CRIMINAL PROSECUTION OF BATTERED NATIVE WOMEN FOR FAILURE TO PROTECT[1]

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Introduction

A disturbing trend has emerged in Tribal and state courts. Women are being criminally charged with "failure to protect" under child abuse, child neglect, or child endangerment statutes solely because of the violent, criminal actions of their abusive partners. Under the laws and practices of many jurisdictions, women with children may be criminally prosecuted for failing to leave their abusers or failing to report or to seek help for the abuse that they and their children suffer.

The criminal justice system has developed an expectation that battered women with children must leave their abusers (even when no resources exist in the community to assist them in leaving) in order to protect the children. Failure of a battered woman with children to leave her abuser may result in criminal prosecution, incarceration, and/or termination of parental rights.

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Recent Trends

Over the past 20 years state and Tribal law enforcement and prosecutors have made extraordinary gains toward recognizing, understanding, and responding to domestic violence. Many Tribes have adopted domestic violence and protection order codes. Full Faith and Credit is routinely given to foreign protection orders throughout much of Indian country. Tribal law enforcement agencies have adopted mandatory arrest policies and Tribal prosecutors have begun to adopt "victimless" or evidence based prosecution protocols. Tribes have begun to build their own domestic violence shelters and, more recently, their own supervised visitation centers.

Federal funding under the Violence Against Women Act has provided for widespread training of Tribal law enforcement, prosecution, and the courts on domestic violence and on the effects of domestic violence on children. As a result of such training, Tribal justice systems have begun to recognize that:

- Domestic violence negatively impacts children.
- Domestic violence can be lethal.
- Children who have been exposed to or who have been the victims of domestic violence often manifest behavioral and

emotional problems, poor academic performance and delinquency.[2]

- Boys who are raised in a home where there is domestic violence are more likely to become abusers when they grow up.
- Girls raised in homes with domestic violence are more likely to become victims of domestic violence in their adult relationships.
- Domestic violence is a known risk factor for recurring child abuse reports and for child fatalities.[3]

Statutory Authority for Tribal and State Prosecution of Victims for Failure to Protect

Based on the growing understanding of the impact of domestic violence on children, Tribal and state justice systems have moved vigorously toward strict accountability for domestic violence where children are either present or are the victims of the violence. Unfortunately, this "strict accountability" has been applied toward both the abuser perpetrating the violence and toward the victim/mother who is on the receiving end of the violence.

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[2] Edelson, J., "Children's Witnessing of Adult Domestic Violence," *Jl. of Interpersonal Violence*, 14 (1999): 839-870.
[3] English, D.J., P.B. Marshall, S. Brummel & M. Orme, "Characteristics of Repeated Referrals to Child Protective Services in Washington State," *Child Maltreatment*, 4 (1999): 297-307.

This trend toward increased parental liability for "failure to protect" children from exposure to abuse (whether experienced directly by the child or by another household member in the presence of a child) is found in both state and Tribal jurisdictions. There are basically two scenarios where women are being prosecuted for "failure to protect" their children: (1) when the abuser is committing acts of abuse against the children and (2) when the children are exposed to domestic violence by witnessing domestic violence being committed against their mother.[4]

(1) Prosecuting A Non-Abusive Parent for Failure to Protect When Another Household Member Commits Acts of Abuse Against The Children

All but 12 states, and many Indian tribes, have child abuse, child neglect, and/or child endangerment laws that criminalize an "omission" or "failure to act" as well as an affirmative act. For example, the Tohono O'odham Nation's criminal code, section 8.7 declares:

> "A. A person commits the offense of endangering the welfare of a minor if he or she knowingly or negligently contributes, encourages or allows a person under the age of eighteen (18) years to:

[4] Definitions vary from jurisdiction to jurisdiction on what constitutes "witnessing" – some require the child to be in the same room and others do not.

1. be subjected to physical or mental injury as result of failing to maintain and provide reasonable care and treatment; or
2. …
3. cause the minor to live in a home which by reason of neglect, cruelty or depravity is an unfit place.

The state of Arizona A.R.S.13-3619 provides:

> "A person having custody of a minor under sixteen years of age who knowingly causes or permits the life of such minor to be endangered, its health to be injured or its moral welfare to be imperiled, by neglect, abuse or immoral associations, is guilty of a class 1 misdemeanor."

In most jurisdictions, those subject to punishment for omissions are limited to parents, guardians and other persons having care, custody or control of a child. By criminalizing omissions, these jurisdictions have created affirmative duties for parents and others having a special relationship with a child to protect children from acts of abuse and neglect, as well as from risks of harm.[5]

Some jurisdictions go even further and will permit the conviction of a battered woman for the same offense committed by another person against her child if she fails to stop it, report it, or obtain

[5] *See* Judith Inglis Scheiderer, Note, "When Children Die as Result of Religious Practices," 51 Ohio St. L.J. 1429, 1434 (1990).

medical care for the abuse.[6] These statutes are increasingly being used to prosecute non-abusive parents for failing to prevent or to report such abuse.

