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Introduction

The unrelenting winter of 1989 witnessed the continued victimization of "Margaret," a mother of several young children. In the fall of that year, Margaret's boyfriend assaulted her in her home.[1] Unfortunately for Margaret, she rented her home, and four days before Christmas her landlord attempted to evict[2] her for failing to prevent that assault.[3] Concerning the assault, the landlord told Margaret that the residents of her building "cannot tolerate such behavior."[4]

The Minnesota district court hearing the case viewed the matter differently. The court felt that the landlord could not evict Margaret for "permitting" an assault on herself.[5] This decision seems normatively correct not only because it kept a family out of the cold, but because it also reflects an instinctual disdain for punishment inflicted for being a victim. The decision also seems

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1. West Bank Homes v. "M.K.," No. 1891221520, slip op. at 2 (4th Dist. Ct. Minn. Jan. 22, 1990) (order denying reconsideration) (party's name withheld to protect identity).

2. *See infra* note 72.

3. *Id.* Margaret cooperated with the Hennepin County Attorney's Office in prosecuting the boyfriend for felonious assault and burglary. *Id.* The boyfriend was still in custody at the time of the attempted eviction. *Id.*

4. Doug Grow, *When Victim Is Seen as the Villain*, STAR TRIB. (Minneapolis), Dec. 29, 1989, at 1B. Such "intolerable" behavior included calling the police ten times on her boyfriend, including twice on the autumn day when police finally arrested him. *Id.*

5. *See* West Bank Homes v. "M.K.," No. 1891221520, slip op. at 3. "Plaintiff failed to state a valid ground for termination. 'Permitting' an assault on oneself will not suffice as a valid termination ground . . . ." *Id.* Another judge echoed this sentiment saying, "[i]t would be a real injustice to blame her for the terrible disruption and violence she has been experiencing." Grow, *supra* note 4, at 1B (quoting Hennepin County District Judge Isabel Gomez).

remarkable in that it reflects a situation thousands of Minnesota women could someday face, and beckons the recognition of a defense to public and private housing evictions based on the truth about the situation of domestic abuse victims.[6]

Although victims of abuse have many needs, retaining housing is one of the most critical. As victims of domestic abuse face constant insecurity and uncertainty,[7] having assurance of retaining a rented dwelling may help victims view the home in its role as comforter and refuge.[8] Also, if the victim shares children with her abuser, the allocation of housing may assist her in a custody proceeding as courts do not always give dispositive weight to abuse.[9]

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6. This Article uses the term "domestic abuse victims" because it draws focus away from the woman and toward the fact that a crime was committed against her. *See* Mary Schouvieller, *Leaping Without Looking: Chapter 142's Impact on Ex Parte Protection Orders and the Movement Against Domestic Violence in Minnesota*, 14 LAW & INEQ. J. 593, 594 n.3 (1996). Legal practitioners are prone to use the phrase "battered women" with "assumptions about battered women based on their own values and self-protective expectations (e.g., "I would never let a man hit me.")." Julie Blackman, *"Battered Women": What Does This Phrase Really Mean?*, DOMESTIC VIOLENCE REP. (Civic Research Inst., Kingston, N.J.), Dec./Jan. 1996, at 5, 11. Further, as physical battering is but one part of the problem, the phrase "domestic *abuse*" signifies that a relationship does not have to be violent to be abusive and encompasses in the discussion a larger pool of victims. "Domestic *violence*," a subset of abuse, may then be used when referring specifically to physical acts.

7. *See* LENORE E. WALKER, TERRIFYING LOVE: WHY BATTERED WOMEN KILL AND HOW SOCIETY RESPONDS 65 (1989) ("To be sure, continual, unpredictable insecurity in the presence of ever-building violence must dramatically influence the way a human being views the world."). *See also* Mary Ann Dutton & Catherine L. Waltz, *Domestic Violence: Understanding Why It Happens and How to Recognize It*, 17 FAM. ADVOC. 14, 18 (1995) (explaining that the psychological effects of abuse include "distrust of others" and "a belief that the world is unsafe").

8. *See generally* Edward S. Snyder, *Remedies for Domestic Violence: A Continuing Challenge*, J. AM. ACAD. MATRIM. L. 335 (1994); *cf.* Mitchell v. United States Dept. of Hous. & Urban Dev., 569 F. Supp. 701, 708 (N.D. Cal. 1983) (discussing how constant relocation prevents establishing the security and stability needed to transform a residence into a home); Donna M. Moore, *Editor's Introduction: An Overview of the Problem*, *in* BATTERED WOMEN 7, 10 (Donna Moore ed., 1979) ("Traditionally, the home is where people retreat for safety, love, and solace.").

9. *See* Joan Zorza, *Protecting a Battered Woman's Whereabouts from Disclosure*, DOMESTIC VIOLENCE REP. (Civic Research Inst., Kingston, N.J.), Oct./Nov. 1995, at 1, 3 ("[A] distressing number of . . . cases, some decided as late as the 1990s, have found that a father's violence against his female partner, even when it results in her death, is not relevant to the custody determination."). *See also* Snyder, *supra* note 8, at 349:

> [B]attered women have still experienced considerable difficulties in custody battles with abusive husbands. This in large part stems from a fairly recent trend by which courts have looked to the 'best interests of the child' when deciding issues of child custody. And strangely, a "best interests" analysis often favors male batterers.

See also Developments in the Law: Legal Responses to Domestic Violence, 106

However, retaining housing is also problematic in Minnesota. The financial hardships of many abuse victims make them likely to seek federally assisted housing,[10] but the availability of such rental housing has decreased in recent years in Minnesota.[11] The private housing market in the Minneapolis-St. Paul area seems similarly restrictive, with rising rent and low vacancy.[12]

This Article outlines three proposals for addressing the housing problems faced by victims of domestic abuse in Minnesota. Part I lays out the scope and pertinent facets of domestic abuse, including views on a victim's inability to predict or control an abuser's behavior and the unrecognized difficulty of leaving an abusive relationship. Part II provides a basic outline of housing law and describes how the present structure works to the disadvantage of, among others, victims of domestic abuse. Part III first traces the evolution of Minnesota's present strict liability standard for deciding evictions and then suggests a defense of "foreseeability" and control for tenants when their abusive partner's behavior prompts an eviction proceeding against the victim. Part IV argues that Minnesota should supplement its Domestic Abuse Act to facilitate the eviction of only the abusive partner when victim and abuser are co-tenants. Part V suggests a rent substitution scheme to assist victims in meeting their rent obligation after the removal of the abusive partner.

HARV. L. REV. 1498, 1503 (1993) [hereinafter *Developments*] ("[I]n child custody proceedings, battered women must fight cultural perceptions that they are weak and dysfunctional, and thus are unfit to be mothers."). *But see In re* Welfare of Scott, 244 N.W.2d 669 (Minn. 1976) (considering a father's violent acts directed against the mother as relevant to termination of parental rights proceedings); MINN. STAT. § 518B.01(6)(a)(4) (1996) (allowing courts granting temporary custody to give primary consideration to the safety of the children).

10. *See infra* notes 51-54 and accompanying text.

11. *Compare* CITY OF MINNEAPOLIS, OFFICE OF THE CITY COORDINATOR PLANNING DEP'T, STATE OF THE CITY 1984, at 37 (1985) (finding a twelve percent public housing vacancy rate in Minneapolis), *with* CITY OF MINNEAPOLIS PLANNING DEP'T, STATE OF THE CITY 1995, at 37 (1996) (finding a two percent vacancy rate). *See also* Eila Savela, *Homelessness and the Affordable Housing Shortage: What Is to Be Done?*, 9 LAW & INEQ. J. 279, 313 (1991) (noting a "chronic" shortage of housing for the poor). *But cf.* Joan Zorza, *Woman Battering: A Major Cause of Homelessness*, 25 CLEARINGHOUSE REV. 421, 428 (1991) (recognizing that applicants who have been "involuntarily displaced" by a household member's violence receive priority consideration in federal housing programs).

12. *See Rent Sampler*, STAR TRIB. (Minneapolis), Mar. 8, 1997, at H27 (reporting a 2.9% apartment vacancy rate and an annual apartment rent increase of 3.9%).

I. The Abuse Problem

A. Scope and Nature

Society has long allowed men to physically harm their intimate partners, with neither legal censure[13] nor moral disapproval[14] readily forthcoming. Despite recent legal reforms,[15] the persistence of violence in the home results in an untold amount of suffering.[16]

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13. *See History of Abuse: Societal, Judicial, and Legislative Responses to the Problem of Wife Beating*, 23 SUFFOLK U. L. REV. 983, 983-97 (1989) (tracing the history of abuse from the Roman empire through twentieth century United States). *See also Developments*, *supra* note 9, at 1502 ("United States law condoned wife abuse . . . through the mid-nineteenth century.").

The history of social approval or acquiescence in woman battering can be traced to the common law. *See* Birgit Schmidt am Busch, *Domestic Violence and Title III of the Violence Against Women Act of 1993: A Feminist Critique*, 6 HASTINGS WOMEN'S L.J. 1, 3 (1995) ("The common law criterion for measuring moderate chastisement, the 'rule of thumb,' permitted a husband to discipline his wife by beating her, so long as the stick he used was no thicker than his thumb."); *see also* MARY LOUISE FELLOWS & BEVERLY BALOS, LAW AND VIOLENCE AGAINST WOMEN 196 (1994) (citing State v. Rhodes, 61 N.C. 453 (Phil. Law 1868)). In *Rhodes*, court upheld the trial court's decision to dismiss an assault and battery charge against a husband because, "[h]is honor was of the opinion that the defendant has a right to whip his wife with a switch no larger than his thumb . . . ." *Id. See also* Joan Zorza, *Using the Law to Protect Battered Women and Their Children*, 27 CLEARINGHOUSE REV. 1437, 1442 (1994) (also discussing the "rule of thumb"). Writing in 1992, domestic abuse victim Sarah Buel recalled a "time 15 years ago when there were no abuse prevention laws, no battered women shelters, . . . [and no] courts that I could find [which] were at all interested in my safety . . . ." Sarah M. Buel, *Legal Services Must Improve Responses to Violence Against Women*, REPORTER (Mass. Legal Serv. Corp.), Feb. 1992, at 1, 4.

14. Consider the events that followed attorney Sarah Buel's attempted flight from abuse:

> I was in a laundromat on a Saturday morning . . . and I saw people over by the counter, so I felt reasonably safe. . . . And then I saw my ex-husband come in the door. . . . [a]nd I look over to the counter, and I ask the people to call the police. . . . I still had bruises on the side of my face, and I said, "This is the person who did this to me, you need to call the police!" And he said, "No, this is my wife, we've just had a little fight and I've come to take her home." So nobody moved. As long as I live, I want to remember what it feels like to be terrified for my life and nobody can even pick up the phone.

Buel, *supra* note 13, at 5, 16. Writing in 1976, Del Martin observed that "[N]o one wants to become involved in what is commonly referred to as a 'domestic situation.'" DEL MARTIN, BATTERED WIVES 3 (1981).

15. All states provide criminal and civil relief for victims of spousal abuse. *See, e.g.*, Zorza, *supra* note 11, at 422.

