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## Responding to Child Homicide: A Statutory Proposal

Charles A. Phipps

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# RESPONDING TO CHILD HOMICIDE: A STATUTORY PROPOSAL

CHARLES A. PHIPPS\*

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## I. INTRODUCTION

While public opinion in the United States often is hard to accurately measure, an occasional dramatic criminal case presents an issue with such starkness that the public response demonstrates society's instinctive reaction to the issue. Rarely has public intrigue with child homicide been more clearly exemplified than the trial, conviction, and post-conviction disposition of British *au pair* Louise Woodward in the fall of 1997.<sup>1</sup>

Louise Woodward was indicted in Massachusetts for the murder of eight-month-old Matthew Eappen. The Commonwealth's case was based primarily on medical evidence indicating the baby died as a result of a violent shaking and fracture to the base of the skull that led to fatal brain injuries.<sup>2</sup> Although the jury convicted Woodward of murder, the trial judge ruled that the conviction for murder amounted to a substantial mis-

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<sup>1</sup> See *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998). The Woodward case has been matched in notoriety by previous cases that raised public awareness of child abuse. See, e.g., Barry Bendetowies, Note, *Felony Murder and Child Abuse: A Proposal for the NY State Legislature*, 18 *FORDHAM URB. L. J.* 383 (1990-91) (recommending a felony murder rule in the aftermath of the brutal killing of Lisa Steinberg for which the defendant was convicted only of manslaughter).

<sup>2</sup> See William F. Doherty, *Eye Doctor Helps Build Case Against Au Pair*, *BOSTON GLOBE*, Oct. 11, 1997, at B3; William F. Doherty, *Doctor Recounts Autopsy of Baby*, *BOSTON GLOBE*, Oct. 10, 1997, at B3; William F. Doherty, *Doctor Says Baby in Au Pair Case Took Blow to Head*, *BOSTON GLOBE*, Oct. 9, 1997, at A37.

The prosecutors also relied on incriminating statements of the defendant and the fact that the defendant had custody of the child when he began exhibiting symptoms of serious injury. See William F. Doherty, *Detective Details Au Pair's Interview*, *BOSTON GLOBE*, Oct. 15, 1997, at B2.

carriage of justice, reduced the conviction to involuntary manslaughter, and released the defendant after sentencing her to time served.<sup>3</sup>

At the heart of his opinion was the trial judge's belief that Louise Woodward did not act with malice:

I believe that the circumstances in which Defendant acted were characterized by confusion, inexperience, frustration, immaturity and some anger, but not malice (in the legal sense) supporting a conviction for second degree murder. Frustrated by her inability to quiet the crying child, she was 'a little rough with him,' under circumstances where another, perhaps wiser, person would have sought to restrain the physical impulse.<sup>4</sup>

This type of justification is not unfamiliar to child abuse prosecutors. Juries and judges would like to believe a child's death results from accidental or perhaps slightly "rough" behavior, and not that the death is the result of a caretaker who intends to kill or cause great bodily harm to a child. A finder of fact must be convinced that a defendant acted with a particular mental state to convict the person of murder, and many juries (and judges) are reluctant to make such a finding when a child is killed at the hands of a caretaker.<sup>5</sup> This is so for several reasons.

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<sup>3</sup> See Woodward, 694 N.E.2d at 1281; Commonwealth v. Woodward, 7 Mass. L. Rep. 449, 452, No. Crim. 97-0433, 1997 WL 694119 at \*6 (Mass. Super. Ct. Nov. 10, 1997).

<sup>4</sup> Commonwealth v. Woodward, 7 Mass. L. Rep. at 452, 1997 WL 694119 at \*6. The judge then expressed a variation of the defense theory that the "roughness was sufficient to start (or re-start) a bleeding that escalated fatally." *Id.* at 452, \*6. For a response from the pediatric community to the medical evidence presented by the defense, see David L. Chadwick et. al., *Shaken Baby Syndrome—A Forensic Pediatric Response*, 101 PEDIATRICS 321 (1998) (letter signed by 72 physicians who specialize in the diagnosis and treatment of child abuse).

<sup>5</sup> The U.S. Advisory Board on Child Abuse and Neglect spent two years studying child fatalities and hearing testimony from individuals around the country. The Board encountered numerous examples of professionals as well as lay persons reluctant to believe caretakers knowingly kill children. As member J. Tom Morgan stated: "Prosecutors all over the country will tell you that the easiest murder to get away with is the killing of an infant or small child by a parent or caretaker." U.S. DEP'T OF HEALTH & HUMAN SERVICES, *A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES* 58 (1995).

First, motive is often unclear when a caretaker kills a child. Unlike a fight between adults that escalates to a killing, there may be little evidence as to why a caretaker would kill a child. Even when a motive exists, the reason for the killing may be so trivial as to be nearly incomprehensible to most people.<sup>6</sup> Moreover, it is often difficult for the finder of fact to determine whether the fatal act resulted from a one-time response from frustration and anger, or if it was the result of hatred and genuine ill-will toward the child.

Another difficulty with prosecuting child homicide is the frequent lack of external injuries. A gunshot or knife wound is readily understandable; evidence of a cerebral hematoma in an otherwise healthy child is not. Child homicide often is committed by a caretaker who is alone with a child for an extended period of time,<sup>7</sup> almost never involves the type of deadly weapons commonly associated with homicides of adults and older children, and results in injuries requiring careful observation by a medical examiner.<sup>8</sup> As a result, child homicide cases often result in a battle of medical experts, with the jury decision hinging on the credibility of the experts.<sup>9</sup>

Finally, many people simply cannot believe adults kill children in their care, leading some jurors and judges to resist verdicts that place a high degree of culpability on a caretaker.<sup>10</sup>

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<sup>6</sup> See, e.g., Steve Scott, *Twenty Years Given To Man in Son's Beating Death*, DALLAS MORNING NEWS, Aug. 19, 1997, at 13A (describing conviction of father who beat his son to death over anger that his son was playing too loudly during a football broadcast). Medical literature reports the most frequent reasons for killing a young child as being anger over an infant's crying and anger over infants and toddlers soiling themselves. See Albert L. Brewster et al., *Victim, Perpetrator, Family, and Incident Characteristics of 32 Infant Maltreatment Deaths in the United States Air Force*, 22 CHILD ABUSE & NEGLECT 91, 100 (1998) (58% of perpetrators who killed an infant 12 months old or younger reported an infant's crying as preceding the abusive episode).

<sup>7</sup> See *infra* notes 27-29 and accompanying text.

<sup>8</sup> See AMERICAN PROSECUTORS RESEARCH INSTITUTE, INVESTIGATION AND PROSECUTION OF CHILD ABUSE 402-25 (2d ed. 1993).

<sup>9</sup> *Id.* at 440-42.

<sup>10</sup> See generally U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *supra* note 5; Nancy Lewis, *Sentences in Child Deaths Are Unpredictable, Varied*, WASH. POST, Sept. 21, 1998, at A9 (comparing sentences for child deaths in the Washington, D.C. metropolitan area from 1992 through 1995); Steve Mills & Louise Kiernan, *Getting Away with Murder*, CHI. TRIB., Nov. 15, 1998, § 1, at 1 (analyzing child homicide prosecutions in the Chicago area).

Additionally, even prosecutors,<sup>11</sup> child protective service workers, police, and medical professionals<sup>12</sup> may fail to recognize or pursue cases of child homicide.<sup>13</sup>

In spite of frequent societal lethargy on the issue, some legislatures have actively encouraged useful innovations. For example, legislators aware of the risk of misdiagnosing child abuse as sudden infant death syndrome<sup>14</sup> have encouraged criminal investigation of suspicious child deaths by mandating autopsies of children who die with no known cause. Other legislation encourages the formation of child death review teams to bring together professionals from a variety of disciplines to evaluate child deaths in a jurisdiction and further investigate deaths that do not appear to be from natural means.<sup>15</sup>

Some jurisdictions faced with recurrent problems have enacted special homicide statutes.<sup>16</sup> These statutes take two basic

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<sup>11</sup> See Jacy Showers & Julio Apolo, *Criminal Disposition of Persons Involved in 72 Cases of Fatal Child Abuse*, 26 MED. SCI. L. 243 (1986) (finding criminal charges were filed in one jurisdiction in fewer than one-half of cases of suspected fatal child abuse because of insufficient evidence).

<sup>12</sup> See Robert H. Kirschner, *The Pathology of Child Abuse*, in THE BATTERED CHILD 248, 271 (Mary Edna Helfer et al. eds., 5th ed. 1997) (“[I]nflicted head trauma deaths continue to be difficult to prosecute because there is often no external evidence of injury (this can lead to speculation about mysterious or trivial accidental injury) and because many clinicians and pathologists equivocate about the timing of the lethal event.”).

<sup>13</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVICES, *supra* note 5, at 43 (“The Board heard the testimony of prosecutors who conceded that charges of child homicides, including heinous cases, are routinely reduced to lesser crimes.”); see also RICHARD FIRSTMAN & JAMIE TALAN, *THE DEATH OF INNOCENTS* (1997).

<sup>14</sup> See *infra* notes 60-61 and accompanying text for a discussion of sudden infant death syndrome.

<sup>15</sup> See U.S. DEP’T OF HEALTH & HUMAN SERVICES, *CHILD ABUSE AND NEGLECT STATE STATUTE SERIES: MANDATORY AUTOPSIES AND CHILD DEATH REVIEW TEAMS* (1997). The success of these laws cannot be easily evaluated, although most professionals believe they provide a useful tool for identifying cases of child homicide. See U.S. DEP’T. OF HEALTH & HUMAN SERVICES, *supra* note 5, at 87-92.

<sup>16</sup> See Angela M. Stewart, *Murder by Child Abuse*, 26 WILLAMETTE L. REV. 435 (1990) (discussing Oregon law passed in 1989 in part in response to a perceived disproportionately low offense—first degree manslaughter—for the beating death of a child); Gary R. Wade, *The Trexler Saga: Hale and Middlebrooks*, 23 MEMPHIS ST. U.L. REV. 319 (1993) (discussing Tennessee law passed in 1988 in response to a jury’s refusal to convict a defendant of first degree murder in a child homicide prosecution); Paul H. Taylor, Note, *Criminal Law—Child Abuse Resulting in Death—Arkansas Amends Its First Degree Murder Statute*, 10 U. ARK. LITTLE ROCK L. J. 785 (1987-88) (discussing

forms. One type of child homicide statute simply lists a child physical abuse offense as an enumerated felony in a felony murder statute. The second type of law designates a separate homicide offense for the death of a child caused during an act of child abuse.<sup>17</sup> Both types of statutes replace the traditional mental state element for the crime of murder with either proof of the intent attached to the underlying felony, or proof of recklessness, extreme indifference to human life, or a similar mental state. These statutes ease the difficulty of proving a more serious homicide offense and establish a significant penalty for the violent killing of a child.<sup>18</sup>

This article examines the need for these special statutes. Part II analyzes sociological and medical information related to child homicide in the United States. Part III considers case law, highlighting difficulties of trial judges, juries, and appellate courts relying on circumstantial evidence to establish intent in child homicide cases. Part IV examines current child homicide statutes in the United States. Part V presents model child homicide statutes and recommendations.

## II. CHILD HOMICIDE IN THE UNITED STATES

Although thorough data on child homicides<sup>19</sup> do not exist, the U.S. Advisory Board on Child Abuse and Neglect estimates

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Arkansas law passed in 1987 in response to a state Supreme Court opinion reducing a child homicide conviction from first to second degree murder).

<sup>17</sup> See *infra* notes 175-94 and accompanying text.

<sup>18</sup> A third type of statute that can have a similar effect as a child homicide statute is one which raises the penalty for a lesser offense when a child is the victim. For reasons discussed in Part IV, I do not classify these as child homicide statutes. See *infra* notes 169-70 and accompanying text.

<sup>19</sup> The term "child homicide" as used in this article refers to the killing of a child in the course of committing a battery or physical abuse upon the child. This definition excludes several categories of cases. For example, the largest age group of child homicide victims is teenagers, but the extraordinarily high rate of teen homicides in the United States is primarily the result of drug related or gang violence, rather than family violence. Nearly all teen homicides involve the use of firearms or knives. David Finkelhor, *The Homicides of Children and Youth, in OUT OF THE DARKNESS: CONTEMPORARY PERSPECTIVES ON FAMILY VIOLENCE* 17-19 (Glenda Kaufman Kantor & Jana L. Jasinski eds., 1997) (86% of teen homicides committed by use of a firearm, 10% with a knife). These cases are excluded from this discussion. Similarly excluded are cases involving domestic violence in which a child is not the intended victim or the child is killed along with other family members, but not in the course of an epi-

that approximately 2,000 infants or young children a year are victims of homicide by abuse or neglect in the United States.<sup>20</sup> By far, children under five are at greatest risk for being killed by abuse or neglect, with homicide being the "leading cause of death related to injury in the first year of life."<sup>21</sup> Finkelhor reports that children under five are the victims in 92% of child abuse deaths.<sup>22</sup> Of these, 40% of child victims are under one year old, 18% between the age of one and two, and 13% ages two to three.<sup>23</sup> The official rate of homicides of children under five is 3.6 per 100,000,<sup>24</sup> although some experts believe the actual number to be as much as 11.6 per 100,000.<sup>25</sup> According to one author, homicide is the cause of death among children

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sode that is abusive in itself. Finally, cases involving death due to inadequate supervision or criminal neglect are excluded. See *infra* note 172 and accompanying text.

Included within this definition are cases of infanticide. Although often poorly defined, infanticide refers to the killing of a newborn under circumstances in which the caretaker (usually, but not always, the mother) does not want the child and intentionally kills the child after birth. (The term neonaticide describes the killing of an infant within the first 24 hours of life.) Although some issues of proof—such as whether a child was born alive—are unique to these cases, they are treated as child abuse homicides in this article. For a discussion of infanticide, see Finkelhor, *supra*, at 23-24. For additional discussion of the scope of child homicide statutes, see *infra* notes 169-74 and accompanying text.

<sup>20</sup> U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 5, at 9. The report indicates that government agencies and other organizations report data ranging from just under 800 to approximately 1,300 deaths from the early 1990s. *Id.* The most recent government report estimates 1,500 child homicides in 1993. U.S. DEP'T OF HEALTH & HUMAN SERVICES, THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT 3-12 (Andrea Sedlak & Diane D. Broadhurst eds., 1996).

For an examination of child homicide statistics in England, see ANIA WILCZYNSKI, CHILD HOMICIDE (1997).

<sup>21</sup> Carolyn J. Levitt et al., *Abusive Head Trauma*, in CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 1, 5 (Robert M. Reece ed., 1994).

