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Mama Mía! How Gender Stereotyping May Play a Role in the Prosecution of Child Fatality Cases

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Author

Chung, Sandra

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in the Prosecution of Child Fatality Cases

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by Sandra Chung¹

Introduction

In 2006, an estimated 1,530 children died in the United States due to maltreatment.² This figure, a slight increase from 2005,³ translates into an astounding average of four child fatalities per day. Tragically, one or both parents were responsible for almost 76% of child maltreatment fatalities.⁴ Statistics seem to indicate that mothers are responsible for more child fatalities than fathers, with mothers acting alone accounting for 27.4%, fathers acting alone accounting for 13.1%, and mothers and fathers acting together accounting for 22.4%.⁵ These heartbreaking statistics suggest that parents, rather than protecting their children, are sometimes a grave threat to them. But a close examination of some of the cases reveals another, equally troubling, pattern.

¹ J.D. expected 2010, University of La Verne College of Law. I would like to give special thanks to Professor Diane J. Klein for all her support and input. Thank you to Professor Megan Chaney for her advice. Immense thanks to my family for their invaluable love and support. And thank you to my friends for putting up with me throughout the writing process.

² U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., CHILD MALTREATMENT 2006 65 (2008), <http://www.acf.hhs.gov/programs/cb/pubs/cm06/cm06.pdf> (stating the most recent national statistics on child abuse and neglect).

³ *Id.*

⁴ *Id.*

⁵ *Id.* Mothers acting with a nonparent perpetrator account for 11.5%, and fathers acting with a nonparent perpetrator account for 1.5%. *Id.*

Consider *State v. Pickles*.⁶ Four-year-old Michael Pickles died after his mother Irene placed him in hot water to punish him.⁷ Irene Pickles was charged and convicted of manslaughter (and child neglect) in her son's death.⁸ His father, Charles Pickles, was charged and convicted only of child neglect.⁹ Though the State did not allege that Charles knew about the hot water, he did "[fail] to seek prompt and proper medical treatment for his son's 'third degree burns.'"¹⁰ Charles's failure to obtain crucial aid for his severely burned son certainly contributed to Michael's death, and yet, Charles faced no criminal liability.

Would the same thing happen today? Perhaps the result in *Pickles*, a 1966 case, can be attributed to traditional, but now-outmoded, beliefs about the different roles of mothers and fathers, together with American legal understandings of "bystander" (non-)liability. Today, of course, gender roles have changes, and the nuclear family is fading, due to "[t]he rise in non-marital birth rates, divorce rates, and numbers of families that include children from surrogacy and/or adoption."¹¹ "[S]ingle fathers and homosexual partners do not fit [this] traditional framework" either.¹²

⁶ *State v. Pickles*, 218 A.2d 609, 615 (N.J. 1966).

⁷ *Id.*

⁸ *Id.* at 611.

⁹ *Id.*

¹⁰ *Id.*

¹¹ Lica Tomizuka, *The Supreme Court's Blind Pursuit of Outdated Definitions of Familial Relationships in Upholding the Constitutionality of 8 U.S.C. § 1409 in Nguyen v. INS*, 20 LAW & INEQ. 275, 292-93 (2002).

¹² *Id.* at 294.

Today, it might seem that men's and women's parental responsibilities are more similar. As one commentator aptly put it, "Why should fathers who had personal responsibility for creating those children be freed from their responsibility for caretaking and support altogether?"¹³ There is increasing societal acceptance of men taking on family roles traditionally carried out by women.¹⁴ Single fathers are the sole nurturers of their children. In homosexual families headed by two men, nurturing responsibilities fall upon the male parent(s) because no woman is present. Today we recognize that "attachments to children and the desire for caretaking should be encouraged beyond just the primary 'Mother' relationship."¹⁵ In this new environment, one might assume that caretaking expectations, and consequent punishment for abuse and neglect, would fall equally upon parents of both genders. A review of several contemporary cases of fatal parental child abuse prosecutions suggests otherwise.

This Note explores how the differential charging of mothers and fathers in child fatality cases suggests gender stereotyping continues to play a role in prosecution. There is also evidence of bias in jury deliberation and judicial sentencing, but of course, defendants can only be convicted and sentenced for the offenses with which they are charged. Prosecutorial discretion becomes paramount. In theory, the charging decisions of prosecutors are based on the satisfaction of objective elements of specific crimes.¹⁶ Yet the recognition of the need for equitable, individualized justice; legislative "overcriminalization"; and limited law enforcement

¹³ Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 34 (2008).

¹⁴ *Id.* at 11.

¹⁵ *Id.* at 34.

¹⁶ *See U.S. v. Simmons*, 96 U.S. 360 (1877).

resources inevitably leads to prosecutorial discretion into the decision-making process, with great deference being afforded to these decisions by the judiciary.¹⁷ This grant of broad discretion to prosecutors can result in an abuse of discretion and potentially, discriminatory charging of certain classes of defendants.¹⁸ Traditional stereotyped beliefs and perceptions of mothers – as reflected in the charging orders in some child abuse cases – are not in accord with modern times, and present an unacceptable risk of gender bias in prosecutorial decisions in fatal child abuse cases, rendering female parents alarmingly and unjustly vulnerable to greater punishments than male parents, regardless of actual culpability.

