

“Which One of You Did It?”  
Criminal Liability for “Causing or Allowing” the Death of a Child

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Introduction

In the United States, the statistics on child abuse and homicide are absolutely staggering. Homicide is the leading cause of death for children under one year of age, and at least five children die each day from abuse and neglect by those who are obligated to protect them.<sup>1</sup> Regrettably, although the homicides are attributable to the acts of persons who supposedly care for the children, it frequently is difficult to identify the culprits.

Prosecutions for child homicide create special problems for prosecutors. By its nature, the homicide occurs most frequently in the privacy of the home. In a case involving multiple defendants – for example, two parents or caretakers -- proof frequently is unavailable to identify the person who actively caused physical harm to the child (the “active abuser”) and the person who although aware of the active abuse failed to prevent it, or failed to get medical treatment for the injured child (the “passive abuser”). It frequently is difficult to determine the relative culpability of the responsible parties. Because there are no living witnesses, the prosecution cannot prove where or exactly how the crime took place, or who, aside from an active abuser, was present. While forensic evidence may prove that the death was non-accidental and the approximate time of death, such evidence still may not be able to clarify who committed the fatal

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The title of this article is based on the title of an article by Professor Glanville Williams, “Which of you did it?” (1989) 52 MLR 179. Prof. Williams’s article addresses the same problems of prosecuting child homicide addressed in this article, but in the context of the United Kingdom. “Causing or Allowing the Death of a Child or Vulnerable Adult,” is the title of proposed legislation drafted by the English Parliament to address the same problems.

act or acts or who was present when they were committed. Given these circumstances, the defendants who committed the acts that caused the death of a child may either not be charged, or, if prosecuted, will likely be acquitted or the charges will be dismissed, even though it is clear that someone caused the death of a helpless child.

These problems are illustrated in the case of People v. Wong.<sup>2</sup> In Wong, a three-month old infant died of shaken baby syndrome.<sup>3</sup> The shaking had occurred in the apartment of the child's two babysitters, Eugene and Mary Wong, with whom the child resided six days a week. After a lengthy investigation, in which the Wongs gave incomplete and contradictory statements, the prosecution charged Mr. and Mrs. Wong with First and Second Degree Manslaughter and Endangering the Welfare of a Child.<sup>4</sup> At trial, the prosecution's medical evidence proved that the fatal shaking of the child occurred in the one-bedroom apartment at some time during a two and one-half hour period at night, during which the defendants had acknowledged to the police that they were both at home and caring for the child.<sup>5</sup> The apartment was a one-bedroom apartment, and the infant slept in the defendants' bedroom. A medical expert testified that the shaking required to cause shaken baby syndrome does not necessarily leave visible exterior marks, the infant would "cry sharply" and then, within 30 minutes, slip into a gradual coma that

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<sup>1</sup> See, U.S. DEPT. OF HEALTH AND HUMAN SERVICES, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES (1995) at xxiii, 16.

<sup>2</sup> 81 N.Y.2d 600, 619 N.E.2d 377, 601 N.Y.S.2d 440 (1993).

<sup>3</sup> Shaken baby syndrome occurs when an infant under the age of one year is shaken violently, causing the head to snap back and forth. The movement of the brain inside the head leads to ruptured blood vessels, hemorrhage, and swelling, but does not necessarily result in any visible injuries. *Id.* at 606, 619 N.E.2d at 380, 601 N.Y.S.2d at 443.

<sup>4</sup> N.Y. P. L. 125.15[1] & 125.20[1] and N.Y.P.L. 260.10[1].

<sup>5</sup> 181 N.Y.2d at 605, 619 N.E.2d at 379, 601 N.Y.S.2d at 443.

could resemble sleep.<sup>6</sup> There was also medical evidence that “prompt medical attention can prevent fatality” in cases such as this one.<sup>7</sup>

At the close of the prosecution’s case, the defense moved to dismiss the charges against both defendants. The defense argued that since the prosecution could not prove who was the active and who was the passive abuser, the defendants could not be found guilty.<sup>8</sup> In response, the prosecution argued that each defendant was liable because, even though there was no proof of the respective roles of the defendants, at least one of them had shaken the baby and the other had failed to intervene.<sup>9</sup> The motion to dismiss was denied.<sup>10</sup>

Both defendants were convicted of Manslaughter in the First and Second Degrees and Endangering the Welfare of a Child.<sup>11</sup> On appeal, the Appellate Division, First Department, modified the judgment by dismissing the convictions for Manslaughter in the First Degree on the unrelated ground that the finding that the defendants had acted or failed to act “with intent to cause serious physical injury” was against the weight of the evidence.<sup>12</sup> The court upheld the convictions for Manslaughter in the Second Degree and for Endangering the Welfare of a Child. Over a two-justice dissent, the court rejected the contention that the prosecution had failed to

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<sup>6</sup> Id. at 606, 619 N.E.2d at 380, 601 N.Y.S.2d at 443.7

<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

<sup>10</sup> Id.

<sup>11</sup> Id.

<sup>12</sup> See N.Y. Penal Law s 125.20[1]. *People v. Wong*, 182 A.D.2d 98, 588 N.Y.S.2d 119 (1<sup>st</sup> Dept. 1992).

produce sufficient evidence of the time and place of death to show that the passive defendant failed to perform a duty imposed by law.<sup>13</sup>

The defendants appealed to the New York Court of Appeals. Leave to appeal was granted, and on appeal, the Court reversed the remaining convictions and dismissed the indictment against both defendants.<sup>14</sup> The Court agreed with the defense that the evidence was insufficient to prove who was the active and who was the passive abuser; that it also was insufficient to prove the guilt of the passive defendant; and that without evidence that both defendants were guilty the convictions of both defendants had to be reversed.<sup>15</sup>

According to the Court, without proof of exactly when and where the death had occurred, the passive defendant's mere presence in the apartment during the relevant time period was insufficient to establish criminal liability. The Court held that the prosecution had failed to prove at the passive defendant had a duty to seek medical care because there was insufficient evidence that the passive parent knew of the need for such care. While the defendants both admitted being awake and tending to the child during a two and one-half hour period when the shaking was likely to have occurred, and although the apartment had only one bedroom, there was no proof that the two were continuously together during the entire time. According to the Court, it was certainly likely that one of them left the room at some point; and, contrary to the People's contention that it would have been coincidence for the shaking to occur at that time, the court considered it quite plausible that a person inclined to abuse a child would wait until he was

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<sup>13</sup> 81 N.Y. 2d at 607, 619 N.E.2d at 380, 601 N.Y.S.2d at 443.

<sup>14</sup> Id. at 600, 619 N.E.2d 377, 601 N.Y.S.2d 440.

<sup>15</sup> Id. at 608, 619 N.E.2d at 381, 601 N.Y.S.2d at 444.

alone with the child to do so.<sup>16</sup> Thus, what was missing was proof that the passive defendant was personally aware that the shaking had occurred. Without that evidence, the jury could not have concluded that the passive defendant was aware of a risk that the infant would die without prompt medical attention. Without that awareness, there was no liability for the failure to act.<sup>17</sup> “In the absence of evidence to show how, or at least where, the abusive acts had occurred and which room or rooms the two defendants had been in, there was no basis for the jury to infer that the passive defendant had actually witnessed the shaking – a form of abuse that leave no visible external marks.”<sup>18</sup>

A theory that was not pursued by the prosecutors in Wong but that might have established that whoever was the passive abuser should have or did know about the risk of serious physical injury is based on the history of abuse of other children who had been left in the Wongs’ care. In the court below, the prosecution proceeded on the theory that the active defendant had shaken the child and the passive defendant was personally aware of the shaking and thus of the risk that the infant would die without prompt medical treatment. In upholding the defendants’ convictions, however, the Appellate Division suggested a different theory, “that the ‘passive’ defendant was criminally culpable for knowingly permitting his or her spouse to tend to a crying child in a late-night situation that was likely to provoke abuse.”<sup>19</sup> The theory is premised on the evidence admitted at trial to demonstrate that other children entrusted to the

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<sup>16</sup> Id. at 609, 619 N.E.2d at 382, 601 N.Y.S.2d at 440.

<sup>17</sup> 81 N.Y.2d 600, 619 N.E.2d 377, 601 N.Y.S.2d 440 (1993).

<sup>18</sup> Id. at 610, 619 N.E.2d at 382, 601 N.Y.S.2d at 445.

<sup>19</sup> 182 A.D.2d at 105, 588 N.Y.S.2d at 122.

