent possesses the requisite intent with respect to the abusive parent's crime, because it has not proved that the FTP parent intended to aid the abusive parent—rather, it has proven only some lesser mental state.⁹⁸ Allowing intent to be inferred from knowledge or mere presence establishes an especially low burden for the prosecution because proving presence or knowledge does not necessarily prove an FTP parent's intent.⁹⁹

California courts have ruled that mere presence does not prove knowledge and intent without something more, but the jury is permitted “to consider actions taken both before and after the crime when imposing liability.”¹⁰⁰ However, the court in *Rolon* clearly states that the jury could infer Rolon's intent from her “presence at the scene of the crime, her duty to protect her child and her failure to do so.”¹⁰¹ Since the FTP parent will always have a duty to protect the child and will always have failed to protect the child when cases like this arise, the *Rolon* court implicitly establishes that intent may be inferred from mere presence.

b. Natural and Probable Consequences

The natural-and-probable-consequences doctrine further eases the prosecution's burden, because the prosecution is not required to prove that the FTP parent harbored any mens rea with respect to the abusive partner's additional crime that resulted in the child's death. The prosecution is only required to prove the FTP parent's intent to aid the abusive parent's crime of child abuse, which makes her legally responsible for the child abuse and any additional crimes that are the natural and probable consequence of the child abuse.¹⁰² Therefore, the FTP parent may be convicted of a crime, such as murder, for which she does not possess the necessary culpability, because the prosecution has “proven” only her intent to aid child abuse, but not any intent or mens rea relating to aiding or committing murder.¹⁰³ The natural-and-probable-consequences doctrine, combined with California's

98. Kashyap, *supra* note 22, at 431–32.

99. *Id.*

100. Lawrence, *supra* note 10, at 1532.

101. *Rolon*, 73 Cal. Rptr. 3d at 367.

102. *People v. Culuko*, 92 Cal. Rptr. 2d 789, 799 (Ct. App. 2000).

103. The natural-and-probable-consequences doctrine has received substantial criticism. DRESSLER, *supra* note 13, at 484. For example, the American Law Institute views this rule as “incongruous and unjust.” *Id.* at 484 n.103. Also consider that the natural-and-probable-consequences doctrine builds on already weak proof of intent used to hold the FTP parent liable as an accomplice.

minimal requirements for proving conduct that constitutes assistance, makes it relatively easy for FTP parents in California to be convicted as accomplices to murder committed by abusive parents.¹⁰⁴

Recall *People v. Potter*, in which Elizabeth Potter was convicted of second-degree murder and felony child abuse resulting in death in part because Potter aided her husband “in committing felony child abuse, and murder was the natural and probable consequence thereof.”¹⁰⁵ In that case, Potter committed three acts—she was present at the scene of the crime, had a duty to protect the child, and failed to do so—that the court reasoned could suffice as conduct assisting her husband. The court reasoned that these acts alone could constitute conduct assisting her husband and that these acts combined with her intent to aid child abuse were sufficient to make her liable as an accomplice.¹⁰⁶ Potter’s aiding and abetting triggered the natural-and-probable-consequences doctrine, which also made her liable for her husband’s subsequent murder of Christopher, and the prosecution was relieved of proving her intent to aid murder and consequently her malice with respect to it. Holding Potter culpable for a serious crime like murder without proving any sort of mental state with respect to the murder of Christopher is unfair.¹⁰⁷

California’s use of aiding and abetting and the natural-and-probable-consequences doctrine has created standards that lower the prosecution’s burden and create expansive liability, resulting in overreaching theories of liability and facilitating the prosecution of FTP parents as accomplices. This expansive liability is unfair because it holds parents who lack the traditional malice required for a murder charge culpable for crimes they did not themselves commit. FTP parents should not be held responsible if their mental state does not fit the crime. Nor should conviction come at the expense of fairness.

104. DRESSLER, *supra* note 13, at 121.

105. *People v. Potter*, Nos. C052634, C053349, 2007 WL 4305547, at *5 (Cal. Ct. App. Dec. 10, 2007).

106. *Id.* at *9.

107. Because the natural-and-probable-consequences doctrine “holds an individual to the same culpability as a principal for a crime the commission of which the accomplice had no knowledge or intent to assist in,” it has received substantial criticism from members of the academic community. John F. Decker, *The Mental State Requirement for Accomplice Liability in American Criminal Law*, 60 S.C. L. REV. 237, 243 (2008).

c. *Illinois Accountability*

Recall that, like California, Illinois holds FTP parents guilty as aiders and abettors under its accountability statute.¹⁰⁸ Like California, Illinois allows the prosecution to prove the FTP parent's intent with respect to accountability by proving knowledge, which eases the burden on the prosecution and facilitates conviction. The same problems result: expansive liability and responsibility for crimes that do not match FTP parents' culpability, all at the expense of fairness.

Under the law of accountability, the FTP parent's intent to "promote or facilitate a crime may be shown by evidence that the [FTP parent] shared the criminal intent of the principal, or by evidence that there was a common criminal design."¹⁰⁹ In practice, intent may be inferred from very little, including presence during the crime and knowledge of abuse.¹¹⁰ For example, recall the case of Violetta Burgos, whose intent to aid her abusive partner, Elijah Staniel, was inferred from her refusal to break off ties with Staniel after he abused her daughter, her authorization of his role as her child's disciplinarian, and the extent and severity of injuries to her daughter.¹¹¹ Yet, there might be an explanation for Burgos's actions that disproves any alleged intent to promote or facilitate Staniel's murder of her daughter: she may not have believed that authorizing discipline would put her daughter at risk of death and, although she authorized discipline, she may not have authorized Staniel to beat her daughter—because discipline does not necessarily include abuse, "the natural tendency of which is to destroy another's life."¹¹² According to Burgos, Staniel's discipline of her daughter involved "spanking (sometimes with a strap) and sometimes exercises, such as headstands."¹¹³ Although sanctioning such behavior might not be exemplary parenting, this information did not prove that she authorized or encouraged Staniel to beat her daughter. Therefore, juries should not be allowed to infer intent to facilitate or promote, or common design to commit, an act, "the natural tendency of which is to destroy another's life" based on such evidence.¹¹⁴

108. See 720 ILL. COMP. STAT. 5/5-2(c) (2013).

109. *People v. Staniel*, 606 N.E.2d 1201, 1210 (Ill. 1992).