I. Cases

Consider the following actual cases, all from the past decade.

Nixzmary Brown was a seven-year-old girl who lived with her mother, stepfather, and five siblings in a three-bedroom apartment in New York.¹⁹ A photo of Nixzmary shows her smiling, and one would not know from looking at her picture that she was frequently beaten, isolated, and tied to a chair in her home.²⁰ One night in early January 2006, Nixzmary's enraged stepfather, Cesar Rodriguez, "pounded her with his fists, held her head under cold water in the tub and left her naked on a bedroom floor."²¹ A few short hours later, Nixzmary's beautiful smile was permanently extinguished.²²

¹⁷ BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:3 (2d ed., West 2008).

¹⁸ *Id.*

¹⁹ Andy Newman, *Jury Selection Begins in Murder Trial of 7-Year-Old Brooklyn Girl's Mother*, N.Y. TIMES, Sept. 16, 2008, at B4.

²⁰ *Id.*

²¹ *Id.*

While Nixzmary's highly publicized death understandably triggered a public outcry and outrage against the failure of child welfare workers to heed the warning signs and remove Nixzmary from a dangerous situation, another legally important aspect of her tragic death has been largely overlooked. Cesar Rodriguez, who admitted "that he had beaten Nixzmary daily for weeks and with particular severity the night she died," was charged with second-degree murder and manslaughter.²³ The prosecution also chose to charge Nixzmary's mother, Nixzaliz Santiago, with the identical offenses.²⁴ What is disturbing about this is that Santiago was not the one who viciously and severely beat Nixzmary.

Equally disturbing, if not more so, was the prosecutorial treatment of Florida mother Kimberly Conine. On July 18, 1996, Conine left her four-month-old twin daughters in the care of their father before leaving for work.²⁵ About two hours later, the father called 911 to report that one twin, Tresca, was choking.²⁶ Sadly, paramedics were unable to save her.²⁷ None of the father's explanations for Tresca's failure to breathe were sufficient to have caused her death, and he was ultimately convicted of first-degree murder.²⁸ Despite Conine's absence during the fatal

²² *Id.*

²³ Andy Newman & Annie Correal, *Subtleties in the Language Made it Murder, or Not*, N.Y. TIMES, Mar. 20, 2008, at B3.

²⁴ Pervaiz Shallwani & Brandon Bain, *Stepdad Guilty in Nixzmary Brown Killing*, NEWSDAY, Mar. 18, 2008.

²⁵ *Conine v. State*, 752 So. 2d 4, 5 (Fla. Dist. Ct. App. 2000).

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

incident, the state charged and convicted her of third-degree murder.²⁹ The charge was based on the prosecution's theory that Conine "permitted ongoing abuse to occur, and allowed the creation of an environment in which the fatal injury could occur."³⁰ Yet, how could Conine be charged and convicted of the murder of her daughter when she was nowhere near the scene of the fatal abuse?

Similar circumstances arose in Utah but ended very differently for the parents whose infant son died while in the care of one of them.³¹ The infant's death occurred while the mother was home alone with both sons and the father was working.³² Though the infant was successfully resuscitated, he was later pronounced brain dead and removed from life support.³³ The State charged the mother with murder but relieved the father of any responsibility, going so far as to say that "there would be no adjudication pursued as to the father."³⁴

And in California, after a young mother gave birth in her home's shower, she used a pair of scissors to stab her newborn child thirty times.³⁵ The child's father was also present in the home and two hours later, finally called 911.³⁶ Not only did the father delay in getting help for

²⁹ *Id.* at 4, 6.

³⁰ *Id.*

³¹ *M.A. v. State of Utah*, 37 P.3d 1172, 1174 (Utah Ct. App. 2001).

³² *Id.*

³³ *Id.* at 1172, 1174-75.

³⁴ *Id.*

³⁵ *In re J.C.*, No. E041343, 2007 WL 155199, at *1 (Cal. Ct. App. Jan. 23, 2007).

³⁶ *Id.*

his severely injured child, he also disposed of the weapon.³⁷ Thankfully, the child survived after numerous medical procedures.³⁸ The mother was charged with attempted murder and child endangerment.³⁹ However, the father was only charged with the lesser offenses of child endangerment and accessory – there was no attempted murder charge.⁴⁰ Why was the father also not charged with attempted murder when he purposely delayed in obtaining life-saving medical aid for his critically injured newborn?

Then there is Tabitha Walrond, the impoverished nineteen-year-old mother who held her infant son, Tyler, in her arms as he died.⁴¹ Inadvertent malnutrition, not abuse, caused Tyler’s untimely demise.⁴² Though Walrond regularly nursed her son, she was unaware that past breast reduction surgery (and possibly childbirth complications) had decreased the sufficiency of her breast milk, and her numerous efforts to obtain Medicaid coverage for her son were constantly rebuffed.⁴³ A court-ordered psychiatric evaluation also showed “[she] lacked insight into the emotional problems that may have contributed to her failure to perceive that her son was in dire

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Nina Bernstein, *Placing the Blame in an Infant’s Death; Mother Faces Trial After Baby Dies From Lack of Breast Milk*, N.Y. TIMES, Mar. 15, 1999, at B1.

