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### Article

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# **Criminalising vulnerability: Protecting ‘vulnerable’ children and punishing ‘wicked’ mothers**

## **Abstract**

This article aims to uncover how, in attempting to ameliorate the vulnerability of children, the offence of ‘causing or allowing the death of the child’ criminalises abused mothers. It explores how, in the courtroom, tropes of female criminality and constructs of the ‘bad’ mother are mobilised in ways that are both gendered and ‘classed’. The effect is to silence female defendants, deprive their actions of context, and deny them agency. This argument has implications for assessing the moral and legal culpability of abused women who fail to protect their children, because it shifts the focus onto how the abuser has exploited and exacerbated the vulnerability of both mother and child. This approach also challenges law’s preoccupation with scrutinising (and punishing) women who do not adhere to a glorified, middle class ideal of motherhood. More broadly, by focusing on the context of a woman’s alleged ‘failure’, there opens a space within legal discourse to refute the characterisation of female criminality as being either ‘mad’ or ‘bad’, and of women who engage in criminal behaviour as being either ‘virgins’ or ‘whores’. Finally, in focusing on vulnerability as a universal and unavoidable part of the human experience, gendered assumptions of autonomy and the self/other dichotomy are challenged.

## **Keywords**

‘causing or allowing the death of a child’, ‘failure to protect’, mothers, domestic abuse, vulnerability, agency

## **Introduction**

This article explores the potential of vulnerability theory to problematise the criminal offence of ‘causing or allowing the death of a child’, by uncovering the gendered discourse that surrounds this crime. The offence, which carries a sentence of up to

fourteen years imprisonment, was introduced in England and Wales as part of the Domestic Violence, Crime and Victims Act (2004, section 5). It was amended in 2012 to encompass cases where a child survives despite suffering 'serious' harm.<sup>1</sup> The article challenges the use of the 'allowing' element of the offence to prosecute mothers who are themselves subject to abuse.

Because failure to protect cases are heard in the Crown Court, they are not reported, meaning that knowledge of these cases is limited to media reports, and these are notoriously sensationalist (Goc, 2009; Cunliffe, 2011). In order to overcome this limitation, I observed one case -- *R v Green & Critchley* (unreported, 2013) -- in its entirety<sup>2</sup>. My analysis in this article largely focuses on this case as representative. I suggest that, while this criminal offence places pressure on women to incriminate their abusive partners, the legal discourse surrounding failure to protect paradoxically silences those same women. In this way, the law manipulates, exacerbates and ultimately criminalises their vulnerability.

*Green & Critchley* flags up the problems with how this legislation operates in practice, and with how failure to protect discourse is infused with an archaic maternal ideology, which is itself grounded in notions of femininity and maternity which silence mothers who are charged under its provisions (Panko, 1996). The labelling of these women as having failed to meet the demands of maternal ideology in order to explain their crimes (and to justify their punishments) leaves no space for women to share their complicated lived experiences with the courts. In this way, essentialist, culturally recognisable stock stories render women's 'true' narratives unknowable. This process exacerbates the vulnerability of abused mothers who are charged. It denies them agency and allows patriarchal gender ideology to continue unchallenged (Cunliffe, 2001; Smart, 1997; Wiest and Duffy, 2013).

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<sup>1</sup> Domestic Violence, Crime and Victims (Amendment) Act 2012

<sup>2</sup> I became aware of this particular case through the national press. A search of the local newspaper (Lancashire Evening Press) gave an approximate date as to when the case would start at Preston Crown court (Sessions House) and I then confirmed the exact date with the scheduling department at Preston Crown Court. After obtaining permission from the judge (via the court usher), I spent 3 weeks observing the case in the area of the court reserved for the press. As I was there for the duration of the case other participants would sometimes volunteer their opinions/ interpretations of events, such as police officers, journalists etc. Due to the pace of proceedings it was sometimes difficult to note direct quotes whilst observing the behavior and reactions of the defendants, the barristers, the judge etc.

Drawing on the work of Martha Fineman, I propose a shift away from maternal responsibility (which is the basis of the law as it is currently understood), and towards the concept of relational vulnerability. There are several benefits to be gained from this move. First, by focusing on how the abuser manipulated and exacerbated the vulnerability of mother *and* child, a relational vulnerability analysis shifts attention away from the omissions of the abused woman and towards the actions of her abuser. It thereby challenges the attribution of moral responsibility and legal culpability, and should result in failure to protect charges being considered inappropriate where there is evidence of abuse towards the mother. A relational vulnerability approach also grapples with how a defendant can be simultaneously vulnerable but nevertheless in possession of agency. As a consequence, the criminal law's need to pathologise and demonise 'criminal' women might be overcome. Finally, an understanding of vulnerability as a universal aspect of the human condition, as proposed by Fineman, challenges the feminisation of vulnerability. Not only has this construct been used to deny agency to women, but it has perpetuated the myth that 'invulnerability' is both desirable and achievable.

### **'You played roulette with her life'**

On 30<sup>th</sup> August 2012, a 999 call was made from the family home of Natalie Critchley (aged 20), Richard S Green (aged 22), and their two young children. Critchley informed the operator that their three year old daughter, Lia, had been suffering from a stomach upset. Green then snatched the telephone and told the operator that his daughter was not breathing. Arriving three minutes later, the paramedics tried to revive Lia, but she was already beyond medical help and was pronounced dead shortly after arriving at the Royal Preston Hospital. She had multiple injuries on her body and a post mortem found that the cause of death was peritonitis caused by the severing of the duodenum. Medical expert witnesses agreed that the injury that caused her death could not have been accidental; it would have required 'great force, a violent kick or punch in the stomach or being thrown extremely violently

against a hard surface'. Green was charged with two counts: (i) murder; and (ii) causing or allowing the death of a child. Critchley was charged with the single count of causing or allowing the death of a child.

When questioned about the events leading up to Lia's death, Green and Critchley each denied perpetrating or witnessing any violent conduct towards their daughter. They each stated that Lia had suffered gastrointestinal symptoms for a couple of days prior to her death. They had assumed that she was suffering from a common childhood stomach upset. When prompted to describe Lia's last days, Green claimed that she had fallen off a swing the day before her death and landed on her bottom. However, medical experts discounted the possibility of this event causing such extreme blunt force trauma; particularly as, by Green's own admission, Lia was 'fine' afterwards and was seen on Closed Circuit Television (CCTV) walking home later that day. The experts emphasised that she would not have been able to do this after the injury that led to her death. Both parents had also informed paramedics, nurses and the police that Lia had been 'up and about' a very short time before she collapsed, a description which one expert found 'extremely unlikely...almost impossible'. These inconsistencies between the parents' accounts and the medical evidence were central to the trial.