<sup>22</sup> See Finkelhor, *supra* note 19, at 24. Relatively few children age 5 through 12 are victims of fatal child abuse (fewer than eight percent of total child abuse deaths). Of those children in this age group who are murdered, approximately half are victims of a caretaker. These children are more likely than younger children to be victims of strangers, and older children in this category are victims of gang violence. While still present, fatal family violence does not have the prominence in this age group that it does in younger children. See *id.* at 26-27.

<sup>23</sup> See *id.* at 24.

<sup>24</sup> See *id.* at 22-23.

<sup>25</sup> U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 5, at 8.



seven times more frequently than meningitis and twenty times more often than AIDS.<sup>26</sup>

Those who kill young children are nearly always caretakers or persons in a significant relationship to the child. In one of the few studies to systematically examine the relationship of the perpetrator to the victim, Starling et al. found, in reviewing the records of 127 young victims of fatal and non-fatal abusive head trauma whose abuser was identified, 94.5% were in a parent or caretaker relationship to the child.<sup>27</sup> Of these, 21% were babysitters, 37% fathers, 20.5% boyfriends of the victim's mother, 12.6% mothers, and 3% stepfathers.<sup>28</sup> The study concluded that men and babysitters are much more likely to commit these offenses than previously suspected.<sup>29</sup>

The homicide of infants and young children is infrequently accomplished with the use of firearms, knives, or other weapons commonly classified as dangerous.<sup>30</sup> Rather, very young children are killed at the hands of their caretakers. Although the most common cause of death in children under five years of age is beating,<sup>31</sup> the very youngest victims are more likely to be suf-

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<sup>26</sup> Levitt et al., *supra* note 21, at 5.

<sup>27</sup> Suzanne P. Starling et al., *Abusive Head Trauma: The Relationship of Perpetrators to Their Victims*, 95 PEDIATRICS 259, 260 (1995). See also Susan B. Sorenson et al., *Child Homicide in the City of Los Angeles: An Epidemiologic Examination of a Decade of Deaths*, 1 J. AGGRESSION, MALTREATMENT & TRAUMA 189, 193 (1997) (suspects in homicides of children under four years old from 1980 through 1989 were family members in 77% of cases, nonfamily members known to the victim in 7% of cases, and strangers in 2.5% of cases).

<sup>28</sup> Starling et al., *supra* note 27, at 260. A significant caveat to this study is that not all of the persons identified as "perpetrators" confessed to the offense or were convicted at the time of publication of the study. The authors clearly identify the adults by categories: whether they confessed, were convicted, or were suspected of abuse because the explanation the person gave did not account for the injuries to the child. *Id.* at 259.

<sup>29</sup> *Id.* at 260-61. Interestingly, of those in their sample who admitted to the abuse, 28 were fathers or boyfriends. *Id.* No babysitters admitted abusing the child, and were identified in the study by whether they were charged or suspected of committing the abuse. *Id.* at 260.

<sup>30</sup> See generally, Finkelhor, *supra* note 19, at 22-23.

<sup>31</sup> Katherine Kaufer Christoffel, *Child Abuse Fatalities*, in CHILD ABUSE: A MEDICAL REFERENCE 49, 51 (Stephen Ludwig & Allan E. Kornberg eds., 1992).

focused, violently shaken, or thrown.<sup>32</sup> These causes of death are discussed below.

#### A. SHAKEN BABY SYNDROME

In recent years the existence of shaken baby syndrome has gained heightened public awareness due in part to highly publicized criminal cases and to intensive public information campaigns.<sup>33</sup> In general, shaken baby syndrome describes injuries of infants and young children resulting from a violent shaking inflicted by an adult. As defined by one pathologist, shaken baby syndrome is "the result of a *violent shaking force* that causes a whiplash acceleration-deceleration motion of the relatively unstable infant's head upon its neck."<sup>34</sup> Based on comparisons to accidental injuries and statements made by numerous abusers,<sup>35</sup> medical literature describes the mechanism of shaken baby syndrome as an adult who holds a child by the rib cage or shoulders and severely shakes the child forward and back for a period ranging from five to twenty seconds and may involve as many as forty to fifty violent shakes.<sup>36</sup> Victims of violent shaking are usu-

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<sup>32</sup> Levitt et al., *supra* note 21, at 6 (stating that abusive head injury accounts for a "substantial but undefined" percentage of fatalities, and indicating that 80% or more of deaths from head trauma in children under the age of two are the result of abusive head injury).

<sup>33</sup> See Jacy Showers, *Don't Shake the Baby: The Effectiveness of a Prevention Program*, 16 CHILD ABUSE & NEGLECT 11 (1992).

<sup>34</sup> Kirschner, *supra* note 12, at 271.

For classic discussions of shaken baby syndrome that are still widely cited in the medical literature, see John Caffey, *On the Theory and Practice of Shaking Infants*, 124 AM. J. DISEASES CHILDREN 161 (1972); John Caffey, *The Whiplash Shaken Infant Syndrome*, 54 PEDIATRICS 396 (1974). For a technical medical discussion of shaken baby syndrome, see Committee on Child Abuse & Neglect, American Academy of Pediatrics, *Shaken Baby Syndrome: Inflicted Cerebral Trauma*, 92 PEDIATRICS 872 (1993); Derek A. Bruce & Robert A. Zimmerman, *Shaken Impact Syndrome*, 18 PEDIATRIC ANNALS 482 (1989).

<sup>35</sup> With increased use of video surveillance in hospitals, child care centers, and homes, episodes of violent shaking are increasingly videotaped. See David P. Southall et al., *Covert Video Recordings of Life-Threatening Child Abuse: Lessons for Child Protection*, 100 PEDIATRICS 735, 737 (1997).

<sup>36</sup> Levitt et al., *supra* note 21, at 4. Shaking also occurs by grabbing the child by the legs or ankles and "either shaking or swinging him in a circular motion." Mary E. Case, *Head Injury in Child Abuse*, in CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE 87, 95 (James A. Monteleone ed., 2d ed. 1998).

ally under two years old, although they may be older depending on the relative sizes of the child and the adult.<sup>37</sup>

During the shaking, the child's head swings forward until the chin strikes the child's chest and then swings back until the back of the head strikes the child's back. Due to an infant's relatively large head and weak neck muscles, the head moves in a violent "whiplash" fashion.<sup>38</sup> The resulting trauma to the brain and accompanying lack of oxygen to brain cells causes the brain to swell and to increase the pressure within the skull.<sup>39</sup> If not relieved, the swelling will kill the child.<sup>40</sup> Victims who survive a violent shaking often lose their sight or suffer permanent brain damage.<sup>41</sup>

The motion of the child's brain rotating violently within the skull also causes tiny veins to tear and bleed in the compartments between the brain and its coverings.<sup>42</sup> This bleeding results in a subdural hematoma or subarachnoid hemorrhage (or both).<sup>43</sup> The bleeding is a marker that severe force has been used, but is not itself the most serious injury; the life-threatening injury is the direct damage to the brain itself.<sup>44</sup>

Rather than solely shaking an infant, abusers often throw or slam a child onto a floor, against a wall, or into another firm surface, resulting in skull fractures and additional damage to

<sup>37</sup> Case, *supra* note 36, at 95.

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

<sup>39</sup> *Id.* at 99-100.

<sup>40</sup> Derek A. Bruce, *Neurological Aspects of Child Abuse*, in CHILD ABUSE: A MEDICAL REFERENCE 117, 118 (Stephen Ludwig & Allan E. Kornberg eds., 1992). Even if physicians are able to relieve the pressure, the threat of serious injury or death remains. See ANGELO P. GIARDINO ET AL., A PRACTICAL GUIDE TO THE EVALUATION OF CHILD PHYSICAL ABUSE AND NEGLECT 151-52 (1997).

<sup>41</sup> James A. Monteleone & Armand E. Brodeur, *Identifying, Interpreting, and Reporting Injuries*, in CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE 1, 15 (James A. Monteleone ed., 2d ed. 1998); U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 5, at 16-17.

<sup>42</sup> Two of the membranes covering the brain are the *dura mater* and the arachnoid membrane. See TABER'S CYCLOPEDIA MEDICAL DICTIONARY 140, 584 (18th ed. 1997). Bleeding beneath the *dura mater* is termed "subdural hematoma" (or "subdural hemorrhage"), and bleeding beneath the arachnoid membrane is termed "subarachnoid hemorrhage." See GIARDINO ET AL., *supra* note 40, at 149.

<sup>43</sup> Case, *supra* note 36, at 100.

<sup>44</sup> *Id.* See also Kirschner, *supra* note 12, at 273-74.

the brain.<sup>45</sup> There may be no external signs of impact such as bruising if a child is thrown against a "yielding" surface.<sup>46</sup> Medical literature demonstrates that, while shaking with impact is common, shaking alone is sufficient to cause severe injury or death.<sup>47</sup>

Common findings of shaken baby syndrome include subdural hematoma, skull fractures (if impact is involved), extensive bleeding in the back of the inner surface of the eyes (retinal hemorrhages), and broken or bruised ribs or arms from where the child was held. The existence of any combination of these injuries provides strong evidence of abuse,<sup>48</sup> but the absence of

<sup>45</sup> Some physicians emphasize that when impact is involved, the mechanism is no longer accurately described as shaken baby syndrome. Thus, a distinction is made between shaken baby and shaken-impact syndrome. See Ann-Christine Duhaime et al., *Nonaccidental Head Injury in Infants—The "Shaken Baby Syndrome,"* 338 NEW ENG. J. MED. 1822 (1998) (arguing that "shaking-impact syndrome" is a more accurate term); Betty S. Spivack, *Biomechanics of Nonaccidental Trauma,* in CHILD ABUSE: A MEDICAL REFERENCE 61, 76 (Stephen Ludwig & Allan E. Kornberg eds., 1992). As a practical matter, a person who violently shakes an infant is unlikely to gently place the child back in bed, and thus, some degree of impact is likely. However, this impact may not result in fractures or other visible manifestations. As pathologist Mary Case notes:

It may not be helpful to try to distinguish a child's head injury as resulting from either impact or shaking because the pathology is identical in both. If there are focal injuries such as skull fractures or scalp bruises, certainly impact can be assumed. In the absence of such impacts, however, shaking only should not be presumed.

Case, *supra* note 36, at 100.

While the mechanism should be as clearly described as possible during a prosecution, clear descriptions are not always given in the cases. Thus, for purposes of this article, all cases in which shaking was identified by an expert witness are classified as shaken baby syndrome, even though impact may have been involved (although not clearly identified in the case).

<sup>46</sup> Monteleone & Brodeur, *supra* note 41, at 14. The authors explain:

A boxer may be knocked unconscious, with injury to the brain, after impact from a gloved and cushioned hand yet suffer no facial bruising. In like manner, a child thrown against a soft crib mattress, bed, or carpeted floor can sustain severe brain injuries with no evidence of external damage.

*Id.*

<sup>47</sup> See Case, *supra* note 36, at 99.

<sup>48</sup> For example, retinal hemorrhages are nearly diagnostic of abuse. See Monteleone & Brodeur, *supra* note 41, at 15 ("retinal hemorrhages in an infant without a history of severe accidental trauma constitutes child abuse until proven otherwise"); Alex V. Levin, *Ophthalmologic Manifestations,* in CHILD ABUSE: A MEDICAL REFERENCE

one or more such injuries does not preclude a shaken baby syndrome diagnosis. Other injuries that one might expect to find frequently are, in fact, rare.<sup>49</sup> In addition, different injuries may be present depending on the precise mechanism of injury.

A child with a fatal head injury will lose consciousness, suffer convulsions, have difficulty breathing, or exhibit other clear symptoms soon after the incident. Thus, in the case of fatal head injury, the trauma most likely occurred after the last confirmed period of normal consciousness. As explained by one of the foremost pediatric forensic pathologists in the United States:

Fatal shaking events are, with rare exception, characterized clinically by almost immediate loss of consciousness, often with associated seizures and apnea. Irritability, inability to feed, vomiting,<sup>50</sup> and lethargy are common components of less severe shaking episodes.

Many medical experts equate the force necessary to kill a child with the force of an automobile accident or a fall from an upper story window.<sup>51</sup> As stated by the American Academy of

191, 198 (Stephen Ludwig & Allan E. Kornberg eds., 1992) (retinal hemorrhages are "one of the cardinal manifestations" of shaken baby syndrome, occurring in 50-80% of shaken baby syndrome infants).

<sup>49</sup> See David F. Merten et al., *Skeletal Manifestation of Child Abuse*, in CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 23, 40 (Robert M. Reece ed., 1994) ("fracture and/or ligamentous injury to the cervical vertebrae is remarkably rare despite the fact that spinal injuries in abused infants are presumably a result of violent shaking").

<sup>50</sup> Kirschner, *supra* note 12, at 273. Elsewhere, Kirschner and Harry Wilson state: "Lethal injuries produce progressively more severe symptoms almost immediately; no significant 'lucid' or asymptomatic period occurs." Robert H. Kirschner & Harry L. Wilson, *Fatal Child Abuse: The Pathologist's Perspective*, in CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 325, 350 (Robert M. Reece ed., 1994). "[S]evere head trauma in infants produces immediate symptoms. This rule applies to both shaken babies and infants with skull fractures and cerebral injuries." *Id.* at 352.

Pathologists explain that immediate symptoms always are present when "diffuse axonal injury" is detected. Diffuse axonal injury is the tearing of tiny nerve tissues in the brain. If a shaking is severe enough, injuries to these tissues cause immediate symptoms such as loss of consciousness, breathing difficulty, and seizures. See Case, *supra* note 36, at 100. Although pathologists are not able to identify diffuse axonal injuries in every shaken baby case, when identified such injuries provide clear evidence that a child would not have had a period of consciousness after infliction of the injuries. *Id.*

<sup>51</sup> See *Jones v. State*, 439 S.E.2d 645, 647 (Ga. 1994) (head injuries from shaking consistent with fall from three to four story building); *State v. Mosley*, 414 N.W.2d

Pediatrics: "[T]he act of shaking/slamming is so violent that competent individuals observing the shaking would recognize it as dangerous."<sup>52</sup> Short distance falls rarely cause skull fractures, but if they do, the fractures are small (less than one millimeter) and differ in type from fractures seen in shaken babies.<sup>53</sup> These forces require the strength of an adult; it is not plausible to explain massive intracranial injury as inflicted by another young child or as the product of normal activity such as bouncing children playfully.<sup>54</sup>

A variety of theories that do not involve severe, traumatic injuries on the scale of car accidents have been produced in recent years by experts testifying on behalf of criminal defendants in child homicide prosecutions. Few of these theories are supported in the scientific literature on shaken baby syndrome.<sup>55</sup> A prominent group of seventy-two physicians who specialize in the diagnosis and treatment of child abuse victims responded to the expert testimony in the Louise Woodward case with a strong rejoinder, stating in part:

The hypothesis put forward by the defense that minor trauma caused a "re-bleed" of an earlier head injury can best be characterized as inaccurate, contrary to vast clinical experience and unsupported by any pub-

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461, 463 (Minn. Ct. App. 1987) (fatal liver injury consistent with degree of force comparable to a car accident); *State v. Johnson*, 400 N.W.2d 502, 505 (Wis. Ct. App. 1986) (fatal injuries to abdomen comparable to 50 mile per hour automobile collision). See also M. Elaine Billmire & Patricia A. Myers, *Serious Head Injury in Infants: Accident or Abuse?*, 75 PEDIATRICS 340, 342 (1985); Kirschner, *supra* note 12, at 275.

