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NOTE

JUSTICE SERVED OR UNJUST CONVICTIONS? A CRITICAL ANALYSIS OF OKLAHOMA’S “FAILURE TO PROTECT” LAW

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* Juris Doctor Candidate at Oklahoma City University School of Law, May 2025. I dedicate this Note to all victims of family and domestic violence and to the compassionate criminal justice professionals who support them and effective policy. And to my children whom I love more than words can express—they will always be my greatest accomplishment. And to my mother, Sandra Woodall, whose unwavering love, strength, support, and guidance have been my foundation. Thank you to the friends who have been by my side through everything. I also want to express my deep appreciation to my mentors: Anne Lowrance, Jaime Yahner, Jennifer Taylor-O’Neill, and Molly Tipton, whose character, wisdom, and steadfast belief in my potential have been invaluable in my endeavors. A special thanks to Professor Maria Kolar for her insight and guidance on this Note. Finally, in loving memory of my stepfather, Scott Woodall, and my grandmother, Judy Kelly, whose love and lessons I will always carry with gratitude.

Introduction

“You are not a monster” “[You do] not deserve to die in prison.”¹

Rebecca Hogue, a resilient single mother and the sole provider for her two-year-old son, Ryder, began dating Christopher Trent in July of 2019.² Trent presented himself as a compassionate and caring individual, leading Hogue to believe that he was “different” from Ryder’s biological father, who had physically abused her in 2017.³ In November of 2019, Trent moved in with Hogue and Ryder.⁴ He helped Hogue with daily household tasks, such as preparing meals for Ryder, and he also watched Ryder while she was at work.⁵ Furthermore, Trent assured Hogue that he would always protect her and Ryder and even expressed a desire to eventually adopt Ryder.⁶

On December 15, 2019, the three took a trip to the lake.⁷ While they were at the lake, Hogue noticed a small bruise on Ryder’s ear.⁸ When Hogue asked Trent about the bruise, he told her that Ryder had fallen during a hike earlier that day.⁹ To Hogue, the bruise seemed like an ordinary bruise, the kind that is common among young children.¹⁰ On December 18, 2019, while Hogue was at work, Trent called her and told

1. *Rebecca Hogue: Mother jailed for 16 months after boyfriend killed son*, BBC (Feb. 11, 2022), <https://www.bbc.com/news/world-us-canada-60356725> [<https://perma.cc/95DW-M8YG>] [hereinafter BBC NEWS] (quoting the trial judge during the sentencing of Rebecca Hogue on Feb. 11, 2022).

2. *Accused: Guilty or Innocent? Failed My Child or Innocent Mother* (A&E television broadcast June 9, 2022) [hereinafter *Accused*] (interview of Rebecca Hogue and criminal defense attorney, Andrew Casey).

3. *Id.* (explaining that Hogue permanently ended her relationship with Ryder’s biological father in July 2017 because he hit her while she was holding Ryder).

4. OFF. OF JUV. SYS. OVERSIGHT, *Review of Death of Jeremiah Ryder Johnson, Jr. of Cleveland County, Oklahoma*, OKLA. COMM’N ON CHILD. & YOUTH (July 26, 2022), <https://oklahoma.gov/content/dam/ok/en/occy/office-of-juvenile-system-oversight/ojs-public-reports/ojs-death-reviews/2020/020220-Jeremiah-Ryder-Johnson-JR-Death-Review.pdf> [<https://perma.cc/D5UG-87JN>].

5. *Id.*

6. *Accused*, *supra* note 2.

7. OFF. OF JUV. SYS. OVERSIGHT, *supra* note 4.

8. *Id.*

9. *Id.*

10. See *Accused*, *supra* note 2; *cf.* 7 of the most common childhood injuries and accidents (and when specialized emergency care may be needed), HEALTHPARTNERS, <https://www.healthpartners.com/blog/most-common-childhood-injuries/> [<https://perma.cc/Z6C9-B9WP>] (“Falls are the leading cause of injury among children.”).

her that Ryder had accidentally sprayed “room spray” in his face, causing his eyes to swell.¹¹ After returning home from work, Hogue took Ryder to the doctor, but the doctor did not identify any significant concerns.¹² Approximately one week later, Trent told Hogue that Ryder had fallen off his bike, resulting in a small cut and a blood blister on the inside of his bottom lip.¹³ Moreover, Trent “reminded” Hogue that these minor injuries were typical for young, rambunctious boys, leading her to believe that perhaps she worried too much about small cuts and bruises.¹⁴

Hogue had never observed Trent raise his voice or display aggression toward Ryder.¹⁵ Thus, there did not seem to be any reason for Hogue to think that Trent would harm or injure Ryder. Nevertheless, out of caution, Hogue searched online for warning “signs of child abuse” and downloaded an informational PDF onto her phone.¹⁶ After carefully perusing the PDF, she concluded that Ryder had not displayed any typical signs associated with child abuse.¹⁷ In addition, Hogue searched online for warning “signs of domestic violence” because she worried that she perhaps “attract[ed] those [types] of men.”¹⁸ After doing so, she concluded that Trent had not displayed any behaviors commonly associated with child abuse or domestic violence.¹⁹ Hogue did discover that Trent’s ex-wife had previously filed a Victim Protective Order (VPO) against him.²⁰ When Hogue confronted Trent about the VPO, he responded that his ex-wife was just “jealous that he had a new girlfriend.”²¹ Thus, Trent persuaded Hogue that he was the safe and caring person he presented himself to be.²²

On New Year’s Eve of 2019, Trent agreed to care for Ryder while Hogue worked a double shift at Riverwind Casino, in Norman, Oklahoma.²³ That evening, before the start of Hogue’s second shift, she

11. OFF. OF JUV. SYS. OVERSIGHT, *supra* note 4.

12. *Accused*, *supra* note 2.

13. *Id.*

14. *Id.*

15. *See id.*

16. *Id.*

17. *Id.*

18. OFF. OF JUV. SYS. OVERSIGHT, *supra* note 4.

19. *Accused*, *supra* note 2.

20. OFF. OF JUV. SYS. OVERSIGHT, *supra* note 4.

21. *Id.*

22. *Accused*, *supra* note 2 (explaining that Trent mentally and emotionally abused Hogue).

23. *Id.*

spoke to Trent and Ryder via FaceTime and everything seemed fine.²⁴ Hogue arrived home from work at about 3:00 a.m. on January 1, 2020, and went straight to bed, where Ryder seemed to be sleeping peacefully next to Trent.²⁵ About seven hours later, Hogue woke up to a mother's worst nightmare: Ryder's body was cold, and he was not breathing.²⁶ Trent was gone, having left sometime before Hogue awoke "with no explanation."²⁷ Hogue immediately called 911 and performed CPR on Ryder until paramedics arrived.²⁸ The paramedics rushed Ryder to the hospital, where he was pronounced dead.²⁹ Hogue tried to call Trent from the hospital several times, but could not get ahold of him.³⁰

The medical examiner's report concluded that Ryder had died from blunt force trauma to his head and abdomen, which was likely a result of physical child abuse.³¹ Accordingly, law enforcement issued an arrest warrant for Trent, contacted the Oklahoma Department of Human Services, and began investigating Ryder's death.³² During the first few days of the investigation, Trent's whereabouts remained unknown.³³ However, on January 4, 2020, law enforcement found Trent in the Wichita Mountains Wildlife Reserve where he had taken his own life.³⁴ Critically, before committing suicide, Trent had carved a message into a tree that said, "Rebecca is Innocent."³⁵ It seemed obvious that Trent had inflicted fatal injuries on Ryder while Hogue was at work and then fled to the Wichita Mountains and killed himself.³⁶

24. *Id.*

25. *Id.*

26. OFF. OF JUV. SYS. OVERSIGHT, *supra* note 4.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Accused*, *supra* note 2.

31. OFF. OF JUV. SYS. OVERSIGHT, *supra* note 4.

32. *Id.*

33. *Accused*, *supra* note 2.

34. Reese Gorman, *Lead detective in Hogue case testifies; prohibited from sharing opinion*, THE NORMAN TRANSCRIPT (Nov. 2, 2021), https://www.normantranscript.com/news/lead-detective-in-hogue-case-testifies-prohibited-from-sharing-opinion/article_3891bb58-3c43-11ec-9d7e-2b3828d77f99.html [https://perma.cc/WP7B-DN4N].

35. *Id.*

36. Samantha Michaels, *Her Boyfriend Killed Her Baby While She Was at Work. Oklahoma Is Sending Her to Prison*, MOTHER JONES (Feb. 10, 2022), <https://www.motherjones.com/criminal-justice/2022/02/child-abuse-mothers-sexist-failure-to-protect-law-rebecca-hogue-oklahoma/> [https://perma.cc/L3JZ-JY6D].