16. *See infra* notes 18-20 and accompanying text (citing state and national estimates of the number of spousal abuse victims). Minnesota legal aid providers believe that the problem is so widespread that they instruct attorneys and client interviewers to assume "that ANY woman coming into or calling your office could be a battered woman," and "that domestic abuse could be a factor in ANY legal problem a client might present." MINNESOTA LEGAL SERV. COALITION, FOR ALL

Women are the overwhelming targets of domestic abuse in the United States.[17] Between two and four million American women are battered annually.[18] Battering is the largest cause of injury to women,[19] and more than half of all American women are victimized at some time in their lives.[20] Despite these alarming numbers, friends and neighbors of victims often forgive assailants and make excuses for them.[21] Many perpetrators, perhaps feeding on societal acquiescence, do not consider their behavior illegal.[22] In the face of such absolution, many victims also fail to see criminality in their partners' behavior.[23]

Besides the physical injuries,[24] abusers cause emotional damage.[25] An abuser can also cause financial problems by harassing a victim at work until she is fired.[26] Loretta Frederick, while an at-

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LEGAL SERVICES STAFF 1 (1995).

17. *See* MINNESOTA DEP'T OF PUB. SAFETY, DOMESTIC ABUSE PROTECTION PLAN i (1992) (noting that 95% of domestic abuse victims are women).

18. Snyder, *supra* note 8, at 336. This equals one woman victimized every fifteen seconds. Patricia M. Moen, *Domestic Abuse Model Arrest Policy and Resources*, *in* DOMESTIC VIOLENCE at iv-15 (Minn. Inst. of Legal Educ. 1994). In Minnesota, figures from 1991 indicate 132,000 incidents of domestic violence. MARTIN J. COSTELLO ET AL., MINNESOTA MISDEMEANORS AND MOVING TRAFFIC VIOLATIONS 637 (2d ed. 1996). These incidents ended in a Minnesota woman's death at least one hundred times in the 1990s. Moen, *supra*, at 18. Nationally, men kill so many women that Carol Orlock uses the terms "femicide" and "womanslaughter." Diana E.H. Russell, *Introduction* to DEL MARTIN, BATTERED WIVES, *supra* note 14, at x.

19. Snyder, *supra* note 8, at 336.

20. Moen, *supra* note 18, at 15.

21. *See, e.g.*, MARTIN, *supra* note 14, at 1-5. A letter of an abuse victim which recounts how clergy, friends, doctors, and police told her that she should be "more tolerant" because her husband "meant no real harm." *Id.* at 2-3. She hears this after being "whipped, kicked and thrown, picked up again and thrown down again[,] . . . punched and kicked in the head, chest, face, and abdomen more times than [she] can count." *Id.* at 1-2.

22. *See* Zorza, *supra* note 11, at 428.

23. *See* Catherine F. Klein & Leslye E. Orloff, *Representing a Victim of Domestic Violence*, 17 FAM. ADVOC. 25, 28 (1995). *See also* Buel, *supra* note 13, at 17 ("So many women . . . still have no idea that the abuse is illegal.") U.S. DEP'T. OF JUSTICE, CRIMINAL VICTIMIZATION SURVEYS IN MINNEAPOLIS 3 (1977) ("There is reason to believe that incidents of assault stemming from domestic quarrels are underreported in victimization surveys because some victims do not consider such events crimes . . . .").

24. Attorney and former victim Sarah Buel provides grisly examples:

> They have their teeth knocked out with hammers; they are run over by cars and trucks; they are raped with hot curling irons and large objects. They are beaten, stabbed, choked, [and] strangled. . . . [A]nd they are tied up and forced to watch the torture and sexual molestation of their own children.

Buel, *supra* note 13, at 1.

25. *See* Klein & Orloff, *supra* note 23, at 28.

26. *See* FELLOWS & BALOS, *supra* note 13, at 216. *See also* Zorza, *supra* note 11, at 424. "Abusive husbands and lovers harass 74 percent of employed battered

torney with the Battered Women's Legal Advocacy Project in Winona, Minnesota, succinctly explained how an abuser can infiltrate many aspects of a victim's life:

> Battering is a multi-faceted pattern of control, punctuated and buttressed by physical violence. It is not an isolated physical assault, nor even a series of assaults. Battered women nearly always experience many forms of violent and other controlling behavior by the batterer. Taken together, these acts cause the woman's life, or parts thereof, to be subject to her abuser's whim or desire. Accordingly, she is forced to negotiate for her daily needs in a climate of fear of everything from assaults to insults.[27]

Victims of domestic abuse struggle within this framework of invasive and pervasive control every day. Not only do abusers thoroughly control victims, some victim advocates discourage women from engaging in forceful resistance to violent controlling behavior for fear increased harm will befall the victim.[28] While the victim alone knows why she must "negotiate for her daily needs," a brief exploration of three important yet frequently misunderstood aspects of domestic abuse may help others begin to understand how a victim might view the world.

B. Domestic Abuse From the Victim's Perspective

1. The Victim as an Innocent Party

Many people falsely assign victims partial responsibility for violence in the home, assuming that the victim must provoke the abuser, enjoy the abuse or participate in the violence.[29] Perhaps society assumes that adult women involved with abusive relationships must contribute to their creation.[30] However, two prevalent

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women at work, . . . causing . . . 54 percent to miss at least three full days of work a month, and 20 percent to lose their jobs." *Id.* (footnotes omitted).

27. Loretta M. Frederick, *Effective Advocacy on Behalf of Battered Women*, *in* DOMESTIC VIOLENCE at vi-1 (Minn. Inst. of Legal Educ. 1992). *See also* BALOS & FELLOWS, *supra* note 13, at 216 (explaining how a woman who is told the abuse is "her fault" and whose family does not intercede will feel as helpless as if she did not exist).

28. *See* Margaret Gregory, *Battered Wives*, *in* VIOLENCE IN THE FAMILY 107, 109 (Maria Borland ed., 1976) *Cf.* Dutton & Waltz, *supra* note 7, at 17 (noting study which found that twenty-three percent of victims who engaged in self-protective behavior indicated that their situation worsened).

29. *See* Beverly C. Dusso, *Anatomy of a Shelter*, *in* DOMESTIC VIOLENCE at vi-6 (Minn. Inst. of Legal Educ. 1994) (listing as two myths about family violence that "[b]attered women are masochistic" and "[v]ictims provoke the violence"); *see also* State v. Kelly, 478 A.2d 364, 373 (N.J. 1984) (citing expert's opinion that society widely holds the fallacious belief that women enjoy being beaten).

30. *See* FELLOWS & BALOS, *supra* note 13, at 217 (noting that adult victims, unlike children, are ignored because of the belief that an adult woman "wants it,

characterizations of domestic abuse place sole responsibility for the initiation of violence with abusers.

First, violent relationships are characterized by the "great power disparities."[31] These disparities mean that perpetrators dictate when relationships become violent, rather than an individual victim's demeanor or conduct fostering an abusive atmosphere.[32] Second, many experts view domestic violence as gender-based.[33] Reacting to deeply-ingrained societal norms, men as a class dominate women as a class,[34] and therefore a woman's "role" in instigating domestic violence consists only of her gender, not her conduct. Under this assessment, domestic violence is not men and women consensually settling a difference with fists; it is men controlling women by committing violent crimes against them. Therefore, both the "power disparity" and the "gender-based" explanations exonerate victims of blame for the consequences of abusive relationships.

2. Victims' Inability to Foresee and Prevent Abuse

Although society may perceive that victims consciously enter relationships with men they know to be batterers,[35] many victims do not foresee that a new partner will one day become violent.[36]

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likes it, or chooses it"); *see also* WALKER, *supra* note 7, at 132-35 (describing one prosecutor's mistaken belief that a woman severely sexually abused by her partner enjoyed the violent relationship).

31. Klein & Orloff, *supra* note 23, at 28.

32. Joan Zorza, *Most Therapists Need Training in Domestic Violence*, DOMESTIC VIOLENCE REP., Aug./Sept. 1996, at 2. *Cf.* Dutton & Waltz, *supra* note 7, at 17 ("[O]nce the violence starts, only the batterer can stop it.").

33. *See* EVE S. BUZAWA & CARL G. BUZAWA, DOMESTIC VIOLENCE: THE CRIMINAL JUSTICE RESPONSE 22-24 (2d ed. 1996); *see also* Busch, *supra* note 13, at 23-24. "[F]amily violence is directed toward a specific class of people—women. . . . [I]n domestic violence cases, a woman would not have been abused had she been a man." *Id.* at 24; *see also* Buel, *supra* note 13, at 21 ("Violence against women . . . has to be about misogyny, when [abuse] . . . is 95-to-97 percent male-inflicted on females.").

34. *See* BUZAWA & BUZAWA, *supra* note 33, at 23. *See also* SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT 219-24 (1982) (explaining that while all men are socialized to dominate women, only some men employ physical force). For a discussion of the societal roots of domestic violence, see NATIONAL CTR. FOR WOMEN AND FAMILY LAW, INC., LEGAL ADVOCACY FOR BATTERED WOMEN 3-4 (1982) [hereinafter LEGAL ADVOCACY]. "'To eliminate the particularly brutal form of violence known as wife-beating will require changes in the cultural norms and in the organization of the family and society which underlie the system of violence on which so much of American society is based.'" *Id.* at 3 (citation omitted). "It seems clear . . . that men beat women because our culture . . . implicitly sanctions this behavior." *Id.* at 4 (citation omitted).

35. *See* Dusso, *supra* note 29, at 6.

36. Lenore Walker's story of "Irene" exemplifies a victim who at first found her

Since abusers do not necessarily behave abusively in relationships outside the home,[37] they give potential victims no warning of future violence inside the home.

Even when a woman realizes that the man she married or lives with is abusing her, she may not know when the abuser will attack or what he will do. When violent incidents occur without any act or omission by the victim, women have no opportunity to forsee an abuser's behavior.[38] One victim explained:

> I have been slapped for saying something about politics, for having a different view about religion, for swearing, for crying, for wanting to have intercourse. . . . I have been threatened when he's had a bad day and when he's had a good day. . . . No one has to "provoke" a wife-beater. He will strike out when he's ready and for whatever reason he has at the moment.[39]

Similarly, in the context of gender-based domination, domestic violence can be seen as punishment for violations of social norms. When the male mind determines the norms, women can never know for sure which norms men expect them to follow and which violations will result in violence, thus preventing foresight.[40]

Despite these generalizations, the unique circumstances of every abusive relationship mean that each victim will have a different level of foresight.[41] The fact that a woman anticipates im-

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new boyfriend "charming" and was "delighted to have [him] in her life," but who later learned that "[t]he man whose charming presence had once brightened her lonely life was progressively turning her daily existence into a hell." WALKER, *supra* note 7, at 126.

37. *See* LOUISE ARMSTRONG, THE HOME FRONT: NOTES FROM THE FAMILY WAR ZONE 5 (1983); Dusso, *supra* note 29, at 6. *Cf.* Dutton & Waltz, *supra* note 7, at 14 ("Typically, battered women are not easily recognized, and batterers are even harder to identify.").

38. *See* BLACK'S LAW DICTIONARY 649 (6th ed. 1990) (defining "foresight" as "reasonable anticipation of result of certain acts or omissions").