110. Kashyap, *supra* note 22, at 431–32.

111. *People v. Staniel*, 606 N.E.2d at 1209.

112. *Id.*

113. *Id.*

114. *Id.* In fact, the Illinois Appellate Court used similar logic in overturning Burgos's conviction, prior to its reinstatement by the Illinois Supreme Court. *People v. Staniel*, 589 N.E.2d 557, 565 (App. Ct. Ill. 1991). The court wrote that:

Also recall the case of Barbara Peters.¹¹⁵ In Peters's case the court found that Peters's intent was shown through "the continued arrangement of [her partner's] control over [her] child," which "sufficiently satisfie[d] the common criminal design standard."¹¹⁶ Although Peters was not present when her partner, Kenneth Jacobsen, beat her son to death, Peters regularly left her son in Jacobsen's care while she worked and, although her son was frequently injured, she believed Jacobsen's explanations for her son's injuries, "believing they were never very serious."¹¹⁷ Peters's babysitter, Karen Wagner, testified that Peters's son's injuries appeared only after Peters's relationship with Jacobsen was initiated.¹¹⁸ According to Wagner, Peters at one point told her that a hospital was going to charge Jacobsen with child abuse.¹¹⁹ Although it is clear from the facts that Peters had, or should have had, knowledge of Jacobsen's abuse of her son, leaving her son in his care while she worked should not be used to infer her intent to promote or facilitate his abuse of her son. Peters stated that she believed Jacobsen's explanations for her son's injuries and that the injuries were never very serious injuries. Although this might demonstrate Peters was in denial about Jacobsen's abuse, it does not demonstrate she had the requisite intent to aid Jacobsen, and it should not be used to infer such intent. If Peters believed Jacobsen's explanations for her son's injuries and that he was not seriously injured, then she could not have intended to put, or even believed that she was putting, her son's life at risk by leaving him in Jacobsen's care. In addition, she left her son in his care while she worked, which should have provided doubt about her intent, because it provides another explanation for leaving her son in his care.

Illinois allows intent to be inferred based on too little evidence—mere presence or knowledge—which eases the burden on the prosecution. Leaving a child in the care of an abusive partner or being present during

[T]he intent to facilitate the commission of murder cannot be inferred from Burgos' presence at Staniel's apartment. There was no evidence that she permitted Staniel to beat the child that day or at any other time. There was no evidence either whether she disapproved or actively opposed Staniel's hitting the child that day. Her mere presence during the beating is insufficient to find that she aided the commission of murder.

Id.

115. Burgos and Peters's appeals were heard jointly by the Illinois Supreme Court, and the decisions were reported in the same case.

116. *Id.* at 1210–11. Also, the court reasoned that Peters aided her abusive partner by placing her son in her partner's care when he clearly abused her son. *Id.*

117. *Id.* at 1207.

118. *Id.* at 1206.

119. *Id.*

abusive situations, without proving any other evidence of, should not be used to infer the FTP parent's intent. As previously mentioned, FTP parents might not intervene in or stop abuse for many reasons that do not include intent to harm her child.¹²⁰ Therefore juries should not be allowed to infer intent from such evidence without further evidence of a culpable mental state.

FTP parents should not be held culpable for something they only *might* be guilty of. Allowing intent to be inferred on the part of the FTP parent results in expansive liability, facilitates conviction of a crime not equal to her culpability, and eases the burden on the prosecution—all at the expense of fairness. Although the prosecution is motivated to hold FTP parents culpable of homicide in order to affirm the value of the child and to express moral outrage over the death, this should not occur at the expense of fairness and justice.

2. Implied Malice Murder

Implied malice murder, which holds FTP parents accountable as independent principals,¹²¹ is also problematic, because the implication of malice and the causation requirement are too expansive. Like homicide doctrines that rely on derivative liability, the use of implied malice murder results in expansive liability for FTP parents and facilitates their conviction, all while unfairly holding them responsible for a crime not equal to their culpability.

Recall that, under California law, to prove that the killing resulted from an intentional act—the element of causation—it is enough that “the conduct of two or more persons contributes *concurrently as the proximate cause of the death*” of the child.”¹²² The conduct of the defendant is a proximate cause in the death if the conduct was a “substantial factor contributing to” the death.¹²³ Although an FTP parent technically qualifies as a proximate cause of her child's death when her abusive partner kills her child, this standard for causation is too expansive. The FTP parent's failure

120. Some potential reasons might be that she is in denial of the abuse, that she is high, that she fears retaliation against her or her child if she interferes, that she fears the abuse will escalate if she interferes, that she is coerced by the abuser into not interfering, that she does not understand the risk to her child, or that she fears she will lose her children if she reports the abuse to the authorities. *See supra* note 96.

121. *See* Cal. Penal Code §§ 187–188 (Deering 2012).

122. *People v. Jennings*, 237 P.3d 474, 496 (Cal. 2010) (quoting *People v. Sanchez*, 26 Cal. 4th 834, 847 (2001)).

123. *Id.*

to act is technically a proximate cause of her child's death because her failure to act concurrently contributed to her child's death. It concurrently contributed to the child's death because it was "operative at the time of the death" and acted in conjunction with her abusive partner's acts to result in the death.¹²⁴ In addition, her failure to act is technically a proximate cause, because the prosecution can prove that but for the FTP parent's failure to act, the death would not have occurred.

