

## CRIME AND PARENTHOOD: THE UNEASY CASE FOR PROSECUTING NEGLIGENT PARENTS

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*On May 29, 2002, Kevin Kelly, a Virginia father of thirteen children, left his youngest child, a nineteen-month-old girl, in the family van when the family returned home from running an errand. A neighbor found the child dead in the van seven hours later.*<sup>1</sup>

*Kelly was promptly prosecuted by the Commonwealth of Virginia for involuntary manslaughter, a decision that immediately ignited a firestorm of controversy. One well-respected commentator, for example, immediately condemned the decision as “send[ing] a chilling message of prosecutorial over-reach and abuse” and compared the “logic” behind the prosecution to “the Vietnam war technique of destroying a village to save it.”*<sup>2</sup>

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<sup>1</sup> See Josh White & Eric M. Weiss, *Girl Was Left in Van More than 7 Hours*, WASH. POST, May 31, 2002, at B2.

<sup>2</sup> Jonathan Turley, Editorial, *A Tragedy, Not a Crime*, WASH. POST, June 9, 2002, at B8. Many commentators, both in law and philosophy, share Turley’s concerns about prosecuting negligent parents. See, e.g., Daniel Kobil, *The Quality of Mercy Strained: Wrestling the Pardoning Power from the King*, 69 TEX. L. REV. 569, 633 (1991) (suggesting punishment is unnecessary when a reckless hit-and-run driver kills her own child because she has already been punished enough); Ann-Marie White, *A New Trend in Gun Control: Criminal Liability for the Negligent Storage of Firearms*, 30 HOUS. L. REV. 1389, 1421 (1993) (arguing that parents should not be imprisoned if they negligently allow a child ac-

Approximately fifteen children under the age of fourteen die every day in this country as a result of unintentional injuries, totaling more than 5600 children per year.<sup>3</sup> Although surely not all, many of these deaths were undoubtedly caused by parental negligence.<sup>4</sup> Yet despite the prevalence of these fatalities, almost no research explores the treatment of these cases by the criminal justice system.<sup>5</sup> Commentators often assert that parents are rarely prosecuted in cases involving deaths due to parental negligence, but they completely fail to cite any authority for that proposition.<sup>6</sup> In addition, prosecutors are relying on the common perception that a failure to prosecute is the norm when making charging decisions in individual cases.<sup>7</sup>

This Article attempts to broaden our understanding of how the criminal justice system addresses parental negligence cases. After briefly surveying the existing literature, the Article reports the results of an empirical study examining prosecutorial charging decisions over a six-year period in cases involving children who died of hyperthermia when left alone in motor vehi-

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cess to a firearm and the child is killed as a result because this “serves as a double penalty on the family”); Robert Bruce Brown, Note, *Negligent Homicide Prosecutions Stemming from Child Passenger Restraint Infractions: A Limit to Prosecutorial Discretion*, 40 WAYNE L. REV. 201, 218 (1993) (arguing that criminal prosecutions of parents who fail to secure their children in mandatory child restraint systems should be “soundly quashed”); see also Jeffrie Murphy, *Mercy and Legal Justice*, in CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS 454, 457 (Michael J. Gorr & Sterling Harwood eds., 1995) (stating “it is no doubt our conviction” that a defendant convicted of vehicular homicide for killing his own child “has already suffered a great deal” and that “the infliction of any additional misery by the state would be gratuitous and cruel”); Alwynne Smart, *Mercy*, 43 PHILOSOPHY 345, 348 (1968) (suggesting mercy is appropriate in a case where a reckless driver has killed his own child).

<sup>3</sup> See NAT’L SAFE KIDS CAMPAIGN, REPORT TO THE NATION: TRENDS IN UNINTENTIONAL CHILDHOOD INJURY MORTALITY, 1987–2000 (2003), available at [http://www.usa.safekids.org/content\\_documents/nskw03\\_report.pdf](http://www.usa.safekids.org/content_documents/nskw03_report.pdf).

<sup>4</sup> For a number of reasons, it is extremely difficult to ascertain precisely how many child deaths are the result of parental negligence. See *infra* text accompanying notes 24–33.

<sup>5</sup> In contrast, there has been a little empirical research about criminal justice outcomes in cases involving fatal child abuse. One study considered seventy-two child abuse fatalities received at one children’s hospital between 1965 and 1984. The researchers concluded that charges were filed in less than half the cases, and convictions were obtained in only one-third of those cases. See Jacy Showers & Julio Apolo, *Criminal Disposition of Persons Involved in 72 Cases of Fatal Child Abuse*, 26 MED., SCI. & L. 243, 243 (1986). The authors concluded that “it is relatively simple for a parent or caretaker to kill a young child without criminal consequences.” *Id.* at 246.

<sup>6</sup> See, e.g., CHRISTINE ALDER & KEN POLK, CHILD VICTIMS OF HOMICIDE 20 (2001) (stating, without citation, that prosecutions are “uncommon” when a child dies as the result of parental negligence, for example by being left unattended in a bathtub or in a house where a fire later broke out); Franklin E. Zimring, *Legal Perspectives on Family Violence*, 75 CAL. L. REV. 521, 532 (1987) (asserting, without citation, that “[t]housands of children die accidentally each year because negligently supervised by parents, but only a trickle of cases are prosecuted in the United States”).

<sup>7</sup> See, e.g., Mai Tran & Christine Hanley, *Professor Won’t Be Charged in Death of Son Left in Hot Car*, L.A. TIMES, Oct. 4, 2003, at B6 (reporting statement of district attorney that he “changed his mind” about prosecuting a father who accidentally left his infant alone in a car for hours after reviewing other cases across the country and concluding that parents were typically not charged).

cles.<sup>8</sup> The results fly in the face of conventional wisdom: my study found that parents were in fact prosecuted in over fifty percent of the cases. Further, although parents are prosecuted in the majority of cases, individuals not related to the victim fare even worse: nonrelatives were prosecuted in over eighty-eight percent of the cases. One particularly important—and disturbing—finding was the disparate treatment of parents from different socioeconomic groups: parents in blue collar professions and parents who were unemployed were four times more likely to be prosecuted than parents from wealthier socioeconomic groups.

In Part II of the Article, I shift from the descriptive to the normative, as I consider the exceedingly difficult question whether these parents *should* be prosecuted. The answer to this question revolves in large part around the relevance placed on a defendant's suffering. Specifically, when a parent's misconduct has caused him to experience emotional suffering, should that fact be the dispositive consideration in the decision whether or not to file criminal charges? Whether to prosecute a grieving father who has lost a child due to his own negligence is an undeniably close and difficult question, but I ultimately conclude that the criminal justice system must treat these tragedies as criminal acts when gross negligence is involved, and charge defendants accordingly.<sup>9</sup> Failing to charge a defendant because of his personal suffering denigrates the life of his victim and raises important concerns about equality of treatment, both as between victims and as between defendants. Instead, questions of suffering are most appropriately considered at sentencing.

Those who oppose any involvement by the criminal justice system in these cases argue that prosecution of negligent parents cannot be justified under either the retributivist or utilitarian philosophies that are typically invoked to justify the government's imposition of criminal sanctions.<sup>10</sup> In terms of deterrence, for example, it is no doubt true that many negligent

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<sup>8</sup> Because several organizations keep comprehensive records on this particular type of tragedy, I was able to examine all cases occurring between January 1998 and December 2003 to determine whether there were any recurring patterns in prosecutorial decisionmaking. For example, was the decision to prosecute Mr. Kelly really an aberration? Are parents who are in fact prosecuted typically sentenced to jail? Is parental negligence in this context treated differently than nonparental negligence?

<sup>9</sup> The term "gross negligence" in this paper refers to "conduct that represents a *gross* deviation from the standard of reasonable care. Put more precisely, a person is criminally negligent if he takes a *substantial*, unjustified risk of causing the social harm that constitutes the offense charged." JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 130 (3d ed. 2001). Ordinarily only gross negligence will justify the imposition of criminal punishment; simple negligence is left to the realm of the civil tort system. *Id.* at 129–30. In some of the cases discussed later in this Article, the parents were arguably reckless and not merely grossly negligent. See *infra* text accompanying notes 99–101. Because recklessness is an even more culpable mental state than gross negligence, the arguments made in this Article in favor of charging negligent parents apply with equal, if not greater, force to reckless parents.

<sup>10</sup> See Turley, *supra* note 2. See generally John Rawls, *The Practice of Punishment*, in CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS, *supra* note 2, at 337 (discussing the two classic "justifications of punishment").

parents like Kevin Kelly can suffer no greater punishment, have no starker deterrent, than the loss of a child. But this objection conflates specific and generalized deterrence. At a minimum, prosecution in these cases can serve the interests of generalized societal deterrence; it can educate and deter other parents who are either unaware of a particular danger or who are knowledgeable, but nonetheless engage in unduly risky behavior.<sup>11</sup> Moreover, prosecution can serve a rehabilitative role within the affected household itself; for example, perhaps a parent serving a period of probation could be provided with additional state resources or community-based support to help ease the undeniable burdens of parenting. In terms of retribution, the decision to prosecute validates the life of the individual victim and, by making a statement that the grossly negligent parent has violated an important legal norm, reflects the importance that society should attach to protecting the lives of its most vulnerable citizens.

More fundamentally, the controversy over whether to prosecute these parents raises troubling questions about our conceptions of parenthood itself and the extent to which a family relationship—by that fact alone—should exempt a malfeator from the reach of the criminal law. One of the most disturbing aspects of the Kelly case is that Kevin Kelly did not bother to check on his twenty-one-month-old daughter Frances for *seven* hours. During that span of time, a toddler would ordinarily need at least two meals, some additional beverages, and two or more diaper changes. Yet in those seven hours, Mr. Kelly never once made any effort to make sure that his child's most basic needs were being addressed. If Mr. Kelly had dropped his daughter off at a daycare center and it was later revealed that her caregiver left the child alone in a room and then ignored her for the entire day, never bothering to provide food, drink, or a clean diaper, can there be any doubt that the community would be universally outraged and that prosecution for child neglect would be uniformly viewed as justified? Yet because Mr. Kelly is Frances's parent, he is somehow viewed as less morally culpable, less deserving of criminal punishment, than an unrelated third party would be.

This Article is one piece of a larger project whose aim is to demonstrate that we need to reconceptualize the way we think about the relationship between parenthood and criminal justice. In the context of parenthood and the criminal justice system, family members are still far more likely to be excused for behavior that would be considered criminal if committed by third parties. Examples abound: the extraordinary difficulties prosecutors

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<sup>11</sup> Indeed, the need for general deterrence is especially evident in the factual scenario that is the basis of this Article's empirical research—the scenario of children dying of hyperthermia when left unattended in a motor vehicle. A survey of 700 parents found that ten percent thought it was acceptable to leave young children alone in a car, a figure that rose to twenty percent among young parents. See Alan Gathright & Marshall Wilson, *Leaving Children in Cars OK to Many; 20% of Young Parents Surveyed Approve*, S.F. CHRON., July 26, 2001, at A17.

face in convicting parents on homicide charges in child abuse cases,<sup>12</sup> the lighter sentences imposed on defendants who kill family members,<sup>13</sup> the preferential treatment in some states given to sex offenders who victimize their own children rather than a stranger,<sup>14</sup> and the outcry over prosecuting negligent parents like Kevin Kelly. This preferential treatment for parents persists even though young children in particular face far greater risk of danger from their relatives at home than they do from strangers in public places.<sup>15</sup>

The arguments in this Article emphatically do not mean that we should engage in wholesale incarceration of grieving parents; incarceration is not now and should never be the inevitable result of criminal prosecution. In most cases, probation and community service may well be the appropriate punishments. However, the decision to file criminal charge is justifiable in cases involving gross negligence because of its deterrent and expressive effects.<sup>16</sup> A defendant's suffering as the result of the crime he committed is

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<sup>12</sup> See Ruth Teichroeb, *Cases Among Toughest to Prosecute: 'Juries Don't Want to Believe a Parent Could Kill a Child'*, SEATTLE POST-INTELLIGENCER, Nov. 1, 2002, at A1 (reporting that "[p]rosecutors across Washington say child homicides are among the toughest cases to prove beyond a reasonable doubt" and that "[w]hen young children die because of parental neglect, the chance of convicting a parent is so small prosecutors rarely file any charges").

<sup>13</sup> See Myrna Dawson, *Rethinking the Boundaries of Intimacy at the End of the Century: The Role of Victim-Defendant Relationship in Criminal Justice Decisionmaking over Time*, 38 LAW & SOC'Y REV. 105 (2004). In her study of more than 1000 homicide cases in the city of Toronto, Dawson found that defendants who killed family members—a group which she defined as including parents, children, and other relatives but not intimate partners—"received sentences close to two and a half years shorter than for those who killed strangers." *Id.* at 125. Unfortunately, Dawson does not further distinguish by victim identity within her family member category—it is certainly possible that defendants who killed their parents were treated very differently than defendants who killed their children. One particularly interesting finding was that the discrepancy was greater for defendants who killed family members than for those who killed intimate partners (who on average received a sentence only one year shorter than defendants who killed strangers). *Id.*

<sup>14</sup> See Leonore M.J. Simon, *Therapeutic Jurisprudence: Sex Offender Legislation and the Anti-therapeutic Effects on Victims*, 41 ARIZ. L. REV. 485, 493–95 (1999) (discussing preferential treatment given to family sex offenders in the state of Washington).

<sup>15</sup> See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CHILD VICTIMIZERS: VIOLENT OFFENDERS AND THEIR VICTIMS 17 (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cvvoatv.pdf> (stating that "in 1994 over 70% of the murders of infants were carried out by a family member," while only 3% of murders of those aged 15 to 17 were committed by a family member). The report also noted that "less than 10% of inmates serving time for the rape or sexual assault of a child reported that the victim had been a stranger to them." *Id.* at 11; see also HOWARD N. SNYDER, U.S. DEP'T OF JUSTICE, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/saycrle.pdf> (reporting that for sexual assault victims under the age of six, forty-nine percent were sexually victimized by a family member and only three percent were assaulted by a stranger).

<sup>16</sup> The moral force of the criminal law has long been recognized. See, e.g., Johannes Andenaes, *The General Preventative Effects of Punishment*, 114 U. PA. L. REV. 949, 950–51 (1966) (discussing the "moral influence" of the criminal law); Frank O. Bowman, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679, 742 ("The criminal justice system . . . also serves the educational function of putting into highly visible ac-

more appropriately considered at the sentencing stage of a criminal case than at the charging stage. Most critically, prosecution can reinforce the normative judgment that parents have a *greater* responsibility to their children because of their decision to assume the obligations—and the concomitant tremendous rewards and undeniable risks—of the parental role.

### I. DEATHS OF CHILDREN DUE TO PARENTAL NEGLIGENCE

Since at least the early 1960s, policymakers and academics have devoted increasing attention and resources toward addressing the problems posed by the physical and sexual abuse of children.<sup>17</sup> The problem of fatal neglect of children, however, has not received comparable attention.<sup>18</sup> Although legal scholars have discussed the important problem of the impact of the disproportionate use of neglect laws against poor and minority families, this is a problem different in kind from that discussed in this Article, because the children at issue in those cases are still alive and the policy debate centers over how best to improve their circumstances, for example through direct aid to or even removal from their families.<sup>19</sup> But in the cases with

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tion the moral vision of the community.”); John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111, 112 (1996) (noting that “criminal law can be perceived usefully as a constellation of symbolic behavioral guideposts that project value and directional mandates”).

<sup>17</sup> See Lloyd Ohlin & Michael Tonry, *Family Violence in Perspective*, in FAMILY VIOLENCE 1, 1 (Lloyd E. Ohlin & Michael H. Tonry eds., 1989); see also Douglas J. Besharov, ‘Doing Something’ About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL’Y 540, 542–50 (1985) (describing legislative developments since the early 1960s). Ohlin and Tonry trace the beginning of this phenomenon to the publication in 1962 of a seminal article on “The Battered Child Syndrome.” For discussions of the treatment of family violence by the American criminal justice system prior to 1960, see Elizabeth Pleck, *Criminal Approaches to Family Violence, 1640–1980*, in FAMILY VIOLENCE, *supra*, at 19–57; Mason P. Thomas, *Child Abuse and Neglect Part 1: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293 (1972). Both Pleck and Thomas also note that improving medical technology led to increasing awareness of the problem of child abuse. Pleck, *supra*, at 47; Thomas, *supra*, at 329–30.

<sup>18</sup> See Zimring, *supra* note 6, at 525 (noting that we continue to give the values of family privacy and autonomy more weight in the child neglect context than in the child abuse context).

<sup>19</sup> See, e.g., Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System*, 48 S.C. L. REV. 577 (1997); Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 894–917, 926 (1975) (tracing the “history of neglect intervention,” including the treatment of poor families); Marsha Garrison, *Why Terminate Parental Rights?* 35 STAN. L. REV. 423, 432–36 (1983) (discussing “family law of the poor,” which has “seldom deferred to parental rights” and noting how “neglect proceedings are still brought almost exclusively against poor parents”); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare ‘Reform,’ Family, and Criminal Law*, 83 CORNELL L. REV. 688, 702–12 (1998); Thomas, *supra* note 17, at 315–22 (discussing early cases involving the use of neglect laws against poor families and children); Ann Shalleck, *Child Custody and Child Neglect: Parenthood in Legal Practice and Culture*, in MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD 308, 308–27 (Martha Albertson Fineman & Isabel Karpin eds., 1995); see also Pleck, *supra* note 17, at 45 (noting the concerns of Progressive Era reformers at the turn of the century with poverty and neglect). It is important to note that poor families are also

which I am concerned, the child is already dead, and the questions are therefore different: whether the criminal justice system has and should be used to redress that wrong.

For my background survey, I first reviewed discussions of fatal neglect in the legal and social science literature. Second, I attempted to locate all judicial opinions involving criminal charges filed against parents after a child died because of parental negligence. I did not conduct an empirical study of these opinions because the problems with relying only on published case opinions are particularly pronounced in this context, so this part of the Article concentrates on identifying some general trends in the case law.<sup>20</sup>

#### A. Fatal Parental Negligence in the Literature

The problem of child neglect is a significant one in this country. The 2002 annual report of the National Child Abuse and Neglect Data System concluded that local child protective agencies determined that 896,000 children were victims of abuse or neglect, with more than sixty percent of these victims suffering from neglect.<sup>21</sup> Despite the pervasiveness of the neglect problem, the legal academy has devoted scant scholarly attention to these cases, and the few discussions of parental negligence found in the academic literature generally have focused on issues other than criminal justice outcomes.<sup>22</sup> When prosecution is referenced, it is typically only to make the broad assertion that the criminal justice system usually decides not to intervene when a child dies as the result of parental negligence, an assertion ordinarily backed by no empirical support.<sup>23</sup>

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treated differently than wealthier families in cases of fatal neglect, a problem discussed *infra* text accompanying notes 104–112.