⁴² *Id.*

⁴³ *Id.*

need of medical attention.”⁴⁴ Lactation experts testified that “nursing mothers who see a baby every day may misperceive even extreme weight loss.”⁴⁵ Walrond was charged with manslaughter and eventually convicted of criminally negligent homicide.⁴⁶ Certain statements from Walrond’s trial are particularly revealing. The judge stated that “[t]he mother is the bottom line.”⁴⁷ And in finding Walrond legally responsible for Tyler’s death, the judge stated, “Who takes responsibility for the infant? The mother, if the mother’s the only person available.”⁴⁸

But Walrond was *not* the only person “available” to take responsibility. Tyler’s father, Keenan Purcell, and Tyler’s paternal grandmother, had visited Tyler just a week before his death and noticed his emaciated appearance.⁴⁹ Yet they did nothing other than urge Walrond to give formula to Tyler.⁵⁰ After Tyler died, Purcell – the same man who broke up with Walrond when she refused to abort Tyler – called Walrond a “monster” and pushed the prosecution to punish her.⁵¹ But what of Purcell’s failure? He saw the condition his son was in – why did he, Tyler’s *father*, not immediately seek medical help? If, as the prosecution said, the case was truly about

⁴⁴ Nina Bernstein, *Mother Convicted in Infant’s Starvation Death Gets 5 Years’ Probation*, N.Y. TIMES, Sept. 9, 1999, at B3.

⁴⁵ *Id.*

⁴⁶ Nina Bernstein, *Bronx Woman Convicted in Starving of Her Breast-Fed Son*, N.Y. TIMES, May 20, 1999, at B1.

⁴⁷ Bernstein, *Mother Convicted*, *supra* note 44.

⁴⁸ Tara George, *Mom Gets Probation in Baby Starve*, N.Y. DAILY NEWS, Sept. 9, 1999, at 4.

⁴⁹ Bernstein, *Placing the Blame*, *supra* note 41.

⁵⁰ *Id.*

⁵¹ *Id.*

Walrond's failure to obtain help for Tyler (stressing intent was not at issue),⁵² why were no charges brought against Purcell? Why did Tyler's mother shoulder all the blame while Tyler's father received no prosecutorial attention (except, of course, when he was cheering them on)?

The pattern suggested by these cases is striking. Mothers acting alone tend to be charged alone – but when fathers act alone, mothers are frequently also charged. The statistics that suggest mothers act alone twice as often as fathers (27.4% vs. 13.1%⁵³) may therefore be quite misleading. How many cases in which mothers “acted alone” actually involved negligent “bystander” fathers like Pickles and Purcell? How many characterized as mothers and fathers “acting together” (22.4%⁵⁴) involved non-acting mothers like Santiago and Conine?

Furthermore, when both parents are charged, mothers tend to be charged more heavily, regardless of whether they bore more actual responsibility for the outcome. A mother who fails to come to her child's aid is likely to be criminally charged beyond the neglect; an equally neglectful father is not. Mothers Nixzaliz Santiago and Kimberly Conine did not take an active role in the child abuse which ultimately led to their daughters' untimely deaths. Yet Nixzaliz Santiago was tried for second-degree murder after her abusive husband was convicted of manslaughter. And Kimberly Conine, who was not even present at the time her daughter was fatally injured, was charged and convicted of third-degree murder. An account is needed to explain how a mother who did not strike the fatal blow or was not even present at the time of the commission of the crime could be charged with such serious crimes.

⁵² *Id.*

⁵³ U.S. DEP'T OF HEALTH & HUMAN SERVS. ET AL., CHILD MALTREATMENT 2006 66 (2008), <http://www.acf.hhs.gov/programs/cb/pubs/cm06/m06.pdf>.

⁵⁴ *Id.*

II. Jury Belief in a Mother's "Higher Duty"

In theory, jurors should base their decision to acquit or convict on the credibility of the evidence presented at trial. However, scholars have shown that "[a]lthough every person on a given jury has been exposed to the same evidence and arguments, jurors evaluate and interpret that evidence differently. These differences in how evidence is weighed and understood must be due to differences in jurors' experience, *values*, and personalities."⁵⁵ Jurors' values and beliefs about gender and family roles may have affected jury deliberations in some of these cases.

Though both of Nixzmary Brown's parents were charged with second-degree murder and manslaughter, separate trials were held. Two years after Nixzmary died, on a Tuesday in March 2008, a jury convicted Cesar Rodriguez of first-degree manslaughter.⁵⁶ The jury acquitted Rodriguez of the higher charge of second-degree murder, because some jurors believed that the prosecution failed to establish that Rodriguez met the standard of "act[ing] with 'depraved indifference to human life.'"⁵⁷ At his trial, Rodriguez attempted to defend himself by pointing the finger at Santiago, painting her as the villainous parent who actually struck the fatal blow.⁵⁸ If jurors had believed this defense, that would logically explain the failure to convict Rodriguez of second-degree murder. However, it appears that this was not the case. Instead, some jurors expressly stated that they did not find Rodriguez's defense credible, but that "[juror] consensus was that Santiago was the bigger villain because a mother has a higher duty to protect her

⁵⁵ MARK COSTANZO, *PSYCHOLOGY APPLIED TO LAW 135* (Vicki Knight ed., Wadsworth/Thomson Learning 2004) (2004) (emphasis added).