<sup>52</sup> Committee on Child Abuse & Neglect, *supra* note 34, at 872.

<sup>53</sup> See generally Ann-Christine Duhaime et al., *Head Injury in Very Young Children: Mechanisms, Injury Types, and Ophthalmologic Findings in 100 Hospitalized Patients Younger than 2 Years of Age*, 90 PEDIATRICS 179, 182-84 (1992); Monteleone & Brodeur, *supra* note 41, at 8-9; Gregory D. Reiber, *Fatal Falls in Childhood: How Far Must Children Fall to Sustain Fatal Head Injury?*, 14 AM. J. FORENSIC MED. & PATHOLOGY 201 (1993).

<sup>54</sup> Levitt et al., *supra* note 21, at 4.

<sup>55</sup> See David L. Chadwick & Henry F. Krous, *Irresponsible Testimony by Medical Experts in Cases Involving the Physical Abuse and Neglect of Children*, 2 CHILD MALTREATMENT 313 (1997). Cf. Jan Bays, *Conditions Mistaken for Child Abuse*, in CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 358 (Robert M. Reece ed., 1994) (describing conditions recognized by medical professionals as capable of being mistaken for child abuse); Arthur Zinn, *Genetic Disorders that Mimic Child Abuse or Sudden Infant Death Syndrome*, in CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 404 (Robert M. Reece ed., 1994).

lished literature. The "re-bleed" theory in infants is a courtroom "diagnosis," not a medical diagnosis, and the jury properly rejected it.<sup>56</sup>

## B. SUFFOCATION

Death by suffocation is even more difficult to identify than death caused by shaken baby syndrome. Unless a perpetrator applies force sufficient to cause bruising, suffocation results in no external indications of abuse.<sup>57</sup> Medical literature on suffocation indicates that a person must deprive a child of oxygen for approximately sixty to eighty seconds before the child loses consciousness, and the entire episode may last two to four minutes.<sup>58</sup> Prevalence of homicides by suffocation is largely unknown, but many experts believe it is often overlooked as a cause of death.<sup>59</sup>

An experienced pathologist may be able to detect subtle signs of abuse accompanying suffocation, but the act of suffocation itself produces "no distinct pathologic changes observable at autopsy."<sup>60</sup> It is extremely difficult for a pathologist to categorically state the cause of death as suffocation in an infant with

<sup>56</sup> Chadwick et al., *supra* note 4, at 321. The Massachusetts Supreme Court rejected Woodward's contention that the medical evidence presented by defense witnesses mandated her acquittal. *See Commonwealth v. Woodward*, 694 N.E.2d 1277, 1293-94 (Mass. 1998).

<sup>57</sup> *See* Roy Meadow, *Suffocation, Recurrent Apnea, and Sudden Infant Death*, 117 J. PEDIATRICS 351 (1990) (documenting 27 cases of intentional suffocation of young children by their mothers).

<sup>58</sup> David P. Southall & Martin P. Samuels, *Ethical Use of Covert Videotaping for Potentially Life Threatening Child Abuse: A Response to Drs. Foreman and Farsides*, 307 BRIT. MED. J. 613 (1993). *See also* FIRSTMAN & TALAN, *supra* note 13, at 505 (describing testimony of Dr. Janice Ophoven who indicated it can take four minutes of suffocation before a child dies).

A 1997 study provides remarkable videotape documentation of more than 80 parents attempting to injure their children while hospitalized. Of 39 patients for whom abuse was suspected, 30 patients were videotaped while a caretaker attempted to suffocate the child in the hospital. The 39 patients had 41 siblings, 12 of whom had previously died unexpectedly. The intentional nature of suffocation is made abundantly clear by this report. (Although intervention by hospital staff prevented harm to the children under surveillance, the ethical problems inherent in this type of study are numerous, and the authors provide a detailed discussion of these issues). Southall et al., *supra* note 35, at 737.

<sup>59</sup> *See* Finkelhor, *supra* note 19, at 22-23.

<sup>60</sup> Kirschner & Wilson, *supra* note 50, at 347.

no additional injuries. Complicating investigation of suffocation is the recognized condition of sudden infant death syndrome (SIDS). While SIDS presents a true cause of death in infancy, some pathologists express concern that it is sometimes used as a ready diagnosis when further investigation might yield evidence of intentional suffocation.<sup>61</sup>

### C. BEATING

In addition to shaken baby syndrome and suffocation—forms of abuse about which most people have little knowledge—beating remains one of the most common forms of child physical abuse. Young children with severe head trauma caused by being beaten or thrown may exhibit external signs of injuries not usually present in the shaken baby. Head injuries in children killed by a beating are somewhat different than those inflicted by shaking but result in the same brain swelling that leads to death.<sup>62</sup>

Children who are severely beaten often have abdominal injuries which result in death. Barry and Weber produce a useful comparison of accidental and non-accidental abdominal injuries reproduced here as Table 1.<sup>63</sup> As this table indicates, injuries to the liver are the most frequent serious abdominal injury.<sup>64</sup> Such internal injuries require significant (and often repeated) beatings such as kicks or punches with a closed fist.<sup>65</sup>

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<sup>61</sup> See Robert M. Reece, *Fatal Child Abuse and Sudden Infant Death Syndrome: A Critical Diagnostic Decision*, 91 PEDIATRICS 423 (1993). SIDS is a diagnosis of exclusion, not an affirmative finding. Thus, a full investigation into the cause of death, including autopsy, is necessary before a diagnosis of SIDS can be made. See GIARDINO ET AL., *supra* note 40, at 230-31.

<sup>62</sup> Bruce, *supra* note 40, at 119.

<sup>63</sup> Richard C. Barry & Thomas R. Weber, *Thoracoabdominal Injuries Associated with Child Abuse*, in CHILD MALTREATMENT: A CLINICAL GUIDE AND REFERENCE 67, 69 (James A. Monteleone ed., 2d ed. 1998).

<sup>64</sup> Multiple internal organs are likely to be injured with serious beatings, such as perforations of the bowels and other internal organs. *Id.* at 70.

<sup>65</sup> *Id.*



**TABLE 1.**  
**DIFFERENCES IN USUAL PRESENTATION FACTORS IN CHILD ABUSE**  
**VERSUS ACCIDENTAL THORACOABDOMINAL INJURY<sup>A</sup>**

PRESENTATION FACTOR	ACCIDENTAL	ABUSE
Time of presentation after injury	Immediate	Delayed
History		
Present	Available and Reliable	Often unavailable, unreliable, or inconsistent with the injury
Past	Unremarkable	Previous abusive episodes and 50% known to [protective services]
Age	7.8 years (mean)	2.5 years (mean)
Old inflicted bruises	0%	50% to 90%
Old fractures	Very infrequent	Frequent
Most frequent abdominal organ injured	Spleen	Liver
Multiple visceral injuries	Infrequent	Frequent
Intestinal injury	Infrequent	Frequent
Death	4.5% to 12.5%	12% to 60%

<sup>A</sup> Reproduced with permission of the publisher, G.W. Medical Publishing, Inc., St. Louis, Missouri.

### III. PROSECUTING CHILD HOMICIDE UNDER TRADITIONAL CHARGING STATUTES

As seen above, child homicide committed by a parent or other caretaker who suffocates or violently shakes an infant or young child is among the most difficult to discover and prosecute.<sup>66</sup> Whether a child dies with many or few external signs of injury, a jury will rightly ask several questions. Can the death be explained as an accident? Was the caretaker merely negligent or was she or he provoked to commit a violent act in the heat of passion? Was the caretaker so reckless as to manifest an extreme indifference to human life? Did the caretaker know the child would die as a result of the conduct? Or, perhaps, did the caretaker intend to kill the child? These are difficult questions for a trier of fact to answer, with the result often being a relatively low level of punishment or no punishment at all for a caretaker who kills a child with his or her hands.

This section discusses case law applying homicide statutes to child victims. Because of the wide variation among statutory language, the following discussion is organized around the familiar understanding of murder and manslaughter (rather than their Model Penal Code equivalent)<sup>67</sup> and considers the various mental state elements required to be proven by statute and case law.

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<sup>66</sup> See AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 8, at 1.

<sup>67</sup> Although the Model Penal Code's structure is more helpful than the traditional murder-manslaughter distinction, few of the cases below interpret statutes based on the Model Penal Code's homicide offenses. I attempt to categorize the various state approaches under the better known—although less precise—common law terms. See MODEL PENAL CODE AND COMMENTARIES, Part II, §§ 210.0 to 210.6 (1980). LaFave and Scott provide an extensive discussion of the common law background and prevailing approaches of the states. See 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, SUBSTANTIVE CRIMINAL LAW §§ 7.12 & 7.13, at 276-99 (1986). For a general discussion of criminal intent and citation of cases in the context of child abuse, including child homicide, see 1 JOHN E. B. MYERS, EVIDENCE IN CHILD ABUSE AND NEGLECT CASES § 4.35, at 365-76 (3d ed. 1997). For a partial list of older cases addressing child homicide convictions, see H.D. Warren, Annotation, *Criminal Liability for Excessive or Improper Punishment Inflicted on Child by Parent, Teacher, or One In Loco Parentis*, 89 A.L.R.2d 396, §§ 9-11, 16-18, 22-23, and 25 (1963).

## A. FIRST DEGREE MURDER

First degree murder—the most serious of the homicide offenses—requires proof of a specific intent to kill after premeditation and deliberation.<sup>68</sup> With premeditation and deliberation notoriously difficult to define and apply under common murder scenarios,<sup>69</sup> the difficulties are amplified in the context of child homicides. Nonetheless, numerous first degree murder convictions have been upheld for the killing of children by abuse.

Reported case law of intent to kill murder convictions falls into two categories. First are cases in which a child has been battered or tortured over an extended period of time with the beatings ultimately resulting in the child's death. The facts of these cases are gruesome, and many courts have little difficulty inferring<sup>70</sup> intent to kill, premeditation, and deliberation from the numerous external signs of cruel acts to the child's body.<sup>71</sup>

<sup>68</sup> See 2 LAFAVE & SCOTT, *supra* note 67, § 7.7(a), at 237. Other forms of first degree murder include first degree felony murder and murder by lying in wait, poison, or torture. *Id.* § 7.7(c), at 242; see also *State v. Pierce*, 488 S.E.2d 576 (N.C. 1997) (upholding conviction for first degree murder by torture of battered and shaken baby). These variations are indicated herein when applicable, although many are excluded from consideration in this article. See *infra* notes 169-74 and accompanying text for a discussion of the scope of homicide statutes included in this article.

<sup>69</sup> As articulated by LaFave and Scott:

Perhaps the best that can be said of 'deliberation' is that it requires a cool mind that is capable of reflection, and of 'premeditation' that it requires that the one with the cool mind did in fact reflect, at least for a short period of time before his act of killing.

2 LAFAVE & SCOTT, *supra* note 67, § 7.7(a), at 237.

<sup>70</sup> For discussion of circumstantial evidence, see *infra* notes 158-68 and accompanying text.

<sup>71</sup> See *People v. Mincey*, 827 P.2d 388 (Cal. 1992) (five-year-old son of defendant's girlfriend had hundreds of injuries, some of which caused his intestines to stop working and others caused his brain to swell); *People v. Oaks*, 662 N.E.2d 1328 (Ill. 1996) (three-year-old son of defendant's girlfriend died from massive head injuries and also had numerous other injuries); *State v. Rowell*, 883 P.2d 1184 (Kan. 1994) (16-month-old daughter died of injuries to internal organs after being subjected to a long period of abuse); *Commonwealth v. Avellar*, 622 N.E.2d 625, 632 (Mass. 1993) (number and severity of injuries to six-month-old justified finding of "extreme atrocity or cruelty"); *State v. Elliott*, 475 S.E.2d 202 (N.C. 1996) (two-year-old daughter of defendant's girlfriend had numerous injuries and died of massive head injuries caused by having her head repeatedly slammed against the floor); *State v. Flippen*, 477 S.E.2d 158 (N.C. 1996) (defendant's two-year-old stepdaughter with numerous injuries died of internal bleeding caused from a torn liver and pancreas); *State v. Per-*

For example, Nevada courts have consistently upheld first degree murder convictions for the death of children by battering. In *Hern v. State*,<sup>72</sup> the defendant beat to death the three-year-old son of his girlfriend. The child died from injury to his liver, and he also had bruises all over his body. The court found that the "nature and extent of the injuries, coupled with repeated blows, constitutes substantial evidence of willfulness, premeditation, and deliberation,"<sup>73</sup> further holding that it must allow a jury to draw reasonable inferences from evidence such as this:

Any other result would leave prosecutors, defenders and judges without guidance in such cases. If the result were to the contrary, then absent direct evidence of premeditation, a first degree murder conviction would be most difficult, if not impossible, to obtain if the victim is a child who has not been killed with a gun or other dangerous weapon—but severely beaten, as in the instant case.<sup>74</sup>

Other courts examining cases with comparably horrifying facts have refused to find a premeditated intent to kill and have lowered jury convictions to second degree murder or manslaughter.<sup>75</sup> For example, in *Midgett v. State*,<sup>76</sup> the defendant en-

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due, 357 S.E.2d 345 (N.C. 1987) (one-month-old infant with multiple bruises and fractures died of blunt force trauma to the head); *Archie v. Commonwealth*, 420 S.E.2d 718 (Va. Ct. App. 1992) (three-year-old daughter of defendant's boyfriend suffered massive head trauma, a fractured arm and wrist, and abdominal injuries).

<sup>72</sup> 635 P.2d 278 (Nev. 1981).

<sup>73</sup> *Id.* at 281.