<sup>20</sup> For example, relying only on published opinions will fail to capture the large universe of child neglect cases that are resolved via a guilty plea. The research discussed in Part I.C showed that of the sixty-three hyperthermia incidents where the government obtained a conviction, at least forty-four involved guilty or no contest pleas, or 69.8 %.

<sup>21</sup> ADMIN. FOR CHILDREN & FAMILIES, DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2002, at xiv (2002), available at <http://www.acf.hhs.gov/programs/cb/pubs/cm02/cm02.pdf>.

<sup>22</sup> One recent and extremely comprehensive book about child neglect, for example, barely mentions the role of the criminal justice system. See NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY (Howard Dubowitz ed., 1999); see also CHERYL L. MEYER & MICHELLE OBERMAN, MOTHERS WHO KILL THEIR CHILDREN: UNDERSTANDING THE ACTS OF MOMS FROM SUSAN SMITH TO THE "PROM MOM" 95–122 (2001) (discussing fifty-seven child deaths resulting from maternal negligence, but focusing on method of death and "profile" factors of perpetrators rather than on criminal justice outcomes); ANIA WILCZYNSKI, CHILD HOMICIDE 12, 26 (1997) (noting that "we know very little at all about how child-killers are dealt with by the criminal justice system" and that negligence deaths in particular are "rarely mentioned in the filicide literature").

<sup>23</sup> See, e.g., ALDER & POLK, *supra* note 6, at 20 (suggesting, without citation, that such cases have traditionally been treated as "accidents" rather than as examples of criminally culpable conduct). Unfortunately, Alder and Polk only devote one paragraph to these cases in their 171 page discussion of child homicide victims. See also WILCZYNSKI, *supra* note 22, at 26 (referring to a "rare instance" of a suc-

Indeed, it is difficult even to determine the number of child deaths due to parental negligence, let alone the criminal justice outcomes in such cases. This problem is multifaceted. First, the larger category of child neglect deaths is one that “has not received proportionate attention from researchers and practitioners.”<sup>24</sup> Indeed, no one knows the true incidence of child neglect deaths.<sup>25</sup> Second, deaths due to parental negligence could be categorized as a subset of these “neglect fatalit[ies],” but whether any jurisdiction chooses to do so—or any researcher chooses to study them—“depends largely on the precise definition of neglect adopted.”<sup>26</sup> For example, in its “deaths due to neglect” statistics, does a jurisdiction include only deaths due to a failure to provide care, such as malnutrition resulting from chronic

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successful prosecution in a parental negligence case); Zimring, *supra* note 6, at 532 (asserting, without citation, that “only a trickle of cases are prosecuted in the United States” and that such prosecutions seem “inappropriate”).

<sup>24</sup> James M. Gaudin, *Effective Intervention with Neglectful Families*, 20 CRIM. JUST. & BEHAV. 66, 67 (1993); see also James Garbarino & Cyleste C. Collins, *Child Neglect: The Family with a Hole in the Middle*, in NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY, *supra* note 22, at 1 (“Much as we may use the phrase ‘child abuse and neglect,’ the overwhelming focus of child maltreatment research, theory, and practice is on abuse, not neglect.”); Leslie Margolin, *Fatal Child Neglect*, CHILD WELFARE, July–Aug. 1990, at 309–10 (noting that “most of the literature on child fatalities caused by maltreatment has dealt with physical abuse” rather than with deaths caused by neglect).

<sup>25</sup> See Barbara L. Bonner, Sheila M. Crow & Mary Beth Logue, *Fatal Child Neglect*, in NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY, *supra* note 22, at 156, 160–61 (“[T]he actual number of children who die as a result of neglect each year is not known.”). Bonner, Crow, and Logue identify several reasons for this problem. First, complete information about the circumstances surrounding a death may not be available. *Id.* at 160. The authors give the example of a child who dies in a fire. The death may simply be classified as an accident, without information being made available about whether the child was left home unattended at the time. They also suggest that the current vital statistics system is inadequate and too narrowly focused on physical abuse. *Id.* at 161. Despite these significant hurdles, Bonner, Crow, and Logue rather hesitantly conclude that there are probably around 650 child deaths per year due to neglect in the United States. *Id.* at 160.

<sup>26</sup> See WILCZYNSKI, *supra* note 22, at 26; see also Bonner, Crow & Logue, *supra* note 25, at 158 (“Legal definitions of neglect . . . vary widely among jurisdictions.”); Gaudin, *supra* note 24, at 66 (“There is . . . a lack of consistency among researchers on conceptual and operational definitions for subtypes of neglect.”); Margolin, *supra* note 24, at 309–10 (noting some researchers “interpret[] neglect fatalities as an extreme consequence of deprivation” but at least one other researcher “suggest[s] that most fatalities from neglect resemble common accidents such as drowning”). Indeed, this is a problem even for the *Child Maltreatment* series published annually by the Department of Health and Human Services Administration for Children and Families. The most recent version available, for the year 2002, concludes that 896,000 children were the victims of abuse or neglect in 2002, with sixty percent being the victim of the neglect. Approximately 1400 of these children died. ADMIN. FOR CHILDREN & FAMILIES, *supra* note 21, at iii, xiv, xvii. But neglect is defined simply as “[a] type of maltreatment that refers to the failure of the caregiver to provide needed, age-appropriate care although financially able to do so or offered financial or other means to do so.” *Id.* at 100. It is thus impossible to know whether deaths due to parental negligence are included in these statistics, and indeed the answer probably varies by state.



neglect, or does it also include deaths caused by a failure to supervise, such as drowning in an unattended bathtub?<sup>27</sup>

Despite these data problems, several statistical sources give some insight into the potential magnitude of fatal neglect. The Centers for Disease Control concluded that in 2001, 859 children aged fourteen years or younger died in drowning accidents.<sup>28</sup> The National Safe Kids Campaign estimated that seventy-two children aged fourteen and under died from unintentional injuries caused by firearms in 2001.<sup>29</sup> The Campaign also estimated that in the year 2000, 603 children aged fourteen and under died from accidental fire injuries.<sup>30</sup> Further, the Campaign concluded that fifty-five percent of the children killed in motor vehicle crashes in 2001 were not secured in a safety restraint system at the time of the crash.<sup>31</sup> Although no doubt not all of these deaths involved parental negligence, surely some did.<sup>32</sup>

Despite the sobering nature of these statistics, there have unfortunately been very few empirical studies of child fatalities caused by parental negligence, and I was unable to find any study that focused on the role of the criminal justice system.<sup>33</sup> The few studies that have considered the issue of negligent parental conduct more generally, however, contain many interesting findings. Leslie Margolin examined a set of eighty-two child fatalities that occurred in Iowa between January 1980 and May 1988.<sup>34</sup> Forty-eight

<sup>27</sup> For a detailed discussion of the definitional problem in child neglect research, see Susan J. Zuravin, *Child Neglect: A Review of Definitions and Measurement Research*, in *NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY*, *supra* note 22, at 24–42.

<sup>28</sup> See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL, WATER-RELATED INJURIES: FACT SHEET, <http://www.cdc.gov/ncipc/factsheets/drown.htm> (last visited Dec. 4, 2005). This actually represents a slight decline from the previous year; the National Safe Kids Campaign estimated that 943 children ages fourteen and under died from drowning in the year 2000. See NAT'L SAFE KIDS CAMPAIGN, *supra* note 3. "Children ages 1 to 4 are at greatest risk of drowning." *Id.* at 9.

<sup>29</sup> See NAT'L SAFE KIDS CAMPAIGN, PREVENTING ACCIDENTAL INJURY: FIREARMS, [http://www.usa.safekids.org/tier2\\_rl.cfm?folder\\_id=172](http://www.usa.safekids.org/tier2_rl.cfm?folder_id=172) (last visited Dec. 4, 2005).

<sup>30</sup> See NAT'L SAFE KIDS CAMPAIGN, *supra* note 3, at 13.

<sup>31</sup> *Id.* (also reporting that 1654 children were killed in car accidents in 2000). These statistics refer to children killed as passengers, not drivers.

<sup>32</sup> See, e.g., Kenneth W. Feldman, *Accidental Injuries*, APSAC ADVISOR, Winter 1994, at 15 (stating that "[i]nadequate barriers to toddlers and young children combined with lapses in caretaker supervision were the primary predispositions" for childhood drownings).

<sup>33</sup> For example, James Gaudin, in his comprehensive 1993 report on child neglect issued by the Department of Health and Human Services, only cites two studies of fatal child neglect: Leslie Margolin's and an unpublished manuscript by J.D. Alfaro. JAMES M. GAUDIN, JR., U.S. DEP'T OF HEALTH & HUMAN SERVS., *CHILD NEGLECT: A GUIDE FOR INTERVENTION* 21 (1993). The lack of empirical evidence regarding the involvement of the criminal justice system in child neglect cases was noted as far back as 1975. See Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1026 n.218 (1975).

<sup>34</sup> Margolin, *supra* note 24, at 311.

children died from physical abuse and thirty-four from neglect.<sup>35</sup> This data set specifically included children who died from episodic negligence, rather than just from chronic neglect.<sup>36</sup> Margolin determined that most children who died from neglect were age three or younger and that boys were more likely to die from neglect than girls, perhaps because parents tend to supervise male children less closely.<sup>37</sup> Twenty-nine of the thirty-four neglect deaths occurred in the child's home.<sup>38</sup> The single most dangerous location in the home for a child was the bathtub: six children drowned when left unattended and three children died from scalding.<sup>39</sup> Seven of the neglect deaths were the result of fires and two were the result of children gaining access to unsecured guns.<sup>40</sup> Mothers alone were the responsible party in fifty-three percent of the cases, while fathers were solely responsible in only twenty-five percent of the deaths.<sup>41</sup> Margolin also found that a larger family size seemed to correlate with child neglect fatalities, perhaps because "the more children caregivers support, the more their resources will be stretched, and the less adequate will be the supervision they provide."<sup>42</sup> Only thirty-nine percent of the families where a child died from parental neglect were previously known to child protective agencies in Iowa, a conclusion which suggests that it would be difficult to implement preventive measures for individual families in advance of a tragedy and that a more global education and prevention strategy might be more effective.<sup>43</sup> Her study did not consider criminal justice outcomes.

In 1986, the Child Welfare League of America conducted a one-year study of parental "lack of supervision" cases, using as a data set 807 new cases of child abuse or neglect reported to the New York State Central Register for Child Abuse and Maltreatment between July 1, 1982 and June 30, 1983.<sup>44</sup> Twenty-two percent of the 17,000 new cases reported to New York

<sup>35</sup> *Id.* at 312.

<sup>36</sup> Indeed, "[t]he fatal neglect was most often a preventable accident associated with a single, life-threatening incident." GAUDIN, *supra* note 33, at 21 (discussing Margolin's study).

<sup>37</sup> Margolin, *supra* note 24, at 312, 317.

<sup>38</sup> *Id.* at 314.

<sup>39</sup> *Id.* at 315.

<sup>40</sup> *Id.* at 315, 316. Other children died from hyperthermia after climbing into a car, from ingesting prescription medication or other dangerous substances, from sleeping in makeshift cribs, or because their caregivers delayed in seeking medical care or failed to follow medical orders. *Id.* at 315-16.

<sup>41</sup> *Id.* at 313.

<sup>42</sup> *Id.* at 317; *see also* ROSS A. THOMPSON, PREVENTING CHILD MALTREATMENT THROUGH SOCIAL SUPPORT 93 (1995) (collecting other studies supporting the premise that maltreating families "are less likely to be intact" and "likely to have more children"). Thompson also collects a number of studies concluding that "family education and income (together with unemployment and underemployment, poor and/or public housing, welfare reliance, single parenting, and more dangerous neighborhoods) are strong correlates of child maltreatment." *Id.* at 92.

<sup>43</sup> Margolin, *supra* note 24, at 318.

<sup>44</sup> *See* MARY ANN JONES, PARENTAL LACK OF SUPERVISION: NATURE AND CONSEQUENCE OF A MAJOR CHILD NEGLECT PROBLEM 1-3 (1987). The New York Department of Social Services defines

authorities during that time frame contained an allegation of lack of supervision, specifically including cases where a parent left a child unattended.<sup>45</sup> Cases containing this allegation “were disproportionately associated with fatalities.”<sup>46</sup> Some of the findings in this study paralleled Margolin’s. For example, lack of supervision cases arose more frequently in families with “more children and younger children” when compared to other cases in the child welfare system.<sup>47</sup> The mother was also more likely to be the perpetrator.<sup>48</sup> This study also did not consider the issue of criminal justice system involvement.

Michelle Oberman and Cheryl Meyer, as part of their larger study examining mothers who kill their children, studied fifty-seven child deaths that occurred as a result of maternal “neglect-omission” between January 1990 and December 1999.<sup>49</sup> They determined “the prevailing theme” within these cases was “inadequate supervision.”<sup>50</sup> The primary causes of death were fires when children were left home alone, car hyperthermia, bathtub drowning, layover suffocation, the provision of inadequate nutrition, and “inattention to safety needs,” such as leaving hazardous substances within the reach of children.<sup>51</sup> However, their study considers the problem of child-neglect fatalities from the perspective of “power and privilege” issues, and accordingly does not focus on criminal justice outcomes.<sup>52</sup> Oberman and Meyer also concluded that mothers were most likely to be the perpetrators of neglect, a finding they attribute to the “disproportionate numbers of children in the custody of their mothers rather than their fathers.”<sup>53</sup> They also concluded that neglectful mothers are generally “young, single, have large families, are lacking in social support systems, and are of

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lack of supervision as leaving a child “alone or not completely attended for any period of time to the extent that his or her need for adequate care goes unnoticed or unmet, and the child is harmed or exposed to hazards which could lead to harm.” *Id.* at 2.

<sup>45</sup> *Id.* at 7.

<sup>46</sup> *Id.* at 8; see also Margolin, *supra* note 24, at 309 (noting that “fatalities appear to result from neglect at approximately the same frequency as from physical abuse”). Jones concludes it is difficult to know whether the reason for the relatively high fatality rates is because lack of supervision cases are more inherently dangerous or because only the lack of supervision involving actual harm tends to be reported. JONES, *supra* note 44, at 62.

<sup>47</sup> JONES, *supra* note 44, at 8; see also GAUDIN, *supra* note 33, at 16 (“Numerous studies have discovered that neglectful families on the average have more children than nonneglecting families.”).

<sup>48</sup> JONES, *supra* note 44, at 8.

<sup>49</sup> See MEYER & OBERMAN, *supra* note 22, at 32, 99. Meyer and Oberman also identified nineteen cases of deaths resulting from maternal “neglect-commission,” where mothers inadvertently killed their children in an effort to stop them from crying, for example by shaking or smothering them. *Id.* at 101–02.

<sup>50</sup> *Id.* at 99.

<sup>51</sup> *Id.* at 99–101.

<sup>52</sup> *Id.* at 96. By “power and privilege issues,” Meyer and Oberman meant they approached the cases with special attention to “the life situations of the mothers committing these acts,” specifically to whether these mothers were members of “disenfranchised groups within American society.” *Id.*

<sup>53</sup> *Id.* at 97–98.

lower socioeconomic status.”<sup>54</sup> They believed that many of the mothers in the cases they reviewed were suffering from depression, low self-esteem, or dependency on drugs or alcohol.<sup>55</sup> Meyer and Oberman briefly mention that criminal charges were filed in ten of the eleven cases they highlight in their discussion, but do not discuss that facet of the cases in any further detail.

### *B. Judicial Decisions Involving Parental Negligence*

I attempted to locate every reported judicial decision involving fatal neglect charges brought against parents or guardians, an effort which located only ninety-two cases, although it is impossible to know whether this data set is complete.<sup>56</sup> Indeed, the results of my research into the hyperthermia cases suggest that looking only at reported cases would grossly understate the number of criminal prosecutions, since that empirical research located forty-three examples of criminal prosecutions against parents in car cases over a six-year period, only two of which resulted in a reported opinion. The most logical inference to be drawn from these numbers seems to be that the vast majority of fatal neglect cases are being resolved via a guilty plea.

In reviewing the cases, this Part uses a categorization scheme suggested by Donna Rosenberg for evaluating fatal neglect cases: (1) failure to provide (such as food, water, or medical care), (2) failure to supervise, and (3) failure to intervene (to protect a child from the abuse or neglect of another adult).<sup>57</sup> The reported case survey showed, as I expected, that a very significant percentage of the cases involved a failure to provide for a child, especially medical care.<sup>58</sup> Forty-three cases primarily involved a failure to provide for the child. In twenty-four of those forty-three cases, the charges against the parent primarily involved a failure to provide timely medical care. Twelve of the remaining cases involved a failure to provide nourishment and six involved a failure to provide both.<sup>59</sup> Another case, in which a four-day-old baby was attacked and killed by a swarm of fire ants, involved a failure to provide safe conditions. Only thirteen of the ninety-two cases included an allegation that the death was caused by a failure to intervene to protect a child from abuse by another individual, probably because this is still a relatively new legal development.<sup>60</sup>

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<sup>54</sup> *Id.* at 103.

<sup>55</sup> *Id.* at 112–15.

<sup>56</sup> See generally Pleck, *supra* note 17, at 33, 38 (finding only two reported cases dealing with child abuse prior to the Civil War and only nine appellate decisions on abuse between 1862 and 1874).

<sup>57</sup> See Donna Rosenberg, *Fatal Neglect*, APSAC ADVISOR, Winter 1994, at 38–40. Kevin Kelly’s case would be an example of a failure to supervise case.

<sup>58</sup> In two of the cases, it was impossible to determine the basis of the criminal charges from the opinion.

<sup>59</sup> In fourteen cases, the parents chose not to provide medical care because of their religious beliefs.