39. MARTIN, *supra* note 14, at 2-3. *See also* SCHECHTER, *supra* note 34, at 221 ("Battering may have no immediate antecedent at all. A woman may have done nothing obvious to insult her husband . . . ."); Gregory, *supra* note 28, at 128 n.12 ("The first time he beat me was two weeks after we were married. He reckoned I hadn't cooked the cabbage right. I was so stunned I just went and walked round the park for hours. You see, I just did not know that things like this could happen."). Incidents such as these prompted Lenore Walker to ask, "What must it be like . . . going to sleep at night, not knowing if you'll wake up the next morning?" WALKER, *supra* note 7, at 64. Walker's insight suggests, that as an extreme example, a woman attacked in her sleep cannot possibly have foresight. Walker also discusses the tougher case in which a woman cannot foresee her abuser's behavior and where the victim does "not know, from one minute to the next, whether she'll be faced with her 'good' husband or her 'bad' husband." *Id.* at 47.

40. *See* SCHECHTER, *supra* note 34, at 219. Schechter gives the example of a husband who broke his wife's wrist because she did not serve him birthday cake first, as he apparently expected. *Id.* at 221.

41. Esther Olson, for example, writes of the feelings of a victim named Claire as she watched her husband become irritated over their stalled car and anticipated

pending violence, however, does not give her the ability to prevent it.

3. The Difficulty of Leaving an Abusive Home or Relationship

A neutral observer who cannot see the abuser's influence on the victim's life will invariably ask the question, "Why does she stay?"—a likely manifestation of the "self-protective expectations" alluded to earlier.[42] The persistence of society's apocryphal belief that women can readily leave an abusive living arrangement minimizes the possiblity of abuse victims ever obtaining relief in housing issues. If the courts believe that a woman can voluntarily remedy an abuser's lease violations by leaving or asking him to move out of the shared home, then courts have no reason to establish eviction standards based on the actual involuntariness of a victim's situation. Examining the various pressures on victims of abuse that make it "all but impossible to leave"[43] will demonstrate the need to assist women trapped in abusive homes.

a. "Separation Assault"[44]

A major reason women may not leave abusive relationships is fear of increased violence during the attempted exodus and thereafter.[45] Many victims describe the kind of fear they live with every

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the beating that soon followed: "Claire felt her stomach knot up. Her throat was dry. Her head pounded. She felt nauseated. She knew what was coming. She had seen it before." ESTHER LEE OLSON, NO PLACE TO HIDE 12 (1982). Although Claire knew, from a pattern of prior behavior, at what point her husband would become so agitated that he would assault her, she did not know on which particular days it would happen. *Id.* at 34. In fact, the day referred to above began "pleasurably," with "no hints of what was to happen." *Id.* at 11. *See also* Buel, *supra* note 13, at 5 ("[B]attered women are the people who know this abuser the best, and they know when he's giving the clues and the signals that he is serious this time. That this is the time that he could kill her.").

42. *See supra* note 6.

43. Buel, *supra* note 13, at 18.

44. Martha Mahoney developed this term to describe "the assault on the woman's separation as a specific type of attack that occurs at or after the moment she decides on a separation or begins to prepare for one." *See* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 65 (1991). Mahoney defines "separation assault" as

> that attack on the woman's body and volition in which her partner seeks to prevent her from leaving, retaliate for the separation, or force her to return. It aims at overbearing her will as to where and with whom she will live, and coercing her in order to enforce connection in a relationship.

Id.

45. *See* Buel, *supra* note 13, at 5. *See also* Dutton & Waltz, *supra* note 7, at 17 ("[R]emaining in the relationship may actually save the victim's life and protect her children.").

day as "an agonizing fear of death,"[46] and "a bloodcurdling kind [of terror] that leaves a hole in the pit of the stomach, that makes a person shake from the inside out."[47] That level of trepidation may actually increase when an abuser threatens a victim he suspects is trying to leave.[48] Abuse victims have good cause to fear separation as greater bodily harm often occurs when the woman flees.[49] The abusers' retaliation and escalated violence when a victim tries to flee[50] also frightens some women into returning to the abuser.

b. Economic Factors

An abuser may take advantage of stark economic realities to augment the force of his physical presence. As a woman, the victim faces financial difficulties from institutional economic inequalities which increase her dependence on the abuser as a provider.[51] The abuser can also increase his control over the woman by appropriating control of the household finances.[52] The abuser may prevent the victim from establishing independent financial

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46. Russell, *supra* note 18, at x.

47. WALKER, *supra* note 7, at 64.

48. *See* Busch, *supra* note 13, at 3 ("Quite often, battered women are . . . kept from leaving by threats of further violence or death if they attempt to leave their abusers").

49. *See* Dutton & Waltz, *supra* note 7, at 17; Buel, *supra* note 13, at 5; Snyder, *supra* note 8, at 346 n.50.

50. *See* State v. Kelly, 478 A.2d 364, 372 (N.J. 1984) ("Case histories are replete with instances in which a battered wife left her husband only to have him pursue her and subject her to an even more brutal attack."); Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1053 (1991); Mahoney, *supra* note 44, at 65. *See also* Buel, *supra* note 13, at 5 (recounting the "amazing tenacity that batterers use in tracking down victims"); *see also* Dutton & Waltz, *supra* note 7, at 16 (discussing stalking as a form of abuse designed to "induce the victim to return to the batterer").

51. *See* NATIONAL COMM'N ON EMPLOYMENT POL'Y, INCREASING THE EARNINGS OF DISADVANTAGED WOMEN 7 (1981) (in 1980 women working full time earned only 64% of the salaries of their male counterparts); COMMISSION ON THE ECONOMIC STATUS OF WOMEN, PAY EQUITY: THE MINNESOTA EXPERIENCE 4 (1994) ("In 1991 employed women working full-time, year-round had average earnings that amounted to only 70 percent of the average earnings for men employed full-time, year-round."); *see also* JOSEPH WILLIAM SINGER, PROPERTY LAW 6-7 (1993) (citing similar gender salary statistics and noting the further financial plight of black families, whose average income was half the average income of white families in 1987).

52. *See* MINNESOTA LEGAL SERV. COALITION, *supra* note 15, at Appendix A, 1 (noting that an abuser may do the grocery shopping to control both the household's finances and food supply). An abuser may engage in "economic abuse," such as preventing the victim from getting or keeping a job, taking her money, or not letting her have access to family income. *Id.* at Appendix D. *See also* Dutton & Waltz, *supra* note 7, at 16 (listing as examples of economic abuse "accruing debt in battered woman's name" and "withholding child support payments").

security[53], forcing the woman to choose between staying with him or "plunging . . . into poverty and homelessness."[54]

c. Social Factors

From birth, women face social pressure to maintain intimate relationships. As Loretta Frederick explains, "[the victim] has been raised to believe that the success or failure of her relationship is a reflection of her worth as a woman; the battering is characterized as her failure to maintain the relationship."[55] The victim's family, even with awareness of the violence, may advise the woman to remain with the abuser.[56] A victim may also perceive that the legal system[57] and religion[58] consider marital dissolutions undesirable.

d. Internal Factors

The previous external factors work against a victim as she attempts, or the abuser senses her attempt, to leave the abusive relationship. There are also at least three internal factors that may keep a victim from seriously considering leaving her abuser. First, a woman, especially one with her first partner, may not recognize

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53. *See supra* note 26 and accompanying text.

54. Maura J. Kelly, *A Matter of Life and Death*, REPORTER (Mass. Legal Serv. Corp.), Feb. 1992, at 16. (noting that the standard of living of women almost invariably drops after divorce or separation). *Id. See also* Busch, *supra* note 13, at 24 ("Women are financially unable to provide for themselves and the children without the abuser."); Frederick, *supra* note 27, at 2 ("As she contemplates life apart from the abuser, she usually finds herself contemplating poverty or at least a dramatic drop in her standard of living."); Benjamin L. Weiss, *Single Mothers' Equal Right to Parent: A Fourteenth Amendment Defense Against Forced-Labor Welfare "Reform,"* 15 LAW & INEQ. J. 215, 226 n.29 (1997) (citing studies showing high correlation between poverty or welfare receipt by women and separation from an abusive partner); Zorza, *supra* note 11, at 421 ("[N]umerous women are forced to go back to their abusers because of lack of money or housing.").

55. Frederick, *supra* note 27, at 1-2.

56. *Id.* at 1. ("[A victim] is usually being pressured, threatened, or cajoled by the abuser, the abuser's family, and maybe her own family or children to reconcile, forgive and forget."); *see also* Snyder, *supra* note 8, at 341 ("Friends and family may actually encourage them to stay with their spouse and 'work things out.'").

57. *Cf.* Baskerville v. Baskerville, 75 N.W.2d 762, 768 (Minn. 1956) ("Since the continuance of the marriage relation is deemed essential to the public welfare, . . . when differences arise between parties to a marriage, no obstacle shall be placed in the way of their reconciliation."); ARMSTRONG, *supra* note 37, at 3-4 (criticizing the double standard of trying to maintain violent homes through counseling, while encouraging divorce in cases of mere incompatibility between the spouses).

58. *See, e.g.*, OLSON, *supra* note 41, at 17 (quoting one victim's parents: "We were brought up to believe that it was more of a sin to divorce than to do anything else. . . . That's what was instilled in us at church. Separation was just bad. Unheard of.") (alteration in original).

the depravity of the violence in that relationship.[59] The woman may find this threat to her health and safety particularly difficult to detect if she grew up in a home where the father was abusive.[60]

Second, a victim may see any relief from physical abuse as a sign that the violence has permanently ended.[61] Del Martin relays a letter from an anonymous victim:

> It must be pointed out that while a husband can beat, slap, or threaten his wife, there are "good days." These days tend to wear away the effects of the beating. They tend to cause the wife to put aside the traumas and look to the good . . . because the defeat is the beating and the hope is that it will not happen again.[62]

The third significant internal factor affecting a victim's ability to leave stems from the abuser's inducement of "learned helplessness"[63] in the victim. This theory refers to a victim's perceived inability to predict the consequences of her actions.[64] Although life with the abuser often means daily misery, a victim may fear life apart from the abuser even more.[65] Lenore Walker explains that a victim "believes the demons she knows well are probably preferable to the demons she does not know at all."[66] Even with these three internal factors, though, the victim's presence in the home or the relationship in no way reflects her approval of the abuse. Leaving simply does not present itself as a viable option.

Each victim is a unique and special person whose life deserves individual attention and care. One should feel remorse in-

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59. *See* Nancy Ngo, *Relationship Abuse Reports on the Rise*, MINN. DAILY, Oct. 16, 1996, at 4, 12 (interviewing Suzanna Short, Assistant Director of the Program Against Sexual Violence at the University of Minnesota). Short stated that victims who are in their first relationship "have no basis of comparison to know that abuse is not part of a healthy relationship." *Id.*

60. *See* BUZAWA & BUZAWA, *supra* note 33, at 45. *See also* Blackman, *supra* note 6, at 15 (quoting a victim as saying, "I saw my father hit my mother. My husband hit me all through our marriage. I never knew I was a battered woman . . . .").