<sup>74</sup> *Id.* See also *Athey v. State*, 797 P.2d 956 (Nev. 1990) (28-month-old son of defendant's girlfriend died of severe head injuries caused by shaking or blunt trauma and had numerous other bruises).

<sup>75</sup> See *State v. Carpenter*, 570 A.2d 203, 207 n.4 (Conn. 1990) (murder conviction lowered to manslaughter—defined as "evinced an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person"—because defendant's act of throwing child into a bathtub did not by itself prove a specific intent to kill required for second degree murder); *Massie v. State*, 553 P.2d 186, 190 (Okla. Crim. App. 1976) (court held evidence that four-year-old had numerous injuries and died of head injuries insufficient to support murder committed with a "premeditated intent and design to effect the death" of the victim); *State v. Brown*, 836 S.W.2d 530, 537 (Tenn. 1992) (defendant's infliction of massive head injuries, multiple internal injuries, an untreated broken bone, bruises to his genitals and extremities, and numerous other injuries insufficient to support first degree murder because the evidence failed to prove premeditation and deliberation); *State v. Bordis*, 905 S.W.2d 214, 224 (Tenn. Ct. Crim. App. 1995) (court held failure to feed

gaged in a course of brutal beatings of his eight-year-old son, ultimately killing him with blows to his abdomen and chest.<sup>77</sup> The court examined the history of the law defining premeditation and deliberation and concluded that beatings with the hands were not comparable to attacks with other "deadly weapons," the use of which justifies a finding of intent to kill. Likewise, the court held that findings of the extent of injuries do not in themselves demonstrate premeditation and deliberation.<sup>78</sup> As such, the court reduced the defendant's first degree murder conviction to second degree murder, in effect finding that parents could not be convicted of first degree murder for the beating death of their child unless they articulated to someone in advance their "premeditation" and "deliberation."<sup>79</sup>

A second category of first degree murder cases consists of those in which few, if any, external signs of abuse to a child's body exist. Typically these cases involve suffocation or a violent shaking of a child who is not otherwise battered. While not common, some courts have upheld first degree murder conviction

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three-month-old child who died from malnutrition and dehydration did not in itself show an intent to kill as there were other "reasonable interpretations of [defendant's] inaction").

<sup>76</sup> 729 S.W.2d 410 (Ark. 1987).

<sup>77</sup> *Id.* at 411. The court described his injuries:

There were recently caused bruises on the lips, center of the chest plate, and forehead as well as on the back part of the lateral chest wall, the soft tissue near the spine, and the buttocks. There was discoloration of the abdominal wall and prominent bruising on the palms of the hands. Older bruises were found on the right temple, under the chin, and on the left mandible. Recent as well as older, healed, rib fractures were found.

*Id.* The court also noted that at his death, the child was "very poorly nourished." *Id.*

<sup>78</sup> *Id.* at 413. In its reasoning, the court stated:

The appellant argues, and we must agree, that in a case of child abuse of long duration the jury could well infer that the perpetrator comes not to expect death of the child from his action, but rather that the child will live so that the abuse may be administered again and again. Had the appellant planned his son's death, he could have accomplished it in a previous beating.

*Id.* The dissent countered that the majority's "clairvoyance" ignored the jury's evaluation that, after considering all the facts, it determined the acts were committed with the intent to kill the child. *Id.* at 416 (Hickman, J., dissenting).

<sup>79</sup> See *id.* at 415 (finding the defendant's "obvious" purpose was to cause serious physical injury to the child, not death).

tions in suffocation and shaken baby cases.<sup>80</sup> For example, in *United States v. Curry*,<sup>81</sup> the defendant was tried for the premeditated murder of two of his sons, one killed by asphyxiation in 1976 and the other by shaking in 1987. Defendant was jointly tried for both incidents and convicted of premeditated murder for both acts.<sup>82</sup> Even though this case is unusual in that the defendant killed two children, the facts identified by the court as supporting an inference of premeditation are not unusual: "the extraordinarily violent nature of the shaking, appellant's demeanor at the hospital, the prior abuse on the child, and appellant's medically nonsensical account of the events."<sup>83</sup> Similarly, the court found "more than sufficient" circumstantial evidence to prove the manner of death of the first child: "evidence tending to prove his threats, boasts, admissions, motive, and demeanor, coupled with his change of story, destruction of evidence, and prior abuse."<sup>84</sup>

#### B. MALICE, DEPRAVED HEART, AND FELONY MURDER

The next most serious homicide offense is a killing in which the actor intends to inflict serious bodily injury but does not necessarily intend to kill the victim. This is common law murder, commonly defined as the unlawful killing of another with malice aforethought.<sup>85</sup> Whether phrased with the common law terminology or the Model Penal Code formulation, the essence of this offense is an act in which the defendant knows or should know the conduct will result in death or serious bodily injury.

A representative murder case involving a child victim is *Webber v. Commonwealth*.<sup>86</sup> In *Webber*, the Commonwealth presented

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<sup>80</sup> See, e.g., *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973) (eight-month-old suffocated by foster mother); *United States v. Curry*, 31 M.J. 359 (C.M.A. 1990) (14-week-old shaken to death and 10-month-old asphyxiated by their father); *Curtis v. State*, 568 P.2d 583 (Nev. 1977) (two-year-old died of head trauma).

<sup>81</sup> 31 M.J. 359 (C.M.A. 1990).

<sup>82</sup> *Id.* at 360.

<sup>83</sup> *Id.* at 372 (describing evidence regarding the second child).

<sup>84</sup> *Id.*

<sup>85</sup> "Malice aforethought" means a defendant was aware or practically certain that his conduct would result in death or serious bodily injury. 2 LAFAYE & SCOTT, *supra* note 67, § 7.1, at 181.

<sup>86</sup> 496 S.E.2d 83 (Va. Ct. App. 1998).

evidence of bruises on the infant victim's face and ribs and the testimony of an expert that brain injuries to the child were caused by a violent shaking.<sup>87</sup> The Commonwealth also presented testimony of admissions by the defendant that he became frustrated with the baby and slapped and shook him (though not, according to the defendant, hard enough to kill the baby).<sup>88</sup> The Virginia Court of Appeals found the "brutality" of the assault supported a finding of malice.<sup>89</sup> Numerous child homicide prosecutions in the United States have been upheld under a similar definition.<sup>90</sup>

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<sup>87</sup> *Id.* at 89.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 90. Using similar reasoning, one of the first cases to recognize that an adult can shake an infant to death was *Regina v. Ward*, 1 All E.R. 565 (Q.B. 1956). An adult man admitted shaking an 18-month-old child violently after being frustrated by the child's crying. *Id.* at 566. The defendant argued that his subjective state of mind should be the standard by which murder should be defined. The court disagreed, holding that the proper standard is whether "a reasonable man would have contemplated death or grievous bodily harm was likely to result" from the conduct. *Id.* at 566-67.

<sup>90</sup> *See, e.g.*, *United States v. Nichols*, 38 M.J. 717 (A.C.M.R. 1993) (defendant's conviction for unpremeditated murder upheld in the battering death of his six-month-old son); *Corbett v. State*, 468 S.E.2d 757 (Ga. 1996) (battered eight-month-old died of asphyxia); *King v. State*, 448 S.E.2d 362 (Ga. 1994) ("malice murder" conviction upheld for death to 15-month-old caused by blunt force trauma to the head); *People v. Tye*, 565 N.E.2d 931 (Ill. 1990) (defendant beat his three-year-old daughter to death); *People v. Ward*, 463 N.E.2d 696 (Ill. 1984) (defendant beat to death four-year-old child of his girlfriend); *Powers v. State*, 696 N.E.2d 865 (Ind. 1998) (defendant inflicted fatal head injuries upon his five-month-old nephew); *Anderson v. State*, 681 N.E.2d 703 (Ind. 1997) (defendant beat to death 21-month-old child of his girlfriend); *Robinson v. State*, 453 N.E.2d 280 (Ind. 1983) (three-year-old child of defendant's cousin killed by defendant and her husband who kicked and threw the child against a chair); *Shipley v. State*, 620 N.E.2d 710 (Ind. Ct. App. 1993) (mother and father convicted of murdering their five-year-old daughter from a combination of blunt force trauma, dehydration, and malnutrition); *State v. Morton*, 638 P.2d 928 (Kan. 1982) (two-year-old died from head injuries); *Commonwealth v. Azar*, 588 N.E.2d 1352 (Mass. Ct. App. 1992) (defendant killed his four-month-old daughter with blunt force trauma to the head); *People v. Biggs*, 509 N.W.2d 803 (Mich. Ct. App. 1993) (mother convicted of suffocating two-year-old son); *State v. Candela*, 929 S.W.2d 852 (Mo. Ct. App. 1996) (defendant killed four and one-half-year-old daughter of her boyfriend by inflicting severe head injuries); *State v. Ballenger*, 738 P.2d 1291 (Mont. 1987) (defendant acted knowingly and purposefully in the beating death of a child); *State v. Sigler*, 688 P.2d 749 (Mont. 1984) (proof of specific intent to kill is not required under deliberate homicide statute; child died of blows to the abdomen); *State v. Galloway*, 628 A.2d 735 (N.J. 1993) (court did not rule on the sufficiency of the evidence in this shaken baby case, but indicated the record supported a charge

Although few reported opinions expressly reverse the equivalent of second degree murder convictions based on insufficiency of the evidence,<sup>91</sup> the Louise Woodward case provides a stark example of the difficulties in obtaining murder convictions of a caretaker who violently kills an infant.<sup>92</sup> The verdict of the *Woodward* jury indicates its agreement with the prosecution's assertion that the defendant's violent shaking and slamming of the eight-month-old victim caused fatal brain injuries. The verdict also indicates the jury considered the defendant to have acted with malice.<sup>93</sup> However, under the authority of a Massa-

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and instruction on purposeful and knowing murder); *People v. Shattel*, 578 N.Y.S.2d 694 (N.Y. Sup. Ct. 1992) (head injuries to a three-month-old constituted "reckless murder"); *State v. Qualls*, 502 S.E.2d 31 (N.C. Ct. App. 1998) (sufficient evidence that defendant acted with malice in severely shaking his two-month-old son); *State v. Hemphill*, 409 S.E.2d 744 (N.C. Ct. App. 1991) (sufficient evidence that defendant acted with malice in shaking to death his four-month-old daughter); *Barcenes v. State*, 940 S.W.2d 739 (Tex. Ct. App. 1997) (19-month-old died of massive head injuries); *State v. James*, 819 P.2d 781, 773 (Utah 1991) (evidence of motive and plans to dispose of the child constitutes sufficient basis to infer intent to kill); *State v. Olsen*, 680 A.2d 107 (Vt. 1996) (boyfriend shook two-year-old daughter of his girlfriend; victim also sustained severe abdominal injuries from punching or kicking); *State v. Brunell*, 615 A.2d 127 (Vt. 1992) (father suffocated or shook 20-month-old daughter); *Webber v. Commonwealth*, 496 S.E.2d 83 (Va. Ct. App. 1998) (one-month-old shaken to death).

The above cases do not include those involving serious physical abuse that do not result in the death of the child. Such cases involve many of the same issues of proof of intent, criminal act, and criminal agency. See, e.g., *Powell v. State*, 487 S.E.2d 424 (Ga. Ct. App. 1997) (conviction for aggravated assault and simple battery upheld against child care provider who caused total blindness and permanent brain damage to an 11-month-old by violently shaking the child); *People v. Goodridge*, 674 N.Y.S.2d 24 (N.Y. App. Div. 1998) (defendant's act of shaking a three-month-old constituted "the kind of recklessness involving a depraved indifference to human life" for purposes of first degree assault).

<sup>91</sup> This may be in part because cases often are decided on grounds other than the sufficiency of the evidence, and in part because few cases are charged as murder in the first place. See *supra* note 13 and accompanying text. Of course, courts reverse murder convictions on many other grounds, some of which give insights into the court's view of the evidence. One of the most likely issues resulting in reversal of murder cases is failure to give an instruction on a lesser included offense. See, e.g., *Allen v. State*, 546 So. 2d 1009 (Ala. Crim. App. 1988) (child died of blunt force trauma to the head; court found evidence warranted manslaughter instruction); *Baker v. State*, 569 N.E.2d 369 (Ind. Ct. App. 1991) (reversing murder conviction in shaken baby case because no involuntary manslaughter instruction was given).

<sup>92</sup> For additional discussion of the facts of this case, see *supra* notes 1-4 and accompanying text.

<sup>93</sup> Malice was defined by the trial judge as: "(a) an intentional act (b) which in circumstances known to the defendant (c) created what a reasonably prudent person



chusetts rule allowing a trial judge to reduce a jury verdict “for any reason that justice may require,”<sup>94</sup> the judge determined that the defendant’s conduct was “most fairly characterized as manslaughter” and lowered the conviction to manslaughter.<sup>95</sup> The Massachusetts Supreme Court affirmed the judge’s actions, although its ruling did not amount to a decision that there was insufficient evidence to support a murder conviction.<sup>96</sup>

Another standard used to define murder in some jurisdictions is an act committed under circumstances manifesting an extreme indifference to the value of human life.<sup>97</sup> This terminology is a modern variation of the well-known common law offense of depraved heart murder,<sup>98</sup> which has been used in

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would have known was (according to common experience) a plain and strong likelihood that death would result.” *Commonwealth v. Woodward*, 7 Mass. L. Rep. 449, 450, 1997 WL 694119 at \*3 (Mass. Super. Ct. Nov 10, 1997) (emphasis added).

<sup>94</sup> *Id.* at 451, 1997 WL 694119 at \*4 (emphasis in original).

<sup>95</sup> *Id.* at 453, 1997 WL 694119 at \*8.

<sup>96</sup> *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998). See MASS. GEN. L. ch. 278, § 11 (1997); MASS. R. CRIM. P. 25(b)(2) (1997). Under the Massachusetts scheme, a judge may lower a verdict “even if the evidence warrants the jury’s verdict.” *Woodward*, 694 N.E.2d at 1284. The Massachusetts Supreme Court held that the trial judge did not abuse this broad discretion in lowering the jury’s murder conviction to manslaughter even though he found sufficient evidence to support the jury verdict. *Id.* at 1288. The appellate court specifically declined to “conduct an independent analysis” of the evidence, reviewing only whether the judge “abused his discretion or committed an error of law.” *Id.* at 1285. Finding that he did not abuse his discretion, the court allowed his decisions on conviction and sentencing to stand. *Id.* at 1288. Thus, the *Woodward* decision does not have the same effect as reversing a conviction based on insufficient evidence.