Wongs' are had also been abused.<sup>20</sup> As the majority in the Appellate Division explained, evidence that there had been prior vicious acts of abuse, that both defendants had been interviewed by a social worker about those acts, and that the defendants participated in the decision to continue their babysitting service established both the knowledge of the passive defendant and a "blatant disregard for the welfare of the child."<sup>21</sup> Moreover, both defendants made statements admitting that they were aware that the infant had been crying for two hours in the early morning before the fatal abuse occurred. "Under such circumstances, commonly known to be an exhausting, frustrating and emotionally wearing experience, to leave the child at the mercy of a known child abuser would be, without more, a conscious disregard of a substantial risk of death."<sup>22</sup>

As the Court of Appeals noted, however, this theory was not submitted to the jury: the evidence of prior incidents of abuse was admitted only to rebut a defense of accident or

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<sup>20</sup> As summarized by the Appellate Division that evidence is as follows:

In March 1988, eighteen month old Kevin Hung, when taken by his father to the hospital after spending a month with the Wongs, was found to have a second degree burn on the sole of his foot, bruises on his face and body, and fractures, one recent and one several weeks old, in each leg. As a result, he was hospitalized for thirteen days. Earlier, on a visit, Kevin's father had observed a burn on the child's mouth, but had dismissed it as an accident when Mrs. Wong told him that Kevin had tried to taste some hot soup that she had left out to cool. In June of 1988, shortly before Kwok-Wei Jiang came into the Wongs' care, one and one half month old Jenny Chan was taken to the hospital by heir father when he visited her at the Wongs' and saw that her face was badly discolored and that she was completely unresponsive. Mrs. Wong claimed that she had found the baby in that condition when she awoke and suggested that it was due to an 'internal problem.' Jenny was hospitalized for three days. " Id.

<sup>21</sup> Id. at 110, 588 N.Y.S.2d at 125.

<sup>22</sup> Id. at 110, 588 N.Y.S.2d at 125-26.

mistake.<sup>23</sup> Had the theory been properly raised, the defendants might have been convicted on the grounds that one of them was the principal and one the accomplice.

Reluctantly, the Court of Appeals reversed both convictions:

We are duty bound to reverse these two defendants' convictions because the alternative – incarcerating both individuals for a crime of which only one is demonstrably culpable – is an unacceptable option in a system that is based on personal accountability and presumes each accused to be innocent until proven otherwise.”<sup>24</sup>

What becomes clear from People v. Wong is that none of the weapons in the prosecutor's traditional arsenal was adequate to avoid this result. First, there were no eyewitnesses. Second, the forensic investigation and resulting evidence, although complete, were not sufficient. Evidence of cause of death and time of death could not establish the defendants' liability without proof of where each of the defendants was when the death occurred. Moreover, absent proof that the cause of death left any visible bruises or signs of distress, there was insufficient proof that the passive defendant actually witnessed the shaking or was otherwise aware that anything fatal had occurred or that anything needed to be done to help the child. Without such proof, there was no mens rea to establish liability based on the failure to act.

Finally, of course, the prosecutor could have granted immunity to one of the defendants.<sup>25</sup> But in the context of child homicide, with the absence of important evidence, the prosecutor's choice of which party to immunize is particularly vulnerable to error. The role of the respective parties in causing the child's death is exactly what the prosecutor does not know.

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<sup>23</sup> 81 N.Y.2d at 610, 619 N.E.2d at 383, 601 N.Y.S.2d at 446.

<sup>24</sup> Id. at 611, 619 N.E.2d at 383, 601 N.Y.S.2d at 446. Bellacosa, J., dissented.

<sup>26</sup> N.Y.C.P.L. § 50.10(1) provides for full transactional immunity in New York.

Even if the prosecutor guesses correctly, a guilty party will go free.<sup>26</sup> But if he guesses wrong, the active, more culpable abuser will go free. And, unlike some other situations requiring a decision to grant immunity, in this case the prosecutor has a full 50% chance of being wrong. On the other hand, it may be that both parties are equally responsible, for example, on an aiding and abetting theory. Thus, although it is clear that someone is responsible for the death of an innocent child, the power to grant immunity may not help at all or may be surrounded by so much guess work that there is an increased and unacceptable risk that a child murderer will be freed.<sup>27</sup>

Neither the U.S. courts nor the state legislatures have dealt with this problem. While much has been written about the omission-liability of a passive child abuser, all of the literature assumes that the prosecution has been able to in fact identify and differentiate the passive from the active abuser.<sup>28</sup> No state court or legislature has proposed an effective method of

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<sup>26</sup> The passive abuser, for example a mother, may have violated a duty to prevent commission of an assault upon her child or for failing to secure medical attention. See discussion, *infra*, at .

<sup>27</sup> Even if the prosecutor guesses correctly, immunity may not solve the problem. The immunized spouse still would have a privilege against testifying against his or her spouse. In New York, where only confidential communications remain privileged, the immunized spouse might be compelled to testify against the other one. N.Y. Penal Law §§ 500.05, 500.10; Social Services Law § 383-b. See, e.g., *People v. Allman*, 41 A.D.2d 325, 342 N.Y.S.2d 896 (2d Dept. 1973) (wife may testify that she saw her husband hit their child and that he would not let her telephone for assistance because social services law suspends confidential communications privilege between husband and wife in proceedings involving child abuse). Accord, *Adams v. Tennessee*, 563 S.W.2d 804, 809 (1978) (wife may testify to fatal assault by husband on child as exception to privileged marital communication). But what would be the result? Still, a potentially guilty party would go free.

<sup>28</sup> See, e.g., Christine A. Martin, *Murder by Child Abuse – Who’s Responsible after State v. Jackson*, 24 *Seattle Univ. L.R.* 663 (Fall 2000); Nancy A. Tanck, Note: *Commendable or Condemnable? Criminal Liability for Parents who Failure to Protect their Children from Abuse*, 1987 *Wis. L. Rev.* 659 (July/Aug 1987); Ricki Rhein, Note: *Assessing Criminal Liability for the Passive Parent: Why New York Should Hold the Passive Parent Criminally Liable*, 9 *Cardozo Women’s L.J.* 627 (2003); Bryan Q. Liang and Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 *Harv. J. on Legis.* 397 (Summer 1999); Jean Peters-

overcoming the evidentiary insufficiency inherent in this most horrible of crimes – the murder of an innocent child.

In the absence of any effective domestic remedy, one needs to look to foreign law. Confronted with similarly horrifying statistics and similar prosecutorial problems, the English parliament<sup>29</sup> recently drafted legislature addressed to solving the problems inherent in prosecuting multiple defendants in a child homicide case.

Part II of this article analyzes how current U.S. criminal law addresses the problem of securing a homicide conviction where multiple defendants are accused in a child's non-accidental death. Part III sets forth the English response: a statute that includes (1) a new substantive crime; (2) a permissible negative inference against a defendant who fails to account for the non-accidental death of a child for whom he or she is responsible; and (3) delay of a motion to dismiss for failure to establish a prima facie case until after the defense has been presented or the jury has been allowed to draw the negative inference. That part of the article analyzes the English response in light of U.S. law, and evaluates its efficacy in meeting the prosecutor's evidentiary problems. The article concludes that the English response should be adopted here, despite the controversial proposal that a jury in a prosecution under the proposed statute be allowed to draw a negative inference against a defendant who bears responsibility for the safety of a child and who fails to account for that child's non-accidental death.

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Baker, Note: Punishing the Passive Parent; Ending a Cycle of Violence, 65 UMKC L. Rev. 1003 (Summer 1997).

<sup>29</sup> Throughout this article I refer to "England" and "English" rather than to the United Kingdom because the legislation as enacted would apply to the courts in England and Wales and not in the entire United Kingdom.

## II. Prosecuting Multiple Defendants for Child Homicide: Existing U.S. Law

Where a child suffers a non-accidental death and more than one defendant is involved, there are two methods of establishing liability. Liability of both parties for homicide may be established under an accomplice liability theory. Where accomplice liability cannot be proven, one defendant may be prosecuted for the homicide as an active abuser, and the other may be prosecuted for his or her own conduct under either a reckless homicide (generally manslaughter) theory or under protection or prevention statutes, such as endangering the welfare of a child. However, in either scenario, the prosecutor must be able to and generally can establish who inflicted the fatal injury and who was aware that the injury occurred. This is precisely the evidence that was missing in People v. Wong.