Nevertheless, the Norman Police Department continued to investigate Ryder's death, focusing on whether Hogue took part in the crime.³⁷ Hogue fully cooperated with law enforcement throughout the entire investigation.³⁸ She willingly participated in interviews and provided law enforcement with any evidence they requested, including her cell phone.³⁹ After a thorough investigation, the two lead detectives on the case concluded that Hogue had never harmed Ryder and was unaware Trent had abused him.⁴⁰ Thus, the two lead detectives recommended that Hogue not be charged regarding Ryder's death.⁴¹ Despite the conclusions and recommendations of the investigators, Cleveland County District Attorney Greg Mashburn asserted that "his office decided to move forward with prosecuting Hogue in order to seek 'justice for a baby that was killed.'"⁴² And on July 6, 2020, Hogue was officially charged with "Murder in the First Degree by Permitting Child Abuse" in the District Court of Cleveland County, Oklahoma.⁴³

Rebecca Hogue's trial began on October 25, 2021.⁴⁴ During opening statements, the prosecutor told the jury that Hogue "put [Ryder] at risk and she *knew* it."⁴⁵ Further, the prosecutor stated that, in the alternative, even if Hogue did not know about Trent's abuse, she should have known about the abuse and she willfully disregarded warning signs indicating that Ryder was at risk of "physical abuse or neglect" while in Trent's care.⁴⁶ To support this assertion, the prosecutor relied on the minor injuries to

37. Gorman, *supra* note 34, at 4.

38. *Id.*

39. *Accused*, *supra* note 2.

40. *Id.*

41. *Rebecca Hogue: Mother jailed for 16 months after boyfriend killed son*, *supra* note 1.

42. Brianna Bailey, *The Frontier: Her boyfriend allegedly killed her 2-year-old son, but she's charged with murder*, TAHLEQUAH DAILY PRESS (July 22, 2020), https://www.tahlequahdailypress.com/news/the-frontier-her-boyfriend-allegedly-killed-her-2-year-old-son-but-she-s-charged/article_8aee26d8-cc2e-11ea-a22e-57b1d9d7f504.html [<https://perma.cc/8CFC-MBD2>].

43. *State v. Hogue*, No. CF-2020-762 (Dist. Ct. Cleveland Cnty. July 6, 2020).

44. *Id.*

45. Reese Gorman, *Attorney's debate whether Hogue had knowledge of child abuse on the first day of trial*, THE NORMAN TRANSCRIPT (Oct. 27, 2021) (emphasis added), https://www.normantranscript.com/news/attorneys-debate-whether-hogue-had-knowledge-of-child-abuse-on-first-day-of-trial/article_963d871a-3774-11ec-965a-973ffd693ad2.html [<https://perma.cc/D2UF-FNWW>].

46. Bailey, *supra* note 42.

Ryder that Hogue noticed during the few weeks before his death.⁴⁷ In addition, the prosecutor claimed that it was “obvious” Trent was not a safe person, as evidenced by his former conviction of driving under the influence, a pending charge of assault and battery against an emergency medical provider, and failure to complete a court-ordered drug program.⁴⁸ Thus, the prosecutor acknowledged that it was Christopher Trent who killed Ryder but claimed that this tragedy only happened because “Rebecca Hogue gave him access” to her child.⁴⁹

In response, Hogue’s attorney, Andrew Casey, emphasized that Hogue could not have known or anticipated that Trent would kill Ryder.⁵⁰ Casey noted that Trent gave Hogue reasonable explanations for all of Ryder’s minor injuries and that the injuries occurred only a few weeks before Ryder’s death.⁵¹ Further, Casey emphasized that Hogue was simply unaware of Trent’s abuse of Ryder until it was too late and when she realized what had happened, she did everything that she could to save Ryder’s life.⁵² Finally, Casey pointed out that if Christopher Trent were still alive, he would have been charged with murdering Ryder and Hogue would certainly have testified against him to seek justice for her son.⁵³ But because Trent was not available to be prosecuted, the Cleveland County District Attorney’s Office charged Hogue instead.⁵⁴

During the eight day trial, the jury was shown numerous pictures of Ryder’s dead body, but they were not allowed to consider much of the evidence in favor of Hogue’s defense, such as the tree carving or the lead detectives’ opinion that charging Hogue was absurd.⁵⁵ During his closing argument, Casey pointed out that “when Hogue took Ryder to check out some bruises, the doctors never confirmed his bruises were child abuse. He asked the jury, ‘So, how should Hogue know?’”⁵⁶ Nevertheless, on

47. *Id.*

48. *Id.*

49. Gorman, *supra* note 45.

50. *Id.*

51. *Id.*; *see also Accused, supra* note 2.

52. *Id.*

53. *Id.*

54. *Id.*

55. *Accused, supra* note 2; *see State v. Hogue*, No. CF-2020-762 (Dist. Ct. Cleveland Cnty. July 6, 2020).

56. Brya Berry, *Fierce debate erupts after Cleveland County woman convicted of murder for 2-year-old son’s death from abuse by now-deceased boyfriend*, KFOR (Nov. 4, 2021, 8:18 PM), <https://kfor.com/news/local/fierce-debate-erupts-after-cleveland-county->

November 3, 2021, Hogue was convicted of Murder in the First Degree by Permitting Child Abuse.⁵⁷ The jury recommended a sentence of “[l]ife imprisonment,” which is the lowest sentence possible for this crime in Oklahoma.⁵⁸ Hogue’s conviction garnered nationwide and even international attention, seriously questioning whether Oklahoma’s law is just.⁵⁹

The purpose of this Note is to explain how Oklahoma’s “failure to protect” law allows for a First-Degree Murder conviction for someone (almost always the mother) whose “crime” may be as minimal as tort-level negligence in failing to recognize the *risk* that *someone else* would hurt or harm her child in *some way*, when that other person ends up killing the child. This Note will also provide context to this issue by first explaining the Model Penal Code’s four levels of “mens rea” and the development of “failure to protect” laws in the United States. Next, this Note will summarize and explain Oklahoma’s current statutory scheme. Additionally, this Note will highlight the striking incongruities within Oklahoma’s statutory scheme, which allows for the imposition of maximum criminal liability—specifically, a conviction of “First-Degree Murder,” with a minimum sentence of “life”—for an offense that may involve only minimal tort-level culpability. Accordingly, this Note will propose that Oklahoma require at least the mens rea of “recklessness” for the offense of “permitting” or “enabling” child abuse, meaning that a person could only be convicted of “permitting” or “enabling” child abuse if that person *actually recognized* the risk level of abuse that ultimately occurred and, nevertheless, decided to disregard the risk. Thus, this Note will propose that Oklahoma law should draw a much clearer and more just distinction between the crime of “enabling child abuse” when such abuse results in someone else killing a child and traditional “First-Degree Murder.”

woman-convicted-of-murder-for-2-year-old-sons-death-from-abuse-by-now-deceased-boyfriend/.

57. Summary Ord., State v. Hogue, No. CF-2020-762 (Dist. Ct. Cleveland Cnty. July 6, 2020).

58. *Id.*; see OKLA. STAT. tit. 21, § 701.9(A) (2023).

59. Rebecca Hogue: Mother jailed for 16 months after boyfriend killed son, *supra* note 1.

I. The Historical and Legal Background

The first step to understanding the problematic nature of Oklahoma's child abuse law in this context and the need for change is to understand both the distinct levels of mens rea and the evolution of "failure to protect" laws in the United States. The importance of precisely understanding the role of mens rea in determining guilt and the unique nature of "failure to protect" laws gives context to the current issue, and in particular, what it means to "enable" child abuse by "permitting" child abuse in Oklahoma.

A. Understanding Mens Rea: A Comprehensive Look

Criminal liability is based upon the combination of two basic elements: actus reus (the guilty act) and mens rea (the guilty mind).⁶⁰ Generally, both elements must be proven beyond a reasonable doubt in the realm of criminal law.⁶¹ Although actus reus is certainly important, mens rea is also critical in determining guilt.⁶² Yet, mens rea is a subtle and complex legal concept, leading to longstanding confusion and challenges within American criminal law.⁶³ In 1952, United States Supreme Court Justice Robert H. Jackson highlighted this confusion and inconsistency in defining the mental element of crime in America, stating that "the variety, disparity, and confusion" of judicial definitions of "the requisite but elusive mental element" of crime was problematic.⁶⁴

In 1953, the drafters of the Model Penal Code responded to Justice Jackson's remark and began working on proposing a clear and precise framework for mens rea, the result of which is still considered to be one of the most significant legal developments in American criminal law.⁶⁵ The Model Penal Code reduced nearly eighty miscellaneous mental states of criminal culpability to four carefully defined mental states, each associated with a specific level of moral and criminal culpability: "purposely," "knowingly," "recklessly," and "negligently," in descending

60. Ben Shaw-Parker, *Actus Reus vs Mens Rea: Criminal Liability, Defences and Legal Exceptions*, JURISTOPEDIA, <https://juristopedia.com/actus-reus-vs-mens-rea/> [https://perma.cc/6NRF-THPT].