The trial judge as well directly ruled that “the verdict . . . was not against the weight of the evidence.” *Woodward*, 7 Mass. L. Rep. at 450, 1997 WL 694119 at \*3. The judge stated that under Massachusetts law, his holding as to the sufficiency of the evidence was a legal one in which he was required to assume that the jury discarded “every scrap” of defense evidence. *Id.* at 449-50, \*2. Looking solely at the prosecution’s evidence, the judge held the jury could reasonably convict the defendant of murder. *Id.* His act of lowering the verdict was a decision that assessed the defendant’s culpability and the broader interests of justice. See *id.* at 451-52, \*5-6.

<sup>97</sup> The “extreme indifference” language was proposed by the Model Penal Code. See MODEL PENAL CODE § 210.2(1)(b). See also 2 LAFAYE & SCOTT, *supra* note 67, § 7.4(a), at 201 (indicating that the Model Penal Code formulation has been “substantially followed by many but not all of the modern codes,” and that a “significant minority” of states do not recognize this offense at all); Jeffrey F. Ghent, Annotation, *Validity and Construction of “Extreme Indifference” Murder Statute*, 7 A.L.R.5TH 758 (1992 & Supp. 1998).

<sup>98</sup> See 2 LAFAYE & SCOTT, *supra* note 67, § 7.4, at 199-206 (discussing depraved heart murder). See also Dale R. Agthe, Annotation, *Validity and Construction of Statute Defin-*

numerous prosecutions for the death of a child. For example, in *State v. Blubaugh*,<sup>99</sup> a fourteen-month-old girl, Faith, was killed by her mother's boyfriend. The court described the conduct of the defendant that resulted in the child's death:

[A witness] testified that when Faith was "fussy," defendant's habit was to place her in the "fetal position"—head in the crook of one elbow, buttocks in the hand of the same arm. He would then put his other arm behind her knees, fold her knees to the chest, compress her body tightly, and hold her eyes shut with his fingertips. If Faith screamed or attempted to arch her body out of this position, [the witness] said that defendant would "squeeze her tighter until her face turned red and then she couldn't breathe very well."<sup>100</sup>

Medical testimony indicated the victim died of brain and vertebral injuries: "Specifically, her skull was fractured, her scalp was bruised in several places, and the instraspinous ligaments in her upper back were torn apart. The cause of Faith's death was anoxia (deprivation of oxygen to the brain) caused either by the skull injury or the back injury."<sup>101</sup>

Analyzing the case under Utah's depraved indifference murder statute,<sup>102</sup> the court held that the jury could reasonably have found that evidence of the defendant's hitting the child or tightly squeezing the child caused her death, and that he knew

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*ing Homicide by Conduct Manifesting "Depraved Indifference,"* 25 A.L.R.4TH 311, §§ 3, 4, 5, 8, and 10[a] (1983 & Supp. 1997) (discussing child abuse prosecutions under the depraved indifference standard).

<sup>99</sup> 904 P.2d 688 (Utah Ct. App. 1995) (depraved heart murder upheld against defendant who killed a 14-month-old child by inflicting blunt force injuries).

<sup>100</sup> *Id.* at 692.

<sup>101</sup> *Id.* at 693.

<sup>102</sup> UTAH CODE ANN. § 76-5-208(1)(c) (1995). The court identified the following elements:

(1) engaging in conduct creating a grave risk of death to another that resulted in the death of that individual (the 'actus reus'); (2) knowing that this conduct or the circumstances surrounding this conduct created a grave risk of death to this individual (the 'mens rea'); and (3) acting 'under circumstances evidencing a depraved indifference to human life'—a qualitative judgment to be made by the jury in determining the extent of the defendant's conduct. It is not a description of the mens rea involved in the commission of the crime, but an evaluation of the actus reus.

*Blubaugh*, 904 P.2d at 694.

this conduct created a grave risk of death. Finally, the court held the jury reasonably could have found the defendant acted with depraved indifference, demonstrating "unmitigated wickedness, extreme inhumanity or . . . a high degree of wantonness."<sup>103</sup>

The final murder doctrine is felony murder—the killing of another while in the course of committing a felony. The offense may be the equivalent of first or second degree murder, depending on the statutory scheme.<sup>104</sup> Prosecutors have long been able to proceed under general felony murder principles in jurisdictions in which underlying felonies are not enumerated. Thus, if a person kills a child while committing a felonious battery, many prosecutors have been able to prosecute the child's death as felony murder.<sup>105</sup>

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<sup>103</sup> *Id.* at 696 (quoting *State v. Bolsinger*, 699 P.2d 1214, 1220 (Utah 1985)). The *Bolsinger* court also described depraved heart murder as "a knowing doing of an uncalled-for act in callous disregard of its likely harmful effect on a victim, which is so heinous as to be equivalent to a 'specific intent' to kill." *Bolsinger*, 699 P.2d at 1220.

<sup>104</sup> See 2 LAFAVE & SCOTT, *supra* note 67, § 7.7(b), at 241.

<sup>105</sup> See, e.g., *Worden v. State*, 603 So. 2d 581 (Fla. Dist. Ct. App. 1992) (nine-month-old beaten to death; underlying offense of aggravated battery); *Isaac v. State*, 440 S.E.2d 175 (Ga. 1994) (felony murder conviction for beating death of three-year-old); *Bethea v. State*, 304 S.E.2d 713 (Ga. 1983) (two-year-old died of blows to the stomach; underlying felony of cruelty to children applied); *Woodrum v. State*, 498 N.E.2d 1318 (Ind. Ct. App. 1986) (two-year-old died of blunt force trauma to the abdomen; battery was the predicate offense to an involuntary manslaughter conviction); *State v. Hughes*, 457 N.W.2d 25, 28-29 (Iowa Ct. App. 1990) (eight-month-old killed by violent shaking; underlying offense of felonious child endangerment); *State v. Pierce*, 488 S.E.2d 576 (N.C. 1997) (two and one-half-year-old killed by violent shaking; underlying offenses of torture and felony child abuse); *State v. Wilcox*, 441 N.W.2d 209 (S.D. 1989) (battered two-year-old died of blows to the abdomen; underlying offense of child abuse), *remanded for resentencing*, *Wilcox v. Leapley*, 488 N.W.2d 654 (S.D. 1992).

Some states have statutes that on first glance appear to be felony murder statutes, but in fact maintain a requirement of proof of the traditional intent elements of murder. For example, Michigan expressly requires proof of malice by both statute and case law. See MICH. COMP. LAWS ANN. § 750.316 (West Supp. 1998) (first degree murder includes murder when committed in the course of child abuse); *People v. Dumas*, 563 N.W.2d 31, 34-35 (Mich. 1997) (discussing the abolition of common law felony murder in Michigan and the retention of an element requiring proof of homicidal intent). Iowa requires proof of "malice aforethought" even under felony murder prosecutions. See *State v. Rhode*, 503 N.W.2d 27, 39 (Iowa Ct. App. 1993), *aff'd*, *Rhode v. Olk-Long*, 77 F.3d 113, 118 (8th Cir. 1996). See also NEV. REV. STAT. § 200.030 (1997).

## C. MANSLAUGHTER

Manslaughter is commonly divided into voluntary and involuntary manslaughter, with few appearances of voluntary manslaughter appearing in child homicide cases since a conviction for voluntary manslaughter typically requires proof of an unlawful killing committed in the heat of passion upon provocation.<sup>106</sup> Courts uniformly hold that a child's behavior cannot provoke a fatal response from a reasonable person.<sup>107</sup> As stated by the Georgia Supreme Court, "[I]t is nearly impossible to conceive of a situation in which a two-year-old child could provoke a reasonable person to kill, requiring a charge on voluntary manslaughter."<sup>108</sup>

A few states define a crime of voluntary manslaughter as an unlawful killing "in the heat of passion" or with "wanton disregard for the value of human life," but do not include an element of provocation. Convictions under this standard are upheld in reported case law.<sup>109</sup>

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<sup>106</sup> 2 LAFAYE & SCOTT, *supra* note 67, § 7.10 at 252.

<sup>107</sup> See, e.g., *Isaac v. State*, 440 S.E.2d 175, 178 (Ga. 1994) (failure to give jury a voluntary manslaughter instruction was not error because a child cannot provoke); *Powers v. State*, 696 N.E.2d 865 (Ind. 1998) (crying of five-month-old cannot constitute provocation); *Patterson v. State*, 532 N.E.2d 604 (Ind. 1988) (child wetting bed was not provocation); *Robinson v. State*, 453 N.E.2d 280 (Ind. 1983) (child wetting the bed "is clearly not sufficient provocation" to justify lowering murder conviction to voluntary manslaughter); *State v. Broseman*, 947 S.W.2d 520, 527 (Mo. Ct. App. 1997) ("We hold categorically and emphatically that an infant's crying is not 'adequate cause' to incite a sudden passion voluntary manslaughter."). Cf. *State v. Taylor*, 452 N.W.2d 605 (Iowa 1990) (error for trial court to find a child provoked defendant's response, but defendant cannot complain of court's error that worked to his advantage since there was adequate evidence to support a second degree murder conviction).

<sup>108</sup> *Isaac*, 440 S.E.2d at 178. In upholding a murder conviction, the court indicated that simply because a person acts in the "heat of passion" does not mean the act cannot constitute murder:

It is a mistake to suppose that if one kill another in the heat of passion, that such killing cannot be murder. Every man is responsible to the community for the control of his temper, and if for some small provocation he permits himself to get into a fury and kills a human being, it is murder. There must be provocation such as justifies the excitement of passion [for the act to constitute voluntary manslaughter].

*Id.* (quoting *Smith v. State*, 49 Ga. 482, 485 (1873)).

<sup>109</sup> See, e.g., *State v. Olson*, 459 N.W.2d 711 (Minn. Ct. App. 1990) (six-week-old shaken baby); *Baker v. State*, 455 So. 2d 770, 773 (Miss. 1984) (killing of five-week-old

A common verdict in child homicide cases is one which requires only proof of a low degree of culpability, most commonly described as criminal negligence, resulting in the crime of involuntary manslaughter.<sup>110</sup> Criminal negligence indicates the actor is engaged in conduct creating a "high degree of risk of death or serious bodily injury," and the actor is aware of the risk.<sup>111</sup> The most common examples of this crime are deaths caused by negligent operation of a motor vehicle or reckless use of a weapon.<sup>112</sup>

When children are victims of fatal child abuse, an involuntary manslaughter conviction is a common result,<sup>113</sup> presumably because juries (and judges) are convinced an adult committed a culpable act but find it hard to believe the person acted with such violence that they knew or should have known their conduct would kill or seriously injure the child.<sup>114</sup> Numerous cases uphold involuntary manslaughter or negligent homicide convictions.<sup>115</sup>

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by infliction of head trauma demonstrated "wanton disregard of the safety of human life"); *State v. Compton*, 701 A.2d 468 (N.J. Super. Ct. App. Div. 1997), *cert. denied*, *State v. Compton*, 707 A.2d 154 (N.J. 1998) (first degree aggravated manslaughter for killing four-month-old son by shaking); *People v. Steinberg*, 595 N.E.2d 845, 847 (N.Y. App. Div. 1992) (first degree manslaughter conviction upheld in beating death of six-year-old; offense defined as causing the death of another while acting with intent to cause serious physical injury); *State v. Wilcox*, 441 N.W.2d 209, 213 (S.D. 1989) (two-year-old killed by blows to the abdomen; the act was committed "in the heat of passion, but in a cruel and unusual manner").

<sup>110</sup> The Model Penal Code classifies the common law crime of involuntary manslaughter as negligent homicide. MODEL PENAL CODE AND COMMENTARIES § 210.4 (1980).

<sup>111</sup> 2 LAFAVE & SCOTT, *supra* note 67, § 7.12(a) at 278.

<sup>112</sup> *Id.* at 281.

<sup>113</sup> Although no statistics are available to confirm involuntary manslaughter as the offense most likely to result in conviction in child homicide cases, many child abuse prosecutors believe this to be the case. See U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 5, at 43 ("The Board heard the testimony of prosecutors who conceded that charges of child homicides, including heinous cases, are routinely reduced to lesser crimes.")

<sup>114</sup> See *Commonwealth v. Woodward*, 694 N.E.2d 1277 (Mass. 1998) (Greaney, J., dissenting in part) ("Here, it appears that the judge identified himself with [the defendant's] cause, compromising the public's confidence in the integrity and impartiality of our courts.")

<sup>115</sup> See *State v. Ojeda*, 810 P.2d 1148 (Idaho Ct. App. 1991) (shaken baby syndrome); *McClaskey v. State*, 540 N.E.2d 41 (Ind. 1989) (shaken baby syndrome; reckless homicide); *People v. Barnwell*, 230 N.W.2d 400 (Mich. Ct. App. 1975) (brain injuries);

#### D. COMMON CHALLENGES ARISING UNDER TRADITIONAL CHARGING STATUTES

##### 1. Lesser Included Offenses

The doctrine of lesser included offenses requires a jury be instructed of any offenses less serious than, but included within, the one charged that could be borne out by the evidence.<sup>116</sup> Determining whether an offense is lesser included within another is a two-step process. The first step is a legal determination of whether all the elements of the lesser offense are included in the greater offense. The second step is a factual determination of whether the evidence in the individual case warrants an instruction.<sup>117</sup>

While some courts hold involuntary manslaughter is not a lesser offense of murder, most courts require an involuntary manslaughter instruction when a defendant is prosecuted for murder.<sup>118</sup> Analysis of an involuntary manslaughter conviction in the context of a child homicide is exemplified by the Mis-

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State v. Frappier, 941 S.W.2d 859 (Mo. Ct. App. 1997) (asphyxiation; involuntary manslaughter); State v. Mergenthaler, 868 P.2d 560, 563 (Mont. 1994) (shaken baby; negligent homicide); People v. Manon, 640 N.Y.S.2d 318 (N.Y. App. Div. 1996) (death caused by dehydration; negligent homicide); People v. Hawkins-Rusch, 623 N.Y.S.2d 465 (N.Y. App. Div. 1995) (shaken baby; negligent homicide); People v. Johnstone, 536 N.Y.S.2d 283 (N.Y. App. Div. 1988) (shaken baby; second degree manslaughter); State v. Morgan, 865 P.2d 1377 (Utah Ct. App. 1993) (lacerated liver; manslaughter). See also *supra* note 109 (citing cases in which murder convictions were lowered to manslaughter).

<sup>116</sup> For an exhaustive discussion of lesser included offenses and associated constitutional doctrines, see James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1 (1995). Shellenberger & Strazzella define the doctrine:

[A] criminal defendant may be convicted at trial of any crime supported by the evidence which is less than, but included within, the offense charged by the prosecution. In a jury trial, the trial judge instructing the jury on all possible verdicts under the charges must include all lesser included offenses warranted by the evidence.