⁵⁶ Newman & Correal, *supra* note 23.

⁵⁷ *Id.*

⁵⁸ Shallwani & Bain, *supra* note 24.

children.”⁵⁹ This suggests that the decision to acquit Rodriguez of the higher charge was not due to the credibility of his defense, but rather, was disturbingly based on pervasive traditional views of gender and family roles.

This dominant perception of traditional gender roles reared its ugly head again during jury selection for the trial of Santiago.⁶⁰ Prospective jurors’ comments indicated that “Santiago, as [Nixzmary’s] mother, may be held to a particularly high standard,” higher than the one applied to Rodriguez.⁶¹ One prospective juror stated that “[t]he biggest part of being a mother is protecting the child from the world,” ominously echoing the sentiments of jurors at Rodriguez’s trial.⁶² Nor was this gender bias of jurors present only in the Nixzmary Brown trials. In explaining Tabitha Walrond’s conviction at the end of her trial, one juror stated, “No matter what, she was the mother . . . she should have been strong enough to do more.”⁶³

In September of this year, several months after Rodriguez was convicted of manslaughter, the trial of Nixzaliz Santiago began. Interestingly, the second-degree murder charge was not dropped against Santiago in light of the acquittal of Rodriguez of murder. Instead, the prosecution amended the murder charge against Santiago to include a second theory under which a murder conviction could be obtained.⁶⁴ The jury could convict Santiago of second-degree murder if they found she caused Nixzmary’s death by acting in a way that: (i)

⁵⁹ Newman & Correal, *supra* note 23.

⁶⁰ Newman, *Jury Selection*, *supra* note 19.

⁶¹ *Id.*

⁶² *Id.*

⁶³ Bernstein, *Bronx Woman*, *supra* note 46.

⁶⁴ Newman, *Jury Selection*, *supra* note 19.

“created ‘a grave risk of death’” or (ii) “created a grave risk of ‘serious physical injury.’”⁶⁵

Appallingly, this meant that although Nixzmary’s actual killer would only be punished for manslaughter, her mother could be convicted of murder.

The prosecution “declined to discuss” its reasons for charging Santiago this way.⁶⁶ With the overwhelming evidence and open admission of abuse by Rodriguez, this outrageous charging decision was not based on any evidence that Santiago played an active role in Nixzmary’s death. Instead, the reason may be inferred from comments made by the lead prosecutor. Ama Dwimoh, Executive Assistant District Attorney and Chief of the DA’s Crimes Against Children Bureau, told the jury that “[Ms. Santiago] was Nixzmary’s last and *only* hope. *Her mother.*”⁶⁷ Prosecutor Dwimoh accused Santiago of being the catalyst for Nixzmary’s beating despite the undisputed account that Rodriguez became enraged when he discovered Nixzmary took pudding from the refrigerator without permission and believed that she had jammed his printer.⁶⁸

The alarming persistence in charging Santiago with second-degree murder inevitably raised the following question: why should the mother, who did not beat the child, be exposed to conviction for a more serious crime than the stepfather who actually committed the fatal abuse? The choice may have a strategic dimension: perhaps having failed to obtain a murder conviction for Rodriguez, the prosecution felt that they had to convict *someone* of murder to appease public sentiment, even if it meant convicting an involved, but clearly less responsible, person.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Andy Newman, *At Trial, Mother as Victim or Catalyst in Girl’s Death*, N.Y. TIMES, Sept. 19, 2008, at B2 (emphasis added).

⁶⁸ *Id.*

The jury in Santiago's trial reached the right conclusion in failing to convict her of the second-degree murder charge.⁶⁹ However, she was convicted of manslaughter and assault.⁷⁰ In imposing the maximum forty-three year sentence on Santiago, the judge, unmoved by pleas for mercy, told Santiago, "You were the mother . . . and you did nothing."⁷¹ Because Rodriguez did not face assault charges, this conviction means that Santiago may be in prison for more than a decade longer than her child's killer.⁷² The prosecution cited "different evidence" as the reason for the disparity in assault charges.⁷³ Yet it is difficult to comprehend how the prosecution could not charge Rodriguez with assault given his admissions of daily beatings. This statement by the judge (who, incidentally, is a woman) can lead one to infer that gender stereotyping also seeped into the sentencing stage of Santiago's trial and resulted in harsh consequences for Santiago.

In other cases, fortunately, judges are able to overcome the possible bias of juries. After Kimberly Conine was convicted of third-degree murder, she appealed.⁷⁴ In her appeal, she argued that the trial court erred in denying her motion for acquittal based on conclusive evidence that Tresca died, in Conine's absence, from a traumatic injury inflicted by Tresca's father.⁷⁵ While Conine admitted to shaking one of her twin daughters before she left for work that fateful

⁶⁹ Kareem Fahim, *Mother Gets 43 Years in Death of Child*, 7, N.Y. TIMES, Nov. 13, 2008, at A33.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Conine v. State*, 752 So. 2d 4, 5 (Fla. Dist. Ct. App. 2000).