*Green & Critchley* is a typical failure to protect case in that, first, a child died in the family home. Second, neither parent would admit responsibility for the death, nor would they incriminate one another. The Crown's case was that Green violently attacked Lia, causing her fatal injuries. Critchley, whilst absent at the time of the attack, was aware of Green's violent tendencies due to the abuse she herself suffered throughout their relationship. Consequently, she had 'allowed' her daughter's death by failing to protect her from Green. Furthermore, the prosecution contended that, upon her return to the family home, Critchley knew that Lia had been seriously injured but she failed to summon potentially life saving medical assistance because of her feckless nature and due to her 'misguided loyalty' to her partner. Green's defence was that his daughter was suffering from a stomach bug; she had fallen off a swing and then collapsed the following morning; and that he was

devastated and baffled by his daughter's sudden death. Critchley's defence was that, as far as she was aware, her daughter was never physically harmed by Green. She believed that Lia was suffering from a stomach upset until the point in time when she collapsed. At that moment, she sought urgent medical assistance.

### **Protecting children; punishing mothers**

The rationale for adopting failure to protect legislation in England and Wales was to close a loophole created by *R v Lane & Lane* (1986). In that case, which involved the death of a child, neither parent would admit responsibility. Neither parent would testify against the other and there no evidence which indicated which parent was culpable. The Court held that, given the ambiguous circumstances, the case could not proceed. This precedent was applied in subsequent cases with similar facts (Law Commission, 2003b:1), sparking public outrage and leading child protection groups, such as the National Society for the Prevention of Cruelty to Children (NSPCC), to complain that parents were quite literally 'getting away with murder.' In 2003, the NSPCC published the report which led to the enactment of s 5 of the Act (NSPCC, 2003).

In the event of an unexpected child death, where neither parent will admit responsibility or incriminate the other, s 5 is said to provide a 'safety net'. If the Crown cannot prove murder or manslaughter beyond a reasonable doubt, s 5 can give rise to an alternative homicide charge. But in *Green & Critchley*,<sup>3</sup> the Crown accepted that Critchley was not present when Lia's injuries were inflicted. However, contrary to the Law Commission's recommendations, s 5 is not limited to circumstances where it is unknown which parent inflicted the injury. Instead, the provision criminalises any parent (or member of the household) who has failed to take 'reasonable steps' to protect a child from harm which they 'had foreseen or ought to have foreseen' (Law Commission, 2003). The objective elements --

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<sup>3</sup> See also *R v Mujuru* [2007] EWCA Crim 1249 and *R v Lewis (Rebecca)* (Unreported, 2006) (Crown Ct(Swansea)) *R v Rigby & Smedley* (unreported, 2012)

*reasonable steps and foreseeability* -- leave much to a Court's discretion, and they place a heavy burden on trial judges to ensure that their directions to juries are clear. In *Green & Critchley*, s 5 amounts to a statement of responsibility. It is used to apply pressure to women such as Critchley to incriminate their partners and thus help the Crown to secure a conviction of murder, as opposed to the lesser offences of manslaughter or causing the death of a child. After several weeks in Court, Green pleaded guilty to manslaughter and the s 5 charge against Critchley was thrown out. In its place was substituted the lesser child cruelty offence of failing to obtain appropriate medical attention (Children and Young Persons Act 1933, s 1 (2)).

In practice, the offence of failure to protect has been frequently used to criminalise women who are themselves victims of abuse (Panko, 1996; Fugate, 2001). For example, Herring (2007; 2008) highlights the plight of Rebecca Lewis, whose partner killed her thirteen month old son. Lewis stayed with this abusive partner as he had threatened to kill her if she ended the relationship. Notwithstanding this threat, she was convicted, with the Court criticising her for 'putting her own interests first, above and beyond that of [her] vulnerable child'. Even though she was not present at the scene of the attack, Lewis was still sentenced to six years in prison. Similarly, Kirsty Smedley was found guilty of failing to protect her two year old son. He died as a result of a violent attack perpetrated by Smedley's partner, Daniel Rigby, while she went to buy cannabis for him. Rigby and Smedley were sentenced to seventeen and four years respectively.<sup>4</sup> During the trial, it emerged that, a couple of weeks prior to the murder, Rigby had been arrested for assaulting (head-butting) a pregnant Smedley in public. However, the case against him was dropped as a result of an investigation that was 'plagued by errors' (Scheerhout, 2014).

Thus, a history of domestic violence does not diminish a woman's responsibility for failing to remove a child from the risk of harm by providing an explanation and justification for inaction. Rather, in these cases, the Crown argues that the more frequent and severe the abuse experienced by the mother, the more

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<sup>4</sup> *R v Rigby & Smedley* (unreported, 2012)

likely it is that she was aware of her partner's propensity for violence (Fugate, 2001; Herring, 2008: 146). This then 'proves' that the harm suffered by the child was foreseeable and, ultimately, that the woman failed to take reasonable steps to protect her child from the potential threat. As a consequence, the defence may decide not to submit evidence of a history of violence against the mother. The context in which her actions -- or, more accurately, her omissions -- occurred therefore is never articulated in Court. As I shall demonstrate below, this approach exacerbates the woman's vulnerability because the lack of factual context results in an increased reliance on age old tropes of female criminality and idealised notions of motherhood<sup>5</sup>. The jury is encouraged by the Crown to interpret a mother's failure to meet this glorified standard of mothering as the justification for the imposition of criminal responsibility (on women who are themselves the victims of abuse) (Panko, 1996; Herring, 2008).