Such an expansive standard for causation is problematic, however, because it facilitates convicting the FTP parent of implied malice murder. Implied malice murder is a crime that does not adequately encapsulate the FTP parent's culpability—resulting in unfair treatment under the law.¹²⁵

Recall *People v. Rolon*, mentioned above, in which the defendant Rolon was held culpable for murder based on two alternative theories of liability: aider and abettor liability and an implied malice theory.¹²⁶ Under implied malice murder, Rolon's failure to protect her son was considered a proximate cause of his death because, but for her failure to protect her son, he would not have died.¹²⁷ However, this expansive standard for causation goes too far because Rolon's failure to protect did not in and of itself contribute to her son's death—her failure was only dangerous to her son because of Lopez's abuse.

Contrast *Rolon* with *People v. Burden*, in which James Ralph Burden committed an act that, in and of itself, could have killed or seriously harmed his baby: he starved the baby, depriving it of hydration and nutrition.¹²⁸ Burden was found guilty of second-degree murder for the death of his five-month-old son due to malnutrition and dehydration caused by starvation.¹²⁹ Burden was obviously a proximate cause of his baby's death, because he caused the baby's death by depriving the baby of nutrition and hydration. His omissions were the substantial factor that

124. *Id.*

125. *See generally supra* note 22, at 431–32.

126. *People v. Rolon*, 73 Cal. Rptr. 3d 358, 360 (Ct. App. 2008).

127. *Id.* at 361–62. Rolon was charged "with one count of assault on a child under eight years of age resulting in death . . . , one count of second degree murder . . . and one count of willfully causing a child to suffer under circumstances likely to result in death . . . with an enhancement because death actually resulted." *Id.* at 361. In order to be charged with implied malice murder, one must be an actual and proximate cause of murder; therefore, it is implicit that Rolon was considered an actual and proximate cause of her child's death. *See DRESSLER, supra* note 13, at 184.

128. Burden did not feed his baby because his wife would get angry with him when he tried to care for the baby and an argument would ensue. *Id.* at 285.

129. *People v. Burden*, 140 Cal. Rptr. 282, 283–84 (Ct. App. 1977).

concurrently contributed to his son's death.¹³⁰ However, unlike Burden, whose act was dangerous to the baby in and of itself, Rolon's failure to intervene and stop abuse could not, in and of itself, harm or kill her child. In *Burden*, the baby was harmed by both parents' independent failures to nourish the baby, whereas the harm resulting from Rolon's failure only arose because of her partner's continuing abuse of her child: although she was a contributory cause, it is unfair to consider her a proximate cause under the law.

People v. Potter presents a similar case. In *Potter*, Elizabeth Potter was convicted of second-degree murder and felony child abuse resulting in death.¹³¹ Potter's husband killed her stepson, Christopher, by severely beating him.¹³² In *Potter*, the court believed that the jury most likely predicated Potter's liability on implied malice murder.¹³³ Recall the court's reasoning that "the jury could have concluded that Potter had a duty to seek medical care for a child under her care and that she made a conscious decision not to act, that such failure to act was inherently dangerous to human life, and deliberately done with conscious disregard for life."¹³⁴ The court wrote this to prove Potter's role as a proximate cause of death and validate her conviction. Yet the decision does not mention whether the prosecution was required to prove that Potter's failure to obtain medical treatment for Christopher was a but-for cause of his death. Without proving that Potter could have saved Christopher by obtaining medical treatment, it is unfair to consider Potter's failure to obtain medical treatment a

130. Utilizing proximate-cause liability makes sense when two defendants have each committed an act that might independently be the cause of death or have put the victim at significant risk of harm. For example, in *People v. Sanchez*, 29 P.3d 209 (Cal. 2001), rival gangs fired shots at each other, resulting in the death of a bystander. *Id.* at 216. Only a single, stray bullet actually caused the death of the bystander, but both parties were found guilty of murder. *Id.* at 211, 222. Similarly, in *People v. Kemp*, 310 P.2d 680 (Cal. 1957), two men chose to engage in a high-speed car race in a residential area. *Id.* at 681. Only one of the drivers struck a car and killed a passenger, but both drivers were convicted of manslaughter. *Id.* In both *Sanchez* and *Kemp*, the defendants committed acts that were dangerous to the victims in and of themselves. The proximate-cause doctrine was used to prevent defendants from escaping liability, when the "but for" cause test might not have been satisfied. Certainly, use of the proximate-cause doctrine in such scenarios and in scenarios in which a parent commits an act that is in and of itself dangerous to a baby, like starving the child to death, seems logical. However, allowing proximate cause doctrine to hold FTP parents independently accountable is wrong because FTP parents do not commit acts that are dangerous to the children in and of themselves.

131. *People v. Potter*, Nos. C052634, C053349, 2007 WL 4305547, at *6 (Cal. Ct. App. Dec. 10, 2007).

132. *Id.* at *2.

133. *Id.* at *7.

134. *Id.* at *16.

substantial factor in Christopher's death. In addition, like *Rolon*, Potter's failure to protect Christopher was only dangerous to Christopher because of her husband's abuse. She did not commit an act, with respect to his fatal injuries, that was dangerous in and of itself. Clearly, applying proximate-cause liability is too expansive with respect to FTP parents.

Implied malice murder allows malice to be implied and utilizes an expansive definition of causation in order to facilitate conviction of people who "as good as" intended to murder their victims. However, FTP parents do not clearly fit under this law. Their crime is not a clear proximate cause of their children's deaths because failure to protect a child is not in and of itself "as good as" intending murder.¹³⁵ Convicting FTP parents of implied malice murder holds them accountable for murder, despite the fact that they may lack the requisite malice for murder—which goes against notions of fairness and justice.