61. *Id.*

62. *Id.*

63. Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815, 815 (1980).

64. *Id.* (citing *Morrisette v. United States*, 342 U.S. 246, 252 (1952)).

65. *Id.*

order of culpability.⁶⁶ Although the Model Penal Code's framework is not legally binding on states, it has served and continues to serve as a model for state criminal codes, encouraging similar laws in different jurisdictions.⁶⁷ In fact, following the Model Penal Code's publication in 1962, "nearly three-fourths of the states revised their criminal codes" in response to it.⁶⁸ Each level of culpability defined by the Model Penal Code is distinct and precise and will be reviewed herein.⁶⁹

i. Purposely

A mens rea of "purposely" is the highest level of culpability and warrants a maximum level of criminal liability because a person acting "purposely" engages in the prohibited conduct to cause the prohibited result.⁷⁰ According to the Model Penal Code:

A person acts purposely with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and
- (ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.⁷¹

For example, if a person hits a child because he or she wants to cause physical injury to the child, then that person has purposely hurt the child.

ii. Knowingly

The mens rea of "knowingly" denotes a lower level of culpability than that of "purposely."⁷² According to the Model Penal Code:

66. *Id.*

67. *Id.* at 815-16.

68. *Id.* (footnote omitted).

69. *Id.* at 818.

70. *Id.* at 818-19.

71. MODEL PENAL CODE § 2.02(2)(a) (AM. L. INST. 1962).

72. *Id.* § 2.02(2)(b).

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.⁷³

Often, “purposely” is merely viewed as just a more aggressive form of “knowingly,” but the two levels of culpability are certainly distinct.⁷⁴ The narrow distinction is the “presence of positive desire for the result” in purposeful conduct that is not present in a mental state of “knowledge.”⁷⁵ Furthermore, a mens rea of “knowingly” indicates that a person is fully cognizant and conscious that their conduct falls within the prohibited nature or that the attendant circumstances of the crime exist, and their conduct will almost certainly produce a prohibited result.⁷⁶ Again, it is important to note that a mental state of “knowingly” does not require a desire to bring about a certain result.⁷⁷

iii. Recklessly

The third level of culpability for purposes of criminal liability is “recklessly.” According to the Model Penal Code, a person acts recklessly:

when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of

73. *Id.*

74. Robinson, *supra* note 63, at 819.

75. *Id.* (emphasis omitted).

76. MODEL PENAL CODE § 2.02(2)(b) (AM. L. INST. 1962).

77. *Id.*

conduct that a law-abiding person would observe in the actor's situation.⁷⁸

Thus, a person acts recklessly when a person decides to commit a certain action despite knowing about the associated risks.⁷⁹ For instance, if a person causes injury to another person while driving under the influence of alcohol or other substances, then it can certainly be said that the person acted recklessly, and therefore, is guilty of causing harm.⁸⁰

iv. Negligently

Finally, negligence is the mildest form of criminal culpability.⁸¹ According to the Model Penal Code:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.⁸²

Moreover, criminal negligence requires "more than the deviation from reasonable conduct required for civil tort liability."⁸³ However, criminal negligence is open to a degree of interpretation and remains a topic of debate among criminal law scholars.⁸⁴

78. MODEL PENAL CODE § 2.02(2)(c) (AM. L. INST. 1962).

79. *Id.*

80. Jerome Hall, *Negligent Behavior Should be Excluded from Penal Liability*, MAURER L. REV. 632, 634 (1963).

81. Robinson, *supra* note 63, at 815.

82. MODEL PENAL CODE § 2.02(2)(d) (AM. L. INST. 1962).

83. Jessica Smith, *Criminal Negligence*, N.C. CRIM. L., A UNC SCH. OF GOV. BLOG (Nov. 18, 2010), <https://nccriminallaw.sog.unc.edu/criminal-negligence/> (citations omitted).

84. Robinson, *supra* note 63, at 817.

In particular, for decades, criminal law scholars have debated whether negligence is enough to justify criminal punishment.⁸⁵ Jerome Hall, a leading American criminal law scholar, is well-known for his support of the proposition that the Model Penal Code rightfully disfavors criminal liability for negligence.⁸⁶ According to Hall, it is well-established under the common law that most jurisdictions have at least required a mens rea of “recklessness” for a conviction of manslaughter.⁸⁷ Moreover, through his scholarly work, Hall has explained that allowing criminal liability for a mens rea of “negligence” raises ethical concerns.⁸⁸ Hall points out that “punishing a human being is a very serious matter. No one should be punished unless he has clearly acted immorally, i.e., voluntarily harmed someone, and unless a criminal sanction is both suitable and effective.”⁸⁹ Often, it is assumed that a person acted negligently and “violated a moral duty because he ‘could have’ acted carefully and thus conformed to his duty.”⁹⁰ Thus, Hall’s arguments provide strong support as to why the Model Penal Code rightfully disfavors criminal liability for a minimum mens rea of “negligence.”

B. The Evolution of “Failure to Protect” Laws in the United States

In the realm of criminal law there is generally no legal duty to assist or rescue a person in peril, even if that person is a child.⁹¹ However, there are specific circumstances where a duty to rescue does apply, particularly in situations involving special relationships.⁹² It is well-established that parents have a special relationship with their children.⁹³ In 1960, the Maryland Court of Appeals decided the case of *Palmer v. State*, establishing that parents have an affirmative duty to take action to rescue their children and, in particular, protect their children from abuse.⁹⁴ The horrific facts in the *Palmer* case provide a helpful context for

85. *Id.*

86. Hall, *supra* note 80, at 634.

87. *Id.*

88. *Id.* at 635.

89. *Id.* at 636 (emphasis omitted).

90. *Id.* at 638.

91. Laura King, Note, *Damned If You Do: The Rational Parent’s Quandary Under Criminal Failure-to-Protect Statutes*, 13 LIBERTY U. L. REV. 121, 124 (2018) (citing 40 AM. JUR. 2d *Homicide* § 82 (2018)).

92. *Id.*

93. *Id.*

94. *Id.*; see *Palmer v. State*, 164 A.2d 467, 473 (Md. 1960).

understanding a parent's affirmative duty to protect their children from abuse, modern-day child abuse laws, and the policy underlying "failure to protect."⁹⁵

i. Palmer v. State: A Parent's Affirmative Duty to Protect

In the case of *Palmer*, Theresa Palmer (Terry), a toddler, was physically abused by her mother's boyfriend, Edward McCue, on numerous occasions for several months.⁹⁶ For instance, McCue slapped Terry in the face when she refused to eat, leaving marks on Terry's face.⁹⁷ In addition, McCue pushed Terry on the stairs in the apartment where the three lived and spanked Terry with a belt so forcefully that it could be heard outside of the apartment.⁹⁸ Shockingly, the mother testified that she witnessed McCue bite Terry on both buttocks, but she considered this proper discipline because Terry had also bitten McCue.⁹⁹ Thus, Terry's mother allowed McCue to brutally abuse Terry and failed to rescue her from this abuse.¹⁰⁰ Tragically, Terry ultimately died from McCue's abuse.¹⁰¹

As a result, Terry's mother was charged with Involuntary Manslaughter.¹⁰² At trial, the State did not allege that the mother ever inflicted harm upon Terry.¹⁰³ Instead, the State contended that Terry's mother was guilty of "gross or criminal negligence" because she *allowed* her boyfriend to abuse her child, resulting in the child's death.¹⁰⁴ The mother did not deny actually witnessing McCue's use of force against Terry, but she argued that his forms of discipline, such as spanking and biting Terry, were not enough to cause Terry's death.¹⁰⁵ Therefore, Terry's mother argued that there was no need to "rescue" Terry, that such failure to do so did not constitute "gross or criminal negligence," and it was not a proximate cause of Terry's death.¹⁰⁶

95. King, *supra* note 91, at 124-25.

96. *Palmer*, 164 A.2d at 469-70.

97. *Id.* at 469.

98. *Id.* 469-71.

99. *Id.* at 471.

100. *Id.*

101. *Id.*

102. *Id.* at 468.

103. *Id.* at 472.

104. *Id.* at 469.

105. *Id.* at 472.

106. *Id.* at 469.

After hearing all of the evidence, the trial judge convicted Terry's mother of involuntary manslaughter, and rightfully so.¹⁰⁷ The mother appealed the conviction, and the Maryland Court of Appeals affirmed the trial court's decision.¹⁰⁸ Further, the court pointed out that McCue's actions would have put "any ordinary, reasonable person on notice that the child's life was truly and realistically in immediate peril."¹⁰⁹ Finally, the court concluded its opinion by noting that the mother "could, and should, have removed Terry from this danger" and that "[h]er failure to do so[] . . . [was] gross and criminal negligence" that contributed to the tragic death of Terry.¹¹⁰ Thus, the *Palmer* decision established the principle that parents are entrusted with a heightened duty to protect their children from abuse by third parties and that failure to do so can result in criminal liability.¹¹¹ This revolutionary concept paved the way for strengthened child abuse laws in the United States.¹¹²

ii. Criminalizing Child Endangerment

After *Palmer*, states began enacting "a new breed of statutes," i.e., statutes criminalizing child endangerment.¹¹³ These statutes were aimed at protecting children from physical abuse and neglect.¹¹⁴ The Model Penal Code proposed a narrow approach to child endangerment statutes, suggesting that "[a] parent, guardian, or other person supervising the welfare of a child . . . commits a misdemeanor if he *knowingly* endangers the child's welfare by violating a duty of care, protection or support."¹¹⁵ However, the Model Penal Code's framework did not delve into specific details regarding the nature of these parental duties.¹¹⁶ Consequently, regarding the crime of "child endangerment," individual states have developed their own guidelines outlining the specific duties and

107. *Id.* at 468.