### **Gendered tropes and the failure to protect**

Tropes are stereotypical 'stock stories' grounded in a particular characteristic or status. To 'explain' female criminality without disrupting gender roles, they offer essentialist, culturally recognisable explanations which serve to pathologise women. This in turn justifies the imposition of criminal punishment (Morrissey, 2003). By portraying the cause of female deviance as a flaw within the particular woman herself, the tropes serve to prevent any understanding of the broader context in which a woman might function. The result is the silencing of defendants and the denial of women's agency. Abused women who are charged with failing to protect their children are subject to many overlapping and contradictory tropes which result from the conflicting ideological preconceptions of them as women, mothers, and victims. Despite being grounded in outmoded conceptions of femininity (and maternity), these tropes of female criminality continue to resonate in criminal trials and they remain influential with juries. For instance, Ballinger (2012) has compared

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<sup>5</sup> Which are also likely to dominate discourse regarding the crime of emotional neglect of children under the new Serious Crime Act 2015 s. 66.



the 1955 trial of Ruth Ellis, the last woman in England to be hanged, and her posthumous appeal in 2003. Despite the gap of forty eight years, the discursive tropes mobilised in both the trial and the appeal were strikingly similar. Of course, these tropes may be used by the defence to 'recuperate' a woman back towards a more desirable notion of femininity. Alternatively, they are deployed by the Crown in order to distance her from that ideal, thereby making her less sympathetic to judges, juries and the wider public (Seal 2010; Cunliffe 2011; Fox and Bell 1996; Nicholson, 1997).

The so called 'mad/bad' dichotomy dominates discourses of female criminality (Allen, 1987). When women commit typically 'masculine' crimes, they are 'doubly transgressive' in that they defy both the law *and* assigned gender roles (Weare 2013; Smart, 1997; Carlen and Worrall 1987). They are then demonised as bad: so monstrously unfeminine as to be 'other' to their gender (Nicholson, 1997). By contrast, when women commit crimes that are more aligned to perceived gender roles, they are pathologised as mad (Coates and Wade, 2004). Mothers such as Critchley are characterised as either pathologically bad or mad depending on which tropes of faulty femininity are advanced by the defence and prosecution. In *Green & Critchley*, the claims put forward by the Crown centred on apparent hypersexuality, duplicity and fecklessness. This resulted in Critchley's construction as pathologically bad and, as a result, as deserving of punishment.

Morrissey (2003; 23) criticises feminist legal scholars for advancing a third trope of victimhood which equally risks denying women agency. She argues that, by only engaging with 'deserving', sympathetic women who have committed violent crime in response to abuse (such as the battered woman who kills her abuser), feminist explanations of female deviance perpetuate the idea of women as 'pathological victims'. Since pathology is antithetical to responsibility, constructing perpetrators as victims of their own physiology means that they cannot be considered autonomous agents (Armstrong, 1999; Weait, 2007). This can have tactical benefits, including reduced sentences and even the avoidance of custodial sentences altogether (Nicholson, 1995). However, this practical gain for individuals

comes at the expense of the status of women more generally. By playing into misogynistic notions of female embodiment, it perpetuates the idea that women are too embodied to be considered rational agents (Shildrick, 1997). As a response, feminist theorists have made a conscious effort to address unsympathetic female defendants who commit theoretically 'difficult' violent crimes (Seal, 2010; Fox & Bell, 1996; Winter, 2002). For example, in her analysis of the trials of serial killers Rose West and Myra Hindley, Winter (2002) respects West and Hindley's agency while continuing to challenge the denial of female subjectivity in the courtroom. She maintains that it should be the defendants' *actions* and omissions on trial, rather than their femininity. In *Green & Critchley*, I would argue that respect for Critchley's agency requires that the Crown's case be based on facts, such as how she downplayed the seriousness of Lia's condition when summoning medical attention, rather than on whether she adhered to a traditional gender role.

#### *Culpable victims: the 'good' mother / 'ideal' victim dichotomy*

Gender tropes do not only construct transgressive women as pathologically mad or bad. In addition, when the alleged transgression involves children, the denial of female agency is exacerbated by the use of maternal tropes which derive from idealised notions of motherhood. This gives rise to yet another problematic dyad in the context of failure to protect cases: the good/bad mother dichotomy. In these cases, mothers can never just be 'good enough' (Silva, 1996). *Green & Critchley* highlights how reductionist tropes cannot deal with the factual complexity of failure to protect cases. Critchley is both victim and perpetrator; her identity is shaped by the application of tropes of female deviance, glorified maternity, and stereotypical notions of domestic violence victims. In legal discourse, the ideal victim of domestic violence and the good mother both derive from notions of appropriate femininity (although different aspects are emphasised) (Smart, 1992).

Women who fail to protect their children from harm are subject to glorified expectations of them as mothers, traceable to such diverse thinkers as Freud and

Rousseau (Badinter, 1980). The good mother of legal discourse is necessarily responsible, chaste, and self-sacrificing to the point of masochism (Herring 2007; Fineman and Karpin, 1995). As a result, mothers who commit crimes are anti-women *and* 'anti-mothers' (Cunliffe, 2011). Tropes of maternal inadequacy are evident in the arguments advanced by both prosecutors and defendants, as well as in the sentencing comments of judges and, most problematically, in the fabric of the offence itself. Failure to protect provisions evince an implicit legal expectation that the responsible battered mother should be willing to sacrifice her own life for that of her child (Jacobs, 1998).

In the courtroom, these tropes reinforce the individualisation of responsibility for children. Expectations that the good mother is responsible, capable, resilient and protective are diametrically opposed to stereotypes of the ideal victim, who is frequently portrayed as 'pathologically weak', 'helpless', 'dysfunctional' and passive (Mahoney, 1991: 4). A good mother automatically prioritises her child above her own wants or needs and it is assumed that she has the emotional and pragmatic resources to do this. This assumption is particularly problematic in cases of domestic abuse. Parenting within the context of an abusive relationship can lead to a 'blurring of borders', and an exhaustion arising out of 'living in the moment where resources only allow for dealing with issues as they arise with no time or energy to assess the "bigger picture"' (Mahoney, 1991:21).

Weait (2007) notes that acting irresponsibly, such as through the taking of risks, is criminally punished unless the risk taker is morally innocent. The unwavering level of responsibility and moral superiority expected of mothers means that *any* risk is cast as immoral and therefore susceptible to criminalisation (Cain, 2016; Friedman, 2014:226). Furthermore, calculations of risk in this context presume that, because a woman herself is subject to abuse, she will automatically anticipate that her partner will act violently towards their child. This is compounded by assumptions that the good mother can be omnipresent to manage risk, or, alternatively, that she has the resources and support to leave the relationship. The logic of failure to protect discourse fails to appreciate the risks associated with

leaving an abusive relationship, including homelessness, accusations of being an 'implacably hostile' mother resulting in the abuser being granted unsupervised contact, and even domestic homicide (Wallbank, 1998; Mahoney, 1991).