*Id.* at 6 (citations omitted).

<sup>117</sup> See *id.* at 6-13, for a discussion of the intricacies of the doctrine.

<sup>118</sup> See, e.g., Allen v. State, 546 So. 2d 1009, 1010 (Ala. Crim. App. 1988) (error for court to refuse a manslaughter instruction because the evidence could have supported a theory of reckless manslaughter). Cf. State v. Tamalini, 953 P.2d 450, 452-53 (Wash. 1998) (holding first and second degree manslaughter not lesser included offenses of felony murder).

souri Court of Appeals in *State v. Ponder*.<sup>119</sup> In *Ponder*, a two and one-half-year-old boy died from brain injuries inflicted either by a violent shaking with impact or a blow to the head. Although the defendant was charged with murder, the trial court directed the jury to consider only the lesser charge of involuntary manslaughter, and while instructing the jury on the elements of the offense stated:

[A] person acts recklessly as to causing the death of another person when there is a substantial and unjustifiable risk that he will cause death and he consciously disregards that risk, and such disregard is a gross deviation from what a reasonable person would do in the circumstances.<sup>120</sup>

The defendant argued that, due to the violent nature of the prosecution's theory of the case, the jury should not be charged as to a recklessness standard: "In Defendant's words, 'One cannot beat a child "recklessly" in the legal sense.'"<sup>121</sup> The defendant sought dismissal on the grounds of insufficient evidence for either murder or manslaughter. The court rejected the defendant's argument, holding that the jury reasonably could have inferred that the defendant became frustrated with the child, hit him on the head or shook him, and in so doing consciously disregarded a substantial and unjustifiable risk that he would cause the child's death, but did not intend to cause the death or to inflict serious bodily injury.<sup>122</sup>

An instruction on a lesser offense is not necessary unless evidence exists to support the lesser offense. Thus, in *State v. Williams*,<sup>123</sup> the defendant was convicted of first degree felony murder and the Kansas Supreme Court held evidence of the underlying felony child abuse was so strong that it was unnecessary to instruct on the lesser offenses of unintentional second degree murder or involuntary manslaughter.<sup>124</sup> The victim in

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<sup>119</sup> 950 S.W.2d 900 (Mo. Ct. App. 1997).

<sup>120</sup> *Id.* at 907 (citation omitted).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 909.

<sup>123</sup> 947 P.2d 25 (Kan. 1997).

<sup>124</sup> *Id.* at 28-29. See also *People v. Ward*, 463 N.E.2d 696, 746-47 (Ill. 1984) (no error for court to refuse involuntary manslaughter instruction since the severity of the beat-

*Williams* was a three-year-old girl who weighed only twenty-three pounds and died of massive head injuries which physicians indicated were caused by "severe repetitive beating and shaking in a violent manner."<sup>125</sup> She had bruises on her forehead and the back of her head, a five inch fracture to the back of her skull, and additional older bruises and fractures. The defendant admitted to shaking the child but denied that the shaking killed her. The court held that when a person is convicted of felony murder, an instruction on a lesser included offense is necessary only when the evidence of the underlying felony is weak or inconclusive. The court found that the evidence of the underlying felony of child abuse in this case was strong and so an instruction on unintentional murder or involuntary manslaughter was not required.

A request for a lesser included instruction may be made by either the defendant or the prosecutor, and, so long as it is supported by the evidence, the request should be granted. The defense strategy unsuccessfully attempted in *Commonwealth v. Woodward*<sup>126</sup> demonstrates this doctrine in a somewhat unique

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ing demonstrated the killing was not simply a reckless act); *Anderson v. State*, 681 N.E.2d 703, 709 (Ind. 1997) (where defendant severely beat a 21-month-old child to death, "the jury could not conclude that the lesser offense was committed [involuntary manslaughter or negligent homicide] but not the greater"); *Martin v. State*, 535 N.E.2d 493, 496 (Ind. 1989) (head injuries; involuntary manslaughter instruction not necessary when defense is accident); *Wedmore v. State*, 519 N.E.2d 546, 546-47, 549 (Ind. 1988) (head injuries; involuntary manslaughter instruction not required); *State v. Carr*, 963 P.2d 421, 432 (Kan. 1998) (instruction on lesser degrees of homicide not required when there was no evidence the injuries were not the product of intentional battering or shaking); *State v. Altum*, 941 P.2d 1348, 1352 (Kan. 1997) (instruction for second-degree murder and involuntary manslaughter not required in prosecution for first degree felony murder when facts indicated defendant killed 14-month-old child either by shaking or by violent blows to the head); *State v. Ballenger*, 738 P.2d 1291, 1294 (Mont. 1987) (instruction for aggravated assault or felony assault not required when defendant was convicted of deliberate homicide after beating child to death); *Barcenes v. State*, 940 S.W.2d 739, 746-47 (Tex. Ct. App. 1997) (instruction on involuntary manslaughter and negligent homicide not required when victim died of massive head injuries and there was no evidence of "conscious risk taking" by defendant to justify an instruction on the lesser offenses). *But see Baker v. State*, 569 N.E.2d 369, 372 (Ind. Ct. App. 1991) (court distinguished prior case law on the grounds that the facts of this case—a shaken baby case—could allow an inference that the act was intended only to hurt the child, and therefore an involuntary manslaughter instruction was necessary).

<sup>125</sup> *Williams*, 947 P.2d at 27.

<sup>126</sup> 694 N.E.2d 1277 (Mass. 1998).



manner. Louise Woodward was indicted for murder and at the close of the evidence the judge gave first and second degree murder instructions to the jury. The prosecution also requested an instruction on involuntary manslaughter but the defendant objected, requesting that the jury *not* be instructed on the lesser offense.<sup>127</sup> The trial judge accepted the defense argument and refused to give the lesser offense even though the defendant's mental state was a disputed fact.<sup>128</sup>

The state Supreme Court found this to be error, holding that so long as the evidence warrants the instruction, the state has a right to a jury instruction on lesser included offenses regardless of whether a defendant wants the instruction.<sup>129</sup> In fact, the court stated it could find no jurisdiction that allows a defendant "to veto a lesser included offense instruction properly requested by the prosecution."<sup>130</sup> The *Woodward* dissent was even more direct in its objection to the trial judge's ruling:

Woodward pressed for those choices despite having full knowledge that her strategic decision might be rejected by the jury. Woodward's tactics, with the judge's approbation, transformed the trial from a search for the truth to a high stakes game of chance. In a phrase, Woodward brought the results on herself. There is much force in the Commonwealth's argument that the judge's actions appear 'to have manipulated the trial's outcome and marginalized the jury, all to Woodward's benefit.'<sup>131</sup>

## 2. Merger

States that do not specify the underlying felonies required to support a conviction of felony murder may encounter the merger doctrine. Some courts unhappy with broad felony murder statutes or common law definitions have added limitations to avoid illogical results. For example, if taken literally, felony murder statutes would allow elevation of manslaughter to felony murder because the underlying offense of manslaughter is a

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<sup>127</sup> *Id.* at 1282.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.* at 1283.

<sup>130</sup> *Id.* at 1283 n.8 (listing cases).

<sup>131</sup> *Id.* at 1299 (Greaney, J., dissenting in part) (quoting the majority opinion, *id.* at 1288, which was restating a prosecution argument).

felony. To avoid this result, courts have imposed two requirements. First, the underlying felony must be inherently dangerous. Second, the underlying felony must be sufficiently distinct from homicide so as to constitute a separate offense. If the underlying felony is not sufficiently distinct, it merges with felony murder and thus cannot act as the underlying offense.<sup>132</sup>

In child abuse cases, the question has arisen whether felony child abuse is sufficiently distinct from homicide to avoid the merger doctrine.<sup>133</sup> In *State v. Lucas*,<sup>134</sup> the Kansas Supreme Court held felony child abuse was not sufficiently distinct and, therefore, it merged with felony murder. The court held that "when a child dies from an act of assaultive conduct, evidence of prior acts of abuse cannot be used to escalate the charge into felony murder. Such acts could be used as additional counts of abuse of a child but the prosecutorial device of charging multiple acts of abuse of a child in one count cannot bootstrap into a felony-murder charge."<sup>135</sup>

After the Kansas legislature amended the statute to clarify that the offenses were separate,<sup>136</sup> the statute was once again challenged, and the court upheld use of child abuse as the felony underlying the state's felony murder statute.<sup>137</sup> Once again the statute was attacked, this time on the grounds that it violated double jeopardy by imposing two separate punishments for the

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<sup>132</sup> See generally *State v. Campos*, 921 P.2d 1266 (N.M. 1996) (discussing the approaches of various jurisdictions). The merger doctrine also appears when a person is convicted both of a homicide offense other than felony murder and a felony child abuse offense. The question in such cases is whether the two offenses merge for purposes of double jeopardy. Courts differ in their conclusions, but even those applying a merger doctrine in these circumstances simply vacate the underlying felony child abuse conviction—the homicide conviction stands. See *White v. State*, 569 A.2d 1271 (Md. 1990). See also *infra* notes 136-40 and accompanying text.

<sup>133</sup> See *Massie v. State*, 553 P.2d 186, 191 (Okla. Crim. App. 1976) (felony of child beating merged into homicide). But see *Schultz v. State*, 749 P.2d 559, 561-62 (Okla. Crim. App. 1988) (finding legislative amendment to child homicide statute changed the *Massie* opinion and eliminated the merger problem). Cf. *State v. Rhode*, 503 N.W.2d 27, 40 (Iowa Ct. App. 1993) (rejecting the merger doctrine altogether in child homicide prosecution).

<sup>134</sup> 759 P.2d 90 (Kan. 1988).

<sup>135</sup> *Id.* at 99.

<sup>136</sup> KAN. STAT. ANN. §§ 21-3401, 21-3436 (1995).

<sup>137</sup> *State v. Hupp*, 809 P.2d 1207 (Kan. 1991).

same act. In *State v. Smallwood*,<sup>138</sup> the Kansas Supreme Court agreed, in part, holding that imposition of punishment for both child homicide and the underlying felony child abuse violates double jeopardy when there is only one act.<sup>139</sup> However, the court required only that the lesser conviction be dismissed since the language of the statute made clear that the legislature intended a person who kills a child while committing child abuse to be convicted of murder.<sup>140</sup>

### 3. *Accomplice Liability and Failure to Protect*

In some cases there arises the difficult question of the identity of the person who caused the fatal injuries. Especially when multiple caretakers are home during the incident, there may be no means of proving which caretaker inflicted the injuries.<sup>141</sup> In other cases both caretakers can be charged, one as the principal and one as an accessory.<sup>142</sup>

Some jurisdictions allow the prosecution of a caretaker who does not inflict the blows on the basis of the caretaker's legal duty to protect the child and the failure of the caretaker to remove the child from an abusive environment. For example, in *Boone v. State*,<sup>143</sup> the mother of a four-year-old was convicted of second degree murder for failing to stop beatings of her son by her boyfriend.<sup>144</sup> The court agreed with the prosecution that the

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<sup>138</sup> 955 P.2d 1209 (Kan. 1998).

<sup>139</sup> *Id.* at 1228.

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

<sup>141</sup> For example, in *People v. Wong*, 619 N.E.2d 377 (N.Y. 1993), a husband and wife were providing 24-hour child care for a three-month-old child. The child died during the night while in the care of the husband and wife, and medical evidence indicated the child was a victim of violent shaking. The prosecution charged both husband and wife with homicide and endangering the welfare of a child on the theory that one of them committed the act and the other failed to obtain medical care. While agreeing that this theory was a plausible one, the appellate court reversed, finding insufficient evidence for convicting the "passive" defendant for failing to seek medical care. *Id.* at 381-82. Since the other actor could not be determined, the court reversed both convictions. *Id.* at 382-83. See also *Johnson v. State*, 506 S.E.2d 374 (Ga. 1998) (evidence failed to support felony murder conviction when multiple people had access to the child).

<sup>142</sup> See AMERICAN PROSECUTORS RESEARCH INSTITUTE, *supra* note 8, at 404-07.

<sup>143</sup> 668 S.W.2d 17 (Ark. 1984).

<sup>144</sup> *Id.* at 18-19.

mother had a legal duty to protect her child from abuse and that, by failing to protect, the mother caused the death "under circumstances manifesting extreme indifference to the value of human life."<sup>145</sup> The numerous social and policy issues raised by prosecution in such circumstances are beyond the scope of this article.<sup>146</sup> To the extent that it raises a pertinent issue in the prosecution of child homicide, it is appropriately addressed by legislation expressing a state's policy.<sup>147</sup>

#### 4. *Corpus Delicti*

The doctrine of corpus delicti is intended to "reduc[e] the possibility of punishing a person for a crime which was never in fact committed"<sup>148</sup> by requiring proof of a criminal act and criminal agency. That is, there must be evidence that "one person was killed, and another person killed him."<sup>149</sup> The corpus delicti doctrine commonly appears in cases in which the cause of a child's death cannot be definitively proven by medical evidence. The argument is made that, absent conclusive proof of the cause of death or absent categorical exclusion of all other possible causes of death, the criminal act is not proven. Most courts reject these arguments. Thus, if a child dies of severe head trauma, the doctrine of corpus delicti requires only suffi-

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<sup>145</sup> *Id.* at 19-20. See also *State v. Miranda*, 715 A.2d 680, 685 (Conn. 1998) (boyfriend who established a "family-like" relationship with mother and two children convicted of first degree assault for failing to protect the children from the mother's abuse); *Lane v. Commonwealth*, 956 S.W.2d 874 (Ky. 1997) (mother has a legal duty to protect child from physical injury); *Labastida v. State*, 931 P.2d 1334, 1339 (Nev. 1996) (mother convicted of second degree murder for failing to protect seven-week-old).

<sup>146</sup> For discussion of problems arising in prosecuting a parent for failing to protect a child from another parent or caretaker, see V. Pualani Enos, *Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children*, 19 HARV. WOMEN'S L.J. 229 (1996); Heather R. Skinazi, Comment, *Not Just a "Conjured Afterthought": Using Duress as a Defense for Battered Women Who "Fail to Protect"*, 85 CAL. L. REV. 993 (1997); Nancy A. Tanck, Note, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse*, 1987 WIS. L. REV. 659 (1987).

<sup>147</sup> See S.C. CODE ANN. § 16-3-85(A) (Law. Co-op. Supp. 1998).

<sup>148</sup> 1 LAFAVE & SCOTT, *supra* note 67, § 1.4(b), at 24.