61. "Women often hope that their partner will change; they may believe his promises that the abuse will end, because they desperately want that to be true." LEGAL ADVOCACY, *supra* note 34, at 5 (citation omitted); *see also* Snyder, *supra* note 8, at 341 (explaining that during the "honeymoon phase" of the "cycle of violence" the woman is "thankful for the respite or convinced that she can now control his anger"); Dutton & Waltz, *supra* note 7, at 16 (suggesting that a batterer will strategically employ "occasional indulgences" to animate a victim's longing for an end to the abuse).

62. MARTIN, *supra* note 14, at 4.

63. *See generally* WALKER, *supra* note 7, at 49-53 (describing the origins of the theory of 'learned helplessness' and the author's contributions to its development).

64. *Id.* at 50.

65. *Id.* at 50-51.

66. *Id.* at 51.

deed if attempts to generalize among victims should compound any one woman's struggle with abusive acts—or what have been described as "attempts . . . to eradicate her identity and her very being."[67] Some common themes, however, do emerge: domestic abuse affects many women; victims of that abuse do not instigate it; victims can neither predict nor control their abusers' behavior and they face a Sisyphean[68] task in leaving the abusive home or relationship. In addition, many women must also fight to avoid homelessness, as Margaret had to fight, should a landlord try to evict them for being beaten.

II. Housing Law and Domestic Violence

Residential rental housing consists of both privately owned[69] and government-owned or -assisted[70] housing. While leases governing the relationship between the private landlord and tenant may contain any provision not contrary to law or public policy,[71] government-controlled leases contain many uniform provisions.

Although the specifics of the eviction[72] standards differ, a court may not allow the eviction of a tenant unless the tenant has violated a lease term.[73] An abuser's behavior toward his victim may violate her lease in several ways. A lease may state that the tenant agrees not to disturb the neighbors' quiet enjoyment of their premises, or may provide for termination of the lease after a certain number of police visits to the property. In these situations, a woman's calls for help to neighbors or police may not only fail to bring her assistance,[74] they may also bring her to the brink of homelessness.

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67. Olson, *supra* note 41, at 7.

68. According to Greek mythology, Sisyphus was fated to continually roll a heavy stone uphill, only to have it roll down again.

69. See *infra* Part III.A.2.b for a discussion of private housing evictions.

70. See *infra* Part III.A.2.a for a discussion of public housing evictions.

71. *See* Rossman v. 740 River Drive, 241 N.W.2d 91, 92 (Minn. 1976).

72. Landlords may only legally evict tenants by asking the court for relief under the theory that a tenant has "unlawfully detained" the land or tenement. *See* MINN. STAT. § 566.02 (1996). For simplicity, "eviction" will be used hereinafter to refer to the process by which a landlord attempts to terminate a lease and remove tenants from rental property in place of the technical term "unlawful detainer."

73. *See infra* note 174.

74. *See* BUZAWA & BUZAWA, *supra* note 33, at 51-52 (noting extremely low rates of arrest in police calls for domestic violence in what the authors label a "bias against arrest"); Klein & Orloff, *supra* note 23, at 29 ("[P]olice have been hesitant to arrest perpetrators due in part to their reluctance to intervene in what they consider to be a family matter.").

The Minnesota Court of Appeals, despite the actions of other states' courts and Minnesota's trial courts,[75] is presently charting a dangerous course in its interpretation of the eviction standards. Although it has not specifically addressed the eviction of an acknowledged domestic abuse victim, the court has nevertheless established a test of strict liability whereby any abuse victim brought before the court to defend an eviction against her for being beaten will lose her home. In the words of one housing attorney, "the Court of Appeals has sent a signal to the state's tenants: live by yourself or get evicted, because as soon as you open your doors to someone, you will be held liable."[76]

III. Reforming Minnesota's Eviction Standard to Prevent the Victim's Eviction for the Abuser's Conduct

A. The Problem: The Court of Appeals' Rejection of a "Foreseeability" Standard and Creation of Strict Liability Deprives Victims of Domestic Abuse of an Eviction Defense

1. Origins of Strict Liability: *Smallwood*

The Minnesota Court of Appeals provided the impetus for later establishing an eviction standard of strict liability, whereby the court holds all household members responsible the actions of any, when it decided *Minneapolis Community Development Agency v. Smallwood*.[77] The *Smallwood* court, under facts extremely unfavorable to the tenant, upheld the eviction of a public housing

75. When these courts have recognized a tenant's status as victim, they have denied the eviction. *See* Moundsville Hous. Auth. v. Porter, 370 S.E.2d 341 (W. Va. 1988). In *Porter*, the tenant's boyfriend roused her from sleep with a beating that allegedly disturbed the neighbors. *Id.* at 342. The court refused to uphold an eviction for this incident because the "boisterous behavior [was] beyond the *control* of the lessee." *Id.* at 343 (emphasis added). The court refused to evict the tenant despite its dissatisfaction with her failure to take steps to exclude the man from the premises. *Id. See also* Stock v. Beaulieu, No. C1-95-39, (9th Dist. Ct. Minn., Mar. 9, 1995). In *Stock*, the court addressed a man's attempted eviction of his female co-habitor after he had been convicted of inflicting bodily harm on her. *Id.* at 2. The court found the eviction to be retaliatory because it was "intended as a penalty for Defendant's good faith effort to enforce her rights by reporting a crime . . . in which she [was] the victim." *Id.* at 3. Significantly, the court allowed the woman to remain in the home—the "shelter for the parties' child"—even though her partner owned the house. *Id.*

76. Interview with Lawrence R. McDonough, Visiting Clinical Professor of Law, University of Minnesota Law School, in Minneapolis, Minn. (Apr. 18, 1997).

77. 379 N.W.2d 554 (Minn. Ct. App. 1986).

tenant.[78] The court found "good cause"[79] to evict the tenant because of a number of occurrences, ranging from dangerous and disruptive behavior[80] to deterioration of the dwelling,[81] allegedly in violation of the lease terms. After noting that neither Smallwood's behavior nor her home maintenance changed despite warnings and complaints,[82] the *Smallwood* court concluded that "[more than] six years of such conduct, in direct violation of the lease, is certainly enough to constitute good cause for eviction."[83] The court also suggested that granting an eviction from public housing would violate due process only when the court deemed the housing agency's reasons for eviction arbitrary, discriminatory or "manifestly improper."[84]

The court of appeals would later rely on *Smallwood* for the proposition that Minnesota courts do not inquire into the tenant's foreseeability and control of the events which cause their eviction.[85] In that case, *Minneapolis Public Housing Authority v. Holloway (Holloway II)*,[86] the court failed to mention that many of the

78. *Id.* at 557.

79. Federal statutes and regulations dictate that all governmentally assisted residential housing leases contain a clause authorizing eviction of tenants only upon a showing of "serious or repeated violation" of material lease provisions or other "good cause." *See* 42 U.S.C. § 1437d(*l*)(4) (1994), 24 C.F.R. § 966.4(*l*)(2) (1996). See *infra* notes 102-105 and accompanying text and Part III.2.a for further discussion of this legislation and the judiciary's interpretation of it.

80. The court mentioned the following events which occurred over several years: starting of fires, loud parties, eggs thrown at other houses, lighting of firecrackers, unlawful entry into neighbors' homes, cars driving on lawns, swearing at neighbors, children spray painting the house, burning furniture, a bullet hole and "vicious dogs terrorizing and attacking the children in the neighborhood, barking and running loose, in and out of the windows of the house." *Smallwood,* 379 N.W.2d at 555-56.

81. In explaining that "Smallwood, her family, and her guests have caused severe damage to the premises," the court noted the following: unkempt lawns, dirty siding, defective down spouts, spiderwebs, unwashed dishes, dirty stove, roach infestation, holes in walls, dog hair and waste in the house, broken bathroom tiles and "floors that need resanding and varnishing." *Id.* at 556.

82. "[I]t is clear that at least as far back as 1979 Smallwood knew she was in danger of being evicted for numerous lease violations. Smallwood's behavior did not change." *Id.* at 555. In 1981 Smallwood was told that she could not keep her five dogs, yet she had the dogs as late as December 1984. *Id.* at 556.

83. *Id.* The court also rejected the notion that "[s]ubsequent remedial action by a tenant can[ ] nullify a prior lease violation," when Smallwood presented evidence at trial of improvement of some objectionable conditions at her residence. *Id.*

84. *Id.* at 557.

85. No. C0-95-391, 1995 WL 479653 at *2 (Minn. Ct. App. Aug. 15, 1995) [hereinafter "*Holloway II*"]. (interpreting *Smallwood* to require the housing authority to show that the tenant has "violated the lease provisions . . . and [was] provide[d] due process" in order to evict).

86. *Holloway II*, No. C0-95-391, 1995 WL 479653.

incidents constituting lease violations in *Smallwood* were arguably within the tenant's ambit of control, and therefore the *Smallwood* court had no reason to articulate a standard of foreseeability.[87]

Smallwood knew of the problems associated with her tenancy. The housing authority indicated its disapproval of Smallwood's behavior by initiating three eviction proceedings in five years.[88] Smallwood was also put on notice of the disruption she was creating by continual complaints from neighbors.[89] Smallwood also could have arguably controlled some of the lease violations, like the "years of junk and debris scattered on the premises."[90] Therefore, *Smallwood*, a situation in which the tenant knew of the problems and could have fixed them, should not control the case of domestic abuse evictions, where the tenant can neither foresee[91] lease violations nor control them.[92]

In addition to its misuse in *Holloway II*, the *Smallwood* decision has other problems which prevent its applicability to issues of domestic abuse. The *Smallwood* court first identified behavior within the tenant's control, such as Smallwood knowingly keeping prohibited dogs for four years,[93] and then used that behavior to impute to the tenant responsibility for the acts of third parties, such as the bullet hole in her house from someone shooting at the animals.[94] Even if pet ownership was construed as a constructive invitation to neighbors to shoot at the pet, that interpretive framework would work grave injustice where the tenant is a victim of abuse. To be consistent, a *Smallwood* holding in Margaret's case,[95] for instance, would have to consider Margaret's participation in the relationship a natural precursor to the criminal assault[96]—an unacceptable outcome.

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87. Appellant's Reply Brief at 20, Minneapolis Pub. Hous. Auth. v. Holloway, No. C0-94-736, 1994 WL 638084 (Minn. Ct. App. Nov. 15, 1994) [hereinafter "*Holloway I*"].

88. *See Smallwood*, 379 N.W.2d at 555.

89. *Id.* at 555-56.

90. *Id.* at 556.

91. *See supra* part I.B.2 (noting that victims are generally unable to foresee or prevent domestic violence).

92. Victims of abuse cannot prevent abusive partners from violating lease provisions. The "control" in abusive relationships is exercised by the abuser, not the victim. *See supra* note 50 and text accompanying note 27.

93. *See supra* notes 81-83.

94. *See supra* note 81.

95. *See supra* text accompanying notes 1-6.

96. *See supra* notes 31-32 and accompanying text (discussing the fallacy that victims provoke abuse).