### **Constructing Critchley: mother/victim/abuser/other?**

In failure to protect cases, including *Green & Critchley*, idealised notions of femininity and maternity converge to create a culturally familiar stock story for the jury. This obscures women's 'real' narratives and denies their agency. Legal discourse perpetuates idealised notions of femininity and maternity. Vulnerability has become synonymous with being the ideal victim who adheres to strict gender roles and is both legally and morally innocent. Brown challenges this 'vulnerable victim'/'dangerous wrongdoer' dyad, arguing that, in reality, there is a nexus between vulnerability and transgression. In other words, it is possible to be *both* vulnerable *and* transgressive. To be perceived as vulnerable, one must be willing to disclose a great deal of personal information and show 'compliance'; ie, to be accepting of any assistance offered (Brown, 2014). Perversely, though, compliance is hindered by cultural assumptions which prevent victims of domestic violence from identifying the cause and extent of their vulnerability. In this regard, Mahoney (1991) argues that some victims of domestic abuse do not seek, nor do they accept, help because they do not identify as victims. This is due to the fact that the victim stereotype is too extreme and reductionist to reflect their lived reality. In contrast, their situation feels both more trivial and more chaotic. This is exemplified by Critchley's nonchalant response after Green punched and kicked her on a bus, months after Lia's death. When the bus driver asked her why she 'put up with it', she simply replied 'because he's my boyfriend isn't he?'

Cunliffe's (2011: 146) contention that 'the public and legal desperation for confession goes far beyond legal strategy' also plays out in *Green & Critchley*. Green's guilty plea is synonymous with a confession, which in turn casts Critchley as the defendant who is still hiding information and obstructing the truth. Even after

acceptance of Green's manslaughter plea, the preoccupation of the Crown and the police continued to be with why Critchley would not 'tell the truth' and blame Green for their daughter's death. This sense of frustration is likely to have been shared by the jury who, as Nadler (2012) concludes, are less interested in the defendant's act itself than in the motivation *behind* that act or, in this case, the failure to act and the refusal to incriminate.

The offence of failure to protect allows guilt to be inferred from silence. Critchley's reluctance to implicate Green is presumed to be meaningful and is interpreted as proof of her duplicity. The provision is intended to compel women like Critchley to give evidence and incriminate their partners. Ironically, however, elements of the offence silence defendants, disrupts their narratives, and increases their reliance on gendered tropes to plug the gaps. Victimhood tropes were never raised in the case, as Critchley and Green jointly (and successfully) petitioned for evidence of incidents of domestic violence perpetrated against Critchley to be excluded (since it would have prejudicially affected *both* of them). For women, this is the ultimate 'catch 22': the facts likely to make jurors sympathetic to mothers such as Critchley and allow their omissions to be contextualised is the same evidence which will incriminate them most forcefully. This form of reasoning ignores the complexities of an abusive relationship. It relies on a narrow, individualistic conception of autonomy inappropriate in the context of familial abuse, as opposed to a relational understanding which recognises that a person's independent 'free' choice always operates within a wider framework of practical, emotional and structural constraints (Friedman, 2003).

The narrative which Critchley relied upon in Court -- that she and Green had a 'normal' family life and that she believed Green was a good father who would not hurt their children -- appeared disjointed and contained unexplained gaps. As a result, she appeared to be deceitful to the jury. For example, one of her colleagues gave evidence stating that she had seen holes in the plaster of a living room wall which had been caused by a table having being thrown. However, Critchley failed to corroborate this, maintaining that Green was not violent towards their children. The

link between duplicity and femininity has a long history throughout mythology and theology, and gives rise to the 'duplicity paradox': 'the woman is constructed as artifice and marginalised for lacking essence and authenticity' (Tseelon, 1995:5). Thus, rather than acknowledging Critchley's agency, her motives are systematically assumed in Court to be duplicitous and thus deserving of punishment. Her acts and omissions are systematically stripped of context, allowing guilt to be inferred from her silence. It is assumed that she is not telling the truth because she is morally corrupt. She failed to protect her child because she is feckless and ambivalent, rather than as a consequence of the absence of realistic options.

This perceived lack of coherence in Critchley's account is particularly prejudicial given the jury's preference for narratives which are both consistent and familiar (Ellison and Munro, 2009; Cunliffe, 2011). Barristers invoking the competing tropes at play in a case such as *Green & Critchley* are so intent on constructing a legally and culturally acceptable narrative -- in this case, the feckless teenage mother -- that they risk silencing defendants, thereby making the truth *even more* elusive. As Saunders (2012) notes, an account which includes untruths does not necessarily render the entire narrative void, yet this does not seem to be appreciated in failure to protect discourse. Inconsistencies in Critchley's account were seen as discrediting *all* of her narrative. She is not lying about some aspects; she *is* a liar. Critchley was depicted as lacking in virtue so that she could be condemned by the Crown for 'play[ing] roulette with [Lia's] life'. Consequently, Critchley's vulnerability failed to come across in Court. Through her failure to comply -- by not incriminating Green -- she is silenced by both the interpretation of the offence and the application of cultural tropes. The result is that Critchley is deemed an 'evil wrongdoer' rather than a 'vulnerable victim' (Brown, 2014).

### *Socio-economic status of mothers who 'fail to protect'*

Socio-economic status plays a crucial role in determining which tropes are deployed when mothers are on trial. This is because the ideal mother of legal discourse is very

much tied to middle class notions of child rearing (Marshall and Woollett, 2000). Throughout the hearing, Critchley's defence strove to portray her as sympathetic, whereas the Crown drew on constructs of 'faulty femininity' such as promiscuity. This allowed for the deployment of the virgin/whore dichotomy in order to depict Critchley as an archetypal bad mother. Social class was used in order to distance her from the middle class norm, while her infidelity contributed to the theory that she was cunning and duplicitous.

Gender performativity -- the extent to which behaviour conforms to the feminine and maternal ideal -- determines which tropes are applicable to mothers who fail to protect (Butler, 1990). The intersection of other factors such as age and socio-economic status also influence whether women are absolved or vilified (Walklate, 2001; Nicholson, 1995). Seal (2012) notes that the only woman to evade being construed as mad, bad or victim is the so-called 'respectable' woman. Her elevated social standing and adherence to heterosexual norms ensures that, despite her transgression, she remains within the bounds of appropriate femininity.