108. *Id.* at 474.

109. *Id.*

110. *Id.*

111. King, *supra* note 91, at 125.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* (citing MODEL PENAL CODE § 230.4) (emphasis added).

116. *Id.*

obligations of parents and caregivers and the penalties for when these duties have been violated.¹¹⁷

In Oklahoma, a parent or guardian of a child commits child endangerment when the parent or guardian:

1. *Knowingly permits* physical or sexual abuse of a child;
2. Knowingly permits a child to be present at a location where a controlled dangerous substance is being manufactured or attempted to be manufactured . . . ;
3. Knowingly permits a child to be present in a vehicle when the person knows or should have known that the operator of the vehicle is impaired by or is under the influence of alcohol or another intoxicating substance; or
4. Is the driver, operator, or person in physical control of a vehicle in violation of Section 11-902 of Title 47 of the Oklahoma Statutes while transporting or having in the vehicle such child or children.¹¹⁸

Moreover, in contrast to the Model Penal Code's proposed framework, Oklahoma has taken a different approach by classifying child endangerment as a felony.¹¹⁹ Further, in Oklahoma, the penalty for child endangerment ranges from one to four years in prison, a fine of up to \$5,000, or both.¹²⁰ In contrast, Kansas classifies child endangerment as a misdemeanor.¹²¹ Furthermore, in Oklahoma and many other states, the criminalization of child endangerment led to the creation of modern forms of "failure to protect" laws.¹²²

117. *Id.*

118. OKLA. STAT. tit. 21, § 852.1(A)(1)-(4) (2023) (emphasis added); *see* OKLA. STAT. tit. 47, § 11-902 (pertaining to under the influence of alcohol or other intoxicating substances or combination thereof).

119. OKLA. STAT. tit. 21, § 852.1(C).

120. *Id.*

121. Jasmine Sankofa, *Failing to Protect: Oklahoma's Child Abuse and Neglect Statute Unfairly Punishes Mothers and Endangers Children*, FWD.US 1, 9 (Nov. 2022), <https://turningthepage.fwd.us/pdf/issue-brief-failing-to-protect.pdf> [<https://perma.cc/U6WD-N6QZ>] (citing KAN. STAT. § 21-5601 (2011)).

122. King, *supra* note 91, at 125.

iii. Mandatory Reporting Laws

In 1962, the Children's Bureau, the first federal agency dedicated to child welfare in the United States, sought to improve state responses to child abuse.¹²³ To do so, the Children's Bureau organized two meetings in Washington D.C., recommending that medical professionals report suspected cases of child abuse to the appropriate agency in their jurisdiction.¹²⁴ In 1963, Ohio was the first state to implement mandatory reporting laws for medical professionals.¹²⁵ By 1967, mandatory reporting laws were implemented in every state.¹²⁶ However, over time, the scope of mandatory reporting laws broadened.¹²⁷

Furthermore, in Oklahoma, "[e]very person having reason to believe that a child under the age of eighteen (18) years is a victim of abuse or neglect shall report the matter immediately to the Department of Human Services."¹²⁸ Thus, *every* person in Oklahoma, irrespective of their status as a private citizen or professional, must report if they suspect a child has been abused, irrespective of their relationship with the child.¹²⁹ Moreover, under Oklahoma law, "[a]ny person who knowingly and willfully fails to promptly report suspected child abuse or neglect or who interferes with the prompt reporting of suspected child abuse or neglect may be reported to local law enforcement for criminal investigation and, upon conviction thereof, shall be guilty of a misdemeanor."¹³⁰ In addition, "[a]ny person with prolonged knowledge of ongoing child abuse or neglect who knowingly and willfully fails to promptly report such knowledge may be reported to local law enforcement for criminal investigation and, upon conviction thereof, shall be guilty of a felony."¹³¹ Like mandatory

123. John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 456 (2008).

124. *Id.*

125. Leonard G. Brown III & Kevin Gallagher, *Mandatory Reporting of Abuse: A Historical Perspective on the Evolution of States' Current Mandatory Reporting Laws with a Review of the Laws in the Commonwealth of Pennsylvania*, 59 Vill. L. Rev. Tolle Lege 37, 40 (2014).

126. Myers, *supra* note 123.

127. *Id.*

128. OKLA. STAT. tit. 10A, § 1-2-101(B)(1) (2023).

129. *Id.*

130. OKLA. STAT. tit. 10A, § 1-2-101(C) (2023).

131. *Id.* (defining "prolonged knowledge" as knowledge of at least six (6) months of child abuse or neglect).

reporting laws, “failure to protect” laws emerged in the 1960s and have broadened over time.¹³²

iv. The Failure to Protect

In the 1960s, “failure to protect” laws were aimed at prosecuting parents who *knew* that their children had been abused by someone else, yet failed to report or stop the abuse.¹³³ Arguably, the criminalization of “failure to protect” is one of the most unique laws in American jurisprudence, “penalizing inaction rather than action” and, in particular, penalizing for failure to prevent harm from another person.¹³⁴ Today, every state has implemented some form of “failure to protect” law.¹³⁵ However, the definition and legal consequences for the crime vary widely among jurisdictions.¹³⁶

Oklahoma has criminalized “failure to protect” since 1963,¹³⁷ defining the crime as the “failure to take reasonable action to remedy or prevent child abuse or neglect.”¹³⁸ Additionally, in Oklahoma, criminal liability for this crime extends to *any* “non-abusing parent or guardian who knows the identity of the abuser or the person neglecting the child, but lies, conceals, or fails to report the child abuse or neglect or otherwise take reasonable action to end the abuse or neglect.”¹³⁹ Further, Oklahoma classifies this crime as a felony; whereas many other states, like California, classify it as a misdemeanor.¹⁴⁰ In six states, including “Oklahoma, Missouri, Nebraska, Nevada, South Carolina and West Virginia,” the maximum penalty for “failure to protect” is a sentence of life

132. See Chrisanna Mink, *California can take kids from abused moms. Why the separation can harm both*, CALMATTERS (Dec. 7, 2023), <https://calmatters.org/justice/2023/12/failure-to-protect/> [https://perma.cc/S8F6-5XEU].

133. *Id.*

134. King, *supra* note 91, at 124.

135. Jeanne A. Fugate, Note, *Who’s Failing Whom? A Critical Look at Failure-to-Protect-Laws*, 76 N.Y.U. L. REV. 272, 278 (2001).

136. *Id.* at 278-79.

137. Megan Lambert & Lindsey Feingold, *Oklahoma’s Failure to Protect Law and the Criminalization of Motherhood*, ACLU OF OKLA. (Nov. 29, 2020, 11:30 AM), <https://www.acluok.org/en/publications/oklahomas-failure-protect-law-and-criminalization-motherhood> [https://perma.cc/J9TG-SS2S].

138. OKLA. STAT. tit. 10A, § 1-1-105(26) (2021).

139. *Id.*

140. Mink, *supra* note 132, at 8.

imprisonment.¹⁴¹ “In Texas, the *maximum* penalty [for this crime] is 99 years” in prison.¹⁴²

The criminalization of “failure to protect” has been a topic of intense debate, often leading to sharply divided opinions.¹⁴³ For example, opponents of Oklahoma’s “failure to protect” law argue that Hogue’s conviction is indicative of a larger systemic issue, highlighting the inappropriate incarceration of individuals in general, especially women.¹⁴⁴ It is worth noting that since 2009, more than 300 people have been charged with “failure to protect,” with a staggering 90% of convictions involving women, many of whom had no prior felony convictions.¹⁴⁵ Additionally, opponents argue that the State’s modern-day “failure to protect” law, commonly referred to as “enabling child abuse,” grants the State too much discretion, allowing for life sentences regardless of the level of culpability, specific circumstances, or the extent of harm or risk involved.¹⁴⁶ Considering these concerns, a comprehensive analysis of Oklahoma’s current child abuse laws is necessary to give these critiques the nuanced consideration they deserve.