### A. Accomplice Liability

Where there is evidence that two or more defendants are present and responsible for the care of a child at the time that the child sustains non-accidental fatal injuries, both defendants may be found guilty of intentional or reckless homicide under a theory of accomplice liability, even if the prosecution cannot prove who was the active abuser and who was the passive abuser. In such a case there is sufficient evidence for the jury to infer that both parties either intended the fatal result or, because they were both present, were aware of the injury and of the risk of death and assisted in bringing it about. In a case like Wong, however, where the prosecution cannot prove exactly when the fatal abuse occurred or who was present, accomplice liability cannot be sustained. While it is clear in such a case that someone committed murder or manslaughter, unless both defendants can be proven guilty, neither can be convicted.<sup>30</sup>

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<sup>30</sup> See, e.g., People v. Wong, discussed supra pp. , 81 N.Y.2d 600, 619 N.E.2d 377, 601 N.Y.S.2d 440 (1993).

Accomplice liability may also be sustained under so-called “accountability” statutes.<sup>31</sup>

Under these statutes, the failure to prevent child abuse will render the passive parent criminally liable as an accomplice for the active abuser’s crime, whether for some form of homicide or assault.

Three cases illustrate the application of accountability principles. First, in Lane v. Commonwealth,<sup>32</sup> a mother and her companion were prosecuted together under an accountability theory for assaulting her two-year-old daughter. The defense was that the injuries resulted from an accidental fall down stairs. Lane was charged with aiding and abetting her companion to commit assault. The medical evidence showed that the victim had sustained many bruises, abrasions and contusions, including a skull fracture. Lane was found guilty of complicity to commit assault in the first degree and her companion was found guilty of the assault. However, the trial judge set aside Lanes’ conviction on the ground that Lane had no legal duty to prevent the assault.<sup>33</sup>

The Supreme Court of Kentucky reversed. The Court held that a parent has a legal duty to provide safety to his or her child. The majority found this duty in recently enacted statutes designed to protect a child’s fundamental right to safety.<sup>34</sup> The concurring justice found the duty

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<sup>31</sup> See, e.g., *State v. Fabrizz*, 276 Md. 416 , 348 A.2d 275 (1975), relying on Md. Ann. Code art. 27 ss 35(a)(1982 vol) current version at Md. Ann Code art. 27, s 35(b) (Supp. 1986); *State v. Williquette*, 129 Wis. 2d 239, 385 N.W.2d 145 (1986), relying on Wis. Stat. S 940.201 (1985-1986).

<sup>32</sup> 956 S.W.2d 874 (Ky. 1997).

<sup>33</sup> *Id.* at 875.

<sup>34</sup> See Kentucky Revised Statutes s 620.020 (fundamental right to be free from personal injury); Kentucky Revised Statutes § 405.020 (duty to “nurture”, which court held does not permit tolerance of personal injury); and Kentucky Revised Statute 508.100 (criminal abuse in the first degree is committed when a person who has custody of a child intentionally permits the child to be placed in a

in the common law, based upon the special relationship between a dependant child and his or her parents.<sup>35</sup> In either event, the court found that the requirement of an actus reus was satisfied by the mother's failure to fulfill that duty. Moreover, the requisite accomplice mens rea was based on the defendant's knowledge of or awareness of risk. The court held that a person who knows that his child is in a dangerous situation and fails to take action to protect the child presumably intends the consequences of the inaction, which is to facilitate the offense.<sup>36</sup>

Similarly, in Palmer v. State,<sup>37</sup> the Supreme Court of Maryland upheld a conviction of a mother for involuntary manslaughter based on her "gross, or criminal, negligence, in permitting her paramour to inflict, upon her twenty months' old child, prolonged and brutal beatings that finally resulted in the child's death."<sup>38</sup> The court premised the mother's duty primarily on Maryland's nurturing statute, which requires parents to supply "support, care, nurture, welfare and education" to their children.<sup>39</sup>

Finally, in State v. Walden,<sup>40</sup> a mother was convicted of aiding and abetting assault solely on the ground that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault. The court recognized a parental duty to take affirmative action to prevent harm to a child.<sup>41</sup>

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<sup>35</sup> Lane, 956 S.W.2d at 876-77 (Cooper, J. concurring).

<sup>36</sup> 956 S.W.2d at 876. See also State v. Miranda, 245 Conn. 209, 715 A.2d 680 (1998) (imposing accomplice liability for permitting a child to be assaulted).

<sup>37</sup> 223 Md. 341, 164 A.2d 467 (1960).

<sup>38</sup> *Id.* at 468.

<sup>39</sup> Art. 72 A, § 1 (1957 code).

<sup>40</sup> 306 N.C. 466, 293 S.E.2d 780 (1982).

We believe that to require a parent as a matter of law to take affirmative action to prevent harm to his or her child or be held criminally liable imposes a reasonable duty upon the parent. Further, we believe this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which

These statutes would not sustain liability in cases such as Wong. In these three cases, the prosecution was able to prove who was the active abuser of the child and who was the passive abuser. In Wong, that proof was missing. In these three cases, the prosecution was able to prove that the passive defendant knew about the abuse or was aware of the risk of abuse, either because he or she was actually present and witnessed the abuse or because of the visibility of the victim's injuries. In Wong, again, there was no such evidence.<sup>42</sup>

## 2. Protection and Prevention Statutes

Many jurisdictions recognize a separate, non-homicide crime based on a common-law, parental duty to prevent the abuse of a child that is punishable with criminal penalties. Again, this duty is based on the special personal relationship between parents and children and the fact that the parent has undertaken to provide safety to the child. Generically, that duty is violated when the defendant is aware of and consciously disregards a substantial and unjustifiable risk of death or injury. At that point, criminal penalties may be imposed under so called "failure to protect," "endangering the welfare," or "contributing to the dependency" statutes.<sup>43</sup> In these jurisdictions, the passive parent is held criminally liable not for the active abuser's conduct, but

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duty has long been recognized by the common law and by statute. 306 N.C. at 472-73, 293 S.E.2d at 785-86:

For similar holdings from other states see, e.g., *Michael v. State*, 767 P.2d 193 (Alaska App. 1988), rev'd on other grounds, *Michael v. State*, 805 P.2d 371 (Alaska 1991); *P.S. v State*, 5656 So.2d 1209 (Ala.Cr.App. 1990); *People v. Peters*, 224 Ill. App. 3d 180, 166 Ill. Dec. 511, 586 N.E.2d 469 (1991); *People v. Peabody*, 46 Ca.App.3d. 43, 119 Cal.Rptr. 80 (1975); *State v. Adams*, 89 N.M. 737, 557 P.2d 586 (1976). 306 N.C. at 472-73, 293 S.E.2d at 785-86.

<sup>42</sup> 81 NY2d at 609-10, 619 N.E.2d at 382-83, 601 N.Y.S.2d at 445-46.

<sup>43</sup> See, e.g., ALA. CODE SS 26-15-1 to -4 (1992); ARIZ. REV. STAT. ANN SS 13-3619 (West 1978); 13-3623B; CAL. PENAL CODE S 273A (West 1988 & 1994); MINN STAT. ANN S 609.378(2)(b)(1-2) (West 1987 & Supp. 1993); N.J. STAT. ANN. §§ 9:6-1 (West 1987 & Supp. 1994), 2C:24-4(a) (West 1995).

rather for his or her own conduct in, e.g., permitting a child to be exposed to great bodily injury<sup>44</sup> neglecting a child, failing to provide medical care,<sup>45</sup> exposing a child to abuse<sup>46</sup> or failing to report abuse of his or her child.<sup>47</sup> These crimes generally are classified as misdemeanors and carry lesser sentences than the homicide statutes, even where the underlying conduct causes a child's death.<sup>48</sup> For this reason they are an inadequate substitute where one of the defendants has clearly caused the death of a child.

Thus, for example, in People v. Carroll,<sup>49</sup> the New York Court of Appeals upheld a conviction for Endangering the Welfare of a Child where the defendant, the stepmother of a child who was beaten to death by the father, failed to alert the authorities or summon medical assistance. The beatings occurred over the course of several days and the defendant witnessed

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<sup>44</sup> See, e.g., *State v. Peters*, 780 P.2d 602 (Idaho Ct. App. 1988); *State v. Walden*, 293 S.E.2d 780, 787 (N.C. 1982);

<sup>45</sup> See, e.g., *People v. Sally* (by not securing medical treatment for a child while the child was being abused by his stepfather resulting in injuries so severe that the defendant was aware that the child required medical attention, the defendant was guilty of violating the common law duty to protect).