Socio-economic class is highly significant in *Green & Critchley*. At no point is Critchley portrayed as respectable; she is not deemed appropriately feminine; nor does she possess appropriate social standing. Instead, she is extremely economically vulnerable. The theme of financial struggle pervades the case: Critchley regularly borrows money from her family, whether to buy cannabis for Green or to recharge the card for their prepaid electricity meter; she falls into arrears with nursery fees, which meant that Lia and her sibling were cared for at home for a short period whilst Critchley worked; and she often received credit from the local shop. This fact was later manipulated to explain Green's mounting frustration as, shortly before he killed Lia, he was either refused credit or found it embarrassing. Once again, this exemplifies traditional notions of gender. It is assumed that Critchley, as a working mother, would not find relying on credit to be demeaning, whereas for Green (despite being unemployed), it is emasculating; a source of shame, frustration, and ultimately the cause of his aggression.

It is difficult to compare the tropes applied to Critchley with those applied to more financially secure women, given the dearth of such cases. From media reports<sup>6</sup>, it appears that economic vulnerability is a significant factor in failure to protect cases. There are two possible explanations as to why a middle class comparator is not easy to find. First, respectable middle class women may be absolved earlier in the criminal justice process. Women who conform to all other aspects of idealised maternity and femininity will be treated more sympathetically (Ballinger, 2007). For instance, the police may presume that they are sufficiently oppressed by their abuser that it is considered unconscionable to charge them with allowing the death of the child for whom they are grieving. Middle class women are more likely to be perceived as victims to be pitied, rather than as feckless and deserving of punishment, provided that they conform to other feminine and maternal ideals (Walklate, 2001; Wells, 2004; Armstrong, 1999):

The second explanation is pragmatic: the financial cost of childcare. Lia and her sibling usually attended nursery whilst Critchley worked. However, after falling into arrears with school fees, both children were cared for by Green and their grandmother for two weeks. Lia was due to return to nursery just four days after her death. Anderson (2010: 87) argues that 'women who are subject to domestic abuse are entitled to a network of services including safe housing, financial and psychological counselling, legal advocacy and the social support necessary to enable them to care for their children'. This is particularly pertinent given the number of children (including Lia) who are attacked when their mothers are temporarily absent at work or running errands.<sup>7</sup> The provision of affordable childcare would potentially limit the number of these cases and would represent a better use of public money than the prosecution of mothers such as Critchley.

The middle class mother of legal discourse appears frequently in contexts *other than* failure to protect cases. The recent amendment to the law of neglect

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<sup>6</sup> Most notably *R v Rigby & Smedley* (unreported, 2012) (Crown Ct (Manchester Crown Court)) and *R v Mujuru* [2007] EWCA Crim 1249.

<sup>7</sup> See also *R v Mujuru* [2007] EWCA Crim 1249 and *R v Lewis (Rebecca)* (Unreported, 2006) (Crown Ct(Swansea))



clarifies that harm encompasses psychological harm. Consequently, emotional neglect is now criminalised<sup>8</sup>. Once again, a well-intentioned law which seeks to ameliorate the vulnerability of children risks criminalising mothers who are themselves vulnerable and in need of support rather than deserving of criminal punishment (White et al 2014). While it is increasingly acknowledged that emotional neglect has very serious consequences (Piper, 2013), this new offence will most likely lead to judgments regarding appropriate levels of maternal emotional care, which will again be based upon middle class maternal ideals.

### *Promiscuity as Provocation*

While Critchley's socio-economic status can be understood as a factor leading to her prosecution, her alleged promiscuity also proves important. To repeat, the virgin/whore dyad has proven a persistent feature of legal discourse. The defence will cast a defendant as chaste, appropriately feminine, and therefore innocent; whereas the prosecution will seize upon any insinuation of sexual desire to argue that she is hypersexual and, consequently, guilty (Bell and Fox, 1996; Evans, 2012). At the time of Lia's death, Natalie Critchley was having an affair. Although it was established that she had not seen her lover in the days preceding Lia's death, her promiscuity became central to the trial. It was used to portray Critchley as both duplicitous and selfish, the opposite of the good mother who is morally superior and devoid of desire, be it sexual or otherwise. To bolster this accusation, the Crown drew the jury's attention to the fact that Critchley, for a brief period prior to Lia's death, had worked as a pole dancer.

Female promiscuity 'shields' male co-defendants from scrutiny thereby reducing the blame attributed to men (Winter, 2002:360; Evans, 2012). Hypersexuality is hyper-masculine and therefore an expected male behaviour. By contrast, for women such as Critchley, it results in their demonisation. Moreover, because hypersexuality and violence are associated with masculinity, Green is pathologised;

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<sup>8</sup> Due to a recent amendment to the Children and Young Persons Act 1933 contained in the Serious Crime Act 2015 PT 5 s. 66.

he is a victim of his biology in that he cannot help but react violently to her adultery (Coates & Wade, 2004). As a result, Critchley's affair is not only seen as proof of her duplicitous nature, but also as the *cause* and *catalyst* for Green's actions. The Crown asserted that her affair caused "simmering resentment" [which was] hardly helped by the responsibility of having to look after the children'. This narrative of provocation became so dominant that Green's 'loss of self-control' was portrayed as being a direct result of her promiscuity:

Richard Green on the 29<sup>th</sup> of last year, you lost all control...your temper was not helped by the fact that you strongly - and rightly - suspected that Natalie was having an affair with another man.<sup>9</sup>

Critchley's infidelity is thus discursively deployed to justify Green's actions. The prosecution's focus on her affair is particularly problematic since (thanks to decades of feminist critique) infidelity no longer provides a ready legal justification for the loss of self-control<sup>10</sup>. Notwithstanding this reform, in failure to protect cases, violence is portrayed as an understandable reaction to being cuckolded.

### **Dependency and the criminalisation of 'secondary' vulnerability**

The current response to abused women who fail to protect their children fails to recognise the multiple ways in which caring *creates* vulnerabilities for the caregiver (Kittay, 1999). Kittay describes this dynamic as 'secondary vulnerability' in that it flows directly from the responsibility for being a main carer. She argues that this responsibility for care affects the carer's autonomy, due to the burden of knowing that another is so reliant upon her. For example, Critchley's decisions were inevitably

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<sup>9</sup> Judge's sentencing remarks to Green.