II. Oklahoma’s Child Abuse Laws

The National Violent Death Reporting System reports that, on average, sixty-three children died from violence between 2016 and 2020 in Oklahoma, and homicide is the second leading cause of death of children in the State.¹⁴⁷ Moreover, in Oklahoma, forty-one percent of all child abuse homicides from 2016 to 2020 were perpetrated by either biological parents, step-parents, or foster parents.¹⁴⁸ According to the Annie E. Casey Foundation and the Oklahoma Policy Institute, 14,466

141. *Id.*

142. *Id.* (emphasis added)

143. *See id.*

144. Max Bryan, *Woman’s case points to larger picture of Oklahoma incarceration*, CNHI NEWS (Apr. 14, 2022), https://www.cnhi.news.com/cnhi/article_25dca22e-bc55-11ec-a173-0bf482b31d1f.html.

145. Sankofa, *supra* note 121, at 11.

146. *Id.*

147. NAT’L VIOLENT DEATH REPORTING SYS., *Violent Deaths Among Children 0-17 Years of Age (2016-2020)*, OKLA. ST. DEP’T OF HEALTH, <https://oklahoma.gov/content/dam/ok/en/health/health2/aem-documents/prevention-and-preparedness/injury-prevention/okvdrs/okvdrs-brief-violent-deaths-among-children.pdf> [<https://perma.cc/BAC8-D767>].

148. *Id.*

Oklahoma children experienced some “confirmed” form of abuse or neglect in 2021.¹⁴⁹ It is important to note that these statistics do not, however, include any unreported or unconfirmed occurrences.¹⁵⁰ The Oklahoma legislature has aggressively addressed the problem of child abuse in the State by enacting broad and punitive child abuse laws.

A. The Definition of Abuse

In the context of “child abuse,” Oklahoma defines “abuse” broadly to include both actual harm and “threatened harm to [the] health or welfare” of a child “by a person responsible for the child’s health or welfare.”¹⁵¹ Further, Oklahoma’s child abuse statute delineates a non-exhaustive list of conduct that is considered “child abuse,” including “non-accidental, physical or mental injury,” “sexual abuse, [or] sexual exploitation.”¹⁵² Surprisingly, the statute expressly excludes “ordinary force as a means of discipline,” such as “spanking, switching, or paddling.”¹⁵³ Considering such, the question arises: At what point does “ordinary force as means of discipline” become abuse? In 1988, the Oklahoma Court of Criminal Appeals addressed this question by distinguishing between unlawful abuse and lawful discipline in the case of *Johnson v. State*.¹⁵⁴

In *Johnson*, D.J., a child, was in the truck with his stepfather on the way to Walmart when the stepfather told D.J. that he was going to “tie him up and throw him into the river.”¹⁵⁵ The stepfather then went into Walmart and left D.J. in the truck.¹⁵⁶ While the stepfather was in Walmart, D.J. left the truck and went into a nearby restaurant to ask for help.¹⁵⁷ D.J. asked a restaurant employee to use the telephone, but when he could not properly dial a phone number, a restaurant employee contacted law enforcement for

149. KIDS COUNT DATA CTR., *Current Child Abuse & Neglect Confirmations in Oklahoma*, ANNIE E. CASEY FOUND. (July 2024), <https://datacenter.aecf.org/data/tables/5514-current-child-abuse-neglect-confirmations#detailed/2/any/false/2048,574,1729,37,871,870,573,869,36,868/any/12090,12091>.

150. *Id.*

151. *Id.*

152. *Id.*

153. OKLA. STAT. tit. 10A, § 1-1-105v1(2) (2021).

154. *Johnson v. State*, 751 P.2d 1094, 1096 (Okla. Crim. App. 1988).

155. *Id.* at 1095.

156. *Id.*

157. *Id.*

him.¹⁵⁸ Upon arrival, law enforcement noticed that D.J. had bruises on his head and legs.¹⁵⁹ D.J. told law enforcement that “his stepfather had beaten him” and “threatened to tie him up and throw him in [a] river.”¹⁶⁰

As a police officer was conversing with D.J., the stepfather entered the restaurant looking for D.J.¹⁶¹ Law enforcement asked the stepfather to go get D.J.’s mother and meet them at the police station; the stepfather complied with the request.¹⁶² Upon arriving at the police station, both the mother and the stepfather were questioned about D.J.’s injuries, and further investigation revealed bruising on D.J.’s back and genitals.¹⁶³ Initially, the stepfather and mother were both charged with “child abuse.”¹⁶⁴ But their cases were later severed, and D.J.’s mother was charged with “Permitting Child Abuse.”¹⁶⁵

D.J.’s mother was convicted of “Permitting Child Abuse” following a jury trial and sentenced to imprisonment for two-and-a-half years.¹⁶⁶ D.J.’s mother appealed the conviction, arguing that although she was aware of bruises on D.J., “ordinary bruising” did not satisfy Oklahoma’s statutory definition of “abuse.”¹⁶⁷ To support her argument, D.J.’s mother relied on the “Commission Comment” to the relevant Oklahoma Uniform Jury Instructions, which explains that the conduct proscribed by the statute must be “extreme and severe.”¹⁶⁸ Thus, D.J.’s mother contended that D.J.’s injuries were a result of “ordinary means of discipline.”¹⁶⁹

The Court acknowledged that “ordinary bruis[ing]” does not necessarily constitute “abuse” but determined that the stepfather’s disciplinary methods and D.J.’s injuries were more than ordinary injuries as evidenced by the trial record.¹⁷⁰ For instance, D.J.’s stepfather disciplined him with a belt and a yardstick on numerous occasions, using “unreasonable force,” which resulted in “extreme and severe” bruising.¹⁷¹

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 1095-96.

163. *Id.* at 1096.

164. *Id.*

165. *Id.*

166. *Id.* 1095-96.

167. *Id.* at 1096.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

In addition, the stepfather disciplined D.J. by using clamps on his hands, which resulted in bruising that persisted for over a month.¹⁷² Moreover, the Court noted that despite D.J.'s obvious and serious injuries, the mother never took D.J. to the doctor.¹⁷³ In light of these circumstances, the Court concluded that the stepfather's conduct was far from *ordinary means of discipline* and, instead, that it was conduct that the legislature intended to classify as "abuse."¹⁷⁴ Therefore, the mother did not permit *ordinary force as means of discipline*—she permitted child abuse.¹⁷⁵ Thus, the *Johnson* case illustrates the basic difference between *child abuse* and *ordinary force as means of discipline* and introduces two distinct child abuse crimes: "engaging" in child abuse, i.e., the stepfather, and "enabling" child abuse, i.e., the mother.

B. Engaging in Child Abuse

In Oklahoma, the crime of child abuse is defined as:

- a. the willful or malicious harm or threatened harm . . . to the health, safety or welfare of a child under eighteen (18) years of age by a person responsible for a child's health, safety or welfare, or
- b. the act of willfully or maliciously injuring, torturing or maiming a child under eighteen (18) years of age by any person.¹⁷⁶

This crime of engaging in child abuse is classified as a felony and can result in a fine in the range of \$500 to \$5,000, a sentence in the range of one year to life, or a combination of both penalties.¹⁷⁷ If the child abuse results in death, then the charge is first-degree murder, even if death was not the intended result of the act that caused the death.¹⁷⁸

In the case of *Fairchild v. State*, the Oklahoma Court of Criminal Appeals established that first-degree murder involving a child is a "general

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

176. OKLA. STAT. tit. 21, § 843.5(O)(1)(a-b) (2024).

177. OKLA. STAT. tit. 21, § 843.5(A) (2024).

178. OKLA. STAT. tit. 21, § 701.7(C) (2023).

intent” crime.¹⁷⁹ In that case, the defendant was charged and convicted of first-degree murder for the death of a child, Adam, who was only three years old.¹⁸⁰ The defendant admitted that he intended to abuse Adam but argued that he did not intend for Adam to die.¹⁸¹ The Court ruled general intent was sufficient.¹⁸² The Court explained that the intent to *willfully* or *maliciously* abuse a child, as outlined in Oklahoma’s “engaging” in child abuse law, is sufficient to satisfy the crime of felony child abuse murder if that abuse results in a child’s death.¹⁸³

C. Enabling Child Abuse

In Oklahoma and many other jurisdictions, the concept of “enabling” child abuse refers to a range of acts or omissions that allegedly contribute to or aid in the abuse of a child by someone else, and this crime applies to persons responsible for a child’s “health, safety or welfare.”¹⁸⁴ Notably, the “enabling” child abuse crime applies to an *extremely broad* range of persons “responsible for [the] child’s health, safety[] [and] welfare,” which includes:

a parent; a legal guardian; custodian; a foster parent; a person eighteen (18) years of age or older with whom the child’s parent cohabitates or any other adult residing in the home of the child; an agent or employee of a public or private residential home, institution, facility or day treatment program . . . or an owner, operator, or employee of a child care facility¹⁸⁵

The penalty for “enabling” child abuse is the same as the penalty for “engaging” in child abuse, i.e., up to life in prison.¹⁸⁶

Moreover, the word “enabling” in the context of child abuse is what distinguishes the crime of enabling child abuse from the crime of

179. Fairchild v. State, 1999 OK CR 49, ¶ 27, 998 P.2d 611, 618.

180. *Id.* ¶ 3, 998 P.2d at 615.