<sup>46</sup> See, e.g., N.Y.P.L. § 260.10[2]. "A parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old" is guilty if he or she "fails or refuses to exercise reasonable diligence in the control of such a child to prevent [the child] from becoming an 'abused child,' a 'neglected child, a 'juvenile delinquent....'" One of the purposes of this statute is to establish "the duty of one parent to protect the child from the other parent." *Carroll*, supra, 567, 501, 500, quoting Donnino, Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 39, P.L. § 260.10 at 348.

<sup>47</sup> *Seattle v. Eun Yong Shin*, 50 Wash. App. 218, 748 P.2d 643 (1988).

<sup>48</sup> See, e.g., N.Y.P.L. § 260.10 {endangering the welfare of a child is a misdemeanor, which carries a maximum sentence of one year incarceration}, supra n. 47; *Ariz Rev. Statutes* 13-3619 (class 2 misdemeanor of permitting life, health or morals of minor to be imperiled by neglect, abuse or immoral associations). But see, e.g., *Ark. Code of 1987 Ann. S 5-27-221(a)(3)* (permitting abuse of a minor is a class B felony if the abuse consists of sexual intercourse, deviate sexual activity, or caused serious physical injury or death. Otherwise it is a class D felony).

<sup>49</sup> 93 N.Y.2d 564, 715 N.E.2d 500, 693 N.Y.S.2d 498 (1999).

most of the violence. The Court held that the evidence established that the defendant was acting as “the functional equivalent” of the child’s parent at the relevant time and had an obligation to take action to protect or help the child.<sup>50</sup>

In Wong, the proof would still have been inadequate to establish the defendants’ liability under these statutes. Again, as with the accomplice liability cases, these cases all contain proof that is missing in Wong: the active and passive abuser are each clearly identified and there is proof, based on the timing, manner and extent of the injuries inflicted, that the passive abuser had or should have had knowledge of the conduct of the active abuser. In Wong, of course, this was the precise evidentiary gap: there was no evidence distinguishing the roles of the two defendants, no evidence of precisely when the fatal abuse was committed, and no evidence of who was present at the time. Accordingly, there was insufficient evidence that the passive defendant was aware of the risk of death or that emergency medical assistance was required.<sup>51</sup>

### III. The English Response

#### A. The Wong Problem in the England: Regina v. Lane

In England, as in the United States, existing law provides that if the evidence shows that one of two accused must have committed a crime, but the prosecution cannot prove which of them committed it, both must be acquitted.<sup>52</sup> This is true in cases of child abuse resulting in death, where two defendants are responsible for the care of a child. In Regina v. Lane and

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<sup>50</sup> Id. at 566, 715 N.E.2d 500, 693 N.Y.S.2d 498 .

<sup>51</sup> 81 NY2d at 610, 619 N.E.2d at 383, 601 N.Y.S.2d at 500.

<sup>52</sup> Regina v. Lane and Lane, (1986) 82 Cr. App. R. 5; Regina v. Bellman, [1989] AC 836.

Lane,<sup>53</sup> the court of appeal held that both defendants were required to be acquitted under these circumstances.<sup>54</sup>

The facts in Lane are very similar to those in Wong, and create the same prosecutorial problems. There, a mother and stepfather were jointly responsible for the care of their child. The child sustained a fractured skull some time between noon and 8:30 p.m. during which time both parents had been absent from the home at times and present at times. Both denied responsibility. The judge rejected a submission of no case to answer, the English equivalent of a motion to dismiss for failure to establish a prima facie case. The prosecution argued and the court instructed the jurors that they could draw an inference that both defendants were culpable because they both bore responsibility for the child. Neither defendant testified, and both were convicted.<sup>55</sup>

The court of appeal allowed the appeal and held that in the absence of evidence either that (1) both defendants were present when the child was fatally injured; or (2) the non-striking parent was actively involved in the harm to the child, the jury should not have been invited to draw an inference that, in the absence of an innocent explanation, the parents were jointly responsible.

#### B. Curing the Wong Problem in England

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<sup>53</sup>(1986) 82 Cr. App. R. 5.

<sup>54</sup> Id. See also, Aston and Mason (1992) 94 Cr. App R 180 quoted in Children: Their Non-Accidental Death or Serious Injury (Law Commission # 282) (15 Sept 2003) (hereinafter “Commission Report”) at 7 “(We have felt forced to come to the unwelcome conclusion that there was nothing in the evidence at the close of the prosecution case which indicated that one of the appellants rather than the other was responsible for inflicting the fatal injuries.... Nor can we find any evidence upon which the jury might have concluded that the two of them were acting in concert....”).

<sup>55</sup> 82 Cr. App. R. at 5-11.

Thus confronted with similar frightful statistics<sup>56</sup> and the same prosecutorial handicaps, the British government appointed a commission to study the issue. A comprehensive Law Commission Consultative Report on the subject, “Children: Their Non-Accidental Death or Serious Injury” followed.<sup>57</sup> Thereafter, legislation was drafted that creates a new crime called, “Causing or Allowing the Death of a Child or Vulnerable Adult.”<sup>58</sup>

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<sup>56</sup> The Commission Report at 15-18.

<sup>57</sup> Id.

<sup>58</sup> The proposed statute reads as follows:

Causing or Allowing the death of a child or vulnerable adult. A person is guilty of causing or allowing the death of a child or vulnerable adult where

1. A child dies as a result of the unlawful act of a person who
  - (a) was a member of the same household as the child; and
  - (b) had frequent contact with him.
2. The defendant was such a person at the time of the act.
- (3) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

In a prosecution for this offense the prosecution does not have to prove which subdivision of (4) above applies.

In any prosecution for this offense it shall be a defense that D could not have protected V without a significant risk of serious physical harm to himself or V.

3. At the time of death there was a significant risk of serious physical harm to the child by the unlawful act of such a person and
  4. Either (a) D was the person whose act caused V’s death; or
- (b) (1) D was, or ought to have been aware of the risk mentioned in (3) above;
- (2) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk in (3);

For the purposes of this statute:

1. “Child” means a person under the age of 16.
2. A person is to be regarded as a “member” of a particular household, even if he or she does not live in that household, if the person visits it so often and for such periods of time that it is reasonable to regard that person as a member of it.

### 1. A New Substantive Offense

The statute creates a new crime that applies where a child dies as a result of unlawful conduct, a member of the child's household caused the death, the death occurred in anticipated circumstances, and the defendant was or should have been aware of the risk but either caused the death or did not take reasonable steps to prevent it. The prosecution does not need to show which member or members of the household actively caused the death and which passively failed to prevent it. This crime is categorized as a homicide offense. Evidentiary and procedural changes accompany it: the jury may draw a negative inference against any defendant who fails to account for the manner of fatal injury either to the police or at trial. The decision on the motion to dismiss is then delayed until the close of all of the evidence to allow either the defendants' statements or the negative inferences against them to be counted as part of the

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3. "The same household as V" refers to any household in which V was living at the time of the act that caused V's death."

Section 5 of the statute, entitled "Evidence and procedure" adopts the existing permissible negative inference based on silence and requires that the decision on the motion to dismiss for failure to state a case to answer be delayed until after all of the evidence has been presented. The U.S. version of the statute would be modified to read as follows:

"Section 5 evidence and procedure"

(1) Where –

(a) a person is charged with an offense under this statute.

(b) the court or jury is permitted to draw such negative inferences as appears proper from the defendants' failure to account for the death of the child, including that the prosecution's charges are true.

The court or jury may draw such inferences in determining whether he is guilty on the charge herein or of any murder or manslaughter charges based on the same death (even if there would otherwise be no prima facie on any charge).

(2) Where –

(a) a person is charged with an offence of murder or manslaughter, and

(b) he or another person is charged in the same proceedings with an offence under section 4 in respect of the same death,

evidence in determining whether the prosecution has established a prima facie case. Once that proof is included, the motion to dismiss is rarely granted.