⁷⁵ *Id.*

day, there was no evidence as to which twin was shaken.⁷⁶ And Conine’s statement that “she knew she should not have gone to work the day of Tresca’s death”⁷⁷ was hardly a sufficient basis for a murder conviction. More precisely, “there was insufficient proof that she participated as a principal in the fatal act of abuse.”⁷⁸

In its brief opinion, the appellate court, though not impressed with Conine as a parent, nevertheless concluded that she was not legally responsible for her daughter’s death and reversed her murder conviction.⁷⁹ The appellate court made the right decision.⁸⁰ Conine should not have to suffer a murder conviction (and accompanying punishment) given her lack of participation in her daughter’s death, especially if gender bias on the part of the jury figured into the conviction.

III. The Legal Duty of Bystander Parents

Civil and criminal law understand parental duty differently. As a general rule of tort law, “[t]he fact that the actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.”⁸¹ As one judge wrote more than a century ago, “[t]he duty to do no wrong is a legal duty. The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law.”⁸² While this may

⁷⁶ *Id.* at 6.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Conine v. State*, 752 So. 2d 4, 6 (Fla. Dist. Ct. App. 2000).

⁸¹ RESTATEMENT (SECOND) OF TORTS § 314 (1965).

⁸² *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1898).

be morally reprehensible and repulsive to some, it remains the law today. As the same judge succinctly wrote, “[w]ith purely moral obligations the law does not deal.”⁸³

An exception to this general rule arises when a special relationship exists between the parties or when one person creates a situation dangerous for another.⁸⁴ A “special relationship arises only when one assumes responsibility for another’s safety or deprives another of his or her normal opportunities for self-protection.”⁸⁵ The mere realization that one should act to help another, for moral reasons, does not itself impose a legal duty.⁸⁶

Five types of relationships have been explicitly recognized by the law as creating an affirmative duty to act.⁸⁷ These five relationships “are those of (1) the carrier-passenger, (2) innkeeper-guest, (3) landowner-invitee, (4) custodian-ward, and (5) employer-employee.”⁸⁸ Notably absent from this list of special relationships is the parent-child relationship; the custodian-ward relationship refers to the relationship between a nonparent custodian and the ward placed in the custodian’s care (e.g. babysitter-child or jailor-prisoner).⁸⁹ And perhaps surprisingly, this does not seem likely to change. The parent-child relationship is not included in the latest drafts of the Restatement (Third) of Torts.⁹⁰

⁸³ *Id.* at 810.

⁸⁴ RESTATEMENT (SECOND) OF TORTS § 314 cmt. a (1965)

⁸⁵ 57A AM. JUR. 2D *Negligence* § 90 (2008).

⁸⁶ RESTATEMENT (SECOND) OF TORTS § 314 (1965)

⁸⁷ DAN B. DOBBS, *THE LAW OF TORTS* 857 (West Group 2004) (2000).

⁸⁸ *Id.* (citing RESTATEMENT (SECOND) OF TORTS §§ 314A, 314B (1965)).

⁸⁹ *Id.*

⁹⁰ RESTATEMENT (THIRD) OF TORTS § 40 (Tentative Draft No. 5, 2007).

At the same time, “[i]n terms of common understanding, it is difficult to think of a more ‘special’ relationship than that between a parent and a minor child.”⁹¹ A parent is a person who is responsible for another life. A legal duty to aid his or her child(ren) should be imposed on a parent, and failure to uphold this duty should result in proper culpability and accountability for his or her actions. The gender of a parent should not matter in determining whether a parent should be held to a higher standard of care. If a duty to act is imposed upon parents, this duty should be applied equally to all parents regardless of gender. And failure to uphold this duty should result in a just and fair punishment befitting the degree of failure – one parent should not be held to a higher standard simply because she happened to be born female.

In criminal law, the situation is somewhat different. Courts have recognized a legal duty of parents to provide medical attention to their children.⁹² A number of the fatal child abuse cases we have reviewed might have ended differently had the other parent not breached this duty. Some courts have held that the breach of this common law duty can be a valid predicate for criminal liability, even though the statute in question does not itself specify the breach as grounds for culpability.⁹³ Parents can be criminally prosecuted for failure to provide necessary medical care to their children.⁹⁴ Yet New York, where Nixzmary’s parents were prosecuted,

⁹¹ Vincent R. Johnson & Claire G. Hargrove, *The Tort Duty of Parents to Protect Minor Children*, 51 VILL. L. REV. 311, 321 (2006).

⁹² Baruch Gitlin, *Parents’ Criminal Liability for Failure to Provide Medical Attention to Their Children*, 118 A.L.R.5th 253 (2004).

⁹³ See *State v. Miranda*, 715 A.2d 680 (Conn. 1998); *Com. v. Barnhart*, 497 A.2d 616 (Pa. 1985); *State v. Williams*, 484 P.2d 1167 (Wash. Ct. App. 1971).

⁹⁴ Gitlin, *supra* note 92.

conspicuously does not include the parent in its list of “persons and officials *required* to report cases of suspected child abuse or maltreatment.”⁹⁵ The statute’s omission of the parent from its extensive list of required reporters supports the inference that New York does not impose a duty upon a parent to aid a child.