3. Felony Murder

Finally, recall that felony murder statutes may be used to convict FTP parents for the death of their child. Common arguments in defense of the felony murder doctrine include that it "is intended to deter negligent and accidental killings during the commission of felonies,"¹³⁶ that it reaffirms human life,¹³⁷ that the felon's intent is transferred to the homicide,¹³⁸ and that it eases the burden on the prosecution.¹³⁹ Felony murder holds the FTP parent accountable regardless of her mental state with respect to the homicide.

In Florida, felony murder can be predicated on child abuse and aggravated child abuse.¹⁴⁰ By utilizing felony murder, the prosecution is not required to prove the FTP parent's mental state with respect to the homicide. Therefore, the FTP parent is held equally as culpable as the abusive parent, although she may lack the requisite intent. However, it is unfair to hold an FTP parent culpable if she lacks any malice or intent with respect to her child's death.

135. See *supra* Part III(A)(1)(a) (discussing why intent should not be inferred from mere presence or knowledge).

136. DRESSLER, *supra* note 13, at 523. In other words, felony murder laws exist to increase the likelihood that the felony will be committed "in a manner less likely to result in death." *Id.*

137. *Id.* at 524.

138. *Id.* at 525.

139. *Id.*

140. *Zile v. State*, 710 So. 2d 729, 732 (Fla. 1998); *Leet v. State*, 595 So. 2d 959, 961 (Fla. 1991).

Indeed, in California, felony murder cannot be predicated on felony child abuse, and consequently, failure to protect.¹⁴¹ California limits the application of felony murder by employing the “inherently dangerous” test in deciding whether felony murder may be predicated on a certain felony.¹⁴² California courts have determined that felony murder will not deter felons from committing felonies that are not inherently dangerous given they “will not anticipate that any injury or death might arise solely from the fact that [they] will commit the felony.”¹⁴³ In other words, a felon will not be aware that she should commit a non-inherently dangerous felony more carefully. Additionally, felony murder should never be predicated on failure to protect because an FTP parent’s crime is an omission—a failure to act—and she cannot fail to act more carefully.

B. IN SUM: THE LAW DOES NOT FIT THE CRIME.

A punishment should fit a crime, but FTP parents’ punishments do not. Derivative liability holds FTP parents liable, even though they may lack the culpable mental states required of the abusive parents. Likewise, implied malice murder uses an expansive definition of proximate cause to hold FTP parents liable, even though the FTP parents may not have actively contributed to their children’s deaths. Finally, felony murder disregards FTP parents’ mental state altogether. Although they should be held culpable, criminal liability should not require broad inferences and expansive liability.

IV. WHAT ARE FTP PARENTS CULPABLE OF?

Although the methods used to hold FTP parents culpable do not fit their crime, FTP parents should not escape culpability altogether. This part

141. *People v. Caffero*, 255 Cal. Rptr. 22, 23 (Ct. App. 1989). Failure to protect is a form of felony child abuse. *See* CAL. PENAL CODE § 273a (Deering 2012) (“Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment.”).

142. *Caffero*, 255 Cal. Rptr. at 24–25.

143. Clayton T. Tanaka & Larry M. Lawrence, *Developments in California Homicide Law: VI. The Felony-Murder Doctrine*, 36 LOY. L.A. L. REV. 1479, 1498–99 (2003) (internal quotations omitted). In deciding whether a felony is inherently dangerous, the court looks “to the elements of the felony in the abstract, not to the facts surrounding the particular killing.” *Id.* at 1499. Felony murder cannot be predicated on felony child abuse because felony child abuse can be committed in a way that does not endanger human life. *See Caffero*, 255 Cal. Rptr. at 22, 25.

examines FTP parents' culpability. The part first discusses why FTP parents are in the best position to protect their children and how failure to do so contributes to harm inflicted on the children. The part then discusses FTP parents' common law and statutory duty to protect their children. While this part suggests FTP parents are culpable of wrongdoing, it also suggests that FTP parents are generally not as culpable as their abusive partners. Ultimately, the conclusion is that FTP parents are guilty of something, but they should not be treated equally as culpable as their abusive partners.

A. FTP PARENTS ARE IN THE BEST POSITION TO PROTECT THEIR CHILDREN AND THEIR FAILURE TO DO SO CONTRIBUTES TO HARM INFLICTED ON THE CHILDREN.

When an FTP parent fails to protect her child from an abusive partner, and that abuse results in death, she has, through her omission, contributed to the infliction of harm on the child. In such abusive situations, the children should take utmost precedence, above and beyond the allocation of blameworthiness or fault amongst the parents involved. Accordingly, it is logical that FTP parents have an affirmative duty to protect their children because, regardless of the dictates of the inter-parent relationship,¹⁴⁴ FTP parents are in the best position to recognize and protect their children from abuse because they routinely interact with, and may live with, both the victims and the intimate-partner abusers.¹⁴⁵ FTP parents are also the only parental advocates for their abused children, and they have a duty to recognize abuse and protect their children from it because children cannot protect themselves.¹⁴⁶ “[E]very child depends on others for the satisfaction of his needs because he cannot look after himself. Although he can scream for help, he relies entirely on those around him to hear his cries, take them seriously, and satisfy the underlying needs.”¹⁴⁷

144. This Note addresses FTP parents who experience spousal abuse under the modified duress section. *See infra* Part V(B).

145. *See* Liang & Macfarlane, *supra* note 40, at 440.