2. Entrenchment of Strict Liability: *Holloway*

A decade after deciding *Smallwood*, the court of appeals had before it another tenant facing eviction in *Minneapolis Public Housing Authority v. Holloway*.[97] Recognizing the lack of control the tenant had over the events surrounding the alleged lease violations, the tenant's attorney in *Holloway II* asked the court to adopt a standard for evictions based on the tenant's ability to foresee, prevent or control the lease violations.[98] By failing to recognize factual dissimilarities with *Smallwood* and misinterpreting federal regulations, the court not only rejected the tenant's proffered standard but established strict liability as the applicable eviction standard.[99]

As an unpublished opinion, *Holloway II* does not create binding precedent.[100] Minnesota's trial courts, especially those faced with domestically abusive tenants, have nevertheless looked to *Holloway II* for authoritative guidance.[101]

In *Holloway II*, the court of appeals made three crucial analytical mistakes while affirming the grant of an eviction against a public housing tenant. The first mistake occurred in the court's reading of a federal housing regulation. The court erred a second time in failing to recognize the tenant's innocence in the lease violations. The court made a third mistake when it failed to examine fairly the tenant's proposed foreseeability test.

First, the court adopted an unnecessarily rigid interpretation of a federally assisted housing regulation.[102] The pertinent part of the regulation obligates tenants "to *cause* the household and guests to refrain from destroying, defacing, [or] damaging . . . the dwelling unit."[103] The *Holloway II* court essentially ignored the

97. *Holloway II*, No. C0-95-391, 1995 WL 479653 (Minn. Ct. App. Aug. 15, 1995).

98. *See* Appellant's Brief at 36-39, *Holloway I*, No. C0-94-736, 1994 WL 638084 (Minn. Ct. App. Nov. 15, 1994).

99. *See Holloway II*, No. C0-95-391, 1995 WL 479653, at *2 (holding that "[t]he eviction standard for public housing does not ask whether the tenant could 'reasonably foresee, prevent, or control' the incidents that caused the eviction. The standard is more strict. The tenant is responsible for the acts of family and guests.").

100. *See* MINN. STAT. § 480A.08(c) (1996) ("Unpublished opinions of the court of appeals are not precedential.").

101. *See, e.g.*, Phillips Neighborhood Hous. Trust v. Brown, No. 960705508 (4th Dist. Ct. Minn. Oct. 15, 1996).

102. *See Holloway II*, 1995 WL 479653, at *2 (citing 24 C.F.R. § 966.4(f)(9) (1993)).

103. 24 C.F.R. § 966.4(f)(9) (1993) (emphasis added). The relevant portions have not changed for 1996. *See* 24 C.F.R. § 966.4(f)(9) (1996).

"cause" element, important for all tenants and crucial for victims of domestic abuse, by interpreting the relevant language to mean "[t]he tenant *is responsible* for the acts of family and guests."[104] This reading of the regulation essentially means that the court will always find a tenant responsible, no matter how innocent or non-involved with the lease violation. Reading the regulation without a cause safeguard will mean that a domestic abuse victim, who has not "caused" her partner's abusive behavior,[105] will nevertheless be told that she "is responsible" for the behavior.

The court made another mistake by conflating the events that transpired on or near Ms. Holloway's residence without separately evaluating her culpability in them.[106] The *Holloway II* court relies on the trial court's finding that eviction was justified on the basis of a "pattern of personal violence and property damage."[107] The *Holloway II* court thus mimics a tactic used by the *Smallwood* court—the aggregation of seemingly unfavorable facts to justify eviction.[108] A closer look at *Holloway II*'s facts reveals that, unlike *Smallwood*, the events in *Holloway II* were largely a product of the neighborhood in which Ms. Holloway lived.

The incidents involving weapons provide good examples of this; the court blames Ms. Holloway because her house was fire-bombed, because her house and children were shot at and because her son made threats with a toy gun.[109] The court seemed unmoved by the fact that police indicated to Ms. Holloway that the shooting and fire-bombing were the work of gang members retaliating against her children for *not* joining the gang[110] and that more

104. *See Holloway II*, No. C0-95-391, 1995 WL 479653, at *2 (emphasis added).

105. *See supra* Part I.B.2 (noting that victims are generally unable to prevent domestic violence). *See also supra* notes 1-2 and accompanying text. The court in "Margaret's" case recognized that victims are not responsible for the acts of perpetrators and thus refused to hold the tenant accountable for lease violations under the theory that she "permitted" domestic violence. West Bank Homes v. "M.K.," No. 1891221520, slip op. at 3 (4th Dist. Ct. Minn. Jan 22, 1990).

106. The court also dismissed Holloway's claim of innocence. *See* Appellant's Reply Brief at 17, *Holloway I*, No. C0-94-736, 1994 WL 638084 (Minn. Ct. App.) ("Ms. Holloway clearly asserted that she could not have done anything to avoid the events that occurred.").

107. *Holloway II*, No. C0-95-391, 1995 WL 479653, at *2. The Housing Authority attributed the following incidents to Holloway: "a bicycle being thrown through a door; windows and walls being broken; two drive-by shootings; threats with a realistic toy gun by Holloway's son; [and] fire-bombing of the house . . . ." *Id.* at *1.

108. *See supra* notes 80-81.

109. *See. Holloway II*, N0. C0-95-391, 1995 WL 479653, at *1.

110. *See* Appellant's Reply Brief at 20 n.4, *Holloway I*, No. C0-94-736, 1994 WL 638084 (Minn. Ct. App. Nov. 15, 1994).

than one house was firebombed.[111] Under these facts, Ms. Holloway appears to have been no more than a victim of what her attorney called a "battering neighborhood."[112] He described the area as "one in which houses get firebombed and people think toy guns are real."[113] As evidence that Ms. Holloway did not consent to the violent nature of her neighborhood, her attorney pointed out that she asked the housing authority to relocate her to a safer area.[114]

The *Holloway II* court made a third mistake by including problematic dicta stating that appellant's proposed foreseeability test would not have prevented Holloway's eviction.[115] In so reasoning, the court applied the foreseeability test to only two incidents on the Holloway property. The court called the first incident, a drive-by shooting that occurred after Holloway left town and put her nephew in charge of the house, a "prime example" of an event which the tenant should have foreseen.[116] The court does not explain how Holloway could have foreseen an event that occurred in her absence. It merely found Holloway liable by stating, "[w]hile Holloway could not have foreseen the shooting, she is responsible for her nephew's actions because she placed him in control of the house."[117] The court thus did not, as promised, find that Holloway could have foreseen the shooting.[118]

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111. Interview with Lawrence R. McDonough, *supra* note 76. Mr. McDonough was also Euzelia Holloway's attorney.

112. *Id.*

113. *Id.*

114. *Id.*

115. "Even if this court were to adopt Holloway's standard, the facts permit a reasonable inference that Holloway could have or should have foreseen some of the situations even if she could not envision the exact events." *Holloway II*, No. C0-95-391, 1995 WL 479653, at *2.

116. *Id.* at *2.

117. *Id.* Ms. Holloway's attorney noted that no argument was made that Ms. Holloway left the house in the control of an irresponsible person. Interview with Lawrence R. McDonough, *supra* note 76.

118. As further evidence that she had no way to foresee the shooting, Holloway noted that the police indicated to her that gang members may have perpetrated the violence against her children because they did *not* join the gang. *See supra* note 110 and accompanying text. It seems counter-intuitive that her children's non-involvement in gang activity would give Holloway *more* reason to foresee a drive-by shooting. The court's implication that Holloway's liability for violent activity remained unchanged when her children actively sought to avoid it creates bad housing policy. The court essentially discourages tenants from trying to prevent *any* disruptive behavior by assigning them responsibility for *all* of it. *See* Appellant's Reply Brief at 21, *Holloway I*, No. C0-94-736, 1994 WL 638084 (Minn. Ct. App. Nov. 15, 1994) (arguing that a foreseeability standard "sends a signal to tenants that they must take action to prevent conduct within their control which might constitute lease violations").

The second incident the court cited was a verbal confrontation between Holloway and her boyfriend which ended with him breaking windows and putting holes in walls.[119] Instead of being concerned with her safety, the court paternalistically informed Ms. Holloway that she should have foreseen that "heated arguments" with her boyfriend can lead to violence.[120] If the court remains loyal to its heated argument explanation, a victim of abuse appearing before the court may find it difficult to convince the court that she did not participate in an argument, even though many instances of domestic violence occur without any foreseeable instigating event.[121] The court also blamed Holloway for not acting as she watched her boyfriend "[break] numerous windows and put holes in some walls."[122] This attitude will prove disastrous to the first domestic abuse victim who tries to explain to the court that she could not control her abuser's behavior.

3. The Potential Disastrous Effects of Strict Liability for Victims of Domestic Abuse: *Brown*

The court of appeals recently heard oral arguments in *Phillips Neighborhood Housing Trust v. Brown*.[123] The outcome of this eviction case may reveal how much damage *Smallwood*'s unfavorable facts and *Holloway II*'s entrenchment of strict liability will inflict on those in a position similar to victims of domestic abuse.

In *Brown*, the tenant and her adult son signed a public housing lease together.[124] As an attempt to establish some control over her son, Ms. Brown had not wanted her son to be a signatory, but rather a member of the household like her two minor daughters.[125] When police found illegal drugs in the home allegedly belonging to the son, the property manager sought to evict the entire household.[126]

Ms. Brown's life with her adult son in at least two ways resembled an abusive relationship. First, Ms. Brown could not control her son's behavior.[127] Second, the son committed violent acts

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119. *Holloway II*, No. C0-95-391, 1995 WL 479653, at *2.

120. *Id.*

121. *See supra* notes 39-40 (noting examples of domestic violence not preceded by any foreseeable instigating event).

122. *Holloway II*, No. C0-95-391, 1995 WL 479653, at *2.

123. No. 960705508, slip op. (4th Dist. Ct. Minn. Oct. 15, 1996).

124. *Id.*

125. *See* Brief for Appellant at 3, *Brown*, No. 960705508.

126. *See Brown*, No. 960705508, slip op. at 3.

127. *See* Brief for Appellant at 3, *Brown*, No. 960705508. *See supra* Part I.B.2 (explaining that a victim of domestic abuse cannot control an abuser's conduct).

towards his mother, sisters and his girlfriend.[128] He threatened to damage the apartment if he did not get the larger bedroom,[129] he threatened household members with a gun when they objected to his girlfriend moving in[130] and at another time Ms. Brown's son "became wild, hitting Ms. Brown with his blue jeans."[131]

Although the housing court referee found facts favorably to the tenant,[132] she felt compelled to follow the strict liability standard solidified in *Holloway II* and its interpretation of federal regulations.[133] The district court affirmed the referee's order.[134]

A court of appeals decision affirming the eviction would demonstrate vividly the impropriety of a strict liability standard. That test provides no responsiveness to each tenant's special circumstances. The standard for deciding eviction cases most equitably for all tenants would involve an evaluation of each tenant's ability to foresee, prevent or control the situation that caused the lease violation. If the tenant could neither foresee nor prevent the lease violations, the court should deny the landlord's eviction request.

B. Minnesota Should Adopt a "Foreseeability" Standard

The *Smallwood* standard of liability, which may have worked with the facts of that case, produced the wrong result in a case like *Brown*, where the victim of a household member's abusive behav-

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128. *See Brown*, No. 960705508 (Minn. Aug. 19, 1996) (Referee's Decision and Order). Although Ms. Brown suffered no physical injuries when her son struck his girlfriend, this could have put her in fear of being struck. *See infra* note 195. Ms. Brown also obtained an Order for Protection, discussed *infra* Part IV.A, restraining her son from having any contact with the rest of the family. *See Brown*, No. 960705508 (4th Dist. Ct. Minn. Aug. 19, 1996) (Referee's Decision and Order at 5).