At the same time, some courts have also allowed the breach of this duty (to obtain medical care) to constitute proximate cause in a homicide prosecution.⁹⁶ William and Linda Barnhart were convicted of involuntary manslaughter when their two-year-old son died from an untreated, cancerous tumor.⁹⁷ Though aware of their son’s precarious health, strong religious beliefs prevented the Barnharts from providing medical care for their young son.⁹⁸ While the appellate court acknowledged the importance of religious freedom, it nevertheless found that “[t]he right to practice religion freely does not include liberty to expose the . . . [child] to ill health or death.”⁹⁹ And in affirming the convictions, the court firmly stated that the Barnharts, as parents, had the “affirmative duty of providing medical care to protect [their] child’s life.”¹⁰⁰

In Indiana, this affirmative duty was echoed in an appellate court’s affirmation of Susan Mallory’s felony neglect conviction and enhanced sentence of twenty years for her failure to

⁹⁵ N.Y. SOC. SERV. LAW § 413 (McKinney 2008) (emphasis added).

⁹⁶ *See Eversley v. State*, 748 So. 2d 963 (Fla. 1999); *Mallory v. State*, 563 N.E.2d 640 (Ind. Ct. App. 1990); *Com. v. Barnhart*, 497 A.2d 616 (Pa. 1985).

⁹⁷ *Com. v. Barnhart*, 497 A.2d 616, 619 (Pa. 1985).

⁹⁸ *Id.* at 621-22.

⁹⁹ *Id.* at 623.

¹⁰⁰ *Id.* at 624.

obtain prompt medical care for her deceased six-year-old daughter.¹⁰¹ And while Etirza Eversley succeeded in appealing her manslaughter conviction for the death of her infant son, Isaiah,¹⁰² her success was based on pure luck and timing. Statutory language in effect at the time of Isaiah's death prevented the court from affirming Eversley's manslaughter conviction.¹⁰³ However, the Supreme Court of Florida's opinion did make clear that in the future, a parent's failure to provide medical attention could support a manslaughter charge when it resulted in the child's death.¹⁰⁴ Arguably then, there is a legal basis for charging a bystander parent with higher-degree crimes when the parent failed to provide medical attention to their child. However, this should not be the sole basis for the charging decision.

A parent should not be treated as a mere bystander, "[o]ne who is present when an event takes place, but who does not become directly involved in it."¹⁰⁵ A parent who does not take part in the fatal abuse may technically fit this definition. However, a parent is not just another person who "happens to be present" when the fatal act took place. A parent, simply by being a parent, is responsible for the well-being of his or her child(ren) at all times. If a parent knows of the abuse or was present when the fatal act occurred (and did nothing), he or she should be punished for the failure to act. A duty to actively protect one's child, not just to obtain medical care, should be imposed on all parents. In the cases discussed above, such a duty was impliedly imposed on the mothers, Santiago and Conine. But it was not imposed on the fathers (e.g. the father in *In re*

¹⁰¹ Mallory v. State, 563 N.E.2d 640, 644 (Ind. Ct. App. 1990).

¹⁰² Eversley v. State, 748 So. 2d 963, 970 (Fla. 1999).

¹⁰³ *Id.* at 968-70.

¹⁰⁴ *Id.* at 967-70.

¹⁰⁵ BLACK'S LAW DICTIONARY 166 (Abridged 8th ed. 2005).

J.C., Keenan Purcell). Thus, the fathers, who are not traditionally viewed as nurturers and caretakers, escaped appropriate liability, while the mothers, trapped by traditional gender stereotyping, faced heavier charges.

It should not matter what the gender of a parent is when that parent stood by and did nothing as his or her child was fatally abused. Male or female, the parent should be held accountable for the failure to act. However, absent some extraordinary circumstance (e.g. the killer is insane and the parent, aware of this, negligently exposed the child to the killer), the level of accountability should ordinarily not exceed that of the actual killer, especially if there are mitigating factors. Nixzaliz Santiago might have been convicted of a higher-degree crime and was sentenced to a longer prison term than Nixzmary's actual killer.¹⁰⁶ Yet there was evidence showing that she was not capable of protecting her daughter.¹⁰⁷ Was it truly in the interests of justice to punish her more severely than the killer? To truly obtain individualized justice, such mitigating factors should have been considered by the prosecution in charging Santiago. The person who committed the fatal abuse should be the one punished most severely. And the prosecution must take the individual circumstances and possibly mitigating factors (e.g. mental instability) into consideration when deciding what charges to press.

IV. Charging Decisions

¹⁰⁶ Fahim, *supra* note 69.

¹⁰⁷ Newman, *At Trial*, *supra* note 67 (reporting evidence presented at trial that Santiago had recently miscarried and become so unstable as to carry her dead fetus home with her and place it in a jar in her bedroom).

When deciding whether or not to prosecute a criminal case, the prosecution first must consider the criminal statutes of the jurisdiction.¹⁰⁸ If all the statutory elements can be proved, the prosecution will charge the defendant with the appropriate crime.¹⁰⁹ Or as New York law states, “[a] public prosecutor . . . shall not institute or cause to be instituted criminal charges when he or she knows that the charges are not supported by probable cause.”¹¹⁰ And when making charging decisions, prosecutors are given broad discretion. Prosecutorial discretion, while necessary, is also dangerous.¹¹¹

¹⁰⁸ See *U.S. v. Simmons*, 96 U.S. 360 (1877).