<sup>10</sup> Following the enactment of the Coroners and Justice Act 2009. As Wake (2012) however notes although sexual infidelity is not a 'qualifying trigger' the Court of Appeal in *R v Clinton & Others* [2012] EWCA Crim 2 felt that it should still be taken into consideration if 'essential' to the context of the crime.

Even if they do, support is often unavailable/lacking as shown in *R v Thornton* [1992] 1 All E.R. 306

shaped by her caregiving responsibilities. Her vulnerability was thus exacerbated by her caring role as mother, combined with the fact that she worked outside of the home (Dodds, 2014: 200). In this way, failure to protect truly uncovers the 'dark' side of care. Despite experiencing domestic abuse, Critchley's responsibility for responding to Lia's innate vulnerability had become so naturalised that she was expected to ensure the safety of her child '24/7', even during her absences from the family home due to her work commitments. Lia's dependency was shouldered entirely by her mother and, when Critchley had no choice but to leave her in the care of her father, tragedy struck.

Remarks made to Green in sentencing imply that resentment and anger are an understandable reaction by a man forced to care for a sick child. In other words, maternal care is portrayed as a moral (and legal) necessity, but paternal care is rendered an act of altruism:

You were having to look after your two young children because there was no money to send them to nursery. And you resented it. Your partner Natalie Critchley, your co-defendant was out at work. So you had to deal with the children alone. You were frustrated and angry.

By contrast, during cross-examination of Critchley, her engagement in paid work was portrayed as self-indulgent, as well as being symptomatic of her maternal ambivalence (Cain, 2016):

Critchley: 'It was his turn to watch them. I didn't see why I needed to come out of work.'

Prosecuting Barrister: 'So you resisted?'

Critchley: 'Yes, I was annoyed. ... He said "why are you crying, it's only a job" ... I thought he should be able to deal with it. I didn't want nursery to know about my life, with him ringing up all the time.'

(Later) Prosecuting Barrister: 'I'm suggesting you didn't want to go home...'

Critchley: 'No I did not want to go home.'

Prosecuting Barrister: 'Because you wanted to remain in contact with Mr X [Critchley's lover]?'

Critchley: 'No, that's not why.'

Prosecuting barrister: '[A witness says] Green presented as a man who couldn't cope, shouting and swearing'...

Critchley: 'He always swears everything he says. Couldn't cope? No, if he couldn't cope I wouldn't have left him in with two children'.

This naturalisation of responsibility for responding to vulnerability ultimately provides the justification for criminalising Critchley's failure to protect (Walker, 1998). By attributing blame to mothers who are themselves subject to abuse, failure to protect laws render not only dependency, but also violence and vulnerability, hidden within the family. This creates a different kind of public/private divide (Fineman & Mykitiuk, 1995). While those types of vulnerability which may be visible to the public are seen as worthy of state resources, other vulnerabilities, such as those created by care-giving, are normalised as private and therefore are not seen as warranting the financial responsibility of the state.

### **From maternal responsibility to shared vulnerability**

In this section, I argue that shifting the legal focus from maternal responsibility (Cain, 2016) to *vulnerability* will promote a more nuanced approach to abusive family

dynamics. Not only does the drafting of s 5 implicitly criminalise vulnerability, but in addition, current legal expectations of mothers and gendered assumptions about care obligations exacerbate vulnerability and justify the criminalisation of mothers who fail to protect. Relational vulnerability is a helpful way to frame these cases since, as noted by Mackenzie et al (2014), it connotes harm, suffering, dependency and care – themes which pervade the failure to protect case law.

Vulnerability is a universal feature of the human condition in that we are all vulnerable as a result of both our corporeality and our social, co-dependent nature (Fineman, 2008). By focusing on this context rather than on individual characteristics, relational vulnerability helps to unpack issues such as foreseeability and responsibility, both of which are key elements of the failure to protect offence. After all, to understand a person's calculation of risk and to decide if they acted irresponsibly, we must appreciate the context of their actions and their environment (Stychin, 2012).

Fineman's (2001:1409) notions of 'inevitable' and 'derivative' dependency are illuminating in the failure to protect scenario. She explains that inevitable dependency is caused by age or disability whereas 'derivative' dependency is perceived culturally as being preventable; for example, dependency on the welfare state. Fineman argues that inevitable dependency attracts a sympathetic response, both culturally and from the state and its institutions. By contrast, derivative dependency is perceived as considerably less worthy of sympathy and resources (Fineman, 1995). Failure to protect laws certainly seek to protect the 'inevitable' dependency of children. However, by refusing to acknowledge the impact of abuse on the choices and actions of women, the criminal justice system simultaneously punishes the 'derivative' (or 'secondary') dependency of abused mothers (Fineman, 2010).

I want to suggest that a vulnerability analysis makes three main contributions to this debate. First, by shifting the focus onto the person who is creating and exacerbating the vulnerabilities of mother and child, it challenges the

victim/perpetrator dichotomy. This dyad is a result of, and perpetuates, the idea that to be recognised as a victim, one must adhere to a set of gendered ideals. Second, recognising the impact of domestic abuse necessitates the reconsideration of the attribution of legal culpability and moral blameworthiness on abused mothers who fail to protect. Finally, a relational approach resists the 'othering' of these abused women; rather, it aids in the deconstruction of the dichotomies which provide the basis for longstanding gendered tropes that have silenced them. Diminishing the power of these tropes thereby will allow women the space to give a contextualised account of their actions, and hopefully will lead to their treatment as autonomous agents rather than as pathological failures. Furthermore, emphasising the universality of vulnerability challenges the feminisation of vulnerability, which derives from the fallacy of the autonomous, invulnerable male legal subject. I want now to expand on each of these claims.

*1. Shifting focus from the gender performativity of the mother to the actions of the perpetrator*

A vulnerability approach ensures that attention remains firmly on the perpetrator rather than primarily analysing the actions or inactions of the victim (Stanko, 2014). In the context of failure to protect, this would mark a paradigm shift. Instead of scrutinising the moral and legal blameworthiness of women such as Critchley, who have themselves been subject to abuse, the focus shifts to the perpetrators of violence and how they have exploited the vulnerabilities of partners *and* children. This leaves space for an examination of the context in which omissions have occurred and for understanding the coercion that may have affected women's decisions.