The proposed statute contains all of the elements that must be established before the state may punish conduct: actus reus; mens rea; and causation. These elements will be addressed seriatim. The statute would also make it possible to establish the liability for homicide of two or more persons who are responsible for a child when that child dies. The possibility of acquittal, dismissal, or conviction of a mere misdemeanor in such a circumstance could be avoided in many cases.

a. Actus reus

Two issues arise concerning the actus reus: whether there is a duty to act and what evidence may be offered in defense of the duty to act.

i. Duty to Act

The proposed statute would recognize a duty to provide a safe environment for a child that includes not physically harming the child as well as failing to prevent harm of which a person responsible for the child was or should have been aware. The persons to whom the statute would apply would be narrower than those who fall within the traditional universe of adults who, under the common law doctrine have a special relationship status that carries with it a duty to provide a safe environment for a child.<sup>59</sup> Under the statute, only those responsible adults who live in the victim's household are included. This would include the Wongs, in whose household the child lived for six days out of every week. It would also include a parent or step-parent who lives with the child, and the paramour or companion of a residential parent, assuming

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the question whether there is a prima facie case on any charge is not to be considered before the close of all the evidence at trial.

<sup>59</sup> See supra at .

that person had frequent contact with the child. On the other hand, the existence of a special status relationship would not be enough under this statute to establish culpability. Thus, for example, a father or mother who did not reside and have frequent contact with the child at the time of the non-accidental injury could not be found guilty, despite the parental relationship, and even if that parent was aware of a risk of serious injury.

Like existing protection and prevention statutes, this statute would also exclude public employees such as social workers, or childcare workers. Under the new statute, these categories of outsiders will not be liable, since they are not members of the victim's household. The same will be true for doctors or nurses who come into contact with the child, however frequently. Moreover, the requirement that the defendant have "frequent contact" with the victim would prevent the liability of occasional visitors, paramours, or guests or those who just happen to be present at the scene.<sup>60</sup> It would also preclude liability of a parent for conduct by a stranger or transient visitor of which he or she would have had no notice. Thus, for example, the inattentive parent whose child is kidnapped from a playground and killed would not be held criminally responsible for the death under the statute.

ii. Defense to Failure to Act

Under the statute it would be a defense that the defendant "could not reasonably have been expected to take" steps to protect the child because, for example, to do so would have subjected him or her to serious physical injury. A defendant should be convicted under this statute only where the jury is sure that any reasonable person in the defendant's position would have taken action, and this should be for the prosecution to prove. Indeed, "in the

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<sup>60</sup> See, e.g., *Johnson v. State*, 269 Ga. 840 (1998) (defendant could not be found liable for fatal abuse of a child where he spent the night downstairs at his sisters while sister and boyfriend upstairs killed child).

commonplace situations in which offences are committed against children it will be a matter of obvious common sense to identify what it was reasonable to expect the responsible person to do.”<sup>61</sup>

This provision has two collateral benefits: it would permit a battered spouse, generally a mother, to interpose a defense to the crime that does not exist in all U.S. jurisdictions.<sup>62</sup> That is, the battered woman would be permitted to prove her own abuse in her defense and then argue that a reasonable person in her circumstances could not have taken action to prevent the death. A full-blown duress defense would not be required.<sup>63</sup> The existence of these defenses might also encourage the passive abuser to give her account of how the child died. This might result in more exposure of and even prosecutions of batterers as well. This proof also would be available for the jury to consider on any accompanying count of murder or manslaughter that the defendant and any co-defendant also faced.<sup>64</sup>

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<sup>61</sup> Commission Report at 55.

<sup>62</sup>For a complete discussion of existing failure-to-protect legislation and how it fails to consider the battered spouse’s circumstances, see Enos, V. Pualani, Recent Development: Prosecuting Battered Mothers: State Laws’ Failure to Protect Battered Women and Abused Children, 19 Harv. Women’s L.J. 229 (Spring 1996). This article argues, inter alia, that the failure to employ a “reasonableness” standard in favor of strict liability for the passive parent is improper.

<sup>63</sup>Michelle S. Jacobs, Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes, 88 J. Crim. L. & Criminology, 579, 587 (1998); see also Wayne R. Lafave & Austin W. Scott, Jr., Criminal Law 108-09 (2d ed. 1986). Courts have not yet identified what acts would be considered to put parents in sufficient danger to excuse their failure to protect a child, probably because such evidence generally would result in an acquittal.

<sup>64</sup>Commission Report at 96.

b. Mens rea: Intent or Awareness of Risk

The mens rea requirement for liability under the statute is satisfied by proof that the defendant either (1) intentionally harmed the child; or (2) had notice of a high level of risk of serious physical harm to the child. The “intent” standard is the traditional intent required for criminal culpability generally.<sup>65</sup> The standard covers the active abuser and the accomplice to active abuse.

The awareness-of-risk standard is applicable to the passive abuser. It contains both an objective and subjective element, and would cover two categories of defendants: (1) a person in the defendant’s circumstances who is aware of or ought to be aware of the risk of serious physical harm being caused by an unlawful act by someone, i.e., the responsible adult who is careful enough to be aware of the risk but does not act reasonably to prevent the result; and (2) the responsible adult who is not aware because he or she is culpably inattentive.<sup>66</sup> The test is not whether a “reasonable person” would be aware of the risk of death to the child. Instead, the test is whether a reasonable person in the defendant’s situation would be aware of a significant risk of serious physical harm.<sup>67</sup>

An additional mens rea requirement is that the offense be committed in the circumstances of the kind the person anticipated or ought to have anticipated and by a person who lives with and who has frequent contact with the child. It is not sufficient that there be

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<sup>65</sup> Generically, a person intends a result when it is his or her conscious purpose to bring it about.

<sup>66</sup> Commission Report at 53.

<sup>67</sup> This is consistent with protection and prevention statutes that consider the culpability of a battered or abused spouse. See e.g., *State v. Williquettee*, 385 N.W.2d 145 (Wis. 1986) (objective standard for determining what constitutes child abuse and doing away with the requirement of other mens rea); *State v. Walden*, 293 N.S.E.2d 780, 787 (N.C. 1982) (“the failure of a parent who is present to take all steps reasonably possible to protect the parent’s child from

awareness of a risk that a child might be the victim of some intervening serious offence or some offence by someone who does not live with the child. Thus, for example, there would be no liability for a grieving parent whose child is kidnapped while playing out of the parents' sight, even if the parent had been culpably inattentive. Nor would there be liability for a parent who allows a child to be alone with an abusive parent, where the child is harmed by another during that time. The risk is of anticipated, deliberately inflicted harm as a result of an illegal act.

This statute would support liability of both parties regardless of whether the prosecution can establish who is the active and who the passive abuser so long as the injury to the child was visible to both parties. Thus, for example, in Lane, where the infant suffered physical injuries, the defendants could now be held liable even without proof of their respective roles because whoever was the passive abuser would have had or should have had an awareness of the risk of serious physical injury. In addition, awareness of a risk of serious physical injury could be established by proof of a pattern of continuing abuse or of prior serious abuse of which the passive defendant would have been aware.

It is not clear, however, that the proof in Wong could have satisfied this statute. Wong was not a case, like Lane, in which the visible nature of the child's injuries would reasonably have been noticed by someone in the defendants' circumstances. Indeed, Wong presents the almost unique circumstance in which the prosecution lacked proof not only of when the baby was fatally harmed and of who was present when the harm occurred; in Wong, the prosecution also could not prove that anyone not present at the moment of abuse would have been aware of the injury, or of the need to act, because, uniquely, the injury left no external bruises. Indeed, the Court of Appeals specifically noted that the symptoms of shaken baby syndrome – a gradual fall

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attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed.”).

into a comatose state with no external injuries - could easily be mistaken for the quieting down of the child.<sup>68</sup> For cases like Wong, the evidentiary and procedural changes suggested in the statute – a negative inference based on duty to account for the non-accidental death of a child and the accompanying delay of the motion to dismiss to permit that account or the inference from its absence – would be required.<sup>69</sup>

c. Causation

To establish criminal liability, proof of causation must, of course, be present. Generally, this should not be difficult for the prosecution to prove. There will almost always be medical testimony that the child died of non-accidental causes. Under the statute, this proof would be sufficient to support the liability of both defendants. Thus, for example, in Palmer v. State,<sup>70</sup> the court affirmed a mother’s involuntary manslaughter conviction for negligently permitting her child to be abused even though she was not the active abuser. The court reasoned that “to construe the proximate cause of the harm sustained by the victim, it was not necessary that [the mother’s] act be the sole reason for the realization of the harm which has been sustained to the [child.]”<sup>71</sup> By keeping the child in proximity to the harm, the court reasoned that the mother indirectly contributed to the abuse. Where liability is premised on a failure to promptly secure medical treatment or care, the proof that frequently exists in prosecutions now – that earlier medical attention would have averted the death – would also be sufficient to establish that the conduct of the passive defendant was a proximate cause of the death.