181. *Id.* ¶¶ 24, 48-55, 998 P.2d at 618, 622-23.

182. *Id.*

183. *Id.*

184. OKLA. STAT. tit. 21, § 843.5(B) (2023).

185. OKLA. STAT. tit. 10A § 1-1-105(53) (2021).

186. *Id.* § 843.5(B).

“engaging” in child abuse.¹⁸⁷ In the statute, “enabling child abuse” is defined as “the causing, procuring or permitting of child abuse.”¹⁸⁸ Strangely, the legislature failed to define the term “procure.”¹⁸⁹ According to Webster’s Dictionary, “procure” means to “induce” or “bring about.”¹⁹⁰ However, the statute does define “permit” as “to authorize or allow for the care of a child by an individual when the person authorizing or allowing such care *knows or reasonably should know* that the child will be placed at risk . . . [of] harm.”¹⁹¹ Considering such, “permitting” child abuse in the context of the Oklahoma “enabling” child abuse statute is often considered to be Oklahoma’s modern-day “failure to protect” law.¹⁹²

As with “failure to protect” laws, the policy motivated behind “permitting” child abuse liability as a form of “enabling” child abuse is that a person responsible for a child’s health, safety, and welfare has a moral obligation to protect the child—and culpably fails to do so—when he or she allows the child to be harmed by someone else.¹⁹³ Thus, if the “willful permitting” of child abuse results in death, then the person responsible for the child may be charged with first-degree murder, as was Rebecca Hogue.¹⁹⁴

III. “Willfully” Allowing Child Abuse

A. Differentiating Between “Willful” and “Purposeful” Mental States

In criminal law, the term “willfully” is often used to refer to a specific mental state or intent.¹⁹⁵ It is critical to differentiate between acting “willfully” and “purposely” in order to accurately understand the crime of permitting child abuse in Oklahoma and the incongruities therein. In

187. Okla. Unif. Jury Instr. CR 4-36.

188. OKLA. STAT. tit. 21, § 843.5(O)(5) (2023).

189. See OKLA. STAT. tit. 21, § 843.5 (2023).

190. *Procure*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/procure> [https://perma.cc/K465-U4RM].

191. OKLA. STAT. tit. 21, § 843.5(O)(11) (2023) (emphasis added).

192. Victoria Law, *Oklahoma’s “Child Abuse” Law Doesn’t Protect Children—It Criminalizes Mothers*, TRUTHOUT (Nov. 19, 2022), <https://truthout.org/articles/oklahomas-child-abuse-law-doesnt-protect-children-it-criminalizes-mothers/> [https://perma.cc/E59R-GKXS].

193. King, *supra* note 91, at 129.

194. OKLA. STAT. tit. 21, § 701.7(C) (2023).

195. Jury Instructions at 10 (Dist. Ct. Cleveland Cnty. Filed on Nov. 4, 2021), *State v. Hogue*, CF-2020-762 (Dist. Ct. Cleveland Cnty. July 6, 2020).

Hogue's case, the jury instructions define "willful" as "a willingness to commit the act or omission referred to, but does not require any intent to violate the law or to acquire any advantage."¹⁹⁶ Therefore, in the context of "willfully permitting" child abuse, "willful" should be understood to mean willingly allowing a child to be abused. The case of *United States v. Walker* demonstrates how a parent "willfully or knowingly permits" child abuse.¹⁹⁷

B. United States v. Walker: A Clear Case of Culpability

In *Walker*, the mother, Amanda Lyn Walker, witnessed her boyfriend abuse her then-two-year-old son, R.T., on numerous occasions for seven months.¹⁹⁸ For instance, when R.T. refused to eat, the mother's boyfriend shoved food "into R.T.'s mouth while R.T. was choking and crying."¹⁹⁹ Rather than helping her child, the mother walked into the other room because "she did not want to hear R.T. cry[]." ²⁰⁰ Moreover, the mother protected her boyfriend rather than protecting her child.²⁰¹ Concerned family members confronted the mother about "a dark handprint-shaped bruise on R.T.'s face and small bruises" on the lower half of his body.²⁰² The mother, with the knowledge that her boyfriend had abused R.T., told family members that the bruises were a result of accidental incidents.²⁰³

On one particular occasion, the abuse resulted in severe injuries to R.T., and the mother finally took him to the hospital, where he was diagnosed with "severe external and internal injuries."²⁰⁴ Again, knowing that R.T.'s injuries were a result of her boyfriend's abuse, the mother told medical professionals that R.T. had fallen off of his bed onto a scooter.²⁰⁵ However, it was obvious to medical professionals that R.T. could not have

196. Jury Instructions at 10 (filed on Nov. 4, 2021), *Hogue*, CF-2020-762.

197. *United States v. Walker*, 74 F.4th 1163, 1174 (10th Cir. 2023) (noting Appellant was charged with two counts of "Enabling Child Abuse" under Oklahoma law and charged "under the Assimilated Crimes Act because R.T. is an Indian and the offense conduct took place within the boundaries of the Muscogee (Creek) Reservation").

198. *Id.* at 1175.

199. *Id.*

200. *Id.*

201. *Id.* at 1176.

202. *Id.* at 1175.

203. *Id.*

204. *Id.*

205. *Id.*

sustained the injuries by merely falling off his bed.²⁰⁶ When the suspected abuse was reported to law enforcement and DHS, the mother asked her family members who had previously confronted her about their concerns to refrain from cooperating with law enforcement during the investigation.²⁰⁷ The mother's boyfriend was convicted of child abuse, and the mother was convicted of enabling child abuse.²⁰⁸ In this case, the mother was rightfully convicted of enabling child abuse because she willfully and knowingly allowed her boyfriend to abuse her child and willfully and knowingly failed to take any steps to protect him.

In the case of *Walker*, the application of Oklahoma's "enabling child abuse" law appears to be fundamentally fair and just. Willfully allowing a child to be abused in this way is a horrendous crime that justifies criminal liability. There is absolutely no excuse or justification for a parent to actually witness his or her child being harmed and then do nothing to protect their child. However, whether criminal liability for "permitting" child abuse is fundamentally fair in other non-similar cases is quite debatable.

IV. The Definition of "Permitting" in Child Abuse Cases

A. The Problem with "Permitting"

The statutory text of Oklahoma's law raises serious concerns due to the definition of "permitting" in the context of "enabling child abuse." While Oklahoma's "enabling child abuse" law seems to criminalize the "willful" allowance of child abuse, the interpretation of "permitting" as a form of "enabling child abuse" imputes a lower, minimal mens rea of tort-like negligence.²⁰⁹ This means that for a felony child abuse conviction of first-degree murder, as in Hogue's case, the prosecution only needs to prove that a person responsible for a child's well-being simply failed to recognize the warning signs of child abuse when the child is harmed by another person.²¹⁰

Moreover, defining "permitting" in the context of child abuse as "to authorize or allow for the care of a child by an individual when the person

206. *Id.*

207. *Id.* at 1176.

208. *Id.* at 1177.

209. OKLA. STAT. tit. 21, § 843.5(O)(5), (11) (2021).

210. *Id.* § 843.5(O)(11).

authorizing or allowing such care knows or *reasonably should know* that the child will be placed at risk . . . [of] harm” is what allows the State to impose maximum “murder” criminal liability on someone who did not even realize that a child was at risk of being abused in some way by someone else, let alone being killed by someone else.²¹¹ Critically, how can a person “willfully permit” child abuse if they were not even aware of the risk of harm to their child? This very worrisome disparity has existed for decades and has yet to be honestly addressed or solved.

B. Tondalao Hall

In 2004, Tondalao Hall was a nineteen-year-old mother of three children, living with Robert Braxton, the biological father of her two younger children.²¹² Hall and Braxton met sometime between 2000 and 2001, when she was only a sophomore in high school.²¹³ Braxton was physically and verbally abusive towards Hall, and the abuse became more severe in August of 2004, when their second child was born.²¹⁴ However, Hall never witnessed Braxton abuse any of her children.²¹⁵ In fall 2004, Hall noticed that their twenty-month-old son had a swollen leg.²¹⁶ She contacted their pediatrician, who told her to put an ice pack on the child’s leg.²¹⁷ Hall asked Braxton what happened to their son, but he denied having any knowledge of the injury.²¹⁸ A couple of days later, their son was still in pain, so Hall took the child to the hospital where he was diagnosed with broken ribs and a broken femur.²¹⁹ Shortly thereafter, it

211. *Id.* (emphasis added).

212. Alex Campbell, *This Battered Woman Wants To Get Out Of Prison*, BUZZFEED NEWS (Nov. 11, 2014, 3:48 PM), <https://www.buzzfeednews.com/article/alexcampbell/this-battered-woman-wants-to-get-out-of-prison> [https://perma.cc/Y9AT-JW7B].