<sup>149</sup> *State v. Morton*, 638 P.2d 928, 932 (Kan. 1982) (quoting *State v. Doyle*, 441 P.2d 846 (Kan. 1968)). See also *United States v. Woods*, 484 F.2d 127 (4th Cir. 1973) (evidence that defendant killed seven previous children sufficient to prove the corpus delicti in prosecution for the murder of an eight-month-old foster child).

cient evidence which tends to prove a criminal act, but need not affirmatively show that no possible accident could have caused the injuries.<sup>150</sup>

Corpus delicti arguments also are made in two other circumstances, each of which arises occasionally in the prosecution of child homicide. First are cases in which a newborn is killed by a caretaker and the body of the child is not recovered. Although the common law precluded prosecution when no body was found, the modern practice does not automatically preclude prosecution on these grounds.<sup>151</sup> Another category of cases are those in which a defendant confesses to a crime. The common law rule precluded conviction based on a confession alone, requiring some evidence independent of the confession to corroborate the occurrence of a crime. Although federal courts simply look to whether the circumstances of the confession indicate trustworthiness,<sup>152</sup> some state courts retain the common

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<sup>150</sup> See *State v. Morton*, 638 P.2d 928, 932 (Kan. 1982) (rejecting the argument that the state "must completely disprove the possibility of death by natural or accidental causes"); *State v. Perdue*, 357 S.E.2d 345 (N.C. 1987) (rejecting the argument that a conviction must be reversed because the state failed to expressly preclude accident as the cause of death); *State v. James*, 819 P.2d 781 (Utah 1991) (inability to prove cause of death through autopsy does not preclude finding of criminal act). *But see State v. May*, 689 S.W.2d 732, 736 (Mo. Ct. App. 1985) (manslaughter conviction reversed because prosecution witnesses did not categorically exclude a fall as a cause of death of an 11-month-old, nor did the prosecution adequately prove the defendant was the criminal agent); *State v. Allen*, 839 P.2d 291 (Utah 1992) (evidence of multiple injuries to child sufficient to corroborate confession even though the child likely died from suffocation for which there was no conclusive medical evidence). *Cf. State v. Cunningham*, 598 P.2d 756, 773-74 (Wash. Ct. App. 1979) (evidence that child was subjected to physical abuse over a period of time corroborates confession even if numerous persons could have inflicted the injuries), *rev'd on other grounds*, 613 P.2d 1139 (Wash. 1980).

<sup>151</sup> See *Jones v. State*, 701 N.E.2d 863 (Ind. 1998) (production of body not required when circumstantial evidence shows a death occurred; evidence sufficient to corroborate confession in murder of four-year-old); *State v. Nicely*, 529 N.E.2d 1236 (Ohio 1988) (circumstantial evidence alone may be sufficient to support murder conviction even in the absence of a body, a confession, or other direct evidence of death). See also 1 LAFAYE & SCOTT, *supra* note 67, § 1.4(b), at 2 n.19 (Supp. 1998); Rollin M. Perkins, *The Corpus Delicti of Murder*, 48 VA. L. REV. 173, 189 (1962) (discussing neonaticide no body cases).

<sup>152</sup> See *Opper v. United States*, 348 U.S. 84 (1954).

law view and require independent corroboration of the confession.<sup>153</sup>

Finally, most courts hold that a conviction will not be sustained based on evidence of mere presence at the scene of a crime or mere opportunity to commit the crime. Thus, evidence that a parent was home during the time at which a child was killed is not, without more, sufficient to prove the person killed the child.

However, "more than a mere opportunity" exists when a person has sole or exclusive custody. For example, in *Woodrum v. State*,<sup>154</sup> the two-year-old victim was picked up from a child care center by her mother's boyfriend. Substantial evidence indicated that the child was healthy while at child care and she appeared terrified when the defendant picked her up.<sup>155</sup> Defendant had exclusive custody of the child until approximately one and one-half hours later when he picked up the child's mother and they went directly to the hospital. The defendant gave a false history to the doctors, causing a forty-five minute delay before the doctors were able to care for the actual injuries. The child died from internal injuries caused by blunt force trauma to her abdomen. At trial, conflicting medical testimony indicated that the child's injuries could have occurred while she was in defendant's custody or sometime earlier. The court held that the circumstantial evidence as a whole demonstrated defendant had "more than a mere opportunity."<sup>156</sup> In cases such as this, the court held, "exclusive opportunity" may be "almost conclusive evidence of guilt."<sup>157</sup>

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<sup>153</sup> See *People v. McMahan*, 548 N.W.2d 199 (Mich. 1996) (reaffirming the common law corpus delicti requirement that a confession be corroborated by independent evidence); *State v. Aten*, 927 P.2d 210, 224 (Wash. 1996) (defendant admitted placing her hand over child's mouth but inconclusive medical evidence failed to corroborate confession).

<sup>154</sup> 498 N.E.2d 1318 (Ind. Ct. App. 1986).

<sup>155</sup> *Id.* at 1323-24.

<sup>156</sup> *Id.* at 1324.

<sup>157</sup> *Id.* Cf. *State v. May*, 689 S.W.2d 732, 737 (Mo. Ct. App. 1985) (rejecting prosecution's argument that defendant was present and had the opportunity to commit the offense).

### 5. *Proof of Intent Based on Circumstantial Evidence*

Rarely does direct evidence of a person's intent exist in a criminal prosecution. Rather, a defendant's state of mind must be inferred from circumstantial evidence. Proof of intent by circumstantial evidence in child homicide cases is likewise necessary since these crimes are nearly always committed when the defendant is alone with the child; only on rare occasions will a defendant give a full confession to the police or make direct statements of his or her intent. As stated by an Illinois appellate court: "Not only *can* circumstantial evidence be used to prove knowledge, but absent evidence of an admission by a defendant, it is the *only* way to prove knowledge."<sup>158</sup> Courts look to several specific factors in analyzing a defendant's intent in child homicide prosecutions.

*The serious nature of the injuries.* Many courts recognize the serious nature of a child's injuries is, by itself, evidence that the person who caused the injuries knew or should have known he was inflicting great bodily harm. Particularly in cases of a violent shaking or a beating, medical testimony as to the violent nature of the act tends to prove the defendant's state of mind.<sup>159</sup> As stated by a Missouri appellate court in a shaken baby case, "The serious nature of [the victim's] brain injury is, in and of itself, a basis for inferring that [defendant] knew that his actions would be practically certain to result in [the victim's] death."<sup>160</sup>

*Admissions.* Prompt questioning of a suspect at times produces partial or complete admissions of the conduct alleged. For example, judicial opinions discussing cases in which an infant was shaken report a variety of admissions, including admissions to throwing or squeezing a child, shaking a child "mildly" in anger, and shaking to revive a child.<sup>161</sup> A partial admission of

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<sup>158</sup> *People v. Rader*, 651 N.E.2d 258, 265 (Ill. Ct. App. 1995) (emphasis added).

<sup>159</sup> *See People v. Ripley*, 685 N.E.2d 362, 365-66 (Ill. Ct. App. 1997) (finding the violent nature of shaking, in combination with other facts, to support a finding that defendant "must have known about the substantial probability of causing injury to the victim" in aggravated battery prosecution).

<sup>160</sup> *State v. Broseman*, 947 S.W.2d 520, 524 (Mo. Ct. App. 1997). *See also* 1 MYERS, *supra* note 67, § 4.36, at 380 n.472.

<sup>161</sup> *See, e.g., Allen v. State*, 546 So. 2d 1009, 1011 (Ala. Crim. App. 1988) (defendant admitted that at times he would throw the nine-month-old victim in the air and fail to

shaking or otherwise injuring a child helps establish the act occurred, and subsequent medical testimony demonstrates the degree to which the defendant's explanation is consistent with the degree of injury inflicted upon the child.<sup>162</sup>

*Failure to seek medical care.* A defendant's failure to promptly seek medical attention for the child or failure to give medical professionals a full and accurate history provides evidence of the defendant's mental state. For example, if a defendant gives a fictitious history to emergency medical personnel and then later admits that he did, in fact, shake or strike the child, the prosecutor may use the initial deceit to show the defendant's consciousness of guilt or to show the defendant's willingness to further endanger the child's welfare by withholding information vital to the child's treatment.<sup>163</sup>

*Prior injuries.* Evidence of prior injuries may be admissible not only to prove that an incident was not an accident, but also to affirmatively prove the defendant had the requisite mental state for the crime charged.<sup>164</sup> For example, in *State v. Candela*,<sup>165</sup> a four and one-half-year-old child was severely beaten, and the child died from head injuries inflicted by her father's girlfriend. At trial, the state introduced evidence of bruises that existed before the fatal beating. The Missouri Court of Appeals found that a "multitude" of prior cases had upheld the admission of

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catch him); *People v. Oaks*, 662 N.E.2d 1328, 1334-35 (Ill. 1996) (videotaped statement of defendant admitting to throwing the child in anger); *People v. Ripley*, 685 N.E.2d 362, 364 (Ill. App. Ct. 1997) (defendant admitted shaking the child to "get him to settle down"); *People v. Biggs*, 509 N.W.2d 803, 804 (Mich. Ct. App. 1993) (defendant admitted smothering child with a pillow); *State v. Broseman*, 947 S.W.2d 520, 522 (Mo. Ct. App. 1997) (defendant admitted violently shaking his son).

<sup>162</sup> See *United States v. Curry*, 31 M.J. 359, 372 (C.M.A. 1990).

<sup>163</sup> See 1 MYERS, *supra* note 67, § 4.36, at 381-82.

<sup>164</sup> Discussions of prior evidence of physical abuse often arise in the context of the widely recognized medical diagnosis of battered child syndrome, which is the "unexplained or inappropriately explained physical trauma and other manifestations of severe, repeated physical abuse of children, usually by a parent." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1625 (28th ed. 1994) (cited in 1 MYERS, *supra* note 67, § 4.6, at 305 n. 63). When an abused child suffers from the condition, expert testimony on battered child syndrome is admissible in nearly every jurisdiction. 1 MYERS, *supra* note 67, § 4.6, at 306. Evidence also is admissible as prior act evidence to show a child's injuries were not accidental. *Id.* § 4.6, at 307. For extensive discussion of these issues, see *id.* at § 4.6.

<sup>165</sup> 929 S.W.2d 852 (Mo. Ct. App. 1996).



prior misconduct evidence as evidence of "motive, intent, or absence of mistake or accident," and concluded: "The evidence of abuse adduced at trial in this case was admissible to show an intent on defendant's part to cause serious physical injury to [the victim], and to refute defendant's claim that [the victim's] injuries were accidental."<sup>166</sup>

*First degree murder cases.* A relatively formalized list of factors has been examined by numerous courts to assist in determining premeditation in first degree murder prosecutions: "(1) the brutality of the attack, and whether more than one blow was struck; (2) the disparity in size and strength between the defendant and the victim; (3) the concealment of the victim's body; (4) the defendant's lack of remorse and efforts to avoid detection; and (5) motive."<sup>167</sup> While excessive focus on the nature of the attack itself is disapproved by commentators, these factors are nonetheless followed in many jurisdictions to assess a defendant's premeditation.<sup>168</sup>

#### IV. SPECIAL CHILD HOMICIDE STATUTES

##### A. TYPES OF STATUTES

Not every statute that increases punishment for the death of a child is a child homicide statute. For purposes of this article, a statute must meet three criteria.<sup>169</sup> First, the statute must be a homicide statute. Statutes increasing penalties for felony battery or child abuse when the victim dies are excluded because they are not homicide statutes. For example, a felony child abuse statute in Colorado increases punishment based on a combination of the actor's intent and the degree of injury in-

<sup>166</sup> *Id.* at 871.

<sup>167</sup> *Archie v. Commonwealth*, 420 S.E.2d 718, 721 (Va. Ct. App. 1992) (citing *Eperly v. Commonwealth*, 294 S.E.2d 882, 892-93 (Va. 1982)).

<sup>168</sup> See 2 LAFAYE & SCOTT, *supra* note 67, § 7.7(a), at 240.

<sup>169</sup> Because Oregon and Louisiana have created a more comprehensive approach toward the punishment of child homicide, I have included all relevant child-related homicide offenses in the appendix regardless of whether each component qualifies as a child homicide statute. See *infra* notes 216-25 and accompanying text for a discussion of these states.

flicted upon a child.<sup>170</sup> While these laws may have beneficial effect, they do not result in a homicide conviction for a person who kills a child.

Second, a child homicide statute penalizes the killing of a child by a person committing an act of physical abuse or battery upon a child. Laws enhancing the offense or penalty when a person kills a child while in the course of committing a sexual offense against the child, kidnapping a child, or other offenses against a child are not included.<sup>171</sup> These offenses are essentially aggravated murder offenses, directed at everything *except* the physical abuse of a child. Similarly excluded are statutes addressing the death of a child resulting from an act of omission such as neglect, failure to protect, and failure to supervise. Most child homicide statutes do not address acts of omission, and the scope and complexity of issues raised by imposing criminal culpability for acts of omission precludes thorough treatment in this article.<sup>172</sup>

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<sup>170</sup> See COLO. REV. STAT. § 18-6-401(7)(a) & (b) (1998). See also MD. ANN. CODE art. 27, § 35C (1996 & Supp. 1998).

<sup>171</sup> See, e.g., IND. CODE ANN. § 35-42-1-1 (West 1998) (child molesting and criminal deviant conduct listed as underlying felonies to felony murder); NEV. REV. STAT. ANN. § 200.030 (1997) (sexual assault, sexual abuse of a child and sexual molestation of a child under the age of 14 years listed as underlying felonies to felony murder).

<sup>172</sup> Child deaths caused by a caretaker's failure to adequately supervise a child or adequately care for a child's physical needs raise extremely difficult issues of criminal culpability. The difficulties lie in the manner in which to codify an offense that distinguishes cases deserving criminal punishment. Deaths of children range from the clear culpability of a parent with adequate means who fails to feed a child to cases where a young child falls into a swimming pool or dies from a fire when left unattended. Occasional reports of parents whose children die locked in a car on a summer day highlight the difficulties of imposing criminal liability. See, e.g., Nicole Marshall, *Toddler Dies of Heat Stroke*, TULSA TRIBUNE & TULSA WORLD, Oct. 2, 1997, at A1 (describing father who forgot child in back seat of his car; although arrested on a manslaughter charge, a law enforcement official was quoted as saying: "We certainly don't intend to try to lock this gentleman up for a long time, because I'm sure he's going through his own phase of punishment at this time."); The Associated Press, *Baby Dies After Father Forgets He Left Her in the Car*, L.A. TIMES, June 27, 1997, at A3 (describing death of child in California who was left in the back seat of a car after the father forgot to drop the child at child care on his way to work); Mike Rodman, *Charge Debated in Heat Deaths*, DALLAS MORNING NEWS, May 3, 1998, at 49A (describing death of two children intentionally locked in a car by the father of one of the children and a friend of the father while the two adults lingered nearby for eight hours).