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<sup>69</sup> See infra at .

<sup>70</sup> Palmer v. State, 164 A.2d 467 (Md. 1960).

<sup>71</sup> 72 Id., quoting 1 Wharton, Criminal Law and Procedure 68 (Anderson).

In conclusion, in those U.S. cases where it is not possible to establish traditional intent or accomplice liability, the suggested statute would provide an alternative homicide statute under which to secure a conviction. In addition, where it is not possible to identify which of two or more defendants was the active and which the passive abuser, the statute would permit a finding of criminal culpability of both, so long as there is evidence to establish sufficient awareness of risk on behalf of both defendants, either because of the defendant's presence at the time of the abuse, the visible nature of the injuries sustained, or a past history of abuse. In the unique circumstance where the prosecution cannot prove when the abuse occurred or who was present, and where the abuse leaves no visible signs, the new statute will probably not be successful absent adoption of the proposed procedural and evidentiary changes that are discussed below.

2. Drawing a Negative Inference from the Failure to Account for the Non-Accidental Death of a Child

The proposed English statute provides that the court and jury be able to draw a negative inference against any of the defendants who fails to give a statement before or at trial concerning how the child's death occurred. Although this appears shocking to the U.S. reader, the law in England has allowed such an inference to be drawn in all criminal cases for at least a decade.

Unlike in the United States, in England the right to remain silent is not absolute. Pursuant to the Criminal Justice and Public Order Act 1994 s 35(3) ("CJPOA"), a jury may draw "such inferences as appear proper" against a defendant who (1) remains silent or fails to answer a question during questioning by the police after being properly cautioned; (2) remains silent at

trial; or (3) proves facts at trial inconsistent with those given in response to earlier police questioning.<sup>72</sup>

Under the proposed statute, where a defendant is charged with murder or manslaughter as well as with the new criminal offense, the jury may draw a negative inference against the defendant as to all charges where that defendant either failed to account for the homicide to the police, failed to give an account at trial, or gave an account at both times but those accounts are inconsistent.

The legality of the CJPOA inference under the European Code of Human Rights, and the ways in which it has been implicated are beyond the scope of this article.<sup>73</sup> It is sufficient to note that the proposed statute would allow the drawing of the inference against a silent defendant both as to the crime of Causing or Allowing the Death of a Child and as to any accompanying charge of homicide.

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<sup>72</sup> An English statute, Criminal Justice and Public Order Act 1994 section 34 provides, in substance, that where a defendant gives evidence and relies on a fact he or she failed to mention to the police, or if a defendant does not give evidence or gives evidence but unreasonably refuses to answer a question, the court or jury may again draw such inference as appear proper. As to facts that the defendant did mention on being questioned and could reasonably have been expected to mention, the court or jury may draw such inferences from the failure as appear proper. Section 38(3) prohibits a conviction based solely on such an inference. These sections have been upheld by the ECHR. *Condon v. UK* (2001) 31 EHRR 1. See *Murray v. UK* (1996) 22 EHRR 29.

<sup>73</sup> The European Court of Human Rights has held that the limitations on the right to silence are consistent with the European Code of Human Rights. It was the Commission's position, as well, that Article 6 would not be violated because of (i) the fundamental importance of the duty owed to the child under Articles 2 and 3; (ii) the unsatisfactory state of the current law; (3) the safeguards described before a jury may draw a negative inference; and (4) the fact that the jury must be sure of the defendant's guilt before convicting. Finally, the Commission recommended that a trial judge be under a duty to withdraw the case from the jury "where he considers that any conviction would be unsafe or the trial would otherwise be unfair." The Commission explicitly noted that this safeguard might be "particularly important if an adverse inference from silence were likely to be an important factor in the jury's considerations." Commission Report at 40-43.

### 3. The Negative Inference under U.S. Law

#### a. Drawing a Negative Inference Based on a Duty to Report

In cases prosecuted under the new statute, i.e., those cases, like Wong, where the prosecution can prove the non-accidental death of a child; can narrow down the group of responsible parties, but cannot prove the defendants' guilt, the duty to provide a safe environment for a child should be construed to include the duty to account for that child's non-accidental death. The failure to so account could then permit a negative inference against the non-reporting defendant. This was a solution proposed by the Commission in England;<sup>74</sup> however, this solution does not appear in the final statute submitted to the Queen. Instead, Parliament simply relied on the existing statutory inference from silence and proposed a delay in the motion to dismiss so that this inference could form part of the prosecution's prima facie case.

Duties to report child abuse already exist in every state of the United States, for example, for doctors, nurses, and others who are likely to be in a position to report on child abuse. Under these statutes, a person can be prosecuted for failing to report suspected child abuse.<sup>75</sup> These statutes reflect a unanimous recognition that child abuse is a problem of staggering dimension and that children can be better protected by encouraging reporting.<sup>76</sup>

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<sup>74</sup> Commission Report at 35-36.

<sup>75</sup> See, statutes collected in Caroline Trost, NOTE: Chilling Child Abuse Reporting: Rethinking the CAPTA Amendments, 51 Vand. L. Rev. 183, n. 63.

<sup>76</sup> See, e.g., Tenn. Code Ann. S 37-1-402(a)(1996) ("The purpose of this part is to protect children whose physical or mental health and welfare are adversely affected by brutality, abuse or neglect by requiring reporting of suspected cases by any person having cause to believe that such case exists. It is intended that, as a result of such reports, the protective services of the state shall be brought to bear on the situation to prevent further abuses, to safeguard and enhance the welfare of children, and to preserve family life. This part shall be administered and interpreted to provide the greatest possible protection as promptly as possible for children." And N.J. State. Ann. ss 9:6-8.8 (West 1993) (the purpose of the statute is "to provide for the protection of

Indeed, in some jurisdictions, a parent's failure to account for abuse of a child is considered proof that the family situation is unlikely to change for the better and is thus part of the basis for terminating parental rights.<sup>77</sup> Moreover, as discussed in Part II supra, some states hold parents criminally liable for failing to prevent abuse either under an aiding and abetting theory for homicide or assault or under a protection and prevention statute.<sup>78</sup> Thus, in some states the duty to report already exists in some form.

We propose that a presumption be created as part of the new statute that would permit the jury to draw a negative inference against one of multiple defendants charged under the statute where that defendant has failed to account for the non-accidental death of a child. The inference would be based on the responsible defendant's duty to account consistent with that defendant's Fifth Amendment privilege. Thus, the failure to account for the non-accidental death would be sufficient to provide an inference that the reason for the failure is that the account would be self-incriminatory.

California v. Byers,<sup>79</sup> is the Supreme Court's major statement on the constitutionality of duty-to-report statutes. In Byers, in a plurality opinion written by Chief Justice Burger, the Supreme Court analyzed a California statute that required any driver involved in a vehicular accident that resulted in property damage to stop at the scene and leave his or her name and

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children . . . who have had serious injury inflicted upon them by other than accidental means.”), cited in Trost, n. 75 supra, n 64.

<sup>77</sup> See, e.g., West Virginia Dept. of Health and Human Resources ex rel Wright v. Doris S. and Rosalee S., 197 W. Va. 489, 475 S.E.2d 865 (1996); Adoption of Larry, 434 Mass. 456, 750 N.E.2d 475 (2001).

<sup>78</sup> See Part supra, at pp. . . .

<sup>79</sup> 402 U.S. 424, 91 S.Ct. 1535, 29 L.Ed.2d 9 (1971).

address. Although the so-called “stop and identify” statute was potentially’ self-incriminatory, the Court upheld it.<sup>80</sup>

The Court began its analysis by noting that it was “balancing the public need on the one hand, and the individual claim to constitutional protections on the other,” and that “neither interest can be treated lightly.”<sup>81</sup> Reviewing other duty-to-report requirements, the Court noted

In each of these situations there is some possibility of prosecution - often a very real one - for criminal offenses disclosed by or deriving from the information that the law compels a person to supply. Information revealed by these reports could well be a ‘link in the chain’ of evidence leading to prosecution and conviction. But under our holdings the mere possibility of incrimination is insufficient to defeat the strong policies in favor of a disclosure called for by statutes like the one challenged here.<sup>82</sup>

Reviewing its precedent, the Court explained that the question is not the possibility of incrimination, but whether the duty to report presents “substantial hazard of self-incrimination.”<sup>83</sup> That determination in turn depends on the answers to the following questions: (i) is the statute aimed at the public at large or at a “highly selective group inherently suspect of criminal activities”<sup>84</sup> (ii) is the statutory purpose “essentially regulatory” or is it aimed at facilitating the criminal conviction of the reporter; (4) is the statute designed to disclose inherently illegal activity of the reporter?<sup>85</sup>

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<sup>80</sup> Id. at 432, 91 S.Ct. 1540.