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*; see Jennifer Palmer, *Seeking clemency: Oklahoma woman seeks change in 30-year child abuse sentence*, THE OKLAHOMAN (Apr. 6, 2015, 2:00 PM), <https://www.oklahoman.com/story/news/local/oklahoma-city/2015/04/05/seeking-clemency-oklahoma-woman-seeks-change-in-30-year-child-abuse-sentence/60755394007/> [https://perma.cc/KEJ3-EELZ].

217. Palmer, *supra* note 216.

218. *Id.*

219. *Id.*

was discovered that their three-month-old daughter had similar injuries.²²⁰ Following the hospital visit, Hall and Braxton were arrested.²²¹ Braxton was charged with two counts of felony child abuse, and Hall was charged with two counts of permitting child abuse, but their cases were tried separately.²²²

During Braxton's trial, Hall was summoned as the State's main witness.²²³ When prosecutor Angela Marsee asked Hall to elaborate on Braxton's treatment of their children, Hall testified that she had never witnessed Braxton abuse their children.²²⁴ Although Hall attempted to testify about Braxton strangling her during her pregnancy, the defense objected to the relevance of the testimony, and the objection was upheld.²²⁵ Consequently, with Hall unable to testify about abuse that she did not actually observe, the State's evidence against Braxton for child abuse was limited.²²⁶ During a recess, the State offered Braxton "a deal," and he pled guilty to injuring their three-month-old daughter.²²⁷ Braxton was only "sentenced to [ten] years in prison," with "eight of those years . . . suspended," enabling his "release[] for time served."²²⁸

There was no evidence indicating that Hall knew that Braxton had harmed their children.²²⁹ However, instead of going to trial, Hall decided to enter a "blind plea," i.e., a guilty plea without an agreement regarding sentencing.²³⁰ Hall pled guilty to enabling child abuse by "permitting"

220. *Id.*

221. *Id.*

222. ACLU OK, *The Heartbreaking Case of Tondalao Hall*, ACLU OKLA. (Nov. 25, 2015, 1:45 PM), <https://www.acluok.org/en/news/heartbreaking-case-tondalo-hall> [<https://perma.cc/B4C2-VLAX>].

223. Campbell, *supra* note 212.

224. *Id.*

225. Roxanna Asgarian, *Oklahoma Woman Imprisoned For Boyfriend's Abuse Gets Chance At Freedom*, THE APPEAL (Oct. 8, 2019), <https://theappeal.org/oklahoma-woman-imprisoned-for-boyfriends-abuse-gets-chance-at-freedom/> [<https://perma.cc/WM8Q-6L5Y>].

226. Campbell, *supra* note 212.

227. *Id.* (explaining that Braxton claimed he became frustrated while he was changing their daughter's diaper, causing him to break "her bones by 'using too much force and pressure for a baby'").

228. *Id.* (noting that Hall did not receive any deal for testifying against Braxton, and she testified against him even after Braxton had made threats of harm to her while the two were awaiting trial).

229. Brief in Support of Application for Post-Conviction Relief at 36, *State v. Hall*, No. CF-2004-6403 (Dist. Ct. Okla. Cnty. Jan. 31, 2018).

230. Palmer, *supra* note 216.

Braxton to abuse both of their children in the fall of 2004 to avoid trial—she was terrified of Braxton—and at the same time, she did not want to spend the rest of her life in prison, away from her children.²³¹ During Hall’s sentencing hearing, on December 20, 2006, prosecutor Marsee stated that Hall deserved “to spend ‘a significant portion of the rest of her life’ in prison” because she is the mother of the children and “the one person in this world who should be standing up for them . . . yet ‘they were in pain because of what she didn’t do, and she should pay for that.’”²³² Hall was subsequently sentenced to thirty years in prison: fifteen years for each of the two counts of enabling child abuse, to be served consecutively.²³³

Hall appealed her case, but her appeal was rejected.²³⁴ Her post-conviction application was also denied.²³⁵ In 2014, “Hall applied for clemency.”²³⁶ In her clemency application, Hall stated:

I am responsible for failing my family — for not predicting what Robert was capable of and for placing my children in a dangerous situation. Despite my failures, I did not physically abuse my children. I was an active parent and [a] proud mother. I loved and cared for my children and would appreciate the opportunity to watch them grow up²³⁷

Whether Hall would be granted clemency was highly publicized, bringing attention to the problems of Oklahoma’s “permitting child abuse” law.²³⁸ 80,000 Oklahoma citizens signed an online petition that supported her release, “believing that for her to spend three decades behind bars is a miscarriage of justice.”²³⁹ However, not everyone believed that Hall should receive any mercy.²⁴⁰ During an interview with BuzzFeed News,

231. Campbell, *supra* note 212.

232. *Id.*

233. *Id.* (explaining that Hall’s formal sentence would have ended in 2034, and that permitting child abuse is an “85% crime,” meaning the earliest Hall would have been eligible for release was in 2030, if she were to receive early release credits and be paroled).

234. Palmer, *supra* note 216.

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. Campbell, *supra* note 212.

prosecutor Marsee stated that Hall's sentence of thirty years "is appropriate for what she *allowed* [Braxton] to do to her children They lived in pain because of what she did not stop."²⁴¹ Was prosecutor Marsee's statement fair?

Strikingly, then-Representative Jari Askins, the author of the bill that added the word "enabling" in the context of "enabling" child abuse, was much more empathetic regarding convictions of women in situations like Hall's.²⁴² During an interview with BuzzFeed News, Askins stated that when the bill was considered, "she and her fellow legislators did [not] contemplate" the outcomes in which the enforcement of the bill has resulted.²⁴³ In 2015, with a 5-0 decision by the Oklahoma Pardon and Parole Board, Hall was denied clemency.²⁴⁴

Once again, Oklahoma's "failure to protect" law was put in the spotlight and attracted national attention, including from CBS News' 60 Minutes.²⁴⁵ Finally, after Hall had served fifteen years, Governor Kevin Stitt pardoned Hall in November 2019.²⁴⁶ Sharyn Alfonsi, an American journalist and correspondent for 60 Minutes, asked Governor Kevin Stitt: "With the enabling child abuse laws you can serve up to a life sentence . . . [d]oes that sound right to you?"²⁴⁷ Governor Stitt responded by saying: "It doesn't. It sounds—it sounds too long. . . . [A]nd that's . . . [one] of the things that we [want to] . . . address in our state."²⁴⁸

Unfortunately, this has not been "addressed," and there have been no changes in Oklahoma's "permitting child abuse" law.²⁴⁹ Megan Lambert, an attorney for the ACLU of Oklahoma and Hall's attorney, pointed out that even two years after Hall's release, no one has "seen [any] indication

241. *Id.* (emphasis added).

242. *Id.* Permitting child abuse is a form of enabling child abuse as mentioned in Section I of this Note.

243. *Id.*

244. Jenn Gidman, *Battered Woman to Stay in Jail Until 2030 for BF's Abuse: Tondalo Hall denied clemency in Oklahoma for not protecting kids from partner*, NEWSER (Sept. 25, 2015, 8:24 AM), <https://www.newser.com/story/213439/battered-woman-to-stay-in-jail-until-2030-for-bfs-abuse.html> [<https://perma.cc/U369-WXJ5>].

245. *Failure To Protect: Oklahoma Woman Reflects 2 Years After Pardon*, NEWS9 (Apr. 20, 2022, 9:07 pm), <https://www.news9.com/story/6260ce899b50842113c09996/failure-to-protect-oklahoma-woman-reflects-2-years-after-pardon> [<https://perma.cc/R6JU-KKVV>].

246. *Id.*

247. *Id.*

248. *Id.* (alteration in original).

249. *Id.*

[that] the way the law is used has changed at all.”²⁵⁰ Lambert is correct: Two years after Hall was released, Hogue was being convicted of Murder in the First Degree by Permitting Child Abuse, in a rather parallel situation, i.e., with no evidence that she actually knew about the risk to her child.²⁵¹ But for Hogue, the crime carried a minimum sentence of life in prison because her child was killed by his abuser.²⁵² Ironically, the day that Hall was interviewed by the ACLU was the same day that Hogue was being sentenced to “life” in prison for Trent killing Ryder.²⁵³

In 2019, when Hall’s case was “in the headlines, a bipartisan bill in the legislature would have added provisions in the law for victims of domestic violence and reduced sentencing maximums.”²⁵⁴ However, the Oklahoma District Attorney’s Association opposed the bill; unfortunately, the bill lost momentum and was not passed.²⁵⁵ Moreover, the President of the District Attorney’s Association, Matt Ballard, who is also the District Attorney for District 12, has expressed his support for Oklahoma’s broad “permitting child abuse” law.²⁵⁶ Ballard stated that child abuse cases “demonstrate the need for maximum sentences . . . [and] ‘[u]ltimately from a DA’s perspective, we’re going to hold the person accountable who let [the] child down.’”²⁵⁷ However, in 2022, a spokesperson for Governor Stitt said: “Failure to Protect is still on his radar, and part of a larger effort to realign sentencing guidelines in the state.”²⁵⁸ However, as of 2024, nothing has changed.