Prosecutors sometimes attempt to prosecute battered women for the abuser's violence against her children based upon a theory of "accomplice liability." "Accomplice liability" permits prosecutors to charge an alleged "accomplice" who did not commit the act of violence with the same offense as the person who committed the violent crime. Exact definitions of "accomplice liability" vary from jurisdiction to jurisdiction. However, two elements are generally present in most definitions for a person (the "accomplice") to be held liable for an offense committed by another person. First, the alleged "accomplice" must have performed an act, given encouragement, or failed to act when he or she should have. Second, the alleged "accomplice" must have *intended* that his or her act, encouragement, or omission would promote or facilitate the commission of the crime. Some jurisdictions also require that the act, encouragement, or omission have *actually aided* the other person in committing the crime.

[6] For example, an Arizona battered woman can be convicted of murder if her abuser kills her child. *See State v. Mott*, 931 P.2d 1046 (1997), cert. den. 177 S.Ct. 1832 (1997).

(2) Prosecuting A Non-Abusive Parent for Failure to Protect When Another Household Member Commits Acts of Abuse Against the Non-Abusive Parent

Some jurisdictions have enacted specific statutes criminalizing "failure to protect" children from exposure to domestic violence, whether or not the child experiences direct abuse. Alaska's child maltreatment statute allows a non-abusive parent to be criminally prosecuted when one household member commits or attempts to commit assault, sexual assault, or homicide against another.[7]

Policy Analysis

Proponents of prosecuting women for "failing to protect" their children advocate vigorous prosecution of child mistreatment and/or maltreatment and the expansion of the legal definitions of child abuse, child neglect, and child endangerment. They contend that such measures are necessary to ensure that children at risk of harm from exposure to domestic violence are brought into the child welfare system.

Critics argue that this approach unfairly penalizes battered mothers and may actually be contrary to the best interests of their children. One researcher observes that many existing laws essentially

[7] AS 47.10.01 para. 8.

punish battered mothers regardless of whether they are at fault: "when determining whether a mother has performed her duty to protect her child, courts employ a strict liability test…[and] neglect to consider the particular circumstances surrounding a women's life and the reasons for her inability to protect her child from harm."[8]

This approach also fails to account for the many ways that victims do protect their children everyday.[9] It ignores the statistical data that demonstrates the significantly increased risk of death or serious injury for victims and their children at the time of separation. It minimizes the effects of the severe shortage of resources and support that are necessary for a victim of domestic violence to successfully leave her battering partner, especially when she has children. Further, criminal prosecution of a victim for failure to protect increases the likelihood that her children will be removed from their home at the very time they are most in need of their mother's care and emotional support.

In the end, this approach discourages women from seeking protection from the police and/or courts out of fear that they will lose custody of their children. As a result, the approach may actually have the opposite effect of its stated purpose. Rather than encouraging non-

[8] V. Pualani Enos, "Recent Development: Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children," 19 *Harv. Women's L. Jl.*226, note 17 at 229-30 (1996).
[9] *See* infra article, "Advocating for Appropriate Custody Determinations."

abusive parents to take their children out of an abusive home, this approach effectively creates a disincentive for victims to seek the intervention and assistance necessary to allow them to leave an abusive partner. Rather than protecting children, these laws may actually expose them to further harm.

Legal Analysis

Nearly all criminal statutes contain a "culpable mental state" as an element of a crime. Depending on the crime, the requisite mental state that a defendant must possess under the statute may be: intentionally, recklessly, knowingly, and/or negligently. Although exact definitions of each mental state vary from jurisdiction to jurisdiction, they may be summarized as follows:

"Intentionally or with the intent to": A person's conscious objective is to cause a certain result or engage in certain conduct.

"Recklessly": A person is aware of and consciously disregards a substantial risk that harm will result from certain conduct.

"Knowingly": Conduct with an awareness of its probable consequences.

"Negligently": A gross deviation from the standard of care that a reasonable person would observe in the situation.

In criminal statutes that delineate a culpable mental state, the applicable mental states(s) must be proven by the prosecution beyond a reasonable doubt. For instance, to convict a non-abusive mother of child abuse under the "accomplice liability" theory, the prosecution must prove beyond a reasonable doubt that when the mother failed to stop her batterer from hitting the child, she actually *intended* to help her batterer commit child abuse. Failure of a battered women with children to stop or report the violence can in no way be construed as intentionally promoting the violence against her children. A battered woman's failure to leave the relationship, report the violence, and seek help are often due to the enormous amount of power and control exercised over the victim by her abuser. She may remain in the home and fail to report the violence not because she wishes to promote or facilitate the violence but to prevent further acts of violence against her and the children. She may stay for fear of losing custody of her children, for fear that her abuser will carry out threats to kill her or the children if they leave, or for lack of services and support enabling her to get to safety.