146. *Id.*

147. ALICE MILLER, BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES 1–2 (Leila Vennewitz trans., 1990).

B. FTP PARENTS VIOLATE THEIR COMMON LAW AND STATUTORY DUTY TO PROTECT THEIR CHILDREN.

Parents have a common law and statutory duty to protect their children from abuse.¹⁴⁸ The common law recognizes that parents have a duty to act in order to prevent harm to their children, and it holds parents culpable for failing to protect their children. For example, in *State v. Williquette*, a mother was charged with two counts of child abuse for failing to “take any action to prevent her husband, Bert Williquette, from repeatedly ‘sexually abusing, beating, and otherwise mistreating’ her seven year old son, B.W.” and eight-year-old daughter, C.P., and for leaving her children in the custody of their father for hours at a time.¹⁴⁹ A Wisconsin trial court dismissed the charges, but the Wisconsin Court of Appeals reinstated them, and the Wisconsin Supreme Court upheld the Wisconsin Court of Appeals’ decision, concluding that “a parent who fails to take any action to stop instances of child abuse can be prosecuted as a principal for exposing the child to the abuse.”¹⁵⁰

Statutory duties to act and statutes punishing parents who fail to protect their children are imposed in all fifty states.¹⁵¹ The California Penal Code provides that any parent or person “who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or . . . permits that child to be placed in a situation where his or her person or health is endangered,” has committed a crime meriting imprisonment.¹⁵²

C. FTP PARENTS SHOULD BE HELD CULPABLE, BUT NOT AS CULPABLE AS THEIR ABUSIVE PARTNERS.

An FTP parent should not be held to the same level of culpability as an abusive parent who actually inflicts the fatal injuries on a child. The FTP parent’s wrongdoing—that is, her failure to protect the child—is not equal to the abusive parent’s acts that kill the child. According to professor

148. Criminal liability based only on failure to protect statutes is not in and of itself sufficient for FTP parents, because it does not acknowledge that the death of a child has occurred. Any law used to convict an FTP parent should acknowledge that a death has occurred in order to affirm the value of children and facilitate society’s expression of moral outrage regarding the death.

149. *State v. Williquette*, 385 N.W.2d 145, 147 (Wis. 1986).

150. *Id.* at 147, 152.

151. *NDAA Failure to Protect a Child from Child Abuse Compilation*, NDAA (last updated June 2010), *available at* <http://www.ndaa.org/pdf/Failure%20to%20Protect%20a%20Child%20from%20Abuse.pdf>.

152. CAL. PENAL CODE § 273a (Deering 2012).

Joshua Dressler, “the criminal law distinguishes between an act that affirmatively *causes* harm, on the one hand, and the failure of a bystander to take measures to *prevent* harm, on the other hand.”¹⁵³ The FTP parent lies somewhere between the bystander and the abusive parent: although the FTP parent neglected her duty to protect her child, the FTP parent did not inflict the fatal injuries “that affirmatively cause[d] harm” and death.¹⁵⁴ Indeed, the FTP parent’s crime only arises because of the abusive parent’s serious abuse of the child; the FTP parent’s act, considered in and of itself, is no crime at all and would not threaten danger to the child were it not for the abusive parent’s actions.

V. PROPOSED LEGISLATION

To balance the paramount interest, the children, with the interest of justice—liability that fits the wrongdoer’s culpability—new legislation is needed that properly embodies FTP parents’ culpability. Therefore, the following legislation is offered:

1. First-Degree Failure to Protect Resulting in Death: Any person with a parental duty of care to a child who knew, or should have known, that an intimate partner was abusing the child in a way likely to cause serious bodily injury or death, and where death of the child did result from said abuse, is guilty of First-Degree Failure to Protect Resulting in Death.

a. Any person convicted of First-Degree Failure to Protect Resulting in Death is guilty of a felony.

2. Second-Degree Failure to Protect Resulting in Death: Any person found guilty of First-Degree Failure to Protect Resulting in Death who is able to prove the modified defenses of duress or failed attempts to protect shall be guilty of a misdemeanor.

A. FIRST-DEGREE FAILURE TO PROTECT RESULTING IN DEATH

First-Degree Failure to Protect Resulting in Death offers a standard that can be proven, that is, one that does not require permissive inferences, and sanctions the behavior that courts are already sanctioning: punishment for the FTP parent’s failure to act in light of knowledge, or when she should have had knowledge, of an intimate partner’s life-threatening abuse

153. DRESSLER, *supra* note 13, at 102.

154. *Id.*

of her child.¹⁵⁵ This proposed statute continues to hold the interest of the children paramount by recognizing that a death has resulted and affirming the value of the children. At the same time, however, this statute would avoid the flaws that occur in the application of the previously explored laws: the statute will not create expansive and overreaching liability because it has been written to encompass why the FTP parent is culpable and to hold her appropriately responsible. The burden on the prosecution is no longer eased, because a lower standard—knowledge rather than intent—is used with respect to the FTP parent’s mental state. Also, an overly-expansive definition of proximate cause is no longer an issue, because no causation needs to be shown with respect to the FTP parent. Finally, the law will ideally function as a deterrent, encouraging FTP parents to actively protect their children from abusive partners.

1. First-Degree Failure to Protect Resulting in Death Utilizes a Lower Standard so That the Burden on the Prosecution Need Not Be Eased.

Knowledge is a lower standard than intent. Requiring only knowledge ensures that the prosecution’s burden need not be eased and that juries need not utilize unfair permissive inferences. Recall that, in practice, current laws and theories of liability do not require the prosecution to prove the FTP parent’s intent or malice. Intent may be inferred from knowledge and, as a result, malice is often implied.¹⁵⁶ However, it is clear from these cases that the FTP parent’s knowledge of her intimate partner’s serious abuse—abuse likely to cause serious bodily injury or death—can be proven beyond a reasonable doubt.¹⁵⁷

Recall *People v. Rolon*, in which Rolon was found guilty of second-degree murder in the death of her son.¹⁵⁸ Rolon’s knowledge that Lopez was abusing her son in a manner likely to cause serious bodily injury could be proven because she was present when Lopez “immersed [her son] in a tub of water and unspecified chemical” and threw him against a wall.¹⁵⁹ Additionally, it can be proven she was present when Lopez punched her

155. Whether an FTP parent knew, or should have known, of abuse likely to cause serious bodily injury or death is a question for the jury.