*2. A reconsideration of the legal culpability and moral blameworthiness of abused women who fail to protect their children*

Acknowledging the vulnerability of abused women who have failed to protect their children renders the pursuit of criminal prosecutions of them undesirable. It also has implications regarding whether they are seen as morally blameworthy. Friedman (2014) has explored what vulnerability analysis brings to the issue of attributing moral responsibility to mothers. Acknowledging the level of coercion inherent in abusive relationships, she considers whether this *justifies* a woman's failure to protect or whether it *excuses* or *exempts* her from moral responsibility. Friedman concludes that the abusive context *excuses* women of moral responsibility on the basis that 'we accept that the act of the failing to protect was wrong but understandable if the woman concerned is in fear of serious harm herself' (Friedman, 2014:23).

Whilst I agree that domestic violence should lessen not only the legal but also the moral accountability of mothers, these assumptions are overly simplistic given that Friedman herself recognises a complex dynamic of coercion. 'Excusing' abused women for their failure to protect on account of their compromised moral agency fails to address the implicit assumption behind the failure to protect law: not only the implicit expectation of self-sacrifice but also of omnipresence. Friedman's assertion that domestic violence 'excuses' mothers such as Critchley from moral responsibility remains focused on the failures of the mother, and the 'excusing' of her shortcomings. But vulnerability analysis leads to a further means of conceptualising whether women are blameworthy; namely, it allows women to 'explain'. That is, it begins to shift the focus from *her* failure to what is wrong with her *situation*. By exploring the context surrounding Critchley's omission, and specifically by looking at how Green exacerbated her vulnerability, Critchley's lack of resilience may become *explicable*.

Not only would this approach make the criminalisation of failure to protect more obviously undesirable, it would also diminish what Lacey and Pickard (2013) call 'affective blame', meaning the hostile emotions associated with blameworthiness. Affective blame is particularly problematic in failure to protect cases, not only with respect to members of the jury, but also with the wider public.

For example, women who have been acquitted often have to deal with the hostile reactions of their local communities. This can have tragic consequences, such as in the case of the death of Danah Vince, who committed suicide following her acquittal of the offence of causing or allowing the death of her sixteen week old daughter. This resulted from her being subjected to taunts such as ‘baby killer’ from members of the general public (BBC, 2015).

### *3. Challenging the denial of female agency; diminishing the power of pathologising gender tropes*

In *Green & Critchley*, a focus on the actions of Green would significantly diminish the power of pathologising tropes, as it would direct attention to Critchley’s circumstances, rather than attributing failure to her as a personal, internalised matter. Victim blaming frequently stems from a tendency to scrutinise the behaviour and character of the victim rather than the assailant. By adopting a vulnerability approach, previously ‘relevant’ factors which encourage victim blaming (such as drug or alcohol consumption or even mode of dress) become irrelevant (CPS 2015; Stanko 1982; Stanko 2014). In the context of failure to protect, this paradigm shift diminishes the power of gender tropes in the courtroom. Under a vulnerability framework, Critchley’s alleged promiscuity loses its significance, as the focus shifts to Green’s manipulation of the vulnerability of both Lia and her mother. The dichotomies of mad/bad and virgin/whore thereby become irrelevant. Fundamentally, emphasising the *universality* of vulnerability begins the task of unpicking the archaic pairing of femininity with vulnerability and masculinity with invulnerability (Scott, 2014; Clowes, 2013). The feminisation of vulnerability reifies gender stereotypes and perpetuates gendered narratives. These tropes then come to dominate legal discourse and they silence women, deny them agency, and further exacerbate their vulnerability.

By contrast, Rowbotham (2011:115) suggests that the solution is ‘for the criminal justice system to develop a conscious awareness of [gender stereotyping]’.



She argues that it is theoretically and practically impossible to entirely resist its pull. From my courtroom observation, however, legal professionals appear to be acutely aware of the role which gender (and maternal) stereotyping can play in these cases. Critchley wore a black trouser suit every day of the trial, aside from the day when she was cross-examined. On that occasion, she wore a black pencil skirt and cardigan, leading the Detective Chief Inspector to remark on her 'mumsy' change of dress. Vulnerability theory assists in understanding why this comment was inappropriate. It highlights the need for a cultural shift whereby gender stereotypes are not par for the course and, in turn, will no longer be seen as an inevitable aspect of courtroom rhetoric (Bell and Fox, 1996).

Just as legal professionals seem well aware of the manipulation of gender stereotypes, jurors could be made more aware of this aspect of the current legal process. At present, gendered discourse is so dominant that juries are not adequately equipped to be able to distinguish between the failure to live up to a stereotypical ideal, and the failure to protect from harm. It has been established that, when assessing the credibility of a witness' account, jurors cannot divorce their decision making from their stereotypical preconceptions of the ideal victim. In the context of failure to protect, that is the construction of the ideal mother (Ellison and Munro 2009). Judges also need to be mindful of this in their summing up, because they can affirm or undermine the narratives presented by the prosecution and defence and thereby shape the verdict of the jury (Winter, 2002).

*From theory to practice; avoiding 'violent protectionism'<sup>11</sup>*

While vulnerability may be theoretically attractive, its transition from theory to practice has proven problematic (Brown, 2014; Kohn, 2014). The word vulnerability is frequently co-opted by governments in order to regulate behaviour which they determine to be undesirable, such as sex work or BDSM (Cowan, 2012; Fitzgerald and Munro, 2012). Furthermore, even well-intentioned state responses to social

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<sup>11</sup> Murphy, 2012

issues are usually based on problematic identity based notions of vulnerability which are grounded in the fallacy that vulnerability is something particular, temporary, and capable of being overcome and eradicated. A 'vulnerable group' is identified on the basis of a shared characteristic or status, such as age, race, or social class. Once identified, it is frequently subjected to paternalistic, unwanted, and at times aggressive intervention in a naive attempt to ameliorate the particular group's vulnerability (Murphy, 2012). In the context of failure to protect, children are the vulnerable group whose inevitable vulnerability must be ameliorated. However, s 5 is pathogenic as the substance and discourse surrounding the offence creates and exacerbates the vulnerabilities of the children's abused mothers (Mackenzie et al. 2014:9).