<sup>60</sup> Two of these cases also involved an allegation that the parent failed to obtain appropriate medical care after the abuse. For discussions of prosecutions of passive parents, see Bryan A. Liang & Wendy

In thirty-four of the ninety-two cases, the parent or guardian was prosecuted because of a failure to provide adequate supervision. Thus, prosecution in failure to supervise cases is certainly not unprecedented. The most common causes of death were as follows: twelve cases involved accidental drowning, which resulted either from children being left unattended in a bathtub or from children being left unsupervised, allowing the children to wander outside and drown in a pool or other water hazard; eleven cases involved leaving young children home alone, who died when a fire broke out in their residence; and seven of the remaining cases involved deaths in automobiles.<sup>61</sup>

Appellate courts were relatively receptive to the government's prosecution efforts in the failure to supervise cases. In the twenty-four cases reviewing a conviction on the merits, the appellate court issued an opinion favoring the government in eighteen of the cases.<sup>62</sup> In six of the cases, the ruling favored the defendant. These courts were often appalled by the decision of the government even to bring criminal charges. The sentiments of an appeals court in California are particularly striking, where the court reversed a conviction of a mother who left four children, all between the ages of two and six, alone in the house late at night, and the youngest burned to death when a fire broke out. The court mused, "Must a parent never leave a young child alone in the house on risk of being adjudged guilty of manslaughter if some unforeseeable occurrence causes the death of the child?"<sup>63</sup> Although not asked to review a conviction on the merits, another court upheld the dismissal of an indictment filed against a mother who left her nine-month-old daughter unattended in the bathtub because "the prosecution of this defendant for a grave mistake that will haunt her forever has unwarranted and excessive repercussions not only for her but for her other children."<sup>64</sup> The court further added that neither the defendant "nor her children

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L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397 (1999); Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 95 (1993); Jean Peters-Baker, Note, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 UMKC L. REV. 1003 (1997).

<sup>61</sup> These cases ranged from the hyperthermia deaths discussed *infra* Part I.C of this Article to falling asleep in a cold car with a baby to failing to secure a child in a safety restraint system. Another author identified six instances where relatives have been prosecuted for causing a child's death by failing to secure him or her with safety restraints. Three of these cases resulted in some criminal conviction. See Robert Bruce Brown, *Negligent Homicide Prosecutions Stemming from Child Passenger Restraint Infractions: A Limit to Prosecutorial Discretion*, 40 WAYNE L. REV. 201, 206-09 (1993) (describing cases).

<sup>62</sup> For example, one judge acknowledged the importance of general deterrence in imposing a short jail sentence on a mother who failed to secure her three year old in a seatbelt and then failed to notice when she fell out of the car. The judge remarked "I think the facts of the case justified sending a message to the public that you need to protect your children. . . . There is nothing I could have done to punish that woman anymore than she has been punished." See *Suarez v. State*, No. 05-03-00096-CR, 2003 WL 23025024, at \*6 (Tex. Ct. App. Dec. 30, 2003).

<sup>63</sup> *People v. Rodriguez*, 8 Cal. Rptr. 863, 868 (Ct. App. 1960).

<sup>64</sup> *People v. Torres*, 634 N.Y.S.2d 354, 355 (App. Div. 1995).

deserve to be further victimized by the stigma and repercussions of a criminal prosecution.<sup>65</sup> These sentiments exemplify the objections often raised to prosecuting parents, which are addressed in Part II.

This review of the existing empirical research and the reported cases makes plain that we know almost nothing about how child fatalities resulting from parental negligence are treated by the criminal justice system. Is the common perception that parents are not prosecuted in these cases accurate? If a parent was prosecuted, did the prosecution result in a conviction, and was that conviction the result of a guilty plea or a trial? If the responsible party was convicted, what sentence was imposed? Are bereaved parents in fact being shipped off to jail to serve lengthy sentences? Further, are there meaningful differences in the way different categories of offenders are treated by the criminal justice system? For example, are parents more or less likely to be prosecuted than day care providers? The study discussed in the next part is an effort to begin to answer these questions.

### C. *An Empirical Study of Failure to Supervise Cases*

*On August 5, 2001, a music minister named Kevin Kinsey and his wife Anita, a youth minister, left their three-year-old son inside their car for over an hour after arriving at church. Each parent thought the other had taken the child. When Kevin Kinsey eventually began looking for his son, he found the boy dead inside the car. A six-person jury, convened as a "coroner's inquest," ruled the death accidental and law enforcement officials subsequently decided not to file charges. The parents, although obviously the most relevant witnesses, were not asked to testify during the inquest. The county sheriff stated, "We wouldn't put them through that."<sup>66</sup>*

This section analyzes actual cases involving the death of a child as a result of parental negligence. I selected the subset of cases involving children who died of hyperthermia as a result of being left unattended in an automobile for several reasons.<sup>67</sup> First, this is unfortunately a quite common factual scenario; in 2003, for example, at least forty-two children died

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<sup>65</sup> *Id.* at 357. Strikingly, the court made almost no references to the most poignant victim in this case, the dead baby.

<sup>66</sup> See Trish Hollenbeck, *Prosecutor: Jury Influenced Decision*, JOPLIN GLOBE (Mo.), Aug. 23, 2001, at 1A (copy on file with the author). For the idea of incorporating case narratives, I am indebted to Victoria Nourse's wonderful article, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

<sup>67</sup> In these cases, children die from heat stroke as the temperature rises inside the car. A recent study done by a geosciences researcher at San Francisco State University showed that the temperature inside a parked car with closed windows rose nineteen degrees in as little as ten minutes. After one to two hours had elapsed, the temperature had risen between forty-five and fifty degrees. Because children are unable to regulate their body temperatures as efficiently as adults, their bodies succumb to heat at a much quicker rate. See JAN NULL, *HYPERTHERMIA DEATHS OF CHILDREN IN VEHICLES SUMMARY SHEET* (2005), <http://ggweather.com/heat>.

from hyperthermia in the United States after being trapped in a car.<sup>68</sup> Second, there are some extraordinarily good websites devoted to this particular problem that have done an excellent job of compiling some basic statistics and thus provide a particularly useful starting point for research.<sup>69</sup> Third, these are cases that typically involve grossly negligent conduct and thus most starkly present the issue at the heart of this Article. Many other fact scenarios raise the specter of either willful and deliberate conduct,<sup>70</sup> or of conduct that does not rise to the level of gross negligence, and therefore potentially sidestep the more difficult questions presented when a death is the result of a level of negligence traditionally recognized as warranting criminal liability.

I attempted to identify as many incidents as possible involving a child dying from hyperthermia in the United States after being left in a car for the six-year period from the beginning of 1998 to the end of 2003.<sup>71</sup> My aim was to develop as much factual information as possible about each separate incident. In particular, I was interested in ascertaining the identity of the responsible party—was it a parent, another relative, or some unrelated caregiver? And how was each incident treated by the criminal justice system?<sup>72</sup>

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<sup>68</sup> See JAN NULL, 2003 HYPERTHERMIA FATALITIES: CHILDREN IN VEHICLES (2003), <http://ggweather.com/heat/hyperthermia2003.htm> (collecting 2003 cases). Indeed, children are left in cars so often that in the first six months of 2001, firefighters in Dallas, Texas responded to “more than 200 calls about children being left unattended in vehicles.” Robert Tharp, *Hearing on Tot’s Siblings Delayed: Boy’s Death in Car Leads to Custody Case*, DALLAS MORNING NEWS, June 6, 2001, at 21A.

<sup>69</sup> See, e.g., NULL, *supra* note 67; 4 R Kids Sake, <http://www.4rkidsake.org> (last visited Sept. 17, 2005); Kids in Cars: Keeping Kids Safe in or Around Vehicles, <http://www.kidsincars.org> (last visited Sept. 17, 2005). Janette Fennell, Terrill Struttman, and Tammy Russell have done a remarkable job with their organizations, all of which arose out of their own personal tragedies, and I would like to express my gratitude for their work.

<sup>70</sup> For example, the scenario of a child dying as a result of a parent’s failure to seek medical treatment is often cast in terms of negligence. See, e.g., *Walker v. State*, 763 P.2d 852 (Cal. 1988) (permitting involuntary manslaughter case to proceed against Christian Scientist mother, where allegation was based on theory that mother was criminally negligent for failing to seek medical treatment for her daughter). However, these decisions typically result from a parent’s deliberate choice not to seek treatment as the result of religious beliefs, and thus involve intentional rather than negligent conduct.

<sup>71</sup> Some incidents involved multiple victims, multiple defendants, or both. The statistics that follow are therefore based on number of incidents, and not on number of victims or defendants or prosecutions. I chose the year 2003 as the ending point of my study because incidents that occurred in 2004 or 2005 might not yet have worked their way through the criminal justice system.

<sup>72</sup> Another recent study looked at hyperthermia cases occurring between 1995 and 2002. This study did not consider criminal justice outcomes at all, but instead attempted to identify common circumstances leading up to the fatalities in order to make recommendations for prevention, such as changes to automobile design. This study examined 159 total incidents, involving 171 victims. Twenty-seven percent of the incidents involved a child who climbed into a car while playing and seventy-three percent involved children who were left by their parents in a car. See Anara Guard & S. Gallagher, *Heat Related Deaths to Young Children in Parked Cars: An Analysis of 171 Fatalities in the United States, 1995–2002*, 11 INJURY PREVENTION 33 (2005). This study found that deaths occurred in forty-one of the fifty states, so this cause of death is a pervasive problem. *Id.* at 34.

I used multiple resources in an attempt to compile as complete a database as possible. One very helpful resource was the various advocacy organizations currently devoted to compiling such case reports. I then searched both Lexis and Westlaw case and news databases to identify other potential incidents, as well as various Internet search engines such as Google and Yahoo. If it was impossible to determine the outcome of an incident from published news reports, I contacted the attorneys for the government, the defendant, or both in a particular incident or consulted court records. After these steps were complete, I then compared my database against two other databases to ensure that I had captured all relevant incidents: one maintained by Jan Null, a forensic meteorologist and adjunct professor at San Francisco State University, and one maintained by Anara Guard, a public health researcher formerly at the Boston University School of Public Health and now at the Education Development Center.<sup>73</sup>

Because of my reliance in part on media reports, gleaned both from my own research and from copies archived by advocacy organizations, it is important to consider whether my data is affected by a selection bias. Specifically, did the media more often report on certain types of cases—e.g., cases where prosecution was pursued or cases involving white-collar professionals—because those cases were considered the most newsworthy? Although the possibility of selection bias exists, I do not believe that it is a significant problem here for several reasons. First, the genesis of my data set was the initial media report(s) issued immediately following the discovery of a dead child in a car. At the time these initial stories were filed, the reporters obviously had no idea whether prosecution would ultimately be pursued,<sup>74</sup> and at most would only have cursory information about the socioeconomic status of the family involved.<sup>75</sup> The primary contribution of my research was de-

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<sup>73</sup> I want to extend my deepest thanks to both Jan Null and Anara Guard, who were extraordinarily generous in sharing data with me. Null focuses on these cases from the perspective of vehicle heating dynamics; Guard evaluates them from a public health perspective (for example, could changes be made in daycare policies that would reduce the incidence of deaths?).

<sup>74</sup> Indeed, the initial news report is filed long before a decision regarding prosecution is made. Imagine a child dies on day one. The initial newspaper or television report about the death would appear on day two. A prosecution decision would ordinarily not be made for weeks or even months, at which time additional media reports might follow.

<sup>75</sup> Indeed, one newspaper editor whom I interviewed told me that he would have little information about a child's race or class at the time the report of a death came into the newsroom and the decision was made to report upon the case. Telephone interview with Ken Otterbourg, Managing Editor, Winston-Salem Journal, in Winston-Salem, N.C. (Aug. 10, 2005) [hereinafter Telephone Interview]. He also told me that he could not think of a reason why any case involving a child's death in a car would not be considered newsworthy and thus be reported by his paper. *Id.* The issue of selection bias has been much in the news lately, as some have questioned why missing persons cases involving young white women receive more attention than cases involving people of color. See, e.g., Rick Lyman, *Missing Woman's Case Spurs Discussion of News Coverage*, N.Y. TIMES, Aug. 7, 2005, at 116. When I asked Mr. Otterbourg about that controversy, he told me that when newspapers make reporting decisions, they view dead people—and especially dead children—much differently than missing persons. Telephone Interview, *supra*.



termining what happened to the case after these initial media reports.<sup>76</sup> Second, the advocacy groups that track media reports explicitly attempt to capture every incident where a child dies after being left unattended in a car because their very purpose is to increase public awareness of the problem by showing its prevalence. These groups simply do not care whether a prosecution is initiated or not; that is not the focus of their work so there is no reason to believe they have introduced a selection bias.<sup>77</sup>

In addition, there is simply no reliable, comprehensive, accessible data source other than media reports. It would be impossible, for example, to attempt to compile meaningful data by going to the Dallas police department and looking at all police reports on child deaths over a six-year period because any one city or county or even state has at most a handful of child hyperthermia deaths in that timeframe. Indeed, even if there had been a large number of deaths in any one city, the public documents available would be incomplete. Autopsy reports, for example, even if accessible to the public, would simply list hyperthermia as the cause of death; there would be no way of ascertaining from the document whether the child died because he was left in a car or because he collapsed while playing outside on a hot day. So although reliance on media reports may be imperfect, such reports are simply the most comprehensive data source available when looking at national trends.

I excluded from my database incidents where the child died after climbing into a car on his own.<sup>78</sup> Although these incidents might well in-

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<sup>76</sup> The main way in which selection bias might realistically come into play is in the twelve cases involving parents as potential defendants where I was unable to obtain prosecution data. It is certainly possible that these cases fell off the radar screen because prosecution was not pursued. I do not believe that is necessarily a fair assumption, however; in some of the cases where I ultimately obtained information, I learned the media had fallen silent because the prosecutor and the defendant had reached a confidentiality agreement. These cases also fell remarkably evenly across the different groups: I was unable to ascertain prosecution data for three cases involving mothers, three cases involving fathers, and two cases involving both parents as potential defendants, so I do not believe the absence of information about this small group of cases skews the data.

<sup>77</sup> There is also certainly no reason to believe that two fellow academic researchers, Anara Guard and Jan Null, are skewing their data in favor of prosecuted cases or white collar defendants.

<sup>78</sup> I also excluded three additional cases. The first, a 2001 case in which a child died after her father parked the car and committed suicide just outside it, was excluded because there was obviously no possibility of prosecution in that case. *See Child Dies in Car After Dad Hangs Himself from Tree: The Father Left Directions, But Deputies Could Not Find the Spot Before the Toddler Died of Exposure*, ORLANDO SENTINEL, June 8, 2001, at A17. The second was a 1998 case where a father failed to get medical treatment for his infant daughter after finding her alive in the family car, because the prosecution rested on the failure to obtain treatment rather than on the negligence involved in leaving her unattended in the car in the first instance. *See Ohio v. Bittner*, No. CA2001-01-009, 2002 WL 4493 (Ohio Ct. App. Dec. 31, 2001). Finally, in one additional case, I was unable to ascertain enough facts even to be sure of the identity of the responsible party. In that Mississippi case, an initial news report suggested that both the mother and grandmother were the responsible parties; each left the car and believed the other had removed the child. *See Child's Death Third Related to Heat Wave*, COM. APPEAL (Memphis, Tenn.), July 22, 2000, at DS3. I was unable to ascertain any other details about this case, and because

volve some degree of parental negligence, such as failing to supervise the activities of a child, a single moment of inattention could result in a child slipping out of the house and into a car. This scenario thus did not seem sufficiently comparable to the negligence involved in forgetting a child in a car for several hours. I identified forty-four separate incidents in which children died after climbing into a car, involving forty-nine total victims. Parents were in fact prosecuted in at least three of these incidents.<sup>79</sup>

After these exclusions, my data set consisted of 130 incidents involving 136 total victims. In forty-six of these incidents, or 35.4%, the mother was the sole party responsible for leaving the child in the car. Fathers were the culpable parties in twenty-eight, or 21.5%, of the incidents. Fourteen incidents, or 10.8% of the total, actually involved both parents as potential defendants. Other relatives were responsible for forgetting the child in the car in fourteen, or 10.8%, of the incidents. Most typically, these incidents involved a grandparent, although there was at least one incident each involving an aunt, uncle, and cousin.<sup>80</sup> Finally, twenty-eight of the incidents, or 21.5%, involved caregivers who were unrelated to the victim, such as a day care worker, babysitter, or foster parent. In at least eighty-seven of the incidents, the child was left alone in the car for three or more hours.<sup>81</sup>

The results of my empirical research into the treatment of these incidents by the criminal justice system are summarized in the table below, and then described in greater detail in the paragraphs that follow.

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the mother was not the sole responsible party, or even necessarily the primary responsible party, have not included it in the statistics involving the treatment of cases against mothers.

<sup>79</sup> Although I did not attempt to ascertain the outcomes in this category of cases in the same exhaustive detail as the cases that were included in the database, the incidents which resulted in prosecution generally seemed to involve some sort of aggravating factor. For example, three children died in St. Louis, Missouri, after climbing into a car on August 13, 2001. Their primary caregiver that day, the mother of two of the victims, was charged with felony child endangerment, a decision which I would suggest rested in part on the number of victims and in part on the extreme youth of the children—two were two years old and one was only one year old—which made it unreasonable for them to be unsupervised for any length of time. She ultimately pled guilty and received a five year suspended sentence and four years of probation. See Tim Bryant, *Woman Who Let Small Children Play Unsupervised Is Sentenced to Probation for Their Deaths*, ST. LOUIS POST-DISPATCH, Dec. 15, 2001, at 21.

<sup>80</sup> Nine of the incidents involved grandparents.

<sup>81</sup> In some of the incidents, it was unclear how long the child was left in the car.

Table: *Hyperthermia Incidents in the Criminal Justice System (1998–2003)*

Identity of Defendant	Number of Incidents	Incidents Prosecuted <sup>82</sup>	Defendant Convicted	Jail Sentence Imposed
Mother	46	26/43 (60.5%)	23/25 (92%)	15/22 (68.2%)
Father	28	11/25 (44%)	10/11 (90.9%)	5/9 (55.5%)
Both Parents	14	6/12 (50%)	5/6 (83.3%)	1/4 (25%)
Other Relative	14	6/10 (60%)	5/6 (83.3%)	1/5 (20%)
Unrelated Party	28	24/27 (88.8%)	20/22 (90.9%)	12/20 (60%)

The conventional wisdom about parental negligence cases supposes that parents are usually not charged with a criminal offense and in the unlikely event they are charged, are rarely convicted.<sup>83</sup> This perception clearly is inaccurate, especially with regard to mothers.<sup>84</sup> I obtained information regarding prosecution decisions for forty-three of the forty-six incidents where the mother was the individual solely responsible for leaving the child in the car. Mothers were prosecuted in twenty-six of these incidents, meaning prosecutions were initiated in 60.5% of the incidents.<sup>85</sup> In one

<sup>82</sup> The right-hand number here reflects the number of cases about which I was able to obtain information. So of the forty-six cases involving a mother as a potential defendant, I was able to obtain information about the charging decision in forty-three of the cases. I was able to learn whether or not the defendant was convicted in twenty-three of the twenty-five cases in which charges were brought, and so on.