156. See *supra* Part III(A)(1).

157. For the purposes of First-Degree Failure to Protect Resulting in the Death, the prosecution can establish that the FTP parent had knowledge if it proves beyond a reasonable doubt that she had knowledge of previous incidents of serious abuse or that her knowledge arose during the course of a single prolonged incident of serious abuse.

158. *People v. Rolon*, 73 Cal. Rptr. 3d 358, 361 (2008).

159. *Id.* at 360.

son in the chest because she told Lopez to leave her son alone after he punched her son.¹⁶⁰ In fact, Rolon had knowledge of Lopez's serious abuse, at the very least, in the week leading up to her son's death because she told the police that she had "attempted to strike Lopez at least once during the week before the homicide" in an attempt to stop the child abuse.¹⁶¹ Rolon's presence and actions taken during Lopez's abuse clearly prove her knowledge of it. Thus, a knowledge standard will allow the prosecution to prove her mental state, rather than infer it from her presence during the abuse and failure to fulfill her duty to protect her son.¹⁶²

Also recall *People v. Potter*, in which Elizabeth Potter was convicted of second-degree murder in the death of her stepson, Christopher.¹⁶³ Like Rolon, Potter also had knowledge of her partner's serious abuse of her stepson.¹⁶⁴ She knew that "Christopher was subjected to great bodily injury for a long time."¹⁶⁵ Potter neglected Christopher and sometimes handcuffed him to the bed.¹⁶⁶ When her father, a retired law enforcement officer, picked up her daughters the day before Christopher's death, Potter did not tell him that Christopher was handcuffed in another room.¹⁶⁷ She also quieted her other son during the fatal beating of Christopher and told her partner to stop beating Christopher.¹⁶⁸ Clearly knowledge could be proven beyond a reasonable doubt because all of this evidence indicates that Potter had knowledge of her partner's abuse of her son.

Likewise, knowledge can clearly be proven in other cases examined by this Note. Violetta Burgos undeniably had knowledge of her partner's serious abuse of her daughter, Electicia, because she had previously lost custody of Electicia after her partner broke Electicia's leg.¹⁶⁹ Although she was never present during the abuse, Barbara Peters also undoubtedly had knowledge of her partner's serious abuse of her son, Bobby.¹⁷⁰ Peters's babysitter, Wagner, noticed injuries to Peters's son and brought them to her

160. *Id.*

161. *Id.* at 369.

162. *See supra* Part III(A)(1).

163. *People v. Potter*, Nos. C052634, C053349, 2007 WL 4305547, at *1 (Cal. Ct. App. Dec. 10, 2007).

164. *Id.* at *9.

165. *Id.* at *8.

166. *Id.* at *2.

167. *Id.*

168. *Id.* at *9.

169. *People v. Staniel*, 606 N.E.2d 1201, 1204 (Ill. 1992).

170. *See id.* at 1208.

attention.¹⁷¹ Additionally, Peters told Wagner that a hospital was going to press charges against Peters's partner and have him arrested for child abuse after Bobby was taken to the hospital due to burns on his back and neck.¹⁷² Therefore, Peters undoubtedly knew that her partner seriously abused her son.

Requiring the prosecution to prove criminal elements beyond a reasonable doubt is an essential standard of criminal law, and it ensures that the defendant is only convicted of a crime that she is culpable for. The knowledge standard, which can be proven beyond a reasonable doubt, ensures that the FTP parent's mental state rises to the requisite level of culpability.

2. Parents Who Should Have Known That Their Intimate Partners Were Abusing Their Children Will Not Escape Liability Under First-Degree Failure to Protect Resulting in Death.

Parents who ignore or deny serious abuse should not escape liability; therefore, the proposed legislation includes parents who should have known about serious abuse. For example, if Peters had been able to prove that she honestly did not know about Jacobsen's serious abuse of her son, she would not escape liability because the evidence shows that she should have known about the serious abuse. Peters's babysitter began pointing out serious injuries to Peters's son after she began dating Jacobsen.¹⁷³ The babysitter discussed the following injuries with Peters: "a bruise covering [his] entire buttocks"; "small bruises on his cheeks, chin, and forehead"; four or five "bumpy like-welts" on his back; "an oval-shaped burn which measured about two or three inches in diameter running across [his] calf"; and a burn that went "'from the top of his scalp down his neck and one shoulder,' and that was 'raw' and 'pussy.'"¹⁷⁴ Additionally, Peters told the babysitter that a hospital intended to press charges against Jacobsen for child abuse after her son sustained the burns on his scalp and neck.¹⁷⁵ There is no denying that Peters should have known that Jacobsen's abuse was likely to cause serious bodily injury or death, and based on the evidence,

171. *Id.* at 1206.

172. *Id.*

173. *People v. Staniel*, 606 N.E.2d 1201, 1206 (Ill. 1992).

174. *Id.*

175. *Id.*

the prosecution can prove this beyond a reasonable doubt, ensuring Peters would not escape liability.¹⁷⁶

3. This Standard Sanctions the FTP Parent's Culpable Behavior and What the Courts Already Seem to be Sanctioning.

Not only is the “know, or should have known” standard provable beyond a reasonable doubt, it captures what courts already seem to be sanctioning: FTP parents should be punished if they have knowledge, or should have knowledge, of their intimate partners' serious abuse of their children, yet fail to act to protect their children from further harm. The language of decisions in failure to protect cases indicates that courts are focusing on punishing FTP parents who knew, or should have known, that their children were being seriously abused but failed to protect them. For example, the language in *People v. Stanciel* suggests that intent to aid was proven because Burgos and Peters knew, or should have known, of the abuse and failed to act.¹⁷⁷ Given that intent was inferred from knowledge of abuse, it is clear that what was truly sanctioned in *Stanciel* was knowledge. The court in *People v. Pollock* wrote that *Stanciel* stands “for the proposition that when proof that a parent aided and abetted an offense is to be deduced from an omission to act, the parent must know of a serious and immediate threat to the welfare of a child.”¹⁷⁸ Although the *Pollock* court focused on the immediacy of the threat, it is clear that the FTP parent's culpability was based on knowledge of danger to the child in the form of abuse and failure to act. The dissent in *Pollock* further distilled the *Stanciel* proposition regarding knowledge and wrote that in order to hold Pollock