V. Possible Reforms

How can Oklahoma lawmakers design statutes that sufficiently protect children and criminalize a truly culpable “failure to protect” children without also overreaching and allowing for unjust convictions, like those of Rebecca Hogue and Tondalao Hall? Developing fair and effective child

250. *Id.*

251. *See id.*

252. Summary Ord. (Dist. Ct. Cleveland Cnty. Filed on Nov. 4, 2021), *State v. Hogue*, CF-2020-762 (Dist. Ct. Cleveland Cnty).

253. *Failure To Protect: Oklahoma Woman Reflects 2 Years After Pardon*, *supra* note 245.

254. *See id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

abuse laws is no easy task. Moreover, Oklahoma's current child abuse laws present complex problems, particularly the crime of "enabling" child abuse by "permitting" child abuse, which cannot be corrected by a simple, quick solution. With that being said, change is still necessary to ensure that the State is not unjust and unfair in convicting non-abusive parents who were unaware of any past or potential harm to their children. The reform that is needed relies on Oklahoma's legislature no longer allowing felony child abuse convictions—particularly convictions of Murder in the First Degree by Permitting Child Abuse that are based upon the culpability of tort-like negligence. Thus, requiring at least a mens rea of "recklessness" regarding child abuse by another person and distinguishing between the various crimes in the context of child abuse is necessary to strike a better balance between protecting children and foundational criminal law principles, as well as fundamental fairness.

A. The Suggested Mens Rea

Requiring a mens rea of at least "recklessness," as opposed to mere "negligence" as the minimum mens rea for every material element of Enabling Child Abuse is one possible solution to the problem of unjust convictions of non-abusing parents. In particular, Oklahoma should apply the Model Penal Code's clear definition of "recklessness," which states:

A person acts recklessly with respect to a material element of an offense when he *consciously disregards* a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.²⁵⁹

259. Marcia Baron, *Negligence, Mens Rea, and What We Want the Element of Mens Rea to Provide*, 14 CRIM. L. & PHIL. 69, 71, 89 (2020) (emphasis added) (citing MODEL PENAL CODE § 2.02 (c)(2) (AM. L. INST. 1985)).

It is well-established that such consciously “reckless” behavior often meets the threshold for imposing fair criminal liability.²⁶⁰ In particular, prosecutors should be required to prove, beyond a reasonable doubt, that the accused had a conscious awareness of the risk of the specific harm that actually occurred, like injury or death, and still chose to “consciously disregard that risk.” It is fair to say that a parent who acts “recklessly” in this manner has “failed to protect” their child, and therefore, is criminally liable for the resulting injuries to the child, even if the injuries were caused by someone else.

B. Distinguish Between the Crimes

Another possible solution is to distinguish between the crime of enabling child abuse and traditional first-degree murder, even when child abuse by another results in a child’s death. The Oklahoma legislature can look to California case law for examples of how this solution can be achieved, particularly the case of *People v. Valdez*.²⁶¹ In *Valdez*, the mother’s eleven-month-old daughter, Thalia, died as a result of abuse inflicted by the mother’s fiancé, Lebron.²⁶² On numerous occasions, Lebron abused Thalia and then made excuses to Thalia’s mother for her injuries.²⁶³ However, the mother in this case *knew* that Lebron’s excuses were likely not truthful and that he was a dangerous person to have around Thalia.²⁶⁴

For example, far before Thalia’s death, the mother told her friends that she was scared of Lebron because he scared the kids.²⁶⁵ Moreover, the mother expressly told numerous people that she was scared Lebron would harm Thalia, but she nevertheless consciously disregarded this risk by leaving Thalia with Lebron unsupervised.²⁶⁶ When Thalia died due to Lebron’s abuse, he was charged and convicted of Assault Resulting in the Death of A Child Under Eight and Involuntary Manslaughter.²⁶⁷ The mother, who was tried separately from Lebron, was found guilty of

260. James B. Haddad, *The Mental Attitude Requirement in Criminal Law—and Some Exceptions*, 59 J. CRIM. L., CRIMINOLOGY, & POLICE SCI. 4, 5-6 (1968).

261. See generally *People v. Valdez*, 42 P.3d 511 (Cal. 2002).

262. *Id.* at 513.

263. *Id.* at 513-14.

264. *Id.*

265. *Id.*

266. *Id.*

267. *Id.* at 513.

“willfully caus[ing] or permit[ting]” Thalia’s death, i.e., of willfully allowing Lebron to kill Thalia.²⁶⁸ Hence, she was convicted of Child Endangerment and sentenced to serve two years in prison.²⁶⁹ In addition, the mother received an enhancement for “permitting abuse” resulting in a child’s death, which added four years of imprisonment to her sentence.²⁷⁰ Unlike Hogue’s case, this case distinguished between the homicide crime committed by the child abuser and the mother’s crime of “willfully permitting” the child abuse to occur, which resulted in the death of her child. Therefore, *Valdez* shows that the crimes of fatally abusing children and willfully allowing such abuse can be appropriately distinguished while still enforcing significant criminal liability for a willful failure to protect a child from someone else’s abuse, even when the abuse results in death.

VI. Concluding Thoughts

The Maryland Court of Appeals’ decision in *Palmer* “demonstrates why failure-to-protect laws are in place.”²⁷¹ These laws penalize parents, guardians, and caregivers for child abuse committed by someone else because “society, courts, and legislatures firmly believe that *willingly allowing* children to be abused is morally wrong.”²⁷² In cases like *Palmer* and *Walker*, it is clear that those who knowingly allow child abuse to happen should face significant criminal liability. And this Note does not suggest otherwise. Moreover, Oklahoma lawmakers have a legitimate interest in passing tough and punitive child abuse laws for those who actively abuse children and those who knowingly or recklessly “fail to protect” children from such abuse. But have they gone too far?

Unfortunately, Oklahoma’s vague broad statutory definition of “permitting” child abuse blurs the line between an innocent and a guilty mental state in these child abuse cases. Oklahoma’s current law raises serious concerns and many questions that need answers. For example, when does a person “know” that there is a risk of harm to their child? How do we determine if a person “should have known” that a child was at risk of harm? Is *any* risk of harm enough to suggest that a person “should have known” that her child would be abused or killed? And, fundamentally,

268. *Id.*

269. *Id.*

270. *Id.*

271. King, *supra* note 91, at 129.

272. *Id.* (emphasis added).

how can a person “willfully” allow child abuse if that person did not know about or recognize the risk of such abuse? Moreover, when child abuse results in death, Oklahoma law allows several statutory provisions to work together in a way that is quite unfair and irrational to form the basis of Murder in the First Degree by Permitting Child Abuse.²⁷³ Rebecca Hogue was convicted of Murder in the First Degree by Permitting Child Abuse, even though she did not knowingly allow Trent to harm Ryder.

Additionally, under Oklahoma’s current law, even if the State cannot prove that a parent “willfully” allowed her child to be hurt, an alternative can be used—simply showing that the risk of abuse “should have been known.” It is easy to imagine (after a tragic case of child abuse) being in the position of Hogue or Hall and thinking: “If I were that child’s parent, I would have recognized the warning signs.” But they did not, and no one truly knows whether they themselves would have recognized the warning signs. Such assumptions are often biased and ignore the complexity of a parent’s duty to protect his or her children and the difficulties of recognizing child abuse in general, especially of young children. Hindsight truly is 20/20.

The jury recommended that Rebecca Hogue spend the rest of her life in prison, but the jury did not have a lesser option. In Oklahoma, the *minimum* sentence for Murder in the First Degree by Permitting Child Abuse is imprisonment for life. However, District Judge Michael Tupper “suspended” Hogue’s life sentence, such that she could actually serve only thirteen months of incarceration.²⁷⁴ As an explanation for this sentencing, Judge Tupper told Hogue that she was “not a monster” and “did not deserve to die in prison.”²⁷⁵ However, one judge’s brave decision to suspend the majority of Hogue’s sentence does not solve the underlying problem of Oklahoma’s law. Until Oklahoma’s overly broad “permitting” child abuse law is adequately amended, *every* parent or caregiver who loses a child to abuse by someone they know risks being convicted for enabling that vicious crime because of what they did not know but, arguably, “should have known.”

273. Def.’s Motion to Invalidate Statute as Constitutionally Defective, *State v. Hogue*, No. CF-2020-762 (Dist. Ct. Cleveland Cnty. July 6, 2020).

274. *State v. Hogue*, No. CF-2020-762 (Dist. Ct. Cleveland Cnty. July 6, 2020); *Rebecca Hogue: Mother jailed for 16 months after boyfriend killed son*, *supra* note 1.

275. *Rebecca Hogue: Mother jailed for 16 months after boyfriend killed son*, *supra* note 1.