¹⁰⁹ *Id.*

¹¹⁰ N.Y. JUD. LAW DR 7-103 (McKinney 2008).

¹¹¹ BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:3 (2d ed., West 2008). (There are several reasons that justify this grant of prosecutorial discretion: (i) achievement of individualized justice, (ii) prevention of legislative “overcriminalization,” and (iii) effective processing of cases. *Id.* The individualization of justice is important because two people who committed the same crime under different circumstances may not deserve the same punishment – does the frightened homeowner who kills the violent intruder in self-defense deserve the same punishment as that of the landlord who kills his tenant in cold blood? One would certainly hope not. Individualized justice can also prevent “the stigma of prosecution” from attaching to deserving individuals. *Id.*

A legislature may go too far when it criminalizes conduct “without regard to enforceability or changing social mores.” *Id.* In such an instance, prosecutorial discretion is necessary to prevent the unjust enforcement of an outdated or improperly defined law. And while it would be wonderful if prosecutors could effectively handle every case that comes before

A less-known factor in the charging decision is whether the individual prosecutor assigned to the case decides or the prosecutor's office. The lead prosecutor in the Nixzmary Brown trials, Ama Dwimoh, holds two titles – Executive Assistant District Attorney, and Chief of the DA's Crimes Against Children Bureau, "a specialized bureau which investigates and prosecutes all child fatalities and sexual and physical abuse crimes against children."¹¹² Not only is Dwimoh the head of this special prosecution office, she is also its founder and has personally prosecuted many of the Bureau's cases.¹¹³

Dwimoh's charging decisions may reflect the perspective of the Bureau. When the prosecutor's office makes the charging decisions, these decisions may be strongly influenced by outside, non-legal forces, such as political and public pressure. These forces can play a stronger role when a case draws the spotlight attention of the media and the public. Nixzmary's death

them, this is a practical impossibility given the "unmanageable volume" of cases in the criminal justice system. *Id.* For all these reasons, the grant of discretion to prosecutors is a valid one. However, while courts have historically given "extraordinary deference to the prosecutor's decision-making function . . .," "[this] combination of prosecutorial discretion and judicial passivity can be dangerous." *Id.* Such deference can lead to the unchecked abuses of prosecutorial discretion – the judiciary must carefully monitor the exercise of prosecutorial discretion to help preserve the integrity and public respect of our judicial system.)

¹¹² *The DA's Office Fights Child Abuse*, CMTY. NEWSLETTER (Office of Kings County District Att'y, Brooklyn, N.Y.), Feb. 2007, http://www.brooklynda.org/community_newsletter/newsletter_feb_07.htm.

¹¹³ *Id.* Kareem Fahim & Colin Moynihan, *Verdict is Manslaughter for Abused Girl's Mother*, N.Y. TIMES, Oct. 18, 2008, at A19.

drew widespread attention and outrage, putting pressure on lawmakers to reform the child welfare system that failed Nixzmary.¹¹⁴ It also resulted in the New York Senate passing “Nixzmary’s Law,” which sentences child killers to life without the possibility of parole.¹¹⁵ Public outrage and attention focused on holding someone accountable for this innocent child’s death.¹¹⁶ Though the trials of Nixzmary’s parents were New York cases, there was nationwide media coverage.¹¹⁷ A simple “nixzmary” search in the Westlaw ALLNEWS database returns almost 1300 results.¹¹⁸ This intense public attention and scrutiny likely placed enormous pressure on the prosecution to obtain a murder conviction.

However, it is also highly likely that Dwimoh’s own personal, individual experiences heavily influenced her decision in charging Ms. Santiago with second-degree murder. According to Dwimoh, “her passion for prosecuting child abuse comes from growing up with a friend who was abused by her stepfather.”¹¹⁹ While Dwimoh’s passion and dedication is admirable, such

¹¹⁴ Ray Rivera, *Agency Failed to Act on Warnings in Deadly Child Abuse Cases, Report Says*, N.Y. TIMES, Aug. 10, 2007, at B1.

¹¹⁵ Kathleen Lucadamo & Joe Mahoney, *Let ACS Workers See Rap Sheets, Sez Mike*, N.Y. DAILY NEWS, Feb. 28, 2007, at 19.

¹¹⁶ See Mike McIntire et al., *Mayor Makes Pledge of Accountability in Girl’s Death*, N.Y. TIMES, Jan. 17, 2006, at B5.

¹¹⁷ See *Good Morning America* (ABC television broadcast Jan. 17, 2006).

¹¹⁸ This Terms and Connectors search was conducted on <http://web2.westlaw.com>, on November 25, 2008, using the terms “nixzmary & da(last 3 years)” in the ALLNEWS database.

¹¹⁹ Veronika Belenkaya, *Nixzmary DA a Tireless Child-Abuse Crusader*, N.Y. DAILY NEWS, Apr. 5, 2008, at 6.

passion and dedication may cloud a prosecutor's judgment and prevent objective, neutral decisionmaking.