129. *See* Brief for Appellant at 3, *Brown*, No. 960705508 (4th Dist. Ct. Minn. Oct. 15, 1996).

130. Interview with Lawrence R. McDonough, Attorney for Mary Brown, *supra* note 76.

131. *See* Brief for Appellant at 6, *Brown*, No. 960705508.

132. In her Memorandum, the referee expressed disapproval of the Housing Authority's refusal to enter into a new lease with just Ms. Brown and her daughters. *See* Phillips Neighborhood Hous. Trust v. Brown, No. 960705508 (4th Dist. Ct. Minn. Aug. 19, 1996) (Referee's Memorandum at 9-10). The referee also expressed reluctance in having to order the eviction: "The result here may and does appear harsh. Indeed, the facts alleged and proven by the [housing authority] depict Ms. Brown as somewhat of a victim herself. The Plaintiff has presented no evidence that Ms. Brown bears any more culpability than, probably, any parent of a wrongdoing adult child." *Id.*

133. *See Brown*, No. 960705508 (4th Dist. Ct. Minn. Aug. 19, 1996) (Referee's Decision and Order at 7). As evidence of the referee's direct reliance on *Holloway II*, she cited the 1993 edition of the Code of Federal Regulations, as used in *Holloway II*, instead of the current version. *Id.* For a discussion of *Holloway II*'s interpretation of the regulations, see *supra* text accompanying notes 102-105.

134. *See Brown*, No. 960705508, slip op. at 1 (4th Dist. Ct. Minn. Oct. 15, 1996).

ior finds herself victimized again by a court that adheres to a strict liability standard. Instead, a standard providing tenants protection from evictions based on lease violations they cannot foresee, prevent or control provides a better fit with the existing statutory schemes for both public and private housing.

1. Federally Assisted Housing

The United States government entered the housing market with the promise to "remedy . . . the acute shortage of decent, safe, and sanitary dwellings for families of low income."[135] To that end, it developed two standards for eviction from federally assisted housing. When a housing authority initiates eviction proceedings on the basis of criminal activity on the rental property, Congress authorized removal of the tenant or anyone living in a unit where such crime takes place,[136] unless the tenant was without "control" over the person committing the crime.[137] The legislative history of this section indicates that Congress had additional defenses of "knowledge" and "prevention" in mind for public housing tenants.[138] The foreseeability standard advocated for Minnesota, by asking whether the tenant could foresee, prevent or control lease violations, aligns squarely with the policy behind this criminal activity standard. [139] Moreover, Minnesota has incorporated similar tenant protection into its laws by providing that the statutory "covenant of lessee not to allow drugs," required of all residential

135. United States Housing Act of 1937, ch. 896, § 1 (codified as amended at 42 U.S.C. § 1437).

136. 42 U.S.C. § 1437d(*l*)(5); 24 C.F.R. § 966.4(*l*)(2)(ii)(A,B) (1996) (applying the statute to "any criminal activity that threatens the health, safety, or right to peaceful enjoyment of the premises by other tenants").

137. 42 U.S.C. § 1437d(*l*)(5).

138. *See* S. REP. NO. 101-316, at 179 (1990), *reprinted in* 1990 U.S.C.C.A.N. 5763, 5941 (asking for the public housing agency's "humane judgment" and opining that "eviction would not be the appropriate course if the tenant had no knowledge of the criminal activities of his/her guests or had taken reasonable steps under the circumstances to prevent the activity"). Similarly, with regard to subsidized housing tenants, Congress "assume[d] that if the tenant had no knowledge of the criminal activity or took reasonable steps to prevent it, then good cause to evict the innocent family members would not exi[s]t." *Id.*

139. Congress aimed this standard primarily at drug offenses. Prior to the addition of the criminal standard in 1988, the government expressed dissatisfaction with the previous efforts to address the drug problem in public housing. *See* Dean P. Cazenave, *Congress Steps Up War on Drugs in Public Housing: Has It Gone One Step Too Far?*, 36 LOY. L. REV. 137, 138-39 (1990). Although Congress berated drug users, no one thought to blame victims of domestic violence for the decay of public housing. *See* Lisa Weil, *Drug-Related Evictions in Public Housing: Congress' Addiction to a Quick Fix*, 9 YALE L. & POL'Y REV. 161, 161-69 (1991). In fact, Congress gives preferential treatment to housing applicants displaced by domestic abuse. *See* 42 U.S.C. § 1437f(o)(3); 24 C.F.R. § 5.420(b)(4).

leases, is violated only if the tenant "knew or had reason to know" of drug activity.[140]

Congress also established a standard of "serious or repeated violation" of lease terms or other "good cause" when a public housing agency attempts to evict tenants for non-criminal conduct.[141] The implementing regulations of the federal act provide further tenant protection by expanding the statute's reach to cover lease renewal as well as termination, and by requiring lease violations to touch "material" provisions of the lease.[142] Congress applied "good cause" and "serious and repeated violation" protection to subsidized housing as well.[143]

Although courts nationwide presently engage in fact-specific decision-making to determine whether a tenant's non-criminal behavior gives the housing agency good cause for eviction, their conclusions form a pattern of tenant responsibility analogous to the proposed foreseeability test for Minnesota. For example, courts have upheld findings of good cause where the tenant had failed to remove pets from her apartment[144] and where the tenant allowed unsanitary garbage accumulation in her unit,[145] while other courts have held that good cause was not established by a tenant's son's fights and alleged sexual misconduct[146] and when a tenant failed to pay a month's rent due to the theft of a money order.[147] The first two cases address autonomous tenant behavior, while the latter two address undesirable activity not directly ascribable to the tenant. Minnesota's proposed test likewise focuses on third-party behavior by asking whether the victim could foresee or control the lease violation.

State courts outside of Minnesota have long made this inquiry. In North Carolina, a court dismissed a housing authority's eviction proceeding based on a tenant's children's criminal behavior.[148] The court noted the inequity of evicting a tenant "not personally at fault."[149] Similarly, a New York court called the eviction

140. MINN. STAT. § 504.181(1) (1996).
141. 42 U.S.C. § 1437d(*l*)(4).
142. *See* 24 C.F.R. § 966.4(*l*)(2) (1996).
143. 42 U.S.C. § 1437f(d)(*l*).
144. Fitzpatrick v. Pierce, 553 F. Supp. 167 (D. Mass. 1982).
145. Greenwich Gardens Ass'ns v. Pitt, 484 N.Y.S.2d 439 (1984).
146. North Shore Plaza Ass'ns v. Guida, 459 N.Y.S.2d 685 (1983).
147. Cincinnati Metro. Hous. Auth. v. Green, 536 N.E.2d 1 (Ohio Ct. App. 1987).
148. Charlotte Hous. Auth. v. Patterson, 464 S.E.2d 68, 72 (N.C. Ct. App. 1995). The criminal activity included auto larceny, breaking and entering, assault with a deadly weapon and murder. *Id.* at 70.
149. *Id.* at 72-73. *See also* Maxton Hous. Auth. v. McLean, 328 S.E.2d 290 (N.C.

of a tenant for the actions of her sons "shocking to one's sense of fairness,"[150] and the Massachusetts Supreme Court[151] stated that the housing agency could not terminate the tenant's lease if "special circumstances indicat[ed] that she could not foresee or prevent the violence."[152]

Courts also tacitly utilize the test proposed for Minnesota when they refuse evictions where no minimal connection exists between tenant and lease violation. In one case an Illinois appellate court found that the tenant had no minimal connection to her son's possession of drug paraphernalia because she had no knowledge of his use drug use.[153] In a New York case,[154] the court held that no "causal nexus existed" between lease violations and the tenant's behavior[155] when the eviction was based on criminal activity of the tenant's children who were not living with tenant when the objectionable behavior occurred.[156]

When Minnesota courts have allowed housing agencies to evict tenants for such disruptive behavior as cars driven on lawns[157] or bicycles thrown through doors,[158] the issue of whether the tenant was involved in the incidents goes unaddressed. Instead, the court adds these incidents to lists of misconduct used to justify the lease termination.[159] When the tenant is a victim of

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1985) (holding no "good cause" shown when tenant was not personally responsible for non payment of rent); *accord* Cincinnati Metro. Hous. Auth. v. Green, 536 N.E.2d 1.

150. Baldwin v. New York City Hous. Auth., 408 N.Y.S.2d 948, 948 (1978).

151. Spence v. Gormley, 387 N.E.2d 741 (Mass. 1982). The conduct in issue in *Spence* included a child firebombing a neighboring tenant and committing racially-motivated assault. *Id.* at 743. Massachusetts law at the time required only a finding of "cause." *Id.* at 745. This provides arguably less protection than the current federal good cause requirement.

152. *Id.* The court observed:

> If an adult member of the household is uncontrollable and likely to commit serious acts of violence, the tenant reasonably could refuse to permit him to stay with her, and could seek outside help in preventing his continued presence. When a tenant has taken such measures, she has done all she can, and should not be held responsible for violence that nevertheless occurs.

Id. at 746. Six years later, the Supreme Judicial Court of Massachusetts clarified that upholding the eviction in *Spence* was not intended to create a presumption that tenants can foresee or prevent the actions of household members. Hodess v. Bonefont, 519 N.E.2d 258, 260 (Mass. 1988).

153. Diversified Realty Group v. Davis, 628 N.E.2d 1081, 1084 (Ill. App. Ct. 1993).

154. Tyson v. New York City Hous. Auth., 369 F. Supp. 513 (1974).

155. *Id.* at 519.

156. *Id.* at 516.

157. *See supra* note 80.

158. *See supra* text accompanying note 107.

159. *See supra* note 80; *supra* text accompanying note 107.

domestic abuse who may feel that she does not exist,[160] or who may be attacked when she is sleeping,[161] it would truly "shock one's sense of fairness"[162] to assign her personal responsibility for disturbing the neighbors.

An victim who is awake has no greater capacity to foresee or prevent violence which violates the lease,[163] and courts in other jurisdictions have held foresight a prerequisite to lease termination.[164] The Massachusetts Supreme Court,[165] in speaking of "an adult member of the household [who] is uncontrollable and likely to commit serious acts of violence,"[166] might as well have been addressing domestic abusers. Not only can victims not control their violent partners,[167] often the partners can completely control the victims.[168] While it is not clear what the Minnesota Court of Appeals would do if it acknowledged the special situation of a tenant as victim of abuse, courts across the country would refuse eviction of tenants like Margaret from public or subsidized housing.

Similarly, framing the foreseeability standard in terms of a "minimal connection" or "causal nexus"[169] would defeat the attempted eviction of domestic abuse victims. First, if domestic violence is gender based,[170] that is, perpetrated against women because they are women, a victim's gender provides the only connection to the lease violation. Second, if most victims cannot leave an abusive home or relationship,[171] their staying does not signal their involvement or approval of the lease-violating violence.

2. Private Housing

Absent public housing's regulatory scheme, lease provisions in private housing giving rise to eviction[172] will vary as tenants

160. *See supra* note 27.