176. Likewise, employing this standard would ensure people like Earl Leet do not escape liability. Leet, who worked nights and slept during the morning, was never present when his partner, Mary Lee Collins, would abuse her son Joshua Collins. *See* *Leet v. State*, 595 So. 2d 959, 960–61 (Fla. 1991). Prior to Collins's fatal beating of Joshua, she was arrested and charged with child abuse for bruises to “Joshua's head, trunk, and extremities.” *Id.* at 960. In the week prior to Joshua's death, Leet also noticed that Joshua had received a black eye, sustained large bruises on his chest, and had swelling near his jaw. *Id.* at 960–61. Leet claimed that he believed Collins's explanations for Joshua's injuries. *Id.* at 961. However, even if Leet's claims are to be believed, the injuries sustained by Joshua and Collins's recent conviction for child abuse indicate that Leet should have known that Collins was abusing Joshua in a way likely to cause serious bodily injury or death. Leet had a parental duty to care for Joshua, although he was not Joshua's biological father; therefore, he should be held culpable for FTP resulting in death. *Id.* at 962.

177. *See* *People v. Stanciel*, 606 N.E.2d 1201, 1210–11 (Ill. 1992) (“Although both Peters and Burgos argue that they did not aid the principals in the pattern of abuse which resulted in the death of the children, the evidence presented against both defendants is sufficient to provide the inference that they both either knew or should have known of the serious nature of the injuries which the victims were sustaining.”).

178. *People v. Pollock*, 780 N.E.2d 669, 684 (Ill. 2002).

accountable for her partner's killing of her daughter, Jami, "the evidence must show that [Pollock] knew that [her partner] was abusing Jami, that there was a substantial risk of serious harm if [Pollock] did nothing to protect Jami from [her partner], and despite this knowledge, that [Pollock] continued to permit [her partner] to have access and control over Jami."¹⁷⁹ The dissent focused on whether Pollock had knowledge of abuse by her partner in considering whether she was criminally liable.

The courts' language in many of the other decisions examined by this Note also indicates that they are concerned with whether the FTP parent had knowledge of the abuse, because the courts focused on facts that established that the FTP parents knew, or should have known, of the abuse.¹⁸⁰ Even in *Johnson v. State*, in which Brenda Johnson's sentence for involuntary manslaughter was examined because it departed from the guidelines, it is clear that court was preoccupied with knowledge when considering the culpability of an FTP parent.¹⁸¹ Johnson was charged with first-degree murder before she pled to manslaughter.¹⁸² Although the prosecution recommended that the trial court follow the low end of the sentencing guidelines, the court departed from the guidelines and imposed a fifteen-year sentence—the maximum permitted by law.¹⁸³ Johnson had a loving relationship with her daughter and her "only real crime was that she lived with a cruel person"—her boyfriend, Eric Rolle, who abused and manipulated her.¹⁸⁴ Nevertheless, the Florida Appellate Court held that Johnson's sentence was valid because she allowed "an abominable and brutal beating" to be administered and she "abdicated a position of trust," resulting in the death of her daughter.¹⁸⁵ The Florida Appellate Court did not go into more detail; however, the trial court's reasoning for the departure was provided. It also did not focus on intent with respect to the felony—only that a severe beating was allowed to be administered and that Johnson abdicated her position of trust or, in other words, that she failed to

179. *Id.* at 684.

180. *See* *People v. Rolon*, 73 Cal. Rptr. 3d 358, 367 (Ct. App. 2008); *People v. Potter*, Nos. C052634, C053349, 2007 WL 4305547, at *8 (Cal. Ct. App. Dec. 10, 2007); *Zile v. State*, 710 So. 2d 729, 737 (Fla. Ct. App. 1998); *Leet v. State*, 595 So. 2d 959, 963 (Fla. Ct. App. 1991).

181. *Johnson v. State*, 508 So. 2d 443, 444 (Fla. Ct. App. 1987). Johnson was originally indicted for first-degree murder; however, "[s]he pled nolo contendere to the charge of manslaughter as a lesser included offense." *Id.*

182. *Id.*

183. *Id.* at 445.

184. *Id.* at 444.

185. *Id.* at 444–46.

protect her daughter.¹⁸⁶ By writing that Johnson allowed the beating of her daughter, both the Florida Appellate Court and the trial court implied that she had knowledge of the abuse and did not intervene. By writing that the sentencing guideline departure was merited because she allowed the beating to occur, the courts clearly indicated that Johnson's culpability arose from her knowledge of the abuse and failure to stop it.

4. The Legislation Will Encourage Parents to Actively Protect Their Children.

The legislation suggested will also function to encourage parents to protect their children from abusive partners. The law establishes a clear standard for holding FTP parents culpable. FTP parents with knowledge of the standard will recognize that they cannot afford to ignore clear signs of abuse and that they must act to protect their children or risk liability for their children's death.

B. SECOND-DEGREE FAILURE TO PROTECT RESULTING IN DEATH AND MODIFIED DEFENSES

Although FTP parents who have knowledge, or should have knowledge, of their partners' serious abuse of their children must be held accountable, the law should also acknowledge the unique scenarios surrounding the abuse and provide defenses lowering the culpability of FTP parents where appropriate.

1. The Modified Defense of Duress Mitigates Liability Where an FTP Parent Did Not Have a Fair Opportunity to Protect Her Children.