<sup>81</sup> Id. at 427, 91 S.Ct. at 1537.

<sup>82</sup> Id. at 428, 91 S.Ct. at 1538.

<sup>83</sup> Id. at 429, 91 S.Ct. at 1538, quoting U.S. v. Sullivan, 274 U.S. 259, 47 S.Ct. 607, 71 L.Ed.2d 1037 (1927).

<sup>84</sup> 402 U.S. at 429, 91 S.Ct. at 1538, quoting Albertson v. SACB, 382 U.S. 70, 79, 86 S.Ct. 194, 199, 15 L.Ed.2d 165 (1965).

<sup>85</sup> California v. Byers, 402 U.S. 424, 430, 91 S.Ct. 1535, 1539, 29 L.Ed.2d 9 (1971).

In Byers, the Court concluded that the statute was aimed at a sufficiently large portion of society (drivers involved in accidents) that it could not be deemed to address a “highly selective group inherently suspect of criminal activities.” The fact that it was aimed at accident participants, many of whom, like Byers, might be guilty of criminal conduct, did not change the fact that driving, and even being involved in an accident, does not necessarily involve criminal conduct.<sup>86</sup> As to the second criterion, the Court noted that despite the collateral criminal consequences of disclosing one’s name and address, and the possibility that this increased the likelihood of prosecution, the statute’s main purpose was essentially to regulate the use of motor vehicles. The condition of the duty to report – that property damage has occurred – indicated that the purpose of the duty was to properly impose responsibility for the economic compensation of any property damage.<sup>87</sup> Similarly, the Court held that, although the statute might provide a link in the chain of evidence needed to prosecute for any criminal conduct that may have occurred, the driver’s self-reporting would not be the sole evidence against a driver in any criminal case. In short, the Court concluded:

The disclosure of inherently illegal activity is inherently risky. Our decisions in Albertson and the cases following illustrate that truism. But disclosure with respect to automobile accidents simply do not entail the kind of substantial

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<sup>86</sup> *Id.* at 431, 91 S.Ct. at 1539. Compare Albertson v. SACB, 382 U.S. at 79, 86 S.Ct. at 199 (order requiring registration by members of communist organizations violates Fifth Amendment) and Haynes v. United States, 390 U.S. 85, 88 S.Ct. 722, 19 L.Ed.2d 923 (1968) (order requiring registration of firearm involved inherently criminal activity and therefore violated Fifth Amendment).

<sup>87</sup> “Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence. Here the compelled disclosure of identity could have led to a charge that might not have been made had the driver fled the scene; but this is true only in the same sense that a taxpayer can be charged on the basis of the contents of a tax return or failure to file an income tax form. There is no constitutional right to refuse to file an income tax return or to flee the scene of an accident in order to avoid the possibility of legal involvement. *Id.* at 434.

risk of self-incrimination involved in *Marchetti*, *Grosso*, and *Haynes*. Furthermore, the statutory purpose is noncriminal and self-reporting is indispensable to its fulfillment.<sup>88</sup>

The Court followed its analysis in *Byers* in a situation in which the safety of a child was in issue, which closely resembles the situation presented in child homicide prosecutions under discussion here. Again, the Court upheld the duty to report.

In *Department of Social Services of Baltimore v. Bouknight*<sup>89</sup> the Court, this time by a seven-judge majority decision authored by Justice O'Connor, held that a parent's duty to produce a child in response to a court order trumps the parent's right against self-incrimination, even in a case where the authorities suspect that the child has been murdered by the parent.<sup>90</sup> In *Bouknight*, a mother who had custody of her child pursuant to a court order refused to comply with another order of the court to produce her child. The authorities believed the child had been abused and had died as a result. The Maryland court of appeals struck the lower court order holding the mother in contempt on the ground that the act of production forced Bouknight to admit "a measure of continuing control and dominion over Maurice's person" in circumstances in which "Bouknight has a reasonable apprehension that she will be prosecuted."<sup>91</sup> Accordingly, the state court found the contempt order unconstitutional.<sup>92</sup>

Again, as in *Byers*, despite the obvious self-incriminatory implications of the duty to produce a child under the circumstances presented, the Supreme Court reversed and held that

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<sup>88</sup> Id. at 431, 91 S.Ct. at 1539. Interestingly, *Byers* was indeed later charged with a substantive criminal offense of overtaking another vehicle. (Id. at 424, 91 S.Ct. at 1535.)

<sup>89</sup> 493 U.S. 549, 110 S.Ct. 900, 107 L.Ed.2d 992 (1990).

<sup>90</sup> For the purposes of the decision, the Court assumed that the act of production was testimonial in nature. Id. at 555, 110 S.Ct. at 905.

<sup>91</sup> Id. at 554, 110 S.Ct. at 904, quoting 314 Md. 2d at 403-04, 550 A.2d. at 1141..

Bouknight could not invoke her Fifth Amendment right against self-incrimination to resist the order to produce her child.<sup>93</sup> The Court used the same four-part test to determine if the duty violated the Fifth Amendment.

First, the Court found that persons who care for children pursuant to custody orders are not members of “a selective group inherently suspect of criminal activities” even though they may have been found by the court to be unable to give proper care to a child.<sup>94</sup> Second, it found that the statute did not “focu[s] almost exclusively on conduct which is criminal.”<sup>95</sup> Even though the mother was suspected of criminal activity, the Court explained:

Even when criminal conduct may exist, the court may properly request production and return of the child, and enforce that request through exercise of the contempt power, for reasons related entirely to the child’s well-being and through measures unrelated to criminal law enforcement or investigation.<sup>96</sup>

Using the Byers and Bouknight criteria, imposing a duty to account for the non-accidental death of a child for whom he or she is responsible should survive Fifth Amendment scrutiny. First, the duty to account is directed toward parents, or those standing in responsible positions to children. This is not a “highly select group inherently suspect of criminal activity.”<sup>97</sup> While it could be argued that the statute is really aimed at those caretakers whose children have

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<sup>92</sup> Bouknight, 493 U.S. at 554, 110 S.Ct. at 904.

<sup>93</sup> Id. at 562, 110 S.Ct. at 909.

<sup>94</sup> Id. at 559, 110 S.Ct. at 907, quoting Marchetti, 390 U.S. at 57, 88 S.Ct. at 707, quoting *Albertson v. SACB*, 382 U.S. at 79, 86 S.Ct. at 199).

<sup>95</sup> *California v. Byers*, 402 U.S. at 454, 91 S.Ct. at 1551 (Harlan, J., concurring).

<sup>96</sup> Id. at 561, 110 S.Ct. at 908. Finally, the Court observed that it was “not called upon to define the precise limitations that may exist upon the State’s ability to use the testimonial aspects of Bouknight’s act of production in subsequent criminal proceedings.” It did note, however, relying on Marchetti, that use immunity “is not appropriate where a significant element of the regulatory requirement is to aid law enforcement. Id. at 562, 110 S.Ct. at 908-09.

<sup>97</sup> See n. 97, supra.

been abused, the same argument was made in Byers and Bouknight – that the statute was aimed at criminal activity (drivers who caused accidents or caretakers who abused their children) and thus at people who were likely to be found to have engaged in criminal conduct. That argument was rejected because the Court found no necessary correlation between causing an accident and criminal conduct<sup>98</sup> or between having court ordered custody of a child because of deficient parenting and criminal conduct.<sup>99</sup> Similarly, the fact that one’s child has been killed does not necessarily mean that the reporter has himself or herself engaged in criminal conduct. Indeed, it is more likely than not that the act of reporting will be proof that the caretaker has not engaged in any crime either as an accomplice or for failure to protect. In addition, in many states, these individuals already have a civil duty to account for harm to a child.

Second, the proposed duty to account could be sustained as having a regulatory purpose besides facilitating the criminal conviction of the reporter. Indeed, the proposed duty to account would be no more than an extension of the existing statutory duties to report that apply to third parties. The purpose of the duty is to protect children from harm at the hands of their caregivers by both encouraging reporting and accurately identifying the abusers. Third, the proposed duty is not impermissibly designed to “disclose the illegal acts of the reporter.”<sup>100</sup> In fact, the duty is aimed at exposing the culpability of the active abuser who causes the death of a child. Indeed, the act of reporting is likely to indicate that the reporter has no criminal liability at all.