<sup>83</sup> See, e.g., Hannah Sampson, *Dad Charged in Death of Son Left in Hot Car*, MIAMI HERALD, July 21, 2004, at 1B (citing statement of Janette Fennell, founder of Kids and Cars, that parents are rarely prosecuted); see also Stephanie Armagost, *An Innocent Mistake or Criminal Conduct: Children Dying of Hyperthermia in Hot Vehicles*, 23 HAMLIN J. PUB. L. & POL'Y 109, 111 (2001) (asserting that since 1980, charges were filed in only 36.5% of cases where children died in automobiles from heat and that convictions resulted in only 14.6% of cases). This perception extends to other contexts in which a child dies as a result of parental negligence. In 2002, for example, a New York court stated that

criminal prosecutions are rarely brought against gun owners who have lost a close relative because of an accidental shooting. Prosecutors always have discretion over whether or not to press charges, but in many instances they do not want to aggravate an already tragic situation by commencing a criminal prosecution. Many believe there is no greater punishment than the knowledge that one contributed irresponsibly to the death of a closely-related child.

State v. Heber, 745 N.Y.S.2d 835, 839–40 (App. Div. 2002).

<sup>84</sup> It is of course possible that prosecution rates are different for other kinds of deaths resulting from parental negligence, such as deaths from drowning; this question is ripe for future research. At a minimum, my review of reported case law suggests that prosecutions for other causes of death are certainly not unprecedented.

<sup>85</sup> I defined prosecution as the formal initiation and pursuit of charges by the prosecutor's office or as the convening of a court martial. In a few instances, the police arrested an individual at the scene but

case, I was unable to learn whether the mother was convicted of the criminal charges filed against her. An overwhelming percentage of the remaining incidents resulted in a criminal conviction: mothers were convicted in twenty-three of twenty-five cases, meaning the government secured a 92% conviction rate.<sup>86</sup>

Not surprisingly, the majority of these convictions were the result of guilty pleas.<sup>87</sup> At least thirteen of the convictions resulted from guilty pleas and seven resulted from a trial or military hearing.<sup>88</sup> Mothers were convicted of offenses ranging from involuntary manslaughter and criminally negligent or reckless homicide to lesser charges of child neglect or endangerment. One Michigan mother was actually convicted of second-degree murder because she deliberately left her two children in the car for three hours while getting her hair done. Both children died.<sup>89</sup>

Moreover, mothers received sentences that included incarceration in a significant percentage of the cases. Mothers were sentenced to jail in 68.2% of the cases where the government obtained a conviction.<sup>90</sup> Although one of these sentences involved just one day of jail time, the remaining cases involving jail sentences ranged from one year to fifteen years to life. The other seven cases that included no jail time resulted in a sentence of either probation or a suspended sentence.

Fathers fared a little better, at least at the charging stage of the case, although they were still prosecuted, convicted, and sentenced to jail in a considerable percentage of incidents. I obtained information regarding prosecution decisions in twenty-five of the twenty-eight incidents involving fathers as potential defendants. Fathers were prosecuted in 44% of these incidents.<sup>91</sup> Again, the overwhelming percentage of these cases, 90.9%, re-

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the prosecutor declined to pursue the case or the grand jury refused to return an indictment. These examples were not coded as prosecuted cases.

<sup>86</sup> In comparison, a 2002 study examining the work of state courts concluded that only sixty percent of arrested homicide suspects and only forty-four percent of arrested robbery suspects are convicted. See COURT STATISTICS PROJECT, EXAMINING THE WORK OF STATE COURTS, 2002, at 89 (2003).

<sup>87</sup> See, e.g., MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 993 (2d ed. 2003) (noting that more than 90% of federal criminal charges are typically resolved via a plea bargain rather than a trial); COURT STATISTICS PROJECT, *supra* note 86, at 61 (“Approximately 3 percent of [state] criminal cases were resolved by trial in 2001.”).

<sup>88</sup> I was unable to determine whether the convictions in three cases were the result of a guilty plea or trial.

<sup>89</sup> See Frank Witsil, *Sentenced Mom Takes Blame for Kids' Deaths*, DETROIT FREE PRESS, Sept. 23, 2004, at 1A.

<sup>90</sup> In one case, the defendant is still awaiting sentencing.

<sup>91</sup> Mothers were therefore 37.5% more likely to be prosecuted than fathers. Because of the small sample size, this differential is not statistically significant under a chi-square analysis, but is nonetheless suggestive of a general trend that some legal scholars have identified of treating mothers more harshly than fathers at some stages of the criminal justice system when harm befalls their children. See generally Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665, 1681 (1990) (“So often lawyers push to blame mothers in order to excuse fathers.”); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare* “Re-

sulted in a conviction. Four of the convictions resulted from a trial and the remaining six from a plea of guilty or no contest. In the remaining case, the father was allowed to enter a diversion program, such that the charges would be dropped if he successfully completed the requirements of a year-long program.

In terms of sentences, I obtained sentencing information for nine of the ten cases with a conviction.<sup>92</sup> Fathers were sentenced to jail time in five of the cases, although one sentence required a father to spend just one day in jail on his daughter's birthday for seven years. The remaining sentences ranged from one year of imprisonment to fourteen years. Four defendants avoided jail time and were either sentenced to probation or received a suspended sentence.

The incidents involving both parents as potential defendants followed the same general pattern. Prosecution information was available for twelve of the fourteen incidents; the prosecution rate was fifty percent.<sup>93</sup> Parents were convicted of criminal offenses in five of these six cases; all were the result of guilty pleas. The remaining case was dismissed by a judge over the government's objection on the ground that the parents' conduct, while negligent, did not amount to manslaughter.<sup>94</sup> Of the four cases where sentencing information was available, three resulted in probation and one resulted in a five year jail sentence for each parent.

Prosecution decisions in the fourteen incidents involving a relative other than a parent were roughly comparable to the parent cases. Of the ten incidents for which I could obtain information, the prosecution rate was sixty percent. Five of the six cases resulted in a conviction; one was the result of a trial and four were the result of guilty or no contest pleas. One case resulted in a five-year jail sentence; the remaining defendants were sentenced to probation.

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*form,* *Family, and Criminal Law*, 83 CORNELL L. REV. 688, 713 (1998) (arguing "the law holds mothers, as opposed to fathers, responsible for harm and violence to their children"); Roberts, *supra* note 60, at 96, 110 (arguing that "criminal law is more likely to impose an affirmative duty on mothers than other classes of people" and that "[c]ourts hold mothers responsible for violence in the family"). *But see* WILCZYNSKI, *supra* note 22, at 118 (suggesting that, based on a sample of British cases, women are less likely to be prosecuted than men for a child's death because female child killers are typically viewed as "mad" while male child killers are viewed as "bad"). Wilczynski further notes that female defendants who are prosecuted are more likely to use "psychiatric pleas" than male defendants and more likely to receive sentences involving psychiatric treatment. *Id.* at 118–19.

<sup>92</sup> I was unable to obtain sentencing information for one case.

<sup>93</sup> Prosecutions were thus brought against both parents in six of the twelve incidents.

<sup>94</sup> *See Judge's Decision Correct: Prosecutors Should Not Appeal in Child Death Case*, NEWS-PRESS (Fort Myers, Fla.), Dec. 16, 2002, at 6B, available at <http://www.news-press.com/news/opinion/021216deadchild.html>. In this case, the parents neglected to take their youngest child, a twenty-three-month old, out of the family van after the family returned home from church. The parents laid down with their other four children for a nap, apparently assuming someone else had taken their youngest into the house and put him down for a nap in another room. They did not look for him or check on him for five hours, until they were getting ready to return to church. *See* Sharon Turco, *Autopsy: Toddler Dies of Heat Stroke*, NEWS-PRESS (Fort Myers, Fla.), July 30, 2002, at 1A.

Prosecution rates were strikingly higher in the twenty-eight incidents involving only adults unrelated to the victim.<sup>95</sup> Of these incidents, sixteen involved workers at daycare centers; the remaining incidents involved babysitters, family friends, or foster parents. I was unable to obtain prosecution information for one of the incidents. For the twenty-seven remaining incidents, the prosecution rate was 88.8%. Of the twenty-two cases for which I could obtain disposition information,<sup>96</sup> the government obtained convictions in twenty cases, or in 90.9%. Fifteen of the cases were resolved via a guilty plea, four were resolved via a trial, and one incident with multiple defendants involved one conviction via a guilty plea and one via a trial.

Nonrelatives who were prosecuted faced the very real possibility of a jail sentence. In twelve of the twenty cases (sixty percent), where the government obtained a conviction, the defendants were sentenced to jail. The remaining eight cases resulted in a sentence of probation. The jail sentences for nonrelatives ranged from ninety days to thirteen years of incarceration.

The stark differential in the treatment of parental defendants versus the treatment of unrelated defendants suggests, I believe, that prosecutors are in fact employing a “suffering discount” for parents.<sup>97</sup> Of the cases where I was able to determine the decision regarding prosecution, parents were prosecuted in forty-three of eighty cases, or in 53.75%, still a very significant percentage. But individuals not related to the defendant were prosecuted far more frequently, in 88.8% of cases where I was able to trace the prosecution history.<sup>98</sup>

It is also clear from the statistics that the initial decision whether or not to prosecute is the most significant one. Although there was a wide disparity in the percentage of defendants prosecuted between the different categories of defendants, the conviction and sentencing statistics were remarkably consistent across all categories. For example, once the decision to prosecute was made, conviction rates ranged from eighty-three percent to ninety-two percent.

Other significant trends were evident in the cases. The factors that influenced prosecutorial decisionmaking are highlighted through the use of

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<sup>95</sup> Five of the cases involved multiple defendants, so these twenty-eight incidents involved thirty-four potential defendants. The statistics in this section are not based on the number of defendants, but on the number of incidents. Also, one incident involved both a victim’s father and a family friend as defendants. Because presumably the father was primarily responsible for the safety of his child during an outing, I have included that incident in the statistics for fathers rather than for unrelated defendants.

<sup>96</sup> Two of the cases apparently remain pending as of the date of this Article.

<sup>97</sup> These results were consistent with those found by Ania Wilczynski in a study of child homicides in Australia. Wilczynski concluded that “non-familial killers” of children were more likely to be convicted and to be sentenced to prison than parents who killed their children. WILCZYNSKI, *supra* note 22, at 174–79.

<sup>98</sup> A chi-square analysis confirmed that the difference in prosecution rates for parents and nonrelatives is statistically significant at a ninety-nine percent confidence level; the p-value was 0.0011.

narrative, so this section incorporates some actual case studies in an effort to illustrate patterns within the various charging decisions.

*On July 27, 2002, a twenty-year-old mother and Navy sailor named Lateasha Moore deliberately left her eleven-month-old son in her car when she went to work because she was unable to find a babysitter. Although she checked on him periodically, he was dead when she ultimately returned to the car. Although she argued that she did not have any intent to harm her baby, she was convicted by a military court of involuntary manslaughter and sentenced to nine years in prison.*<sup>99</sup>

*On June 28, 2002, a twenty-five-year-old mother named Tarajee Maynor deliberately left her three-year-old son and ten-month-old daughter in her car for more than three hours while she was getting her hair done and getting a massage. When Ms. Maynor returned to her car and discovered that her children were dead, she drove around with their bodies for another three hours trying to concoct a story to explain her conduct. She initially told the police she had been taken from the car and raped, and returned to the parking lot after the rape to find her children dead. She eventually confessed to intentionally leaving the children, but claimed that she was "too stupid" to know that the children could be harmed as a result. She recently pled guilty to second degree murder and was sentenced to 12.5 to sixty years in prison.*<sup>100</sup>

My research showed that prosecutions were initiated in every case where the responsible party left the child in the car deliberately.<sup>101</sup> The evidence in these cases did not suggest that the perpetrator intended to kill the child; indeed, the facts typically demonstrated that the defendant was unaware that a decision to leave the child behind posed any fatal danger. Nonetheless, prosecutions were far more likely in these cases than in a case where the responsible party simply forgot the child was in the car. The remarkably consistent decisions to prosecute across this category of cases are perhaps explained because these defendants arguably behaved recklessly, rather than only negligently.

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<sup>99</sup> See Matthew Dolan, *Seaman Who Left Son in Car Sentenced to 9 Years in Prison*, VIRGINIAN-PILOT (Hampton Roads, Va.), Jan. 21, 2004, at B1; Louis Hansen, *Navy Lowers Charge from Murder in Baby's Death; Manslaughter Alleged Against Child's Mother*, VIRGINIAN-PILOT (Hampton Roads, Va.), May 3, 2003, at B1. Moore's case also involved an allegation that she had burned her child with an iron in an earlier incident.

<sup>100</sup> See John Masson, *'I Didn't Know . . . They Would Die': Charges Reduced for Mom Who Left Kids in Hot Car*, DETROIT FREE PRESS, July 11, 2002, at 1A; Zlati Meyer, *Stiffer Charge OK'd in Hot-Car Deaths*, DETROIT FREE PRESS, June 30, 2004, at 1D; Frank Witsil, *Sentenced Mom Takes Blame for Kids' Deaths*, DETROIT FREE PRESS, Sept. 23, 2004, at 1A.

<sup>101</sup> The Guard and Gallagher study found twenty-seven percent of the incidents they studied involved caregivers who left the child in the car deliberately. See Guard & Gallagher, *supra* note 72, at 35. This statistic clearly suggests that prosecution may have both a deterrent and educative effect.

*On August 1, 1999, a thirty-year-old mother named Sandra Arteaga accidentally left her eight-month-old son in her car after a night of drinking. Ms. Arteaga was driving home with her two children after a night of partying when she decided to pull over in a gas station parking lot to rest. A limousine driver noticed Ms. Arteaga and offered her a ride home. Ms. Arteaga brought her two-year-old daughter into the limo, but forgot her son was also in her car and drove off without him. Her son was found dead in the car more than ten hours later. Ms. Arteaga was convicted at a jury trial of reckless injury to a child and sentenced to twelve years in prison. Her husband objected to the prison sentence and stated that the jurors should have imposed probation, saying "it's the least they could have done for her."<sup>102</sup>*

Prosecutions were initiated in virtually every case where any sort of aggravating factor was present. For example, the responsible party was prosecuted in every case where there was an indication of significant drug or alcohol use prior to forgetting the child in the car. The only exception to this trend was a daycare provider who waited thirty-five minutes to call 911 after finding an unconscious child in her van. Despite the delay in summoning help and the fact she was a daycare provider, a category of defendant prosecuted in more than eighty-eight percent of the incidents, the grand jury declined to indict her.

*On July 24, 2001, an unemployed twenty-four-year-old father named Brian Gilbert accidentally left his five-month-old son in his car for three hours while he visited a relative to play video games. Prosecutors in San Jose, California, charged him with involuntary manslaughter and child neglect. Mr. Gilbert went to trial and was found guilty of both charges by a jury. He was sentenced to four years probation and 500 hours of community service.<sup>103</sup> The prosecutor remarked after the verdict that Gilbert's actions constituted a "flagrant departure from what the community expects" in terms of a parent's duty of care and "that it was obvious that he should have been aware of his own son."<sup>104</sup>*

*On August 8, 2003, a forty-nine-year-old college professor and Fulbright scholar named Mark Warschauer accidentally left his ten-month-old son in his car for over three hours when he went to work. The district attorney in Irvine, California, declined to file charges, saying the death was a*

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<sup>102</sup> See Steve Brewer, *Mother Gets 12 Years in Baby's Death: 8-month-old Boy Was Left in Hot Car*, HOUSTON CHRON., Mar. 14, 2000, at A13.

<sup>103</sup> See John Woolfolk, *Dad Avoids Jail in Death of Baby Left in Hot Car: Community Service Sentence May Include Public Safety Video*, SAN JOSE MERCURY NEWS, Nov. 23, 2002, at 1A.

<sup>104</sup> See John Woolfolk, *Father of Boy Left in Car Guilty of Manslaughter*, SAN JOSE MERCURY NEWS, July 20, 2002, at 1A.



*“tragic mistake” and citing Warschauer’s “unquestionable love for his child.”*<sup>105</sup>

One of the most striking trends in the data was the preferential treatment accorded parents who could be identified via descriptions contained in media reports as middle or upper class or employed in “white collar” professions.<sup>106</sup> I was able to obtain information regarding both socioeconomic status and prosecution outcome for fifty-one of the cases involving parents as potential defendants.<sup>107</sup> Thirty of these cases involved parents who could be characterized as working in a white collar profession or as being the spouse of a white collar professional.<sup>108</sup> Professions ranged from a NASA scientist to college professors to a hospital CEO. Of these individuals, only seven were prosecuted, for a prosecution rate of 23.3%. But of the twenty-one individuals who could be classified as working in a blue collar profession or who were unemployed, or had some other indicator of a lower socioeconomic status such as living in a mobile home with no working

<sup>105</sup> See Mai Tran & Christine Hanley, *Professor Won’t Be Charged in Death of Son Left in Hot Car*, L.A. TIMES, Oct. 4, 2003, at B6. One of the more striking aspects of the district attorney’s decision was his statement that he “changed his mind” about prosecuting after reviewing other cases across the country and concluding that parents were typically not charged. *Id.* This assessment was clearly inaccurate.

<sup>106</sup> This finding is consistent with that in a study conducted by anthropologist Anna Lowenhaupt Tsing; Tsing concluded, albeit without citing statistics, that middle-class white women charged with “endangering newborns in unassisted births” were treated more favorably than lower income women and women of color. See Anna Lowenhaupt Tsing, *Monster Stories: Women Charged With Perinatal Endangerment*, in UNCERTAIN TERMS: NEGOTIATING GENDER IN AMERICAN CULTURE 282, 298 n.1 (Faye Ginsburg & Anna Lowenhaupt Tsing eds., 1990) (reviewing twenty-five cases that took place between 1984 and 1988); see also Steven Barnett Boris, *Stereotypes and Dispositions for Criminal Homicide*, 17 CRIMINOLOGY 139, 149 (1979) (concluding in a study of homicide cases that “unemployed offenders have their cases prosecuted to a significantly greater extent than do higher status—employed—offenders”); Roberts, *supra* note 60, at 107–08 (discussing Tsing’s study).