A mother charged with "failure to protect" her children under child abuse, child neglect, child maltreatment, or conspiracy statutes may, depending on the jurisdiction, have certain defenses to the various culpable mental states. These defenses may include:

1. Duress – Duress is recognized in many jurisdictions as an affirmative defense to a culpable mental state. Generally, a battered mother is under duress if her free will to act is negated or substantially impeded by another's use or threatened use of force against her and/or her children. Minnesota and Oklahoma recognize an affirmative defense to prosecution for "failure to protect" if, at the time of the acts for which she is being charged, she had a reasonable apprehension that acting to stop or prevent child neglect or endangerment would result in substantial bodily harm to her or her children.[10]

2. Diminished Capacity – Most jurisdictions have a defense for persons who are proven to be insane or to suffer some other serious mental disease or defect. Many jurisdictions also recognize a defense of "diminished capacity." Someone with a "diminished capacity" does not have a serious mental disease or defect, but, at the time of the offense, was not able to fully comprehend the nature of the criminal act he or she is accused of committing. This inability to comprehend the nature of his or her actions might be caused by emotional distress, a physical condition, or other relevant factors. A battered woman accused of child abuse, child neglect, or child maltreatment for "failure to protect" may be able to assert this defense. She may argue that the trauma she has experienced as a battered woman resulted in a

[10] Minn. Stat. Ann. 609.378.; Okla. Stat. 21 §852.1.

"diminished capacity" to comprehend the nature of her actions (or her inaction).

3. Battered Woman's Syndrome (BWS) or Battered Wife Syndrome – This concept is based upon Lenore Walker's theories of the "cycle of violence" and "learned helplessness" which have been criticized by domestic violence scholars over the last decade. According to these theories, a battered woman manifests symptoms of learned helplessness and may not seek help since she feels powerless to escape from the abuser. Lenore Walker's "battered woman's syndrome" and "learned helplessness" theories have been criticized as providing an incomplete picture of domestic violence and placing the focus on the victim's state of mind or mental health rather than placing the responsibility on the abuser. Some jurisdictions continue to recognize "battered woman's syndrome" as a valid defense. Depending on the jurisdiction, "battered woman's syndrome" may be used to negate a mental state or to establish that her conduct constituted self-defense.

Some jurisdictions recognize Battered Women's Syndrome only as it relates to self-defense. In *State v. Mott,*[11] a battered woman in Arizona was criminally charged with murder and child abuse for the death of her child at the hands of her abuser. The trial court allowed

[11] 931 P.2d 1046 (1997), cert. den. 117 S. Ct. 1832 (1997).

the defense attorney to introduce expert witness testimony related to "battered woman's syndrome" in an attempt to negate the culpable mental states of "intentionally" and "knowingly" killing the child. The State of Arizona appealed the trial court's decision to admit this expert testimony and the Arizona Supreme Court reversed the decision and excluded the testimony. This holding essentially limits the use of "battered woman's syndrome" in Arizona solely to a self-defense claim (for example, where a battered woman has killed or injured her abuser and claims self-defense).

4. Battering and Its Effects – Many domestic violence experts contend that a more accurate representation of battering and its effects should include a range of issues on the nature and dynamics of battering, the effects of violence, battered women's responses to violence, and the social and psychological context in which domestic violence occurs. This type of testimony may be useful in establishing that a battered woman did not possess the requisite mental state for a child abuse, child endangerment, or child neglect charge.

Conclusion

There are significant policy and legal implications of prosecuting battered women for "failure to protect" their children. For some battered women, the most "protective" choice they can make for their

children is to stay in an abusive home. The reality is that many battered women lack the resources to feed, clothe, and shelter their children once they leave their abusive partner. Many batterers are highly lethal and will stalk and kill their partners and children if they leave. Making an attempt to escape a violent home may actually increase the risk of injury or death for a battered woman and her children. Careful safety planning and preparation can take time but will ultimately provide a battered woman with her best chance at safely leaving an abusive home and keeping her children safe.

Laws and polices that encourage the prosecution of battered women for "failure to protect" do not accomplish their stated goals. These laws and policies discourage women from reporting abuse for fear that they may be prosecuted or lose custody of their children. By closing off an avenue of intervention and assistance for battered women, these laws and policies make it less likely that these women will be able to safely leave their batterers and keep their children safe. Finally, laws and policies that seek to hold a battered woman responsible for the abuse meted out by her batterer represent a grave injustice that flies in the face of one of the fundamental principles underlying criminal justice—that persons should be held criminally responsible only for actions for which they are culpable.