Finally, under U.S. law, the safeguards accompanying the drawing of the inference in the criminal context may be sufficient to minimize the impact on the Fifth Amendment right and thus protect the right against self-incrimination. To be sure, the defendant must be advised of the

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<sup>98</sup> See supra at n.. and accompanying text

<sup>99</sup> See supra at n. and accompanying text.

permissible inference when questioned by the authorities; this would be added to the standard Miranda warnings where the non-accidental death of a child is suspected.

b. The Supreme Court's No-Inference Precedent

Having established a duty to account for the non-accidental death of a child, the jury should be allowed to draw a negative inference against a non-reporting defendant in a prosecution under the new statute. The inference is supported by the following factors: (1) the importance of protecting children from murder at the hands of those who are supposed to care for them; (2) it is based on a substantive, common-law duty to provide safety; (3) it would only be available in the limited circumstance of prosecution under the new substantive crime, i.e., where the prosecution cannot prove the guilt of two or more responsible parties for the death of a child for whom they were responsible. Under these circumstances, the drawing of the inference should be sustained under the Fifth Amendment.

The Fifth Amendment provides, in relevant part, “No person ... shall be compelled in any criminal case to be a witness against himself...” In Griffin v. California,<sup>101</sup> the Supreme Court held that neither a court nor a prosecutor may comment on the defendant’s silence. Under Griffin, no negative inference whatsoever may be drawn from the defendant’s silence because such an inference would chill a defendant’s exercise of that right by making its exercise costly.<sup>102</sup>

The Supreme Court has adhered to this conclusion. Thus, sixteen years after Griffin, in Carter v. Kentucky, the Court reaffirmed that the defendant has a right to have an instruction given to the jury that it may not draw any inferences from the defendant’s failure to testify.<sup>103</sup>

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<sup>100</sup> See supra n. and accompanying text.

<sup>101</sup> 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

<sup>102</sup> Id. at 611, 85 S.Ct. at 1233.

<sup>103</sup> Carter v. Kentucky, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), on remand 620 S.W. 2d 320 (Ky. 1981).

And, most recently in 1999, in Mitchell v. United States,<sup>104</sup> the Court, albeit by a five-to-four majority, extended the no-comment rule to sentencing proceedings, refusing to allow a judge to rely on a defendant's failure to contest certain factual assertions that served to increase her sentence. The majority eloquently (and quite relevantly to a comparative analysis) defended the no-adverse-inference rule as follows:

The rule against adverse inferences is a vital instrument for teaching that the question in a criminal case is not whether the defendant committed the acts of which he is accused. The question is whether the Government has carried its burden to prove its allegations while respecting the defendant's individual rights. The Government retains the burden of proving facts relevant to the crime at the sentencing phase and cannot enlist the defendant in this process at the expense of the self-incrimination privilege.<sup>105</sup>

To be sure, the Supreme Court has thus chosen to stick to its no-adverse-inference rule. Indeed, as the above quote from Mitchell implies, one difference between the United States and other countries (including England), is that the United States remains a resolutely accusatorial system.<sup>106</sup> Before the recent, domestic adoption of the ECHR, England was not a rights-based system by any means. Although it recognized many rights of accused persons similar to the United States, it has no written constitution or bill of rights. Moreover, as a monarchy, England has remained more inquisitorial than the U.S. system with more emphasis on the obligations of its citizens as subjects. In the United States, the system is still built upon protecting against conviction of the innocent and limiting the authority of the king rather than viewing its citizens as subjects.

Nevertheless, where, consistent with the Fifth Amendment, a defendant charged with the new crime of Causing or Allowing the Death of a Child, and has a substantive duty to account

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<sup>104</sup> 526 U.S. 314, 119 S.Ct. 1307, 443 L.Ed.2d 424 (1999).

<sup>105</sup> *Id.* at 329, 119 S.Ct. at 1316.

for the death of the child; where it is clear that someone has caused the non-accidental death of a child; and where the prosecution cannot otherwise prove its case (i.e., the Wong and Lane circumstances), the Court should uphold a negative inference against the non-reporting defendant. Like the juries in England, the jury would be instructed that it could consider the non-reporting defendant's failure to account for the death of the child. If the jury believes the failure to account is based on the fact that the defendant is responsible for the death under the new statute, then it should draw the negative inference. The jury could also consider the defendant's explanation for his or her failure to account in evaluating whether to draw a negative inference. As in England, the jury would also be instructed that it could not base a verdict of guilty on the inference alone. And, as in England, the court would retain the power to vacate a conviction if it concluded that the inference played too large a role in the jury's verdict.

### 3. Delaying the Decision on the Motion to Dismiss

Finally, what of the statutory provision delaying the decision on whether there is a case to answer until the close of all of the evidence? Without the possibility of a negative inference against the defendant being used to establish a prima facie case, there is no reason to adopt this procedure in the United States. Similarly, in light of the new statute, there will be no need to rely on the defense for any proof, since the prosecution does not need to prove the respective roles of the defendants.

Like the U.S. motion to dismiss at the end of the prosecution's case, in England there is a procedural rule that requires a judge to dismiss a case at the close of the prosecution's case where a properly directed jury could not convict (i.e., there is "no case to answer").<sup>107</sup> According to the Commission, it is the operation of this rule that prevents the prosecution from

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<sup>106</sup> Id.

properly convicting those responsible for child abuse, because under traditional principles the evidence is insufficient at that time to establish the defendants' relative culpability. As the Commission noted, the requirement that this decision be made after the close of the prosecution's case makes no logical sense in a child abuse case, where the only witnesses (because the child is dead or too young to speak) are the defendants themselves, who by that time will not have been heard from. Thus, the Commission recommended that the decision whether to send the case to the jury be made only after the defendant's case. That is, the more or less taken-for-granted procedure should be changed to abolish the decision whether there is a case to answer and to substitute the decision whether the case should go to the jury, which decision would properly be made at the end of all of the evidence.

Delay of the motion to dismiss would likely survive constitutional scrutiny in the United States. To be sure, a defendant is entitled to a determination that the prosecution has established a prima facie case, i.e., that the evidence is sufficient to go to the jury.<sup>108</sup> While it is preferable for the motion to be made at the end of the prosecution's case, so that the defendant knows whether he should attempt to rebut the prosecution's case, the determination of sufficiency can be reserved until even after the jury verdict and can be made until seven days after the jury has been discharged.<sup>109</sup> Thus, under U.S. law, there would be no constitutional barrier to delaying the motion to dismiss until after the close of all of the evidence.

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<sup>107</sup> Galbraith [1981] 1 WLR 1039.

<sup>108</sup> Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 362 U.S. 199 (1979).

<sup>109</sup> Fed. R. Crim. P. 29(c).

## Conclusion

This article supports the enactment in the United States of a statute similar to England's proposed statute. Like its English counterpart, this statute would impose the same criminal responsibility on each member of a small, definable group of members of a deceased's child's household for the child's non-accidental death and would not require proof as to which person was the active or passive abuser. The new offense would be classified as a homicide offense. It would establish liability for homicide, but the sentence would be less than that for other homicides. At the very least, then, the statute would impose a sentence that is greater than that currently available under Endangering the Welfare of a Child statutes, which are misdemeanors in most jurisdictions even where the defendant's conduct causes death.<sup>110</sup> At the same time, this new statute would prevent acquittal in those jurisdictions that do not recognize omission liability for failure to prevent abuse or to seek medical assistance.

In other cases, however, the key to successful prosecution is the drawing of the negative inference from the failure to account and the delay of the motion to dismiss. Under established Supreme Court precedent, the U.S. courts could recognize an evidentiary inference against a defendant who fails to account for the death of a child for whom he is responsible under the proposed statute that would be permissible in a case in which the defendants are charged under the statute. Balancing the state's interest in and need for the inference and the limited incursion on the Fifth Amendment right to remain silent would prevent the acquittal of all parties where it is clear that one or both of them are responsible for murdering a helpless child.

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<sup>110</sup> See, e.g., N.Y. Penal Law § 260.10 (endangering the welfare of a child is an A misdemeanor); *People v. Carroll*, 93 N.Y.564, 715 N.E.2d 500, 693 N.Y.S.2d 498 (1999).