Furthermore, identity based constructs of vulnerability lend themselves to 'othering'. That is, they perpetuate the dichotomies from which gendered tropes flourish (male/female; mother/child; good/bad mother). Ignoring the relationality between men and women, and between mothers and their children, exacerbates vulnerability (Todres, 2009). Denying the interconnectedness between abused mothers and their children increases 'maternal alienation' (Morris, 1999). Motherhood and domestic violence are both potentially isolating experiences and a combination of the two means that women are unlikely to seek support. They are thus more likely to remain in abusive relationships, which may culminate in the sort of tragedy which this article has documented, where the abuser suddenly vents his anger or frustration on the child, rather than the mother.

Fineman challenges the conventional construct of vulnerability as an undesirable and avoidable characteristic or status of the individual. Instead, she emphasises its universality and inevitability (see also Naffine, 2003). In order to avoid paternalism, vulnerability theory must remain relational as well as context driven, rather than status based. Like resilience, vulnerability depends upon constellations of external factors (such as our relationships and our environment). It is not attributable to a particular characteristic, such as age, race or class. A relational approach not only takes into account systemic inequalities in the wider

society, but it also examines inequality within personal relationships (Kabeer, 2014). By recognising that our vulnerability and resilience are dependent on those around us (Goodin, 1986), we can build a 'reconceptualised relationship between the self and other' (Boon, 2013). A relational vulnerability approach shifts attention to how the abuse which has been suffered has compromised the resilience of both mother and child, ensuring that the interests of children are no longer seen as oppositional to, or disconnected from, the interests of their abused mothers (Lapierre, 2008; Herring, 2007).

Problematic interventions are often the result of well intentioned attempts to completely ameliorate vulnerability. This stems from the misconception that the opposite of vulnerability is invulnerability. But the eradication of vulnerability is an unachievable aim. Whilst our vulnerabilities may change in nature and extent over our lifetime, we can never become completely invulnerable. Consequently, when used in a reactionary way, such projects almost always descend into paternalistic interventions aimed at identity based constructs (Kohn, 2014; Herring 2012). Fineman makes an important distinction here between ameliorating vulnerability and building resilience. As vulnerability is universal and inevitable, it cannot be escaped. Resilience, however, can be bolstered (2008;10). If we accept that the opposite of vulnerability is resilience, then the focus of social policy becomes fostering resilience, rather than seeking to reduce the vulnerabilities of any particular group.

Fineman's theory avoids the individualisation and privatisation of responsibility (which currently underpins the law on failure to protect) by shifting our attention to the important role that the policies of the state should play in building the resilience of its citizens (Fineman, 2008; Ramsay, 2013). She criticises the way in which, within capitalist societies, the market is now dominant and the role of the state has been diminished. Concerns over privacy detract from the state's important function in empowering its citizens. Fineman calls for a more responsive, non-authoritarian state, which takes power back from the market and recognises its own role in fostering resilience (Fineman, 2008).

Applying this analysis, we can conclude that failure to protect provisions can never completely ameliorate the inevitable vulnerability of children, as vulnerability is both universal and unavoidable. However, state initiatives that help to build resilience in women and children are currently being cut as they are no longer a government priority. For example, 'Sure Start' centres build resilience by offering support to both parents and children. Whilst the number of families using these services has grown steadily year on year (with over one million children and families currently using 'Sure Start' centres in the UK (4Children, 2015)), funds have been cut annually since 2012. This has led to the closure of hundreds of centres, and shorter opening hours for those that remain combined with a reduction in services (particularly domestic violence support). At best, this policy development is ill conceived; at worst, it reflects the state's attempt to ensure that vulnerability is understood as a private issue, rather than as a public concern.

Criminalising mothers for failing to protect their children makes it clear that the vulnerability of children is the responsibility of mothers, and thereby limits the state's responsibility for the protection of women and children (Herring, 2007). Furthermore, it can be argued that, in this context, particular vulnerability is criminalised in order to protect vulnerable institutions (Fineman, 2010:37). For example, the criminal justice system and child protection services today can both be considered vulnerable, given that they are overburdened and under-resourced. As institutions, they are only sustainable if the majority of the population abide by the law and do not need to call upon family support.

## **Conclusions**

In this article, I have argued that identity based constructs of vulnerability and glorified notions of motherhood have led to the adoption of failure to protect laws. These create, perpetuate and exacerbate the condition of vulnerability, rather than fostering resilience. Although children undoubtedly are vulnerable, this does not justify the imposition of a regime which punishes victims of domestic abuse. The offence of failure to protect is pathogenic in that it manipulates and exacerbates the

vulnerability of abused mothers who are charged with this crime. The law embodies the opposite of Fineman's call for a non-authoritarian responsive state which strives to empower its citizens. Instead, the current approach is punitive and coercive. In short, the law should not apply where there is evidence of domestic violence towards the defendant. Women who have lost their children at the hands of their partners should be able to disclose their experiences of domestic abuse without fear that this will be used against them to prove their failure to protect in law.

Charging mothers with this offence risks further ruining the lives of women who are themselves victims of abuse. Even if acquitted, a woman may be prevented from regaining custody of any surviving children, gaining custody of any future children,<sup>12</sup> or being able to work with children. The discourse surrounding failure to protect is also problematic because it illustrates law's continued reliance on antiquated tropes which deny women's agency. It creates the impression that their failure is a result of something inherently wrong with *them* rather than something wrong with the context in which they were attempting to parent. Damaging tropes of femininity, maternity and victimhood all converge in these cases, rendering the circumstances of the omission irrelevant. A failure to meet a glorified standard of motherhood should not be synonymous with a failure to protect in law. It is not a justification for criminalising vulnerability.

A shift towards a more nuanced approach, which takes account of parties' relational vulnerability, focuses on the party who has exacerbated or manipulated the vulnerability of both mother and child. This reduces the likelihood of legal culpability for abused mothers by rendering prosecution undesirable. Furthermore, a more holistic approach which takes into account the circumstances in which women were attempting to parent helps to explain their actions and omissions, lessening the moral blame attributed to them. In allowing mothers such as Critchley to disclose the abuse they have suffered, women's actions and omissions are afforded context. This creates space for sympathetic reactions and lessens the reliance on gendered tropes. By deconstructing the gendered nature of vulnerability and resilience, this

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<sup>12</sup> *Re J (Children)* [2013] UKSC 9

approach also destabilises the cornerstone of criminal law, namely, the invulnerable male legal subject. Furthermore, this shift challenges traditional constructs of femininity and this may lead to discursive gains for women, not just in failure to protect cases, but with respect to the woman (and mother) of legal discourse more generally.

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