<sup>107</sup> It is important to note that characterizing socioeconomic status is necessarily somewhat subjective. For example, I classified incidents where a parent was a truck driver or a convenience store clerk as working in a blue collar profession or having a lower socioeconomic status, and incidents where a parent was working as a police officer as having a higher socioeconomic status, but I recognize it is possible that some might disagree with those characterizations. I had also very much hoped to examine whether race played a factor in charging decisions, but I was unable to ascertain that information for a sufficient number of cases. For a discussion of the role race plays in the child welfare system, see Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171.

<sup>108</sup> The fact that so many of these child deaths occurred in middle- or upper-class homes is surprising. For example, a study of child homicides conducted in Ottawa, Canada, although unfortunately based on a very small number of cases, found that *none* of the deaths occurred in families with a “high” socioeconomic status. 46.2% of the deaths occurred in families with an average socioeconomic status and 53.8% in families with a low socioeconomic status. Dominique Bourget & John M.W. Bradford, *Homicidal Parents*, 35 CAN. J. PSYCHIATRY 233, 234 (1990); see also Rosalie Anderson, Robert Ambrosino, Deborah Valentine & Michael Lauderdale, *Child Deaths Attributed to Abuse and Neglect: An Empirical Study*, 5 CHILD. & YOUTH SERVS. REV. 75, 82 (1983) (reviewing child abuse and neglect deaths over a three-year period in Texas and concluding, albeit tentatively because of the small sample size, that only 9.6% of the involved families could be classified as white collar where income statistics were available).

utilities, eighteen were prosecuted, translating to a staggering prosecution rate of 85.7%.<sup>109</sup>

It might be possible that this disparity is the result of a correlation between socioeconomic status and some of the other factors that seem to affect prosecutorial decisionmaking. For example, if blue collar parents are more likely to leave a child in a car deliberately because of child care problems, then the disparity might be based on this factor and not on socioeconomic status.<sup>110</sup> But a multiple regression analysis confirmed that socioeconomic status was an independently significant factor in prosecutorial decisionmaking.<sup>111</sup> Even after controlling for the variables of leaving a child in a car deliberately or of using drugs or alcohol prior to forgetting the child, the variable of socioeconomic status proved to be statistically significant in terms of patterns of prosecutorial decisionmaking at more than a ninety-nine percent confidence level.<sup>112</sup>

## II. SHOULD WE PROSECUTE PARENTS?

The research discussed in the preceding section demonstrates that a significant number of children die as the result of negligence, in a wide range of circumstances. We saw that prosecuting individuals unrelated to the victim is commonplace; indeed, there is almost universal outrage when a child dies due to the negligence of a paid caregiver.<sup>113</sup> But the research also shows that contrary to public perception, parents are being prosecuted as well, although such prosecutions are very controversial. Now that we know such prosecutions occur, it seems time for a dialogue about whether such prosecutions are appropriate, so that future decisions about whether to prosecute in individual cases will be based upon more than the misperception that parental prosecutions occur only in negligible numbers.

Perhaps the most common objection raised to prosecuting parents whose negligence results in the death of a child revolves around the suffer-

<sup>109</sup> A chi-square analysis also confirmed that the difference in the prosecution rates for blue collar and white collar parents is statistically significant at greater than a 99.9% confidence level; the p-value was 0.00001156.

<sup>110</sup> It is of course also possible that this disparity might in part be explained by the fact that white collar defendants often have access to better lawyers, a variable not taken into account here because of insufficient information.

<sup>111</sup> A logistic regression is used because the dependent variable only has two possible values; either the defendant is prosecuted or he is not. For a detailed discussion of logistic regressions, see G.S. MADDALA, LIMITED-DEPENDENT AND QUALITATIVE VARIABLES IN ECONOMETRICS 22–27 (1983).

<sup>112</sup> The p-value was 0.0040. The detailed multiple regression results are on file with the Author and are available upon request.

<sup>113</sup> See, e.g., Press Release, Office of the Shelby County Dist. Attorney Gen., Three Indicted by Grand Jury for First Degree Murder of Child Left in Daycare Van (Aug. 7, 2003), available at <http://www.scdag.com/archive/803.htm#daycare1> (citing statement of district attorney that “[t]hese indictments should send a strong message to the daycare industry that if neglect of duty results in the injury or death of an innocent child, those responsible will be prosecuted to the furthest extent of the law”).

ing of the responsible parent: surely the parent has already suffered enough.<sup>114</sup> It is unquestionably true that for most individuals there can be no greater pain than the loss of a child, and that the suffering endured by parents in this position is almost unimaginable. But should the suffering already endured by a potential defendant be the dispositive consideration when deciding whether or not to initiate a criminal prosecution, particularly when the suffering is the direct result of the defendant's actions? In other words, even if the suffering already endured by the defendant is relevant to the *sentence* she might receive upon conviction, should that suffering be considered with respect to the initial *charging* decision?

The relevance of defendant-created suffering is a question that lurks at the margins of criminal law; only a few legal scholars and philosophers have wrestled with the issue.<sup>115</sup> Suffering has typically been referenced in the contexts of conviction, sentencing, and clemency, but not in the realm of charging decisions.<sup>116</sup> In terms of convictions, commentators often have asserted that a defendant's suffering is one basis upon which juries may choose to nullify, but there has been very little discussion about whether this is an appropriate basis for the exercise of that power.<sup>117</sup> Indeed, the standard trial practice of instructing jurors that their deliberations should not be influenced by "prejudice, fear, sympathy, or favoritism" indicates

<sup>114</sup> See, e.g., Turley, *supra* note 2.

<sup>115</sup> Alwynne Smart and Kathleen Dean Moore are two of these philosophers, whose writings will be discussed in greater detail below. For some legal references to suffering, see, for example, Kobil, *supra* note 2, at 633 (suggesting that a defendant's suffering might be an appropriate basis for granting clemency under a retributive approach); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421, 1437 (2003); Samuel H. Pillsbury, *Emotional Justice: Moralizing the Passions of Criminal Punishment*, 74 CORNELL L. REV. 655, 672 (1989) (noting that "[s]ympathizing with an offender based on his suffering may lead to excusing an offense when little or no excuse should be available under retributive principles"). Jeffrie Murphy, who works at the intersection of law and philosophy, has done some marvelous work in this area. See, e.g., JEFFRIE MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* (1988); Murphy, *supra* note 2, at 454.

<sup>116</sup> Similarly, the related values of "apology and remorse factor in most significantly at sentencing." Stephanos Bibas & Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 98 (2004).

<sup>117</sup> See, e.g., Clay S. Conrad, *Jury Nullification: The Lawyer's Challenge*, 24 CHAMPION 30, 35 (2000) (suggesting that a defense lawyer pursuing a nullification strategy argue to the jury that the defendant is a victim or that the defendant has already suffered enough); Nancy J. King, *Silencing Nullification Advocacy Inside the Jury Room and Outside the Courtroom*, 65 U. CHI. L. REV. 433, 479–80 (1998) (including the extent of the defendant's suffering in a list of reasons that might lead a jury to nullify). Interestingly, Professor King suggests that some of the reasons in this list might be considered "bogus" reasons for nullification, although it is unclear whether she would characterize the defendant's suffering as a "bogus" or legitimate reason. She further adds that it would be difficult in any event to develop a meaningful basis for distinguishing between "acceptable and unacceptable reasons for acquittal." *Id.* at 481; see also Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 302 n.188 (1996) (citing some examples where the jury nullified because of the defendant's suffering). Professor Leipold suggests that the defendant's suffering might be an appropriate basis for nullification in some circumstances, but adds, without extensive discussion, that this would be highly controversial. *Id.* at 315.

considerable hostility to considering a defendant's suffering when determining his guilt or innocence.<sup>118</sup>

In terms of sentencing, suffering is discussed as a sentencing factor by both utilitarians and retributivists. For example, utilitarian theorists weigh the defendant's suffering as one factor in the calculus when determining the appropriate sentence for a particular crime, but their concern is with the suffering created by the sentence imposed, not with the defendant's suffering triggered directly by his crime.<sup>119</sup> Retributivists rely on suffering in two different contexts. First, the imposition of punishment under traditional retributivist theory inevitably inflicts suffering on the offender.<sup>120</sup> But offenders are made to suffer because they deserve it; their breach of the social contract renders state condemnation and the resulting imposition of privations appropriate. This is not to suggest that retribution is the functional equivalent of revenge. The defendant's suffering here is the byproduct, and not the purpose, of the punishment; punishment cannot be simply the gratuitous infliction of pain. Again, the discussion of suffering in this context refers to the suffering created by the punishment itself.

But second, and conversely, some philosophers, such as Kathleen Dean Moore, have argued that an offender's suffering, unrelated to his punishment, might be an appropriate basis under retributivist theory for granting leniency.<sup>121</sup> As a practical example, clemency has been granted in some cases involving battered women who kill their abusers, in part because such defendants were thought to have already suffered enough as a result of the

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<sup>118</sup> See, e.g., CRIMINAL JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA No. 2.02, at 60 (Barbara E. Bergman ed., 4th rev. ed. 2004); see also Steven P. Garvey, "As the Gentle Rain Falls from Heaven": Mercy in Capital Sentencing, 81 CORNELL L. REV. 989, 989-90 (1996) (discussing case of *California v. Brown*, in which the Supreme Court upheld the use of such an instruction); Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1430-31 (2004) (same).

<sup>119</sup> See Garvey, *supra* note 118, at 1013 (suggesting that "[t]he only relevant inquiry for a utilitarian sentencer is whether the punishment she imposes, taking into account the suffering of the defendant offset against the benefits his suffering brings to society, will produce a net increase in overall utility"); Louis Michael Seidman, *Soldiers, Martyrs, and Criminals: Utilitarian Theory and the Problem of Crime Control*, 94 YALE L.J. 315, 320 (1984) (suggesting that for a utilitarian, "[s]ince everyone's welfare is included in the social calculus, the cost of crime prevention includes not only enforcement costs (police) and process costs (courts), but also the suffering imposed upon criminals made to undergo punishment"). The Federal Sentencing Guidelines essentially reject this kind of extensive consideration of the defendant's suffering in setting a sentence. See generally Bowman, *supra* note 16, at 695-704 (discussing the sentencing factors that the Guidelines allow a judge to consider).

<sup>120</sup> See, e.g., John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4-5 (1955) ("It is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing."); see also R.A. Duff, *Justice, Mercy, and Forgiveness*, 9 CRIM. JUST. ETHICS 51, 52 (1990) (noting "the central retributivist intuition that 'the guilty deserve to suffer'" and that punishment is "the infliction of suffering on the criminal").

<sup>121</sup> KATHLEEN DEAN MOORE, PARDONS: JUSTICE, MERCY, AND THE PUBLIC INTEREST 11 (1989); see also Markel, *supra* note 115, at 1428 n.22 (discussing Moore's theory).

prior beatings they had sustained.<sup>122</sup> But should clemency be granted if the defendant suffers emotional pain as a result of a crime she committed? To use the example of the battered wife, should she receive more lenient treatment from the criminal justice system because she is suffering from the loss of the spouse whose death she caused?

The extent to which we should take defendant-created suffering into consideration also could be conceptualized as a question of mercy, a topic that has lately received some welcome attention by the legal academy.<sup>123</sup> This Article will draw upon Robert Misner's helpful definition and use the term "mercy" to refer to the state's decision, based on the principle of compassion, either to forgo punishment entirely or to reduce the criminal sentence that would otherwise justly result from the offender's conduct.<sup>124</sup> Strikingly, the recent academic discussions of mercy have tended to revolve around the issues of sentencing and clemency, and not around whether the exercise of mercy might be appropriate at earlier stages of the criminal justice process.<sup>125</sup> This could simply be the result of oversight or, more plausi-

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<sup>122</sup> See Joan H. Krause, *Of Merciful Justice and Justified Mercy: Commuting the Sentences of Battered Women Who Kill*, 46 FLA. L. REV. 699, 762–63 (1994) (suggesting this is an appropriate basis on which to consider a reduction in sentence). Another example could be forgoing punishment of a criminal who is terminally ill. See, e.g., Duff, *supra* note 120, at 59 ("[I]f a criminal is suffering seriously (if he is grievously ill, perhaps, or recently bereaved—the suffering need not itself be a result of his crime), we might, and perhaps should, come to see him from the perspective of compassion and mercy rather than from that of retributive justice."). Jeffrie Murphy and Jean Hampton suggest that a merciful judge might reduce an embezzler's sentence out of compassion for his suffering when his crime "had cost him his career, his marriage, his social standing, . . . [and] his savings." MURPHY & HAMPTON, *supra* note 115, at 159. Murphy and Hampton further note, however, that "this leniency risks undermining both the deterrent message and the expression of the value the wrongdoer has transgressed." *Id.* Moore might take issue with the first two examples in this footnote because they are unrelated to the crime committed, although she would presumably agree with the example cited by Murphy and Hampton.

<sup>123</sup> See, e.g., Markel, *supra* note 115, at 11–12; cf. Garvey, *supra* note 118, at 991 n.9 (collecting sources on mercy); Robert L. Misner, *A Strategy for Mercy*, 41 WM. & MARY L. REV. 1303, 1306–07 (2000) (suggesting that the topic of mercy has long been neglected by legal commentators and policy-makers).

<sup>124</sup> Misner, *supra* note 123, at 1322.

<sup>125</sup> Indeed, the titles of the articles are illustrative. See, e.g., Frank O. Bowman III, *The Quality of Mercy Must Be Restrained, and Other Lessons in Learning to Love the Federal Sentencing Guidelines*, 1996 WIS. L. REV. 679; Garvey, *supra* note 118; Michael Heise, *Mercy by the Numbers: An Empirical Analysis of Clemency and Its Structures*, 89 VA. L. REV. 239 (2003); Colloquium, *The Jurisprudence of Mercy: Capital Punishment and Clemency*, 82 N.C. L. REV. 1279 (2004); Eric L. Muller, *The Virtue of Mercy in Criminal Sentencing*, 24 SETON HALL L. REV. 288 (1993). Robert Weisberg's article provides another example: when discussing what an act of mercy "actually does," he states that "[t]echnically, it can vacate a conviction, release a person from prison, protect the convicted from collateral consequences of conviction, or spare the condemned from death." Robert Weisberg, *Apology, Legislation, and Mercy*, 82 N.C. L. REV. 1415, 1416 (2004); see also Misner, *supra* note 123, at 1323 n.85 (noting that commentators on mercy "have 'center[ed] their attention on the judgment of the sentencing judge"). Two recent articles represent an exception to this general trend. Dan Markel, for example, acknowledges that both prosecutors and grand jurors might exercise mercy in declining to bring charges against an individual. See Markel, *supra* note 115, at 1439 (observing that mercy "can appear throughout the life cycle of a crime"); see also Misner, *supra* note 123, at 1306 n.25 (noting that the exercise of mercy by prosecutors in charging decisions is "tolerated readily" but rarely discussed). Misner further

bly, the conscious or unconscious assumption that the end stages of the criminal justice process are the appropriate stages in which to temper justice with mercy.<sup>126</sup>

This last point suggests that we must grapple with two separate questions. The first is whether the defendant's suffering, when it is caused by the crime the defendant committed, should ever be a basis for forgoing or reducing punishment. The second question is whether his suffering, even if it should be used as a basis for reducing or forgoing punishment at the end of the criminal justice process, should be an acceptable basis for declining to charge a defendant with a criminal offense in the first instance. In other words, is there something unique about the charging decision itself, such that mercy based on a defendant's suffering should not be a mitigating factor in relation to the charging decision?

#### A. *The Relevance of Suffering*

As an initial matter, the relevance of the defendant's post-crime suffering, as an issue apart from the suffering inflicted by the punishment itself, is most typically debated within the confines of a retributivist theory of punishment.<sup>127</sup> Indeed, there has been some suggestion that for a pure utilitarian, perhaps the defendant's suffering is irrelevant because the primary concern of utilitarianism is the future consequences of any particular punishment. As Kathleen Dean Moore has argued, "[b]ecause retributivists look back, they can see prior suffering. Utilitarians only look forward to judge the deterrent effect of punishment; their philosophical blinders take away hindsight."<sup>128</sup> Although I am not convinced that utilitarians would be so quick to dismiss any consideration of suffering, a defendant's suffering is nonetheless a concern primarily of retributive theorists, so it is on retributivism that I will focus.

The classic hypothetical that retributivist philosophers have used to wrestle with the relevance of suffering is the reckless driver who kills his own child.<sup>129</sup> Alwynne Smart suggests that "to impose the full penalty"

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in charging decisions is "tolerated readily" but rarely discussed). Misner further suggests that mercy might be utilized by legislators in defining criminal justice policy, such as the appropriate policies for drug crimes. *See id.* at 1386.

<sup>126</sup> *See generally* Markel, *supra* note 115, at 1473–77 (noting that retributivism does not preclude the exercise of "justice-enhancing discretion," either to correct error or possibly to limit the application of overly broad criminal statutes to conduct that is not actually harmful, but treating this as distinct from the granting of mercy for compassion-based reasons).

<sup>127</sup> *See, e.g.,* Murphy, *supra* note 2, at 455 (stating that mercy "requires a generally retributive outlook on punishment and responsibility").

<sup>128</sup> MOORE, *supra* note 121, at 168.