Child abuse is correlated with spousal abuse.¹⁸⁷ "In homes where mothers are victims of domestic violence, about seventy percent of fathers or father-substitutes also beat the children."¹⁸⁸ While some scholars are "reluctant to attribute any blame to the mother for a child's injury or death at the hands of a violent intimate,"¹⁸⁹ a parent living in a violent home still has a legal duty of care to her child. "Although the adult might have found herself or himself in circumstances such that protection of the child seemed impossible, the child is still a child. No matter how weak the mother, she is

186. *Id.* at 445. The dissent also believed that the trial judge thought Johnson had inflicted some of the injuries to her daughter. *Id.* at 446.

187. Heather R. Skinazi, *Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect"*, 85 CALIF. L. REV. 993, 995 (1997).

188. *Id.*

189. Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure To Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579, 599 (1998).

in a much better position than the child to prevent abuse and owes a duty of care to her children.”¹⁹⁰ All parents should be held culpable where their failure to protect their child from an abusive partner results in death—but parents who are victims of spousal abuse should be held to a lower standard of culpability than parents who do not face such obstacles. For this reason, the proposed legislation proposes a modified duress defense.

A modified duress defense is needed because the FTP parent facing criminal liability may be both a victim and culpable in the death of her child. “The defense of duress recognizes that all humans have breaking points; society is prepared to excuse a coerced actor’s unlawful conduct if she accedes to a threat that, upon honest self-reflection, most of us doubt we would have the moral fortitude to resist either.”¹⁹¹ It excuses an actor when her “available choices are not only hard, but deeply unfair” and although “the coerced actor possesses free will, she does not possess a *fair opportunity* to exercise her will to act lawfully.”¹⁹²

Women experiencing intimate-partner violence should be allowed to invoke a modified duress defense based on the Model Penal Code’s definition.¹⁹³ The modified duress defense should mitigate the FTP parent’s crime from First-Degree Failure to Protect Resulting in Death to Second-Degree Failure to Protect Resulting in Death where she can prove that she was compelled to commit the offense by the use, or threatened use, of unlawful force by the coercer upon her or another person.¹⁹⁴ The modified duress defense recognizes scenarios in which a mother may be unable to

190. *Id.* at 597.

191. DRESSLER, *supra* note 13, at 308.

192. *Id.*

193. “Duress is an affirmative defense to the unlawful conduct by the defendant if: (1) she was compelled to commit the offense by the use, or threatened use, of unlawful force by the coercer upon her or another person; and (2) a person of reasonable firmness in her situation would have been unable to resist the coercion.” DRESSLER, *supra* note 13, at 319 (citing MODEL PENAL CODE § 2.09). A traditional duress defense will not suffice, because it does not acquit murder. *Id.* at 303. In addition, the defense of duress requires proof of a number of elements that an FTP parent facing intimate partner violence would probably not be able to prove, including that the threat against her was “present, imminent, and impending” at the time of the criminal act and that “the actor was not at fault in the coercive situation.” *Id.* at 304–05.

194. Note that the difference between this and the Model Penal Code’s definition of duress is that the modified duress defense eliminates the requirement that “a person of reasonable firmness in her situation would have been unable to resist coercion.” The “person of reasonable firmness” requirement is eliminated because it is an objective standard “based upon the incapacity of men *in general* to resist the coercive pressures.” *Id.* at 321.

protect, or faces significant barriers to protecting, her children from her abusive partner.

Although “some feminist scholars are reluctant to attribute any blame to the mother for a child’s injury or death at the hands of a violent intimate,”¹⁹⁵ this Note offers a modified duress defense that mitigates the FTP parent’s liability, but it does not excuse her from liability. This is an attempt to balance the paramount interest of the child, who is unable to protect herself from an abusive adult, with the interest of the FTP parent facing intimate partner violence. In addition, this is an attempt to recognize that the FTP parent facing intimate partner violence is an active agent in her own life.

2. A Modified Defense of Failed Attempts to Protect Mitigates an FTP Parent’s Liability Where She Made Reasonable Attempts to Protect Her Child.

The law should also recognize FTP parents’ reasonable attempts to protect their children. A modified defense of abandonment should be offered to those FTP parents who perform certain acts, in an attempt to stop the abusive parent, because they have demonstrated an effort to protect their children.¹⁹⁶ The modified defense of abandonment should hold that an FTP parent is guilty of Second-Degree Failure to Protect where (1) she can establish that she has contacted the police regarding the abuse by her intimate partner against her child or (2) where she can establish that she has attempted to intervene and protect her child from the abuse in some other manner. Other acts might include obtaining medical care, reporting the abuse to a school or social worker, or physically attempting to stop the abuse.

VI. CONCLUSION

In conclusion, this Note has argued that, although FTP parents should be held culpable when they fail to protect their children, current laws and theories of liability used to hold FTP parents criminally liable contradict traditional notions of fairness by relying on unreasonable permissive inferences and a broad definition of causation to facilitate convicting FTP parents for serious crimes. These laws and theories do not punish FTP

195. Jacobs, *supra* note 189, at 599.

196. In many courts, a person who might normally be guilty of complicity can avoid accountability by subsequently abandoning the criminal endeavor. DRESSLER, *supra* note 13, at 492. The common requirements are that “the accomplice must communicate his withdrawal to the principal and make bona fide efforts to neutralize the effect of his prior assistance.” *Id.*

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parents for the wrongs they have actually committed. This Note explored the practical applications of current laws and theories of liability used to hold FTP parents responsible for homicide and murder. Then this Note critically analyzed the application of these laws. Also, this Note examined why the application of these laws failed to capture FTP parents' culpability—concluding that FTP parents' crime exists when they knew, or should have known, of their partners' serious abuse of their children. Finally, this Note proposed new legislation that seeks to balance the interests of children and criminal justice. If the proposed legislation is enacted, it will allow society to affirm the value of children and express moral outrage regarding the death of children, while upholding an essential value of criminal justice: fairness.