161. *See supra* note 39; Moundsville Hous. Auth. v. Porter, 370 S.E.2d 341, 342 (W. Va. 1988).

162. Baldwin v. New York City Hous. Auth., 408 N.Y.S.2d 948 (1978).

163. *See supra* notes 39-42 (noting that, among other factors, absence of any provocation means that victims cannot foresee abusive behavior).

164. *See supra* notes 151-52.

165. Spence v. Gormley, 439 N.E.2d 741 (Mass. 1982).

166. *Id.* at 746.

167. *See supra* note 92.

168. *See supra* Parts I.B.3.a, I.B.3.b (noting perpetrators use of financial abuse and separation assault to control victims).

169. *See supra* notes 154-56 and accompanying text.

170. *See supra* notes 33-34.

171. *See supra* Part I.B.3.

172. Minnesota requires that a landlord may bring an eviction action only if the

contract with landlords for shelter.[173] Minnesota needs to expand its private housing law to assure that the proposed foreseeability standard can provide domestic abuse victims relief from eviction for an abuser's behavior. It could accomplish this either legislatively or judicially.

Minnesota's present eviction statute affords private tenants less protection than federally assisted tenants[174] because it does not contain the "good cause" element that courts outside of Minnesota have used to require findings of personal responsibility for lease violations.[175] In reforming its statute, Minnesota should look to New Jersey's Anti-Eviction Act[176] for guidance. This act prevents private evictions unless the court finds "good cause" from a number of circumstances, including that the tenant "has willfully or by reason of gross negligence caused or allowed destruction, damage or injury to the premises."[177] Such a clause would assist abuse victims because they do not "allow" their partner's behavior.[178] The foreseeability standard would attach to the willful requirement of the act. Since willful actions require knowledge and volition,[179] domestic abuse victims should argue that their inability to foresee or control[180] prevents them from having the level of knowledge necessary for "willfulness."

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lease provides the landlord with such a right, called "re-entry," for lease violations. *See* Bauer v. Knoble, 53 N.W. 805, 805 (Minn. 1892).

173. Some commentators have suggested that it feels "unnatural" for one person to have to bargain with another for permission to occupy territory. *See* ARTHUR BERNEY ET AL., LEGAL PROBLEMS OF THE POOR 97 (1975) ("'[Y]ou are undone if you once forget that the fruits of the earth belong to us all, and the earth itself to nobody.'"), *quoting* JEAN JACQUES ROUSSEAU, A DISCOURSE ON THE ORIGIN OF INEQUALITY (1974).

174. *Compare* MINN. STAT. § 566.03(4) (1996) (authorizing eviction for "a violation by the tenant" of a private lease provision) *with* 42 U.S.C. § 1437d(*l*)(4) (1994) (authorizing eviction for "serious or repeated violation" of a public lease provision).

175. For a discussion of several such cases, see *supra* text accompanying notes 144-156.

176. N.J. STAT. ANN. § 2A:18-61.1 (West 1987 & Supp. 1996).

177. *Id.* § 2A:18-61.1b.

178. *See* note 30 (supporting the proposition that adults do not choose to be abused). *See also* American Apartment Mgmt. Co. v. Phillips, 653 N.E.2d 834 (Ill. App. Ct. 1995). In *Phillips*, one of the tenant's guests brought crack cocaine into the residence without tenant's approval or knowledge. *Id.* at 835-36. The lease forbade the tenant from "permitting" the residence to be used for criminal activity. *Id.* at 837. Defining "permit" as "to consent to expressly or formally," the Illinois Court of Appeals found that the tenant did not have the requisite knowledge to have "permitted" a lease violation. *Id.* at 840-41 (citing Chicago Hous. Auth. v. Rose, 560 N.E.2d 1131, 1136-37 (Ill. App. Ct. 1990)). Under *Phillips*' definition of "permit," a woman never "expressly consents" to being beaten. *See supra* Part I.B.1.

179. *See* BLACK'S LAW DICTIONARY 1599 (6th ed. 1990) ("Proceeding from a conscious motion of the will; . . . knowingly").

180. *See supra* Part I.B.2.

Until the legislature acts, Minnesota courts must work within the current statute, which provides possible aid to victims of domestic abuse by stating that landlords may only evict tenants for lease violations "by the tenant."[181] Advocates for domestic abuse victims facing eviction based on the conduct of an abuser should argue that the violations were not "by the tenant." This argument applies, both when a non-tenant partner commits lease violations in the victim's unit and when both parties are tenants,[182] if the victim's representative can help the court see beyond the myth that victims create violent confrontations.[183] The victim's advocate, however, may have more difficulty convincing a court that lease violations were not committed "by the tenant" when the parties live together because of the instinctive reaction that if the victim did not leave the situation, she must have approved of and participated in it.[184]

IV. Evicting the Cause, Not the Victim

The previous section argued for a standard that would prevent a landlord from evicting a victim of abuse for lease violations caused by the abuser. This works best where the lease contains the names of only innocent parties, that is, when the victim lives alone or with children, and the abuser has entered the premises, as in Margaret's case. If the victim and abuser live together however, both having signed the lease, they would both lose a home if an eviction terminates that lease. As only one tenant has caused the lease violation, Minnesota should allow a method of removing only the abuser to supplement the victim's eviction defense.

A. Limitations of the Order for Protection

Minnesota's present method for removing a batterer from a household is contained in its Domestic Abuse Act.[185] The statute allows courts to "exclude the abusing party from the dwelling

181. *See* MINN. STAT. § 566.03(4) (1996). This section also provides a defense to victims in case a landlord tries to collect for damage to the apartment from an abuser's actions. The statute makes tenants liable only if "a person acting under the tenant's discretion or control" caused the damage. *Id.*

182. See *infra* Part IV. for a discussion of the abuser as co-tenant.

183. *See supra* Part I.B.2.

184. *See supra* Part I.B.3; *see also supra* note 6 (explaining the difficulty legal practitioners have overcoming such "self-protective expectations").

185. MINN. STAT. § 518B.01 (1996). This statute applies to, among others, "persons who are presently residing together or who have resided together in the past . . ." and covers both physical and emotional injury. *Id.* § 518B.01(2)(a)-(b).

which the parties share."[186] To access this remedy, a victim must file a petition for an Order for Protection ("OFP").[187] The main weakness of the otherwise powerful Domestic Abuse Act[188] is found in the requirements for granting OFPs. The Act instructs the victim to state "specific facts and circumstances" in an affidavit under oath.[189] The victim must show a *present* harm to herself or a threat thereof;[190] while past abuse may be a factor, it is not dispositive.[191] The court of appeals has raised the threshold for allegations by interpreting the Domestic Abuse Act to require the woman to show "some overt action" by the abuser and that he "intended" to put her in fear of imminent harm.[192]

There are two problems with the statute's language and the court's interpretation. First, the Legislature intended that courts apply the domestic abuse statute with a preventive goal.[193] Perhaps the Legislature realized that some women may be unwilling or unable to pursue other remedies like filing criminal charges, tort claims or divorce proceedings.[194] However, since some victims may endure much suffering before they can present evidence of present harm, the judiciary's imminence requirement strips the Domestic Abuse Act of its prophylactic character. Furthermore, because violence is merely one facet of abusive behavior, a woman may be abused even when no one is violent towards her.[195]

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186. *Id.* § 518B.01(6)(a)(2). This provision does not allow a judge to exclude the victim from the residence. *See* Swenson v. Swenson, 490 N.W.2d 668, 670 (Minn. Ct. App. 1992).

187. MINN. STAT. § 518B.01(4) (1996).

188. The Domestic Abuse Act allows for warrantless arrest of an abuser who violates an OFP by being on the couple's shared premises. MINN. STAT. § 518B.01(14)(b) (1996). Police, however, often do not enforce such provisions with much vigor. *See* Zorza, *supra* note 11, at 422.

189. MINN. STAT. § 518B.01(4)(b).

190. *See* Kass v. Kass, 355 N.W.2d 335, 337 (Minn. Ct. App. 1984).

191. *See* Boniek v. Boniek, 443 N.W.2d 196, 198 (Minn. Ct. App. 1989).

192. *See Kass*, 355 N.W.2d at 337. The court of appeals has also potentially expanded protection, however, by holding that a victim does not have to show an overt *physical* act. Knuth v. Knuth, No. C1-92-482, 1992 WL 145387 (Minn. Ct. App. June 30, 1992). Thus a verbal threat may suffice to inflict fear of imminent harm. *Id.* at *1 (quoting Hall v. Hall, 408 N.W.2d 626, 629 (Minn. Ct. App. 1987)). Despite this glint of emancipation, the courts have left the OFP with potentially restrictive conditions.

193. *See* Swenson v. Swenson, 490 N.W.2d 668, 670 (Minn. Ct. App. 1992) ("As a remedial statute, the Domestic Abuse Act receives liberal construction. . . . The construction of the statute may not be expanded in a way that does not advance its remedial purpose.").

194. *See* State v. Errington, 310 N.W.2d 681, 682 (Minn. 1981).

195. *See* Klein & Orloff, *supra* note 23, at 25. *See also supra* note 6 (distinguishing "abuse" and "violence"); Dutton & Waltz, *supra* note 7, at 14 ("Recognizing not just who is hit, but who is afraid of being hit, creates a more accurate picture of

Second, even if a victim of abuse suffers the kind of harm the court of appeals has enumerated, she may be unable to present to the court, under oath, the specific facts the statute requires.[196] Reasons for this differ. According to the theory of "learned helplessness,"[197] a victim's lack of faith that her individual efforts will have any positive consequences might prevent a victim from even attempting to obtain an OFP. In a slightly different context, that of giving evidence at trial, Klein and Orloff note that a woman's testimony, while potentially the strongest evidence of the existence of domestic abuse, may be impaired by the victim's fear.[198]

Even if the woman does make it to the courthouse, embarrassment,[199] a desire to protect the abuser's public reputation[200] or an unconscious minimization of the abuse[201] may render her unable to allege specific facts. Further, a "posttraumatic stress reaction" can prevent some victims from "thinking, feeling, or remembering" violent incidents.[202] A victim may also run into problems in the procedural phases of the application. It has been suggested that the clerk, whose task it is to assist victims in completing this form, may try to derail the process.[203] Minnesota should consider two approaches to assist in the eviction of only the abuser.

B. Common Law Solution

Under the first approach, which would not require legislative intervention, a court could enter judgment in the eviction proceeding in favor of the landlord with respect to the party responsi-

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victimization.").

196. MINN. STAT. § 518B.01(4)(b). Some victims falsely believe they need an attorney to fill out a petition. *See* Buel, *supra* note 13, at 17.

197. *See supra* notes 63-66 and accompanying text (explaining one understanding of "learned helplessness").

198. Klein & Orloff, *supra* note 23, at 28. *See also supra* text accompanying notes 52-53 (describing the fear some abuse victims experience).

199. *See* WALKER, *supra* note 7, at 135 ("Paulette decided that she was too embarrassed to talk at a public hearing about the terrible things that had been done to her. She chose to plead guilty and stay in prison, perhaps for the rest of her life, rather than expose her experiences of degradation and violent sexual abuse.").

200. *See* Dutton & Waltz, *supra* note 7, at 16.

201. *See* Frederick, *supra* note 27, at 2.