<sup>129</sup> Alwynne Smart is often credited as the originator of this hypothetical, which has subsequently been utilized by a variety of scholars. Smart, *supra* note 2, at 348; *see also* Kobil, *supra* note 2, at 633 (suggesting that a defendant's suffering might be an appropriate basis for granting clemency under a retributive approach and citing a reckless driver who has killed her own child as an example); Andrew Leipold, *supra* note 117, at 315 (suggesting that a jury might be inclined to nullify in a case where a de-

available for such a crime “would be to impose a total amount of suffering quite out of keeping with the gravity of his crime” and that this case presents “a gap between moral justice and legal justice.”<sup>130</sup> Kathleen Dean Moore uses Smart’s hypothetical as one example of a class of cases where a pardon might be justified because the defendant has “already suffered enough” as a direct consequence of the crime committed.<sup>131</sup> Moore does note that pardoning an offender because of his suffering “disturbs a nest of problems, philosophical and otherwise,” but nonetheless concludes that a pardon may be justified.<sup>132</sup>

Before addressing my specific concerns about Smart and Moore’s conclusions, it is necessary to pause for a moment to consider what a “retributive theory of punishment” means. Joshua Dressler suggests there are at least three different schools of retributivist thought.<sup>133</sup> The first and perhaps most vengeful version, a version Dressler describes as “assaultive retribution, public vengeance, or societal retaliation,” is based on the notion that hating criminals is morally justifiable because of the damage they have inflicted upon society.<sup>134</sup> Because the wrongdoer has harmed society, it is just for the wrongdoer to be harmed in return.<sup>135</sup> Dressler describes the second variant as “protective retribution,” meaning that punishment is inflicted “as a means of securing a moral balance in the society.”<sup>136</sup> Punishment is thus the way an offender satisfies his moral debt to society.<sup>137</sup> Dressler’s third

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defendant’s reckless driving led to the death of her infant son). Jeffrie Murphy uses a similar hypothetical, although he compares Smart’s unfortunate driver to a defendant who kills in cold blood. See MURPHY & HAMPTON, *supra* note 115, at 170; see also Muller, *supra* note 125, at 300, 323–25 (discussing the Murphy hypothetical). Professor Muller suggests that the first defendant, “who has lived through the horror of accidentally killing his own child, is less morally culpable than” the second defendant. *Id.* at 300. But surely that is because of the difference in the *nature of the conduct*—an accidental or reckless killing versus a purposeful one—and not because of the identity of the victim. To argue otherwise would diminish the worth of the victim.

<sup>130</sup> See Smart, *supra* note 2, at 348.

<sup>131</sup> MOORE, *supra* note 121, at 168–69. Moore suggests that suffering resulting from the crime itself, which she characterizes as “natural suffering,” would be an appropriate basis for a pardon, as long as the suffering was not the intended consequence of the crime. Suffering unrelated to the crime—such as the recent loss of a parent or financial ruin—should not mitigate punishment because it bears no relevance to the offender’s desert for the particular crime committed. See *id.* at 169–71.

<sup>132</sup> *Id.* at 169.

<sup>133</sup> See DRESSLER, *supra* note 9. John Cottingham has suggested there are nine different versions of retributivist thought. See John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238 (1979).

<sup>134</sup> See DRESSLER, *supra* note 9, at 17. Dressler cites Sir James Fitzjames Stephens as one of the proponents of this variety of retributivism. See 2 JAMES F. STEPHENS, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (London, MacMillan 1883).

<sup>135</sup> DRESSLER, *supra* note 9, at 17.

<sup>136</sup> *Id.*

<sup>137</sup> *Id.* at 18. Dressler points us to Herbert Morris, who argued that

it is just to punish those who have violated the rules and caused the unfair distribution of benefits and burdens. A person who violates the rules has something others have—the benefits of the system—but by renouncing what others have assumed, the burdens of self-restraint, he has acquired

variant is the “victim vindication” model set forth by Jean Hampton, in which punishment “evens the score” between the victim and the offender.<sup>138</sup> More recently, Dan Markel has set forth a “Confrontational Conception of Retribution,”<sup>139</sup> in which we punish to achieve the “affirmation of moral agency; the effectuation of equal liberty under law; and the state’s defense of its decision-making authority.”<sup>140</sup>

My own conception of retributivism, and the lens through which I will analyze the arguments made by Smart and Moore, is a variant of Jean Hampton’s “victim vindication” model. For Hampton, a “wrongful action[] that merit[s] retributive punishment” is one that “diminishes” the value of a victim.<sup>141</sup> The harm imposed upon a victim is two-fold. First, by choosing to injure the victim in some fashion, the wrongful actor suggests that the victim “is worth far less than his actual value,” worthy of less dignity and respect than that conveyed by the intrinsic value possessed by all human actors.<sup>142</sup> Second, the wrongful actor conveys the message that his own worth is greater than that of the victim; his act attempts to elevate the worth of the wrongdoer over the worth of the victim.<sup>143</sup> Punishment is, therefore, “inflicted to nullify the wrongdoer’s message of superiority over the victim, thus placing the victim in the position she would have been in if the wrongdoer had not acted.”<sup>144</sup> Thus, “retribution is actually a form of compensation to the victim.”<sup>145</sup>

Where I perhaps diverge a bit from Hampton is to emphasize the global rather than the personal. There are some crimes where it is impossible to restore value to the victim. Homicide is the most obvious example because there is no victim left to whom value can be returned, but even with respect to other serious assaultive crimes, such as rape, the physical and emotional injuries can be so severe that the victim can never be made whole. Instead, the best we can do is to validate the worth of that victim within the eyes of society and condemn the horror of the crime perpetrated upon her. Hampton indeed acknowledges this purpose of punishment; she writes that “a decision not to punish wrongdoers such as the rapist is also

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an unjust advantage . . . . Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from an individual what he owes, that is, exacting the debt.

Herbert Morris, *Persons and Punishment*, 52 *MONIST* 475, 478 (1968). For a critique of Morris’s argument, see Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 *UCLA L. REV.* 1659, 1660–61 (1992).

<sup>138</sup> DRESSLER, *supra* note 9, at 18.

<sup>139</sup> Dan Markel, *Are Shaming Punishments Beautifully Retributive?: Retributivism and the Implications for the Alternative Sanctions Debate*, 54 *VAND. L. REV.* 2157 (2001).

<sup>140</sup> *Id.* at 2202.

<sup>141</sup> Hampton, *supra* note 137, at 1672, 1674.

<sup>142</sup> *Id.* at 1677.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.* at 1698.

<sup>145</sup> *Id.*



expressive: it communicates to the victim, and to the wider society the idea that such treatment, and the status it attributes the victim, are appropriate.”<sup>146</sup> In my conception of punishment, this expressive purpose is imperative: we use punishment to affirm both that our society cared about this victim and that we collectively are appalled by the wrongful treatment accorded her.<sup>147</sup> A decision not to punish based solely on the identity of the victim thus sends a pernicious message about the worth of this victim in the eyes of society: this life mattered less.<sup>148</sup> The respect we accord the living members of this category of victim thus inevitably is diminished as well.

It is through the lens of this expressive “victim validation” model that I turn to my concerns about Smart and Moore’s conclusions. First, their accounts of our unlucky reckless driver are strikingly devoid of any reference to the unfortunate victim. This myopic focus on the defendant, to the exclusion of the victim, is a theme that runs throughout criminal law generally.<sup>149</sup> But it is a problem that is particularly pronounced in the context of intrafamilial crime.

By suggesting that mercy is warranted when the victim is the defendant’s own child, Smart and Moore’s hypothetical implicitly assumes that mercy, as reflected either by a jury’s act of nullification or a decision to forgo or reduce punishment, would not be similarly warranted in a case where the defendant’s reckless driving led to the death of an innocent, unrelated pedestrian.<sup>150</sup> What does that assumption say about the value that we attach to the life of the child relative? The nature of the conduct—reckless driving—is the same; the amount of harm caused—the death of an innocent—is the same. The only differences are the degree of familial relationship between the defendant and the victim and the extent to which that relationship, or lack thereof, causes the defendant to feel guilt or remorse or

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<sup>146</sup> *Id.* at 1684; see also Jean Hampton, *The Moral Education Theory of Punishment*, in CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS, *supra* note 2, at 358 (suggesting that enforcement of the criminal law “conveys an educative message not only to the convicted criminal but also to anyone else in the society who might be tempted to do what she did”).

<sup>147</sup> For other discussions of what Dan Kahan deems the “expressive dimension of punishment,” see Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594–605 (1996). See also Joel Feinberg, *The Expressive Function of Punishment*, 49 MONIST 3 (1965), reprinted in JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 95 (1970).

<sup>148</sup> See Kahan, *supra* note 147, at 598 (describing “the expressive view” that “unduly lenient punishment reveals that the victim is worthless in the eyes of the law”).

<sup>149</sup> See, e.g., Bibas & Bierschbach, *supra* note 116, at 108 (noting that “a focus on the individual offender to the exclusion of victims, society, and their relationship with the offender” is “symptomatic of a deeper strain of thinking that runs throughout contemporary criminal law scholarship”).

<sup>150</sup> To be clear, my concern here is with treatment of child victims who are related to the defendant. If our reckless driver killed a child whom he did not know, I have no doubt that the vast majority of commentators would be calling for imposition of the maximum penalty. See generally Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 346–47 (2003) (describing a study in which fifty-three percent of capital jurors interviewed indicated that they would be more likely to sentence a defendant to death if the case involved a child victim).

emotional pain as the result of his crime. We undoubtedly feel tremendous sympathy for the defendant who has killed his child, but the existence of the family relationship does not diminish either the severity of the conduct or the harm caused by that conduct. The position advanced by Smart and Moore holds that taking the life of a child relative warrants less punishment than taking the life of an unrelated stranger, which is a position that diminishes the worth and importance of the life of that child.<sup>151</sup>

This problem can be analyzed from two different perspectives. A perspective that emphasizes equal justice under law should find differential treatment of our culpable parent offensive. The punishment an offender merits is affected under this perspective by offender-specific characteristics. Is this his first offense? Was his ability to choose whether or not to engage in criminal conduct affected by mental illness short of insanity or coercion? But these considerations are typically taken into account at the time of sentencing, not at the time of charging. Further, taking *victim*-specific considerations into consideration at the time a charging decision is made is even more discomfiting. We would find it offensive explicitly to argue that the killer of a businessman should be charged with first degree murder, and not the killer of a drug courier. Why should the killer of a child warrant preferential treatment at the time of charging? To forgo punishment of our reckless parent is to render our child victim less equal in the eyes of the law. And once we begin extending leniency to a killer based on characteristics of the victim, such as the degree of relationship to the defendant, how do we prevent decisionmakers from considering victim characteristics that would make us profoundly uncomfortable, such as race or socioeconomic status?

From a more pragmatic and less noble perspective, traditionally our chosen punishment has indeed reflected the worth we ascribe to the particular individual victimized.<sup>152</sup> Legislators enhance the punishment imposed against offenders who prey on especially vulnerable classes of victims, such as the elderly or the infirm, because they deem those acts to be particularly offensive.<sup>153</sup> Juries tend to reduce a defendant's punishment if a victim is viewed as unworthy, for example because of involvement in the drug cul-

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<sup>151</sup> Cf. ANDREW VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* 73 (1976) (arguing that “[u]nderstating the blame [involved in a criminal offense] depreciates the values that are involved: disproportionately lenient punishment for murder implies that human life—the victim’s life—is not worthy of much concern”).

<sup>152</sup> See MURPHY & HAMPTON, *supra* note 115, at 141 (arguing that “how society reacts to one’s victimization can be seen by one as an indication of *how valuable* society takes one to be); *id.* at 159 (noting that granting leniency based on an offender’s suffering “risks undermining” both deterrence and norm expression).

<sup>153</sup> See James R. Acker & C.S. Lanier, “Parsing This Lexicon of Death”: *Aggravating Factors in Capital Sentencing Statutes*, 30 CRIM. L. BULL. 107, 149–51 (1994) (providing examples). A far more ignoble example is the research suggesting that defendants who kill white victims are statistically more likely to receive the death penalty than defendants who kill African American victims. See David C. Baldus et al., *Law and Statistics in Conflict: Reflections on McCleskey v. Kemp*, in HANDBOOK OF PSYCHOLOGY AND LAW 251, 259 (D.K. Kagehiro & W.S. Laufer eds., 1992).

ture or a choice to engage in other risky behavior.<sup>154</sup> Society has made a collective judgment that the reckless hit-and-run driver described by Moore has committed a criminal offense worthy of punishment. To decline to impose any punishment on our reckless driver by failing to charge, because the identity of his victim has caused the driver to suffer more intensely, conveys the message that this particular victim is less worthy of protection, less deserving of reaffirmation.<sup>155</sup>

The objection might be made at this point that showing leniency to our reckless driver does not diminish the worth of the child victim, but instead simply reflects an understanding of the unique circumstances of our particular defendant. But this objection leads to the problematic result of elevating the suffering of the parent over the worth of the life of the child in the charging calculus.<sup>156</sup> The fact that the parent is feeling emotional pain is given greater weight than the fact that a child's life unnecessarily has been lost. This is an example of a parent-centered view of family life that so often permeates the law.<sup>157</sup> A classic example of this phenomenon is the traditional deference shown by courts when parents refuse medical treatment for their children on religious grounds. Courts now routinely intervene when the denial of medical treatment would result in death or grievous bodily injury to the child.<sup>158</sup> However, if the dispute involves an injury or illness of a lesser magnitude, courts often remain unwilling to order medical treatment over a parent's objections if the parent refuses that treatment for his child on religious grounds.<sup>159</sup> We would never allow an adult to impose his reli-

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<sup>154</sup> See Sundby, *supra* note 150, at 357 (noting that juries were less likely to impose a death sentence if victim was "viewed as 'too careless or reckless'").

<sup>155</sup> See Bibas & Bierschbach, *supra* note 116, at 122–23 (arguing that "excusing [an offender] from punishment belittles the crime and the harm"); MURPHY & HAMPTON, *supra* note 122, at 130 ("[P]unishment symbolizes the reassertion of the victim's value.").

<sup>156</sup> For a discussion of the interaction between value choices and the law, see generally Jane C. Murphy, *Rules, Responsibility, and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1133 (1999) (discussing Martha Minow's argument that laws are never "value-neutral"). Murphy writes that "[e]ach time the government, through its lawmakers, decides to regulate or refrain from regulating, a choice in values is made." *Id.* The same is true of decisions whether or not to prosecute. See also Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 311 (1988) ("The regulation of, and the failure to regulate, family matters . . . reflect public decisions about the family.").

<sup>157</sup> See generally E. Wayne Holden & Laura Nabors, *The Prevention of Child Neglect, in* NEGLECTED CHILDREN: RESEARCH, PRACTICE, AND POLICY, *supra* note 22, at 174, 184 (noting that one aspect of a program to prevent child neglect must be "advocat[ing] for a change in cultural norms and public laws that portray family matters as private and children's rights as secondary to the parental right to privacy in childrearing matters").

<sup>158</sup> See James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1396–1405 (1994) (discussing free exercise cases involving parental refusals to obtain medical care for their children because of the parents' religious beliefs).

<sup>159</sup> See *id.* at 1399 (stating that "no court has decided that it is constitutionally permissible to override the religious objections of parents to medical treatment when the danger is of less serious injury"). Professor Dwyer gives as examples a Pennsylvania court's decision not to override a parent's refusal to

gious beliefs on someone else's child or on another adult by refusing to allow potentially useful medical treatment.<sup>160</sup> Yet we willingly make that accommodation for a parent, even though the parent's refusal harms the child and not the parent himself. The rights and needs of the parent are given greater emphasis than the rights and needs of his own child.

Another striking example of this phenomenon is the acceptance of the "parental discipline defense" in child abuse prosecutions. As Deana Pollard has persuasively argued, "there is a fundamental flaw in child abuse jurisprudence because the analysis centers on the parent's motive[s] in disciplining the child, instead of the harm done to the child."<sup>161</sup> In sum, the parental discipline defense elevates the right of the parent to discipline his child over the right of the child not to be subjected to physical force. We would never allow an adult to exercise comparable physical force against another adult or against someone else's child—any adult who took a belt to the backside to an unrelated adult or child would be facing swift and certain punishment.<sup>162</sup> Why is a child relative entitled to less protection than an unrelated adult?<sup>163</sup>

Relatedly, Smart and Moore's position also undermines the importance of the status relationship between parent and child.<sup>164</sup> Presumably they

consent to surgery to correct a severe case of scoliosis, which had the potential to leave the child bedridden, and cases in which courts uphold parental refusals to vaccinate against potentially fatal childhood illnesses. *See id.* at 1399–1401.

<sup>160</sup> *See id.* at 1403–04, 1407 (arguing that any adult who tried to compel another adult to refuse medical treatment or otherwise act in accordance with particular religious tenets would find her case summarily dismissed). For an extensive critique of Professor Dwyer's theories, focusing on his arguments regarding parents' decisionmaking about their children's education and religious training, see Stephen G. Gilles, *Hey, Christians, Leave Your Kids Alone!*, 16 CONST. COMMENT. 149 (1999).

<sup>161</sup> Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 644–45 (2003). Professor Pollard's article contains an excellent discussion of different approaches states take in evaluating parental claims that the injuries they inflicted upon their children should not be considered child abuse because they were simply disciplining their children. *Id.* at 635–47. She also notes that despite mounting evidence about the dangers posed by spanking, ninety percent of American parents still hit their children. *Id.* at 577.

<sup>162</sup> *See Zimring, supra* note 6, at 523–24 (using a hypothetical to suggest that if a stranger slapped a child, it would be considered assault and battery, but the matter would be treated very differently by the legal system if a mother slapped her own child).

<sup>163</sup> The criminal justice system's tradition of dismissing the horror of abuse and neglect perpetrated against children has been replicated in other fields as well. Swiss psychologist Alice Miller has made a similar point in the context of psychoanalysis, arguing that it has "concealed and denied the realities of child abuse and children's sufferings." *See* Marie Ashe & Naomi R. Cahn, *Child Abuse: A Problem for Feminist Theory*, 2 TEX. J. WOMEN & L. 75, 94 (1993). Ashe and Cahn's article contains an extensive discussion of Miller's critique of traditional psychoanalytic theory, and of feminist theory as well, for failing to grapple with the reality of child abuse. *Id.* at 93–97. For examples of Miller's work, see ALICE MILLER, *THOU SHALT NOT BE AWARE: SOCIETY'S BETRAYAL OF THE CHILD* (Hildegard Hannum & Hunter Hannum trans., 1984); ALICE MILLER, *BANISHED KNOWLEDGE: FACING CHILDHOOD INJURIES* (Leila Vennewitz trans., 1990).

<sup>164</sup> In *Jones v. United States*, 308 F.2d 307, 310 (D.C. Cir. 1962), a federal court set forth the traditionally recognized circumstances in which an individual will be found liable for failing to comply with

would not argue for consideration of defendant-created suffering when a potential defendant runs over a nonrelative because the suffering in that instance is less severe, less painful to the defendant. There would thus be no argument based on defendant-created suffering that a daycare driver should not be prosecuted when he inadvertently leaves a child in a van. But prosecuting the daycare driver, and not the parent, has the perverse result of elevating the importance of a contractual duty over the duty that parents owe to their children. Surely parents, and not some caregiver whose duty arises only out of contract, have the greater responsibility to care for their children, and their failure to fulfill that obligation is *more* blameworthy because of the relationship, not less so.