When the prosecution makes a charging decision, there may be social forces at play, especially when the case involves a child. Our society and legal system is committed to protecting children, as evidenced by inter alia, prohibitions on child pornography and child abuse reporting statutes.¹²⁰ Laws, and the punishments administered under them, are meant to deter and prevent future occurrences of similar acts.

With a highly publicized case, the message sent out by charging decisions carries a far greater impact than the message imbedded in the charging of a nondescript, unreported case. Keeping the public in mind, prosecutors may choose charges that are not the most appropriate but that best serve other social policies they wish to implement.¹²¹ With respect to child fatalities due to abuse, prosecutors may choose to treat the abusive parent and non-abusive parent equally in order to send a clear message that no excuses will be accepted, and parents will be severely punished for failing to protect their child no matter what the circumstances may be. While this is not necessarily a bad thing, is it really fair to punish one parent more severely simply because she happened to be born female?

V. Conclusion

Prosecutors and juries need to be more aware of how their own perceptions and attitudes (with respect to gender roles) may influence their decisions and guard against the influence of such possible bias. It is easy to believe that one is being completely objective in decisionmaking

¹²⁰ Johnson & Hargrove, *supra* note 91, at 324.

¹²¹ See Bruce A. Green & Fred C. Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 869, 883 (2004).

when one is not. While most individuals' beliefs about gender roles probably do not significantly affect anyone else in everyday life, the outdated beliefs of prosecutors and jurors can potentially cost someone his or her life.

Though attorneys can interview prospective jurors about their beliefs and attempt to discover any existing gender stereotypes, this may not always be effective in weeding out biased jurors. Ideally, a prospective juror will be honest in his or her answers but what if he or she is not aware of, or does not acknowledge, his or her gender-stereotyped views?¹²² Then a supposedly neutral juror, who may gender stereotype, is placed in a position to decide a person's fate.

Jury instructions are one possible point of intervention. A jury instruction to disregard a defendant's gender in assessing culpability could help. And certainly the court should issue such an instruction in these cases. As a practical matter though, one should not expect such an instruction to be that effective. As easy and simple it is to instruct jurors to disregard any gender stereotypes they may hold, is it really realistic to expect that a person can disregard long-held beliefs simply because they are told to do so?¹²³

¹²² See Richard Seltzer et al., *Juror Honesty during the Voir Dire*, in *THE JURY TRIAL IN CRIMINAL JUSTICE* 214, 214-16 (Douglas D. Koski ed., 2003); Craig Haney, *Exoneration and Wrongful Condemnsions: Expanding the Zone of Perceived Injustice in Death Penalty Cases*, 37 *GOLDEN GATE U. L. REV.* 131, 151-52 (2006); Neil Vidmar, *When All of Us Are Victims: Juror Prejudice and "Terrorist" Trials*, 78 *CHI.-KENT. L. REV.* 1143, 1149-51 (2003).

¹²³ See Joel D. Lieberman & Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 *PSYCHOL. PUB. POL'Y & L.* 589, 600-09 (1997) (finding that jurors do not follow limiting instructions); Bradley Saxton, *How Well Do Jurors Understand Jury*

More needs to be done to safeguard against possible juror bias. During voir dire, prospective jurors could be given similar hypothetical cases in which defendants are assigned letter names and their genders are not identified. The hypothetical defendants could be given certain traits or behaviors that are traditionally identified with one gender or the other. Prospective jurors should then be asked how they would decide the cases and identify the gender of the defendants. In this way, true views on gender roles will emerge and gender stereotyping may be more effectively prevented from influencing the trial. Prior to making a charging decision, a prosecutor needs to examine his or her own beliefs about gender roles and whether such beliefs may influence the charging decision. As a practical matter though, it is unrealistic to expect that all prosecutors are aware of the need for this self-examination or would even acknowledge such a need. This is why the judiciary needs to take a less deferential approach to prosecutorial discretion.

The judicial system needs to take a more active approach in guarding against the influence of gender stereotyping in the prosecution of child fatality cases. Abuse of prosecutorial discretion in charging should be a basis for appeal. Though this may, at first glance, appear to raise a separation of powers issue, it truly does not. Judicial review of charging decisions is similar to existing judicial review of other possible bases of appeal. Judicial review of unfounded prosecutorial decisions simply reinforces the judiciary's function of ensuring that the laws are properly interpreted and that a person's rights are not violated. So long as the

Instructions? A Field Test Using Real Juries and Real Trials in Wyoming, 33 LAND & WATER L. REV. 59, 66-77, 81-83 (1998) (citing previous research showing jurors have difficulty following instructions and finding its own study to correspond with such prior research).

prosecutor is properly enforcing the laws, there will not be any judicial encroachment on executive territory.

Such an active judicial role is necessary to ensure that gender stereotyping does not seep into the possibly unjust charging decisions of prosecutors (who themselves may be unaware of their own gender bias). The laws are not enacted with a particular gender in mind – there is not one set of laws applicable only to females and another set of laws applicable only to males. The laws are meant to apply equally to both genders and the judiciary needs to ensure that the enforcers (i.e. the prosecutors) of laws decide in an objective, gender-neutral manner.