202. *See* Dutton & Waltz, *supra* note 7, at 16. *See also* Frederick, *supra* note 27, at 2 ("[A victim] may have trouble distinguishing any violent incident from the rest, remembering dates or details.").

203. *See* MINNESOTA LEGAL SERV. COALITION, GETTING PROTECTION FROM ABUSE AND HARASSMENT: A GUIDE FOR OBTAINING COURT ORDERS 7 (1995). "Sometimes the clerk at the courthouse may tell you that you do not qualify for an OFP. They will sometimes do this if you have not lived with the abuser for long, but the law protects you if you have *ever* lived together. Clerks have no right to screen applicants . . . ." *Id.*

ble for breaching a lease provision, the perpetrator of the domestic abuse, but would deny relief to the landlord with respect to the innocent party, the victim of the abuse. This is sound policy as it merely expands on the idea that only culpable parties should be evicted: in the assisted housing eviction, the landlord could remove only the tenant he or she has good cause to evict,[204] and in the private housing eviction, the landlord could evict only the tenant who has materially violated the lease.[205]

At least one court has adopted this approach. In *Akron Metropolitan Housing Authority v. Rice*,[206] an Ohio trial court held that it could enter judgment on an eviction against one household member but not the rest of the family, which was innocent in the matter. This could aid a victim whose partner's violent acts create grounds for eviction, but who cannot obtain an OFP that excludes the man from the dwelling. The Minnesota Court of Appeals has a similar case pending before it now.[207]

Minnesota courts could also find support for the idea of entering judgment against only one household member from Minnesota's real property forfeiture statute, which allows landlords to evict tenants when controlled substances are seized in the rental unit.[208] The statute allows tenants to raise a defense to the eviction proceeding that they had no knowledge of the controlled substance's presence or could not prevent its entry into the apartment.[209] In a landlord's action to remove a couple for lease violations caused by domestic violence, both defenses borrowed from the property forfeiture statute would greatly assist a court in justifying the removal of only the abuser.[210]

First, for a defense of lack of knowledge in the forfeiture statute, if a party is aware of his or her co-tenant's illicit drug operations, a court implicates the party by inferring that the party approved of and participated in the operation. In the domestic abuse situation, however, even when a victim has knowledge of her part-

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204. *See* 42 U.S.C. § 1437d(*l*)(4).

205. *See* MINN. STAT. § 566.03(4) (1996).

206. No. 88-CV-04013 (Ohio Mun. Ct., Akron, filed June 22, 1988) (cited in *Case Developments*, 23 CLEARINGHOUSE REV. 300, 322 (1989)).

207. See *supra* Part II.A.1.c for a discussion of *Phillips Neighborhood Housing Trust v. Brown*, No. 960705508, slip op. (4th Dist. Ct. Minn. Oct. 15, 1996).

208. MINN. STAT. § 609.5317(1)(a-b) (1996).

209. *Id.* § 609.5317(3).

210. A federal district court has used a federal statute similar in relevant language to Minnesota's to remove an adult grandchild who sold drugs from the apartment and to allow the grandmother to remain in the unit because she lacked knowledge of the drug activity. *See* United States v. 121 Nostrand Ave., 760 F. Supp. 1015 (E.D.N.Y. 1991).

ner's conduct, the implied approval and participation are absent. Thus, a court would find that a victim had "notice" of the abuse, but that, implied approval, the aspect of "knowledge" that makes it incriminating is missing.

Second, the statute's defense of inability to prevent a co-tenant's actions seems tailor-made for the domestic abuse setting. Victims generally cannot control abusers' behavior.[211] In each instance, a court could consider evidence of the victim's physical stature and economic standing relative to the abuser and examine the history of abuse within the relationship to satisfy its desire to objectively determine whether the victim could have prevented the lease violation by controlling the abuser.

C. Statutory Remedies

Amendments to the Domestic Abuse Act designed to facilitate one-party evictions could augment the common-law solutions suggested above. For example, Minnesota could amend the Act to allow a victim to remove the abuser, like an eviction, rather than leave it up to the court to exclude a party. This would give the victim an option in situations where the landlord chooses not to terminate the tenancy of the abuser despite lease violations of disturbance of neighbors or property damage. However, it would preserve the problems of the OFP in leaving the victim to take the initiative and carry the burden of proof.[212] The Act might also be amended to allow landlords[213] or third parties to provide the specific information necessary for an OFP.

The path recommended by these statutory and common law measures would facilitate the removal of a woman's abusive partner from the shared rental unit, but may put the woman at risk of homelessness if she lacks the financial resources to cover the

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211. *See supra* Part I.B.

212. *See supra* text accompanying notes 185-89.

213. Landlords have certain responsibilities to take action when the safety or comfort of their tenants is in jeopardy. For example, in *Person v. Torchwood Mgmt.*, No. UD 1920604543 (4th Dist. Ct. Minn. July 6, 1992), "abusive language" and "unjustified harassment" by neighboring tenants adversely affected the plaintiff's use and enjoyment of her dwelling. *Id.* The court noted that the landlord occupied a position of some power to "abate the nuisance[s]," and stated that the landlord must "make reasonable and good faith efforts" to do so. *Id.*

Statutory duties also attach regarding tenant safety. St. Paul, Minnesota, for example, requires one-inch dead-bolt locks on all apartment doors leading to the outside. ST. PAUL LEGIS. CODE § 34.09(3)(i). *See also* MINNEAPOLIS CODE § 244.675 (requiring security doors that lock automatically for egress and ingress to all multiple dwelling buildings).

abuser's share of the rent.[214] Landlords may be less willing to support a one-party eviction if it hampers their rent collection. Minnesota should therefore enact measures to ensure that no innocent party—the victim or landlord—will bear the cost after removal of an abuser from the home.

V. Protecting Private Landlords

After a victim has removed the batterer with an OFP or a one-party eviction, she may have trouble staying current with rent without the batterer's resources. Minnesota needs to recognize a theory under which an evicted abuser, while removed from the landlord's property, remains liable with the victim for rental obligations. One solution, closely aligned with present legislative policy, would involve an action against the abuser in restitution.

Illinois recently amended its criminal code to require convicted batterers to reimburse the expenses domestic violence shelters may have had to incur while serving the batterer's victim.[215] Minnesota could adopt analogous legislation requiring excluded batterers to pay "restitution" to landlords (effectively serving as shelters) for any lost rent they may incur. Although Minnesota tenants are presumed jointly liable for the covenant to pay rent, it would be manifestly unfair to expect victims to continue to meet each month's full rent, particularly where the abuser had kept the victim from supporting herself.[216] At the same time, batterers do not suffer unjustly under this scheme, even if they have to face two rental obligations. Assaults such as the kind they inflict on their intimate partners,[217] if committed on any other member of society, would surely warrant the assaulter's incarceration if not institutionalization.

Minnesota would not need to legislate in radically new territory to provide rent relief to victims of abuse. The Domestic Abuse Act comes very close to providing this type of relief by allowing the court to "order the abusing party to pay restitution to the [victim]."[218] This payment to the victim for her physical suffering could be recast in terms of restitution to landlords (as involuntary

214. *See supra* note 55 (discussing a victim's increased financial hardship after separation from an abuser).

215. 730 ILL. COMP. STAT. ANN. 515-5-6(b) (West 1996).

216. *See supra* note 52 and accompanying text (explaining how abusers control household finances); *see supra* note 27 (noting that many abusers prevent victims from retaining employment).

217. *See supra* note 25.

218. MINN. STAT. § 518B.01(6)(a)(10).

guardians) for their lost profits. The Domestic Abuse Act also allows courts to mandate continued insurance coverage and "in its discretion, other relief."[219]

In one case, furthermore, the Minnesota Court of Appeals in essence allowed an abused wife to remain in exclusive possession of the family home and not make mortgage payments.[220] In that case, the excluded husband had challenged the trial court's failure to order payments from the wife, and the appellate court dismissed this contention as "without merit."[221] With this level of protection already in place for victims, Minnesota could take the next step of providing for rent substitution.

The amount of relief should vary with both parties' financial circumstances. If the victim receives government benefits, those benefits might increase when the abuser's contributions leave the household. The government could withhold a portion of those payments in the victim's name while the abuser paid rent and could release the funds to the landlord should the abuser default.[222] Alternatively, the government could provide the abuser's

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219. MINN. STAT. § 518B.01(6)(a)(11)-(12).

220. *See* Rigwald v. Rigwald, 423 N.W.2d 701, 705 (Minn. Ct. App. 1988).

221. *See id.*

222. Minnesota may also need to provide the victim protection against eviction if she cannot regularly pay rent, for lack of government benefits or otherwise, and the evicted abuser fails to contribute his share. The North Carolina Supreme Court addressed a similar problem in the public housing context. *See* Maxton Hous. Auth. v. McLean, 328 S.E.2d 290 (N.C. 1985). In *Maxton*, a tenant's monthly rent increased from $0 to $171 because she married the father of her children and he moved in. *Id.* at 291. The tenant's government benefits also terminated upon the marriage, leaving her with no income, save her husband's earnings. *Id.* at 294. The husband moved out of the apartment after the woman filed assault charges against him. *Id.* The husband defaulted on his child support order. *Id.* Thereafter, the housing authority sought to evict the tenant for nonpayment of rent. *Id.* at 291. The court refused the eviction because the "fault" rested with the husband, in that he was responsible for the increased rent and for its nonpayment. *Id.* at 294. The court also stressed that since the tenant had "not committed any wrongful acts," to evict her "would indeed shock one's sense of fairness." *Id.*

The court expressly limited its decision to public housing leases, *id.*, but Minnesota should nonetheless apply *McLean*'s policy generally to the housing and domestic abuse situation. Although the husband in *McLean* apparently moved out on his own volition and thus seems objectively responsible for his wife's predicament, an abusive spouse removed by the victim or a court effectively consents to vacating the apartment by battering his partner. Just as the tenant in *McLean* did not commit "wrongful acts," victims of abuse are just as innocent. *See supra* Part I.B.1. The idea from *McLean* that landlords can only act against tenants at fault for nonpayment of rent merits universal application. In short, the North Carolina policy would assist a victim whose battering partner has been removed from the shared household under an OFP, because the batterer's removal is his fault, and the ensuing non payment of rent prompts an eviction against the victim.

share of "restitution" to the landlord and then require the abuser to make his payments to it. Providing such exceptional relief for abuse victims would allow the victim to concentrate on healing herself and her children while the state assumed responsibility for pursuing delinquent abusers.

Conclusion

Women often enter relationships innocently and become trapped by men who abuse them. A combination of reality and psychology prevent them from leaving the abuser, whose behavior often violates lease terms. Unfortunately, the Court of Appeals has failed to articulate a standard affording victims protection against evictions in such situations.

Minnesota should adopt a foreseeability standard to assure that innocent victims of domestic abuse have a defense to evictions based on an abuser's actions. Courts must realize that although a victim may live in an abusive home, or fail to prevent an abusive partner from entering her apartment, the victim does not foresee or sanction the lease violation. In addition, Minnesota should supplement its Domestic Abuse Act with common law that allows victims and courts more opportunities to remove an abuser from a victim's home. Finally, Minnesota needs to consider methods of collecting restitution from the removed abuser to assist the victim in paying her rent.