Failure to charge our reckless parent therefore raises real concern about equality of treatment as between victims. The second criticism of Smart and Moore is that their willingness to excuse the parent who kills a child relative raises real concerns about equality of treatment as between *defendants*. Dan Markel makes the important point that giving a “punishment discount” to the driver who is unlucky enough to kill his own child, rather than a stranger, is to “privilege mere bad luck.”<sup>165</sup> This is surely an uneasy basis on which to rest a substantial difference in treatment by the criminal justice system.<sup>166</sup> In our hypothetical, luck affects the outcome in terms of the identity of the victim killed, but it should not affect our evaluation of the parent’s desert; that should be determined at the moment our parent chose to engage in the conduct of driving recklessly.<sup>167</sup>

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a duty owed to others: when the parties are in a status relationship, such as parent/child or husband/wife; when a statute imposes a duty of care; when a party has assumed a contractual duty to care for another; or when a party has voluntarily assumed the care of another individual and secluded him so as to prevent others from rendering aid.

<sup>165</sup> See Markel, *supra* note 115, at 1462. As Markel acknowledges, the criminal justice system undeniably “privilege[s] bad luck” in other contexts. See *id.* This phenomenon is perhaps most obvious in the realm of attempt law. An offender will typically receive a lesser sentence for an attempted crime than for a completed crime, even though pure luck may have been entirely responsible for the failed effort. Markel argues that we should not use mercy to “exacerbate [luck’s] pernicious role.” *Id.* I would further add that in the context of attempts, the differential treatment is based in large part on the difference in the actual harm caused. The unlucky reckless driver who kills his own child has certainly not caused a lesser harm than the driver who kills a stranger. See also Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 378–85 (arguing why we should “try as much as possible to wring luck out of decisions about blame and punishment”).

<sup>166</sup> One response could be that the driver who has killed his own child is still suffering, even after his sentence is commuted. But the driver who has killed a stranger and thus remains in jail for the duration of his sentence is obviously suffering the very real loss of liberty and all the other deprivations that go along with prison life from which the first driver is now free. See generally Markel, *supra* note 115, at 1455–56 (“If everyone is entitled to the same package of liberties safeguarded by political and legal institutions, it is hard to see how granting mercy to some offenders but not to others effectuates this ideal.”).

<sup>167</sup> See Morse, *supra* note 165, at 383 (arguing that “[r]esults should not matter to desert”). Further, even if results should matter in our evaluation of an offender’s desert, is the identity of the victim a morally and legally relevant aspect of a result?

Equality concerns are further raised in the following sense. If we decide to allow suffering to be a mitigating factor, how do we decide which kinds of suffering should count and how much suffering is enough?<sup>168</sup> Even assuming that we should ignore suffering unrelated to the crime, criminal offenders undeniably experience suffering created as a direct result of their crimes in many contexts. Most defendants suffer financially, including the loss of an income, job, and a good reputation.<sup>169</sup> Many defendants also experience profound shame. Congressman Bill Janklow, whose reckless driving led to the death of a motorcyclist, faced the loss of his political career and the community stature he had worked a lifetime to build.<sup>170</sup> A husband who kills his wife in a fit of rage after discovering her infidelity and then is filled with remorse suffers the loss of a spouse and the potential loss of his children.<sup>171</sup> All defendants placed in pretrial detention suffer as a result of their loss of liberty and the resulting impact on family and employment relationships.<sup>172</sup> Yet in these contexts would we argue for the preclusion of punishment because a defendant is already suffering emotional or financial pain? One response could be that these losses do not approach the pain caused by the loss of a child, but that argument presumes too much. First, it presumes that all parents are in fact devastated by the loss of a child, a view that unfortunately represents an unduly rosy view of parenthood. Second, it minimizes the very profound pain that defendants may feel in the other situations described above.

According preferential treatment on the basis of defendant-created suffering is also inconsistent with the principle that “[r]arely, if ever, does the criminal law embrace defendants who are to blame for creating their own

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<sup>168</sup> See MOORE, *supra* note 121, at 169 (noting that “defining exactly what kinds of suffering count to reduce punishment” is one of the “primary” philosophical issues raised by her analysis).

<sup>169</sup> Martha Stewart, for example, was forced to resign from the executive position she held at the company she had founded. See Kathleen Day, *The Strength of Stewart’s Convictions: Director’s Role to End Soon for Company Founder*, WASH. POST, Mar. 9, 2004, at E1.

<sup>170</sup> See T.R. Reid, *Parties Expect Janklow’s Collision to End His Career*, WASH. POST, Aug. 22, 2003, at A8 (discussing political consensus that the accident, regardless of whether or not he was prosecuted, would end Janklow’s “storied political career”). It is interesting to note that Janklow, who was ultimately convicted of felony manslaughter and sentenced to jail, pleaded for leniency at his sentencing based on his suffering, arguing that “[m]y political career is wrecked” and “I can’t be punished any more than I’ve punished myself.” T.R. Reid, *Janklow Sentenced to 100 Days in Jail*, WASH. POST, Jan. 23, 2004, at A3. The judge was unsympathetic, pronouncing that “the citizens of South Dakota expect justice.” *Id.*

<sup>171</sup> See generally Krause, *supra* note 122, at 762 (noting that battered women who kill their abusers may experience suffering because “they killed the men they loved”).

<sup>172</sup> See, e.g., RONALD F. WRIGHT & MARC L. MILLER, CRIMINAL PROCEDURES: CASES, STATUTES, AND EXECUTIVE MATERIALS 760 (1st ed. 1996) (noting that pretrial detainees “lose income, . . . suffer dislocation and sometimes even permanent rupture in their family lives, . . . [and] suffer social stigmatization and loss of self-respect” (citing VERA INST. OF JUSTICE, FAIR TREATMENT FOR THE INDIGENT: THE MANHATTAN BAIL PROJECT (1972)).

defense.”<sup>173</sup> We do not allow a defendant to escape criminal liability for killing a pedestrian if the accident was caused by defendant-created intoxication.<sup>174</sup> Similarly, we do not allow a defendant to raise a necessity or duress defense if he bears any fault for placing himself into the situation in which the need to assert such a defense arose.<sup>175</sup> Why, then, should a defendant escape liability if his reckless conduct, for which he has no defense or excuse, results in personal suffering? In all these instances, the defendant is responsible for creating the conditions upon which he relies to argue against prosecution.

Before we turn to the important objection that we should forgo punishment because parents already have sufficient incentives to avoid harming their children, let us return for a moment to retributive theory. Even if one believes that I have overemphasized victim validation as an important component of a retributive justification for punishment, granting preferential treatment to our reckless parent should be a matter of concern. If retribution is instead about “rectifying the balance” that the offender has disturbed by his transgression, the moral imbalance created by the wrongdoer is no less because of the existence of a family relationship with the victim.<sup>176</sup>

Further, the authority of the state is necessary to restore the moral balance; it is simply not enough to say that the offender’s internal suffering somehow restores the necessary equilibrium. As Jean Hampton has argued, “morality demands that *the state* inflict retribution for certain serious moral wrongs.”<sup>177</sup> Indeed, the history of the criminal law reflects a progression away from privately imposed sanction and toward its replacement by punishment imposed by the state. It is only in public action to disapprove of

<sup>173</sup> Nourse, *supra* note 66, at 1334–35; *see also* Paul H. Robinson, *Causing the Conditions of One’s Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1 (1985).

<sup>174</sup> *See, e.g.*, DRESSLER, *supra* note 9, at 322–23 (discussing the principle that voluntary intoxication is generally not a defense to criminal liability).

<sup>175</sup> *See id.* at 289, 299 (noting that in order to raise a necessity defense, “the defendant must come to the situation with clean, sometimes immaculate hands” and that a “duress defense is unavailable to a defendant if she was at fault for being in the coercive situation”).

<sup>176</sup> *See* VON HIRSCH, *supra* note 151, at 51 (discussing how punishment “rectif[ies] the balance” in “the Kantian sense”); *see also* Morris, *supra* note 137, at 483 (arguing that punishment’s “justification was related to maintaining . . . a fair distribution of benefits and burdens”).

<sup>177</sup> Hampton, *supra* note 137, at 1701 (emphasis added). Hampton argues that “the modern state . . . is the only institutional voice of the community’s shared moral values. Serious crimes represent serious attacks on those moral values . . . and thus the state is the only institution that can speak and act on behalf of the community against the diminishment accomplished by the crime.” *Id.* at 1694; *see also* HERBERT MORRIS, ON GUILT AND INNOCENCE: ESSAYS ON LEGAL PHILOSOPHY AND MORAL PSYCHOLOGY 104 (1976) (arguing that “feeling guilty” does not have “the significance carried by punishment inflicted by others”). Dan Markel argues that the state “plays the role of the exclusive decisionmaker (at least with respect to punishment) because it, and it alone, has the capacity for legitimacy among all actors in society in a way that various communal institutions could not” and because even “victimless” crimes are “a rebellion against the government’s rule-making authority.” Markel, *supra* note 139, at 2199–200.

wrongdoing that offender condemnation is adequate and victim validation complete.

### B. *The Importance of Family Ties*

Perhaps the most powerful objection to prosecution is that it is unnecessary because parents already have sufficient incentives to avoid causing harm to their children and therefore prosecution can have no additional deterrent effect.<sup>178</sup> These incentives are thought to be two-fold: first, the love and obligation that a parent feels individually towards his children will cause him to behave responsibly,<sup>179</sup> and second, the expectations and constraints that society imposes on parents by defining what constitutes a “good parent” will further induce appropriate parenting choices.<sup>180</sup>

But there are several rejoinders to this important argument. First, this objection does not account for the retributivist argument that we impose punishment because the offender deserves it, and not simply to further some other net societal gain like deterrence. But more fundamentally, the premises underlying the objection are often incorrect. Our society undeniably has a rose-colored view of parenthood; we desperately want to believe that all parents are good and loving individuals whose lives revolve around their children and who always act in their children’s best interest.<sup>181</sup> But the prevalence of child abuse and neglect in our society shows this assumption is categorically untrue.<sup>182</sup> For example, the National Clearinghouse on

<sup>178</sup> See Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 592 (1992) (discussing our “deeply ingrained” presumption that “parents will usually act in the best interests of their children”). McMullen cites all the way back to William Blackstone for this proposition, arguing that “Blackstone noted that Providence had enforced parental duties more effectively than could laws by ‘implanting in the breast of every parent that natural . . . or insuperable degree of affection, which not even the wickedness, ingratitude, and rebellion of children, can totally suppress or extinguish.’” *Id.* at 593 (quoting William Blackstone, *The Rights of Parent and Child*, in 1 COMMENTARIES ON THE LAWS OF ENGLAND 434, 435 (Neill H. Alford, Jr. et al. eds., 1983); see also Marsha Garrison, *Autonomy or Community?: An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 73 (1998) (discussing the “tendency to assume that family relations are governed by altruism rather than the constraints of formal justice,” especially in relation to the “parent-child tie”).

<sup>179</sup> See Ira C. Lupu, *The Separation of Powers and the Protection of Children*, 61 U. CHI. L. REV. 1317, 1323–24 & n.16 (1994) (noting that even “the Framers themselves likely subscribed to the late-eighteenth-century view that family members shared a natural loyalty and affection”).

<sup>180</sup> See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2435 (1995) (“Informal social norms play an important part in shaping parents’ recognition that their role is defined by serious obligation and subordinated self-interest.”); cf. Seidman, *supra* note 119, at 335 (arguing that it is “obvious” that many people “would refrain from criminal conduct even if there was no chance of punishment, simply because they believe that the conduct is morally reprehensible”).

<sup>181</sup> See Thomas, *supra* note 17, at 293 (noting “our reluctance to believe that parents—whom we expect to love and protect their offspring—could maltreat or abuse their own children, sometimes even fatally”). Thomas further notes that “[o]ur laws and legal systems have developed over hundreds of years around the expectation that parents will love and protect.” *Id.*

<sup>182</sup> See, e.g., Lupu, *supra* note 179, at 1324 (“[I]t is now clear that the psychological influences at play in family life are not limited to the positive sentiments of affection and concern.”). There are of



Child Abuse and Neglect Information concluded that there were approximately 1400 child abuse and neglect fatalities in the United States in 2002, although that number is in all likelihood too low because these cases are traditionally underreported.<sup>183</sup> Moreover, even parents who do not act out of deliberate malevolence may neglect their children because of ignorance<sup>184</sup> or because their personality characteristics or background simply render them ill-equipped to undertake the enormously stressful and demanding job of parenting.<sup>185</sup>

In the New York study of lack of supervision cases discussed earlier in this Article,<sup>186</sup> a significant percentage of the cases involved parents who left young children unattended or in the care of an unsuitable caregiver. In forty percent of the cases studied, the responsible parents indicated “they believed there was nothing wrong with what had happened.”<sup>187</sup> Further, the social workers who were asked to review ninety-nine of the case records in detail concluded “that in more than half the cases . . . the supervision problem was due to a lack of knowledge or poor judgment about the abilities or needs of children of a given age.”<sup>188</sup> Shockingly, in fifteen percent of the cases, one of the reasons for the lack of supervision was “the parents’ negative attitude towards the child.”<sup>189</sup> Only seven percent of the cases involved an emergency situation where the usual child care arrangements had fallen through.<sup>190</sup>

In terms of personality factors, social scientists have identified some typical characteristics of neglectful families. One researcher has suggested that some neglectful parents may have difficulty prioritizing their children’s needs.<sup>191</sup> James Gaudin noted that neglectful parents are “typically lacking

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course a tremendous variety of social, economic, and psychological factors that may contribute to a parent neglecting a child. See, e.g., Patricia McKinsey Crittenden, *Child Neglect: Causes and Contributors*, in *NEGLECTED CHILDREN: RESEARCH, PRACTICE, AND POLICY*, *supra* note 22, at 47–67 (discussing, inter alia, low socioeconomic status, social isolation, and “poor interpersonal relationships”), Martha Farrell Erickson & Byron Egeland, *Child Neglect*, in *THE APSAC HANDBOOK ON CHILD MALTREATMENT* 4, 13–15 (John Briere et al. eds., 1996) (citing various environmental and psychological factors that might play a role in neglectful families, including, inter alia, parental depression, poverty, and lack of a support network).

<sup>183</sup> See ADMIN. FOR CHILDREN & FAMILIES, *supra* note 21, at xvii, 132.

<sup>184</sup> JONES, *supra* note 44, at 24.

<sup>185</sup> See McMullen, *supra* note 178, at 594 (suggesting that “adverse early life experiences or extreme stress” can result in poor parenting).

<sup>186</sup> See *supra* text accompanying notes 44–48.

<sup>187</sup> JONES, *supra* note 44, at 24.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* For a concrete example of this phenomenon, see *Harrington v. State*, 547 S.W.2d 616 (Tex. 1977). In a statement given to the police after she was arrested for allowing her two-year-old daughter to starve to death, the defendant said “she was a ‘bad mother’ and just did not like small children.” *Id.* at 618.

<sup>190</sup> JONES, *supra* note 44, at 26–27.

<sup>191</sup> See Gaudin, *supra* note 24, at 71.

in psychological maturity” and “tend to be impulsive, egocentric, and lack the ability to arrange their lives to meet their needs and the needs of their children.”<sup>192</sup>

This research thus suggests that our reliance on the bonds of family affection to protect children is precarious at best. There are undoubtedly many families who lose a child due to negligence where the responsible party was the kind of parent who warranted our rose-colored view of parenthood, who was neither confused about appropriate standards of care nor immature but simply made a tragic mistake. But the quality of past parenting can best be taken into account at sentencing, once more is known about the family and the facts of the case. Taking these factors into account at charging tends to benefit white collar families, because of the pervasive tendency in our legal system to assume that wealthier families are “better,” more loving families.

Some commentators object that prosecution imposes unnecessary suffering not only on a defendant, but also on his family.<sup>193</sup> But this is true in every criminal matter. Every criminal defendant is someone’s child or spouse or parent. We typically do not allow the fact that a family will be deprived of its primary breadwinner to preclude prosecution for either the violent criminal or the white collar offender, although it may impact the sentencing decision.<sup>194</sup> Why should it suddenly become determinative in the charging decision in a case where a defendant has killed his own child?

Finally, there is the broader objection regarding punishment for negligent conduct generally. It is of course important to note that in some ways Smart’s hypothetical simplifies the issues raised in this Article because she posits a reckless hit-and-run driver, whereas the parents studied here who inadvertently leave their children in a car are in most instances negligent rather than reckless. The issue of whether negligence is an appropriate ba-

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<sup>192</sup> *Id.*; see also GAUDIN, *supra* note 33, at 15 (noting that some studies have found that neglectful parents “lack knowledge of and empathy for children’s age-appropriate needs” and “have more unrealistic and more negative expectations of their children than nonneglecting parents”). Gaudin adds that “[m]any neglectful mothers are indeed psychologically immature and childlike in their inability to consider the needs of others, postpone gratification of basic impulses, and to invest themselves emotionally in another person.” *Id.* at 14. In a study of low-income neglectful mothers in Philadelphia, Norman Polansky concluded that a significant percentage suffered from a syndrome he called “apathy-futility” syndrome, which is marked by, *inter alia*, “feeling[s] of futility” and “[l]ack of competence in many areas of living.” NORMAN POLANSKY ET AL., DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT 39, 40, 110–11 (1981).

<sup>193</sup> See, e.g., Thomas, *supra* note 17, at 341 (arguing that even in cases of physical abuse, prosecution of parents is usually not appropriate because “[f]ines reduce limited family financial abilities” and “[i]mprisonment separates parent and child”); White, *supra* note 2, at 1423 (arguing that “[p]arents do not deserve the harsh conditions of imprisonment”).

<sup>194</sup> See Roberts, *supra* note 60, at 104–05 (suggesting that some judges treat women more leniently than men at the time of sentencing because they are “reluctant to deprive children of a provider or caregiver” and consider “caretaking to be more indispensable than economic support to children’s welfare”).

sis for criminal liability is enormously controversial.<sup>195</sup> But as long as gross negligence continues to be an accepted basis for imposing criminal liability, the fact of a family relationship between the defendant and the victim should not affect our assessment of whether to charge the grossly negligent wrongdoer with a criminal violation.

### C. *The Charging Versus Sentencing Distinction*

Let us leave for the moment the final resolution of whether these problems with granting leniency based on a defendant's suffering are insurmountable.<sup>196</sup> Even the reader who finds these points thought provoking is no doubt still wrestling with the undeniable emotional appeal of the reckless bereaved parent. We are still left with the second question: even if we assume that the defendant's suffering should play some mitigating role in determining the ultimate level of punishment that should be imposed, should the existence of suffering play a role in determining whether he should be *charged* with a crime in the first instance? Is there something unique about the nature of the charging decision, as opposed to the sentencing or clemency decision, that renders the exercise of mercy inappropriate at that stage of the criminal justice process?

Alwynne Smart implicitly acknowledges this possibility in her seminal article. She states that "it would be irresponsible to suggest that remorse was sufficient to absolve a man from the consequences of his crime" and that "to impose the *full* penalty" under the circumstances seems unduly cruel.<sup>197</sup> This certainly seems to suggest that some penalty is appropriate, but perhaps a lesser penalty than the full sentence authorized by law ought to be imposed. Similarly, Kathleen Dean Moore talks about Smart's hypothetical in the context of pardons, not in the context of whether prosecution at all is appropriate.<sup>198</sup> It is the more recent commentators, such as Jonathan Turley, who argue that even the initial decision to file charges is unjustifiable.

Indeed, there are a variety of factors that we take into account at sentencing for serious crimes that do not seem appropriately considered at the

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<sup>195</sup> For some examples of this debate, see H.L.A. HART, PUNISHMENT AND RESPONSIBILITY (1968); Jerome Hall, *Negligent Behavior Should Be Excluded from Penal Liability*, 63 COLUM. L. REV. 632 (1963); Samuel H. Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105 (1996); Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365 (1994).

<sup>196</sup> There is obviously a vigorous debate about whether the dispensation of mercy is appropriate at all within the criminal justice system, let alone in the circumstances that are discussed in this Article. For some examples of this debate, see, for example, Markel, *supra* note 115, at 1464–77; Misner, *supra* note 123, at 1303.

<sup>197</sup> Smart, *supra* note 2, at 348 (emphasis added).

<sup>198</sup> MOORE, *supra* note 121, at 168.

time of the charging decision.<sup>199</sup> The defendant's criminal history is one obvious example; we would never decline to charge a violent carjacker on the basis that this was his first offense, but the absence of a criminal record would certainly be an important factor in the sentencing calculus.<sup>200</sup> The defendant's age is another; a seventeen-year-old carjacker would almost certainly face the same initial charge as the thirty-five-year-old, but he might be able to convince a judge to impose a reduced sentence on the basis of his youth.<sup>201</sup> Remorse is another; the defendant who genuinely regrets committing his offense and accepts responsibility is likely to receive a better sentence than the unrepentant.<sup>202</sup> A defendant's family status might even play a role in some state systems; one researcher who interviewed a number of court personnel found they believed that "defendants who provide economic support or care for others deserve more lenient treatment [in terms of sentencing] than those without such responsibilities."<sup>203</sup>

So why does a judge take these factors into account at sentencing? Criminal history, age, remorse, and family obligations are relevant to an evaluation of an offender's prospects for rehabilitation and need for specific deterrence. We believe the young, inexperienced, repentant offender is more amenable to treatment and thus less likely to re-offend. Offenders with family responsibilities are viewed as "more stable" with greater incentives to avoid re-offending.<sup>204</sup> In stark terms, these offenders pose less of an ongoing danger to the community. These factors are not related, however, to the offender's core culpability for the crime: whether young or old, a rookie or career criminal, the nature of the offense committed by our violent carjacker is the same and the amount of harm caused by the conduct is the same. His moral desert is the same. The charging decisions for these different categories of offenders therefore are the same.

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<sup>199</sup> It is certainly possible that the factors discussed in this paragraph might be taken into consideration at the time of the charging decision for petty crimes, such as shoplifting. But the death of a child would certainly not fall into the category of a petty offense.

<sup>200</sup> See U.S. SENTENCING COMM'N, SENTENCING GUIDELINES MANUAL §§ 4A1.1–4B1.5 (2004) [hereinafter SENTENCING GUIDELINES] (discussing treatment of criminal history).

<sup>201</sup> For example, the Supreme Court has concluded that the Eighth Amendment bars imposition of the death penalty on a defendant who committed his crime before the age of eighteen. See *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>202</sup> See SENTENCING GUIDELINES, *supra* note 200, § 3E1.1. Whether this is a valid practice is another question. Professors Bibas and Bierschbach argue in a compelling recent article that "psychology, psychiatry, sociology, and criminology have not empirically linked expressions of remorse and apology to a decreased need for specific deterrence of particular offenders." See Bibas & Bierschbach, *supra* note 116, at 106. Bibas and Bierschbach further suggest consideration of remorse and acceptance of responsibility at sentencing seems inconsistent with classic forms of retributivist philosophy. *Id.* at 106–09.

<sup>203</sup> Kathleen Daly, *Structure and Practice of Familial-Based Justice in a Criminal Court*, 21 LAW & SOC'Y REV. 267, 273 (1987). It is important to note that Daly's work was based on a relatively small sample size of thirty-five court employees. *Id.* at 271.

<sup>204</sup> *Id.* at 273–74.

The identity of the victim of our reckless driver seems similarly related to the concerns about specific deterrence, rehabilitation, and recidivism. Indeed, the loss of a child would hopefully deter our driver from ever driving recklessly again. Because our reckless parent is unlikely to re-offend, perhaps a criminal sentence is not necessary to ensure his rehabilitation.<sup>205</sup> Thus, a punishment discount may be appropriate; that portion of the sentence that would ordinarily further his rehabilitation or deter future misconduct is not needed.

Sentencing also offers us the most appropriate opportunity to incorporate the important values of compassion, forgiveness, and mercy into the criminal justice system's decisionmaking about an individual defendant.<sup>206</sup> In practical terms, much more is known about a defendant, his background, and the circumstances of his crime at that stage of the case. In moral terms, choosing to charge, and then allowing compassion to influence our sentencing decision, makes a normative statement that the moral desert of the reckless parent in Smart's hypothetical is no less than that of the driver who kills a stranger—the nature of the act, the underlying mental state, and the amount of harm caused are all the same. Indeed, a compelling argument could be made that it is greater—a parent has a greater duty to his own child than to a stranger, and thus would ordinarily be under an obligation to be aware of his child's whereabouts, to take measures to ensure that his child is not running around the streets unattended, and so on. Choosing to *charge* the reckless driver who runs over his own child, or the grossly negligent parent who forgets his child in a car, acknowledges that the defendant has engaged in an act worthy of condemnation and expresses the moral judgment that this child's life was worth protecting, a life as important as the life of a stranger victim. Reducing the *punishment* ultimately imposed both reflects our compassion and acknowledges the reality that this offender is unlikely again to represent a danger to the community, and therefore no rehabilitation component of a sentence is warranted.

A reader might respond that holding open the promise of a sentence discount is of little comfort to our bereaved parent because mandatory sentencing guidelines have reduced judges' ability to dispense mercy, leaving prosecutors as the only state agents who can dispense leniency by declining to prosecute in the first instance.<sup>207</sup> As a practical matter, however, manda-

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<sup>205</sup> Whether a criminal sentence ever in fact contributes to rehabilitation is a topic for another day.

<sup>206</sup> See generally Jeffrie G. Murphy, *Forgiveness and Resentment*, 7 *MIDWEST STUD. PHIL.* 503, 510 (1982) (suggesting that a defendant's suffering might sometimes warrant forgiveness, because "suffering is redemptive" and "tends to . . . humble" the offender, thus restoring the equilibrium between offender and victim (emphasis omitted)).

<sup>207</sup> Mandatory sentencing schemes have greatly reduced judicial discretion in sentencing by restricting the factors a judge may consider in setting a sentence. See, e.g., Bowman, *supra* note 16, at 695–704 (discussing the limited sentencing factors that the Guidelines allow a judge to consider); Misner, *supra* note 123, at 1376 (observing that mandatory sentencing schemes have constrained the exercise of judi-

tory sentencing schemes generally do not apply to the charges of involuntary manslaughter or negligent homicide, leaving the dispensation of mercy at the sentencing stage a very real possibility.<sup>208</sup> Kevin Kelly, the Virginia father discussed at the beginning of this Article who was convicted of involuntary manslaughter, was sentenced to spend just one day in jail for the next seven years on the anniversary of his daughter's birthday and to perform community service.<sup>209</sup> Lori Kelly, who forgot to drop her two-month-old baby off at daycare, pled guilty to involuntary manslaughter and was sentenced to three years of probation and 120 hours of community service. She was also ordered to create a videotape to be shown at local hospitals about how to prevent comparable tragedies.<sup>210</sup> It is undeniably true that the indictment itself imposes tremendous costs and burdens on a defendant and that the provision of mercy at the time of sentencing cannot possibly ameliorate all those costs, but surely some adverse consequences are appropriate for causing the death of an innocent child.<sup>211</sup>

### III. CONCLUSION

Why are we so reluctant to prosecute parents when harm befalls their children as a result of parental negligence? One reason is that we persist in viewing wrongful acts committed against children as an intrafamily matter in which the state should intervene only reluctantly, and only when absolutely necessary. This general hesitance to intervene in family life, even to protect children, is a deeply ingrained historical tradition in this country.<sup>212</sup>

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cial discretion). Misner argues that recent sentencing schemes have left prosecutors as the state agents with the power to dispense mercy. Misner, *supra* note 123, at 1377.

<sup>208</sup> Indeed, a quick survey of states with negligent homicide statutes, involuntary manslaughter statutes, or both revealed only a handful had mandatory minimum sentences for those particular crimes; the longest minimum sentence was two years. In addition, there are other charging options available to prosecutors in these cases that would increase sentencing flexibility, such as a prosecution for child endangerment or even for the specific crime of leaving a child unattended in a motor vehicle.

<sup>209</sup> See Josh White, *VA Father Gets Scant Jail Time in Death: Judge Sympathizes over Loss of Girl Left in Van*, WASH. POST, Feb. 22, 2003, at A1.

<sup>210</sup> See *Mother Gets Probation, Community Service in Son's Death* (Idaho News Channel 7 television broadcast July 30, 2003) (copy on file with author).

<sup>211</sup> See, e.g., R. Michael Cassidy, *Toward a More Independent Grand Jury: Recasting and Enforcing the Prosecutor's Duty to Disclose Exculpatory Evidence*, 13 GEO. J. LEGAL ETHICS 361, 403 (2000) (“[T]here are substantial costs associated with indictment which will not be remedied even by a subsequent acquittal, such as the expense of mounting a defense and the ongoing damage to one’s reputation.”).

<sup>212</sup> See, e.g., Murphy, *supra* note 156, at 1165 (“One of the most deeply embedded principles in American family law is the principle of family autonomy, which limits the state’s intervention in the affairs of the intact family.”); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835–39 (1985) (discussing the “legal tradition of noninterference in the family”); Scott & Scott, *supra* note 180, at 2406 (noting that courts, media and academic commentators have begun to argue that “the latitude given to parents in rearing their children is . . . excessive, allowing some parents to inflict unmonitored and unsanctioned harm on their children” and that “the tradition of legal protection of parental rights has deep historical roots”).

Although it is certainly true that public concern is increasing about child abuse,<sup>213</sup> we still have not gone far enough.<sup>214</sup>

Even when intervention is clearly necessary, such as when a child has suffered serious injury or even death, we persist in viewing the parent's actions as some sort of aberration or as a manifestation of some psychological malady rather than as a criminal act. Indeed, there is a fascinating contrast in this regard between our approach to crimes committed against women and crimes committed against children. Elizabeth Pleck succinctly captured the difference:

While reformers against child abuse opposed criminal sanctions against perpetrators, reformers against wife abuse and marital rape favored them and tried to pressure the police and courts to respond adequately to the complaints of women victims. The medical and social work professionals who dominated child abuse reform defined child battering as a psychological illness of the parents requiring social services and psychological treatment. The feminist activists and lawyers who led the campaign against wife beating and marital rape rooted the problem in the inequality of women and the lack of proper law enforcement.<sup>215</sup>

This view of the maltreatment of children as something other than a criminal act is a problem that is particularly pervasive in the realm of parental neglect cases.

Moreover, another reason we are so reluctant to prosecute in failure to supervise cases in particular is undoubtedly because these incidents are just as likely to occur in upper- and middle-income families as in poorer ones. If we are reluctant to view harms committed against children as criminal acts, we are even more reluctant to do so when the harmful act is committed in a home typically viewed positively by both society at large and the criminal justice system.<sup>216</sup> This bias in favor of homes and parents traditionally considered "good" is evident in a number of ways throughout the criminal justice system. For example, at the time of sentencing, "[c]ourts may assume that white middle-class mothers are both more amenable to nonjudicial social controls and more needed in the home by their children than other groups of mothers."<sup>217</sup> Indeed, the fact that so many of these

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<sup>213</sup> See Scott & Scott, *supra* note 180, at 2435 (referencing the increasing concern about child abuse).

<sup>214</sup> See generally Murphy, *supra* note 156, at 1205 (arguing that "there is still an enormous gap between . . . rhetoric and the existence of policies that protect children").

<sup>215</sup> Pleck, *supra* note 17, at 49–50; see also Besharov, *supra* note 17, at 553 ("Most Americans believe that child maltreatment is primarily a social and psychological ill and that treatment and rehabilitation, not punishment and retribution, are the best means of protecting endangered children.").

<sup>216</sup> See generally Ashe & Cahn, *supra* note 163, at 99 (discussing prosecutions in child abuse cases and noting that "decisions concerning prosecutions will tend to reflect race, class, and gender biases of prosecutors who have tended to be white, middle-class, and male").

<sup>217</sup> Roberts, *supra* note 60, at 106; see also Barbara F. Reskin & Christy A. Visher, *The Impacts of Evidence and Extralegal Factors in Jurors' Decisions*, 20 LAW & SOC'Y REV. 423, 431 (1986) (con-

cases involve the father as the responsible party is probably another factor in our hesitance to prosecute as well. We are far more forgiving of paternal mistakes in childrearing than maternal ones.<sup>218</sup>

So what should we do when confronted with a child's death caused by parental negligence? The point of this Article is not to suggest that we engage in wholesale prosecution and incarceration of negligent parents. Instead, the existence of a family relationship between a defendant and a victim should not be treated as the dispositive consideration at the time of the charging decision. That relationship can appropriately be taken into consideration at the time of sentencing.

Parenting is undeniably one of the most difficult, demanding, unceasing jobs that an adult can undertake. Indeed, all parents of young children have endured heart-stopping moments in which a momentary distraction and loss of attentiveness have resulted in a child wandering off in a store or playing with a hazardous item in the home. Even in a world where we consider prosecution of negligent parents, this kind of simple negligence should not result in intervention by the criminal justice system. But prosecution is entirely appropriate when gross negligence or certainly recklessness is involved.<sup>219</sup> In the car cases discussed at the beginning of this Article, two-thirds of the incidents involved leaving the child alone in the car for three or more hours. Kevin Kelly did not bother to check on his daughter even once in a span of over seven hours. This degree of inattentiveness rises to the level of gross negligence that warrants prosecution.

Prosecution is an important tool for protecting children because of the concrete impact it can have in improving safety conditions for them; it can help to shape societal norms about what constitutes an appropriate standard of care.<sup>220</sup> In part, we do not leave two-year-olds bouncing around unrestrained in a car because our fellow commuters would look at us with horror if we did. Automobile safety is a classic example of evolving community norms that have led to better protection of children and a reduction in the

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cluding that “[i]f defendants seemed attractive or were employed, jurors were less likely to believe they were guilty”).

<sup>218</sup> See generally Appell, *supra* note 19, at 584–85 (discussing how fathers are subject to “lower expectations” in the child protection system than mothers).

<sup>219</sup> Whether the conduct underlying a particular fatality rises to the level of gross negligence will necessarily need to be determined on a case-by-case basis. I would suggest that some relevant factors would include the amount of time the child was left in the car, whether the parent would have been responsible for meeting any of the child's needs during the time the child was in the car (a factor which makes failing to attend to the child for a number of hours even more problematic), any reasons explaining why the child was left behind on this particular occasion, and any drug or alcohol use by the parent prior to leaving the child.

<sup>220</sup> Bonner, Crow & Logue, *supra* note 25, at 169 (“[A]s case law accumulates, precedent is set and community standards for definitions of neglect evolve. Thus, in addition to punishing neglecting parents and protecting other children in the home, prosecution plays an important role at the societal level in addressing issues of neglect.”).



incidence of child fatalities.<sup>221</sup> Prosecution can play an important role in reshaping these norms because our conception of what behavior is considered neglectful is shaped in part by the actions taken by the criminal justice system.<sup>222</sup> As prosecutions and the resulting publicity begin to increase, community members typically gain a greater understanding of safety norms and begin to modify their conduct to comply with those norms.<sup>223</sup>

The title of this Article states that the case for prosecuting negligent parents is an uneasy one, and indeed it is. We obviously have tremendous compassion and sympathy for a parent who has suffered the unimaginable loss of a child, and it is entirely appropriate to incorporate that compassion into a sentencing decision. But we must have the greatest compassion for our children, who are utterly without resources to protect themselves. Charging a parent who has acted with gross negligence is one important tool that can both lead to the incorporation of more stringent safety norms to protect children and change our tendency to excuse parents who commit acts that would clearly be viewed as criminal if committed by a non-relative. Jane Murphy has suggested that “there is . . . an emerging consensus about the centrality of protecting children as, perhaps, the core value that should be promoted by family law.”<sup>224</sup> The protection of children must be one of the core values of criminal law as well.

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<sup>221</sup> Garbarino & Collins, *supra* note 24, at 11 (“[I]n the United States of the 1950s, there were no minimal standards of care for children in automobiles. By the 1980s, knowledge had stimulated changes in community values, and now it is considered neglectful to permit a young child to ride in a car without a car seat.”).

<sup>222</sup> See Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 HARV. J.L. & PUB. POL’Y 33, 48 (2003) (arguing that we are “formed by the criminal law” and that “[o]ur characters, desires, and motivations are formed by the rational debate, deliberation, decision, and reflection involved in the choice and execution of criminal law norms”).

<sup>223</sup> One group of child fatality researchers have argued: “[A]s case law accumulates, precedent is set and community standards for definition of neglect evolve. . . . [P]rosecution plays an important role at the societal level in addressing issues of neglect.” Bonner, Crow & Logue, *supra* note 25, at 169.

<sup>224</sup> Murphy, *supra* note 156, at 1128 (emphasis omitted).