For an example of a child homicide statute addressing criminal neglect, see the Oregon child homicide statutes that include as a separate offense causing the death

Third, a child homicide statute does not require proof that the actor intended to kill or should have known an act would kill a child. Thus, statutes establishing the age of a child as an aggravating factor to a murder charge are not included when the element of a "knowing or purposeful" killing remains.<sup>173</sup> Likewise, statutes addressing particular acts (such as murder by torture or starvation) that require proof of an intent to commit the particular act are not included.<sup>174</sup> While deserving their own policy debates, the issues raised by these statutes are separate from the primary concern in this article of the difficulty of proving intent in cases of children who are killed from assaultive acts.

Statutes meeting the above definition fall into two broad categories. First are felony murder statutes which list as an underlying felony a child abuse offense.<sup>175</sup> The elements of the

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of a child by neglect or maltreatment. OR. REV. STAT. ANN. §§ 163.115(1)(c), 163.118(1)(c), 163.125(1)(c) (Supp. 1998).

<sup>173</sup> See, e.g., ALA. CODE § 13A-5-40(15) (1994) (capital offense if child under 14 is murdered); ARK. CODE ANN. § 5-10-102 (1997) (first degree murder to knowingly cause the death of a child under 14); COLO. REV. STAT. ANN. § 18-3-102(f) (1997) (first degree murder if a person in a position of trust with respect to the victim knowingly causes the death of the child under 12); CONN. GEN. STAT. ANN. § 53a-54b (West Supp. 1998) (capital offense if child under 16 murdered); N.J. STAT. ANN. § 2C:11-3(b)(3)(a) (West Supp. 1998) (increased penalty if murder victim is under 14); TEX. PENAL CODE ANN. § 19.03(a)(8) (West 1994) (capital murder if child under six murdered).

The Arkansas and Colorado statutes could be classified as child homicide statutes in that they eliminate any requirement of premeditation and deliberation for first degree murder. However, I do not include these as child homicide statutes since they retain a requirement of proof that the defendant knowingly caused the death of a child.

<sup>174</sup> See, e.g., 720 ILL. COMP. STAT. 5/9-1(b)(7) (West 1997) (capital offense if a child is under 12 and death results from exceptionally brutal or heinous behavior indicative of wanton cruelty).

<sup>175</sup> See ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 1997) (underlying felony: child abuse); FLA. STAT. ANN. § 782.04(1)(a)(2)(h) (West Supp. 1999) (underlying felony: aggravated child abuse); IDAHO CODE § 18.4003(d) (1997) (underlying felony: aggravated battery on a child under 12); KAN. STAT. ANN. § 21-3401(b) (1995) (underlying felony: abuse of a child); LA. REV. STAT. ANN. § 14:30.1(A)(2)(b) (West Supp. 1999) (underlying felony: cruelty to juveniles); MISS. CODE ANN. § 97-3-19(2)(f) (Supp. 1998) (underlying felonies: felonious child abuse or battery of a child); N.D. CENT. CODE § 12.1-16-01(1)(c) (1997) (underlying felony: abuse or neglect of a child); OR. REV. STAT. ANN. § 163.115(1)(b)(J) (Supp. 1998) (underlying felony: first or second degree assault of a child under 14); TENN. CODE ANN. § 39-13-202(a)(2) (Supp. 1998) (underlying felonies: aggravated child abuse or aggravated

statutes are simple: the killing of a child in the course of committing felony child abuse upon the child. Variations among these statutes are minimal and largely inconsequential. A few states expressly indicate that only the mental state accompanying the underlying felony need be proven,<sup>176</sup> and other legislatures have inserted language to address issues arising under the case law of that state.<sup>177</sup> On the whole, however, a felony murder statute simply adds a state's felony child abuse offense to the list of felonies underlying an existing felony murder statute.

Utah employs the felony murder concept to develop several different child homicide offenses, with the degree of seriousness of the homicide offense dependent on the level of culpability attached to the underlying offense. The underlying statute divides child abuse into two separate offenses: infliction of physical injury upon a child and infliction of serious physical injury upon a child.<sup>178</sup> The penalty attached to the murder de-

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child neglect); UTAH CODE ANN. § 76-5-203 (Supp. 1998) (underlying felonies: child abuse).

I do not include states identifying *any* felony as one which underlies felony murder, although the practical effect may be the same if prosecutors make use of the statute. See MO. REV. STAT. § 565.021 (1997); N.M. STAT. ANN. § 30-2-1 (Michie 1997); S.D. CODIFIED LAWS § 22-16-9 (Michie 1997). Nor do I attempt to identify those states in which a felonious battery serves as an underlying felony. As discussed throughout this article, the recurrent problem with prosecuting child homicide has been that common law doctrines have *not* been employed to obtain convictions proportionate to the crime. See *supra* notes 10-13 and accompanying text. Exceptions to the rule, of course, exist.

<sup>176</sup> See, e.g., LA. REV. STAT. ANN. § 14:30.1(A)(2)(b) (West Supp. 1999).

<sup>177</sup> See, e.g., KAN. STAT. ANN. § 21-3436 (1995) (including language to address case law applying the merger doctrine to prior felony murder child abuse cases).

<sup>178</sup> As defined in the statute, physical injury means:

[A]n injury to or condition of a child which impairs the physical condition of the child, including: (i) a bruise or other contusion of the skin; (ii) a minor laceration or abrasion; (iii) failure to thrive or malnutrition; or (iv) any other condition which imperils the child's health or welfare and which is not a serious physical injury as defined in Subsection (d).

UTAH CODE ANN. § 76-5-109(1)(c) (Supp. 1998). Serious physical injury is defined as:

[A]ny physical injury or set of injuries which seriously impairs the child's health, or which involves physical torture or causes serious emotional harm to the child, or which involves a substantial risk of death to the child, including: (i) fracture of any bone or bones; (ii) intracranial bleeding, swelling or contusion of the brain, whether caused

depends on whether the underlying child abuse was committed intentionally or knowingly, recklessly, or with criminal negligence. Thus, the most serious offense is the intentional or knowing infliction of serious physical injury upon a child which results in the child's death.<sup>179</sup> The next most serious offenses are the reckless or criminally negligent infliction of serious physical injury which results in death.<sup>180</sup> The least serious offense is the intentional, knowing, reckless, or criminally negligent infliction of physical injury upon a child which leads to the child's death.<sup>181</sup> Using the felony murder model as a base, the Utah statutes connect the culpability in the commission of the underlying offense to the punishment resulting from the homicide offense.

In contrast to felony murder statutes which merely expand an existing definition of murder, a homicide by abuse statute is typically a completely separate offense, unrelated to other homicide offenses. A common construction of a child homicide statute is exemplified by the South Carolina statute: "A person is guilty of homicide by child abuse who . . . causes the death of a child under the age of eleven while committing child abuse or neglect and the death occurs under circumstances manifesting extreme indifference to human life."<sup>182</sup>

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by blows, shaking, or causing the child's head to impact with an object or surface; (iii) any burn, including burns inflicted by hot water, or those caused by placing a hot object upon the skin or body of the child; (iv) any injury caused by use of a dangerous weapon as defined in Section 76-1-601; (v) any combination of two or more physical injuries inflicted by the same person, either at the same time or on different occasions; (vi) any damage to internal organs of the body; (vii) any conduct toward a child which results in severe emotional harm, severe developmental delay or retardation, or severe impairment of the child's ability to function; (viii) any injury which creates a permanent disfigurement or protracted loss or impairment of the function of a bodily member, limb, or organ; (ix) any conduct which causes a child to cease breathing, even if resuscitation is successful following the conduct; or (x) any conduct which results in starvation or failure to thrive or malnutrition that jeopardizes the child's life.

*Id.* § 76-5-109(1)(d) (Supp. 1998). The child abuse offense also applies to one who, "having the care or custody of such child, causes or permits another to inflict physical injury upon a child." *Id.* § 76-5-109(2)(a) (Supp. 1998).

<sup>179</sup> *Id.* § 76-5-203(1)(d) (Supp. 1998). Utah also has a capital murder offense applicable when a person intentionally or knowingly causes the death of a child while committing child abuse on a child under 14. *Id.* § 76-5-202(1)(d) (Supp. 1998).

<sup>180</sup> *Id.* § 76-5-208(1)(a) & (b) (Supp. 1998).

<sup>181</sup> *Id.* § 76-5-208(1)(c) (Supp. 1998).

<sup>182</sup> S.C. CODE ANN. § 16-3-85(A)(1) (Law. Co-op. Supp. 1998).

Homicide by abuse statutes contain three basic elements: (1) the actor kills a child while engaged in child abuse; (2) the circumstances manifest an extreme indifference to the value of human life; and (3) the victim is a child under a specified age.

First, homicide by abuse statutes specify that the killing must be related to child abuse. In some states this is embodied by the requirement that the act be committed while in the course of committing child abuse or a battery upon a child.<sup>183</sup> Other states require proof of *prior* incidents of abuse upon the child.<sup>184</sup> The element may be broadly defined as engaging "in a past pattern of child abuse upon the child"<sup>185</sup> or precisely defined as one or more incidents of child abuse.<sup>186</sup> It may apply only to the child who was killed<sup>187</sup> or may apply if the person has engaged in a pattern of abuse of other children.<sup>188</sup> A few states impose the additional requirement that the actor be a parent, guardian, or a person in a position of trust in relation to the victim.<sup>189</sup>

The second element, exemplified by the South Carolina statute, is an altered mental state, most commonly that the act "manifest extreme indifference to human life." In some states the mental state is that a person act recklessly or with criminal negligence,<sup>190</sup> while other states require the act be committed "knowingly."<sup>191</sup> Some states combine two or more mental states,

<sup>183</sup> See, e.g., CAL. PENAL CODE § 273ab (Supp. 1999); IOWA CODE § 707.2(5) (Supp. 1998); OKLA. STAT. ANN. tit. 21, § 701.7(C) (West Supp. 1999); S.C. CODE ANN. § 16-3-85(A)(1) (Law. Co-op. Supp. 1998); W. VA. CODE § 61-8D-2a (1997).

<sup>184</sup> See, e.g., ALASKA STAT. § 11.41.100(a)(2) (1998); COLO. REV. STAT. § 18-3-102(1)(f) (1997); DEL. CODE ANN. tit. 11, §§ 633 & 634 (1995 & Supp. 1998); MINN. STAT. § 609.185(5) (1996); OR. REV. STAT. ANN. §§ 163.115(1)(c), 163.118(1)(c), 163.125(1)(c) (Supp. 1998); WASH. REV. CODE ANN. § 9A.32.055 (West 1988).

<sup>185</sup> MINN. STAT. § 609.185(5) (Supp. 1999).

<sup>186</sup> OR. REV. STAT. ANN. § 163.115(6)(c) (Supp. 1998).

<sup>187</sup> MINN. STAT. § 609.185(5) (Supp. 1999).

<sup>188</sup> OR. REV. STAT. ANN. § 163.115(1)(c) (Supp. 1998).

<sup>189</sup> See, e.g., CAL. PENAL CODE § 273ab (West Supp. 1999); COLO. REV. STAT. § 18-3-102(1)(f) (1997); W. VA. CODE § 61-8D-2a (1997).

<sup>190</sup> See, e.g., OR. REV. STAT. ANN. §§ 163.118(1)(c) & 163.125(1)(c) (Supp. 1998); DEL. CODE ANN. tit. 11, §§ 633 & 634 (1995 & Supp. 1998). States imposing a "reckless" standard typically also require proof of a past pattern of abuse. See *id.*

<sup>191</sup> Depending on the wording of statutes and how courts interpret the "knowing" requirement, this element may negate the intended effect of a child homicide statute by requiring proof that the person knew or should have known that the conduct would result in the death of the child. For this reason, such statutes are excluded in

requiring, for example, proof of a "reckless" act committed "under circumstances manifesting an extreme indifference to human life."<sup>192</sup>

Last, an element present in both felony murder and homicide by abuse statutes is the age group of children to which the statute applies. Of the twenty-one child homicide statutes included in the appendix, the states apply their statutes as indicated by Table 2.<sup>193</sup>

While the vast majority of child homicides are committed against very young children, most child homicide statutes expansively apply to children up to age seventeen. In many states, this construction mirrors the child physical abuse statute and provides a logical and consistent delineation.<sup>194</sup>

this article from the classification as child homicide statutes. *See, e.g.,* Davis v. State, 925 S.W.2d 768, 773 (Ark. 1996) (defining "knowingly" under ARK. CODE ANN. § 5-10-102(a)(3) as a person who "is aware that it is practically certain that his conduct will cause such a result").

By comparison, ALASKA STAT. § 11.41.100(a)(2) (1998) has a "knowing" requirement, but "knowing" refers to the underlying assault, not the killing itself. Thus, a person must knowingly engage in a pattern or practice of assault or torture, but need not know the act is likely to kill a child.

<sup>192</sup> *See* N.Y. PENAL LAW § 124.25(4) (McKinney 1998); OR. REV. STAT. ANN. § 163.115(1)(c) (Supp. 1998).

<sup>193</sup> Under 18: ARIZ. REV. STAT. ANN. § 13-1105(A)(2) (West Supp. 1997); FLA. STAT. ANN. § 782.04 (West Supp. 1999); IOWA CODE § 707.2(5) (Supp. 1998); KAN. STAT. ANN. § 21-3436(a)(7) (1995); MINN. STAT. § 609.185(5) (Supp. 1999); MISS. CODE ANN. § 97-3-19(2)(f) (Supp. 1998); N.D. CENT. CODE § 12.1-16-01(1)(c) (1997); OKLA. STAT. ANN. tit. 21, § 701.7(C) (West Supp. 1999); TENN. CODE ANN. § 39-13-202(a)(2) (Supp. 1998); W. VA. CODE § 61-8D-2a(a) (1997). Under 17: LA. REV. STAT. ANN. § 14:30.1(A)(2)(b) (West Supp. 1999); UTAH CODE ANN. § 76-5-208 (Supp. 1998). Under 16: ALASKA STAT. § 11.41.100(a)(2) (1998); WASH. REV. CODE ANN. § 9A.32.055 (West 1988). Under 14: DEL. CODE ANN. tit. 11, §§ 633 & 634 (1995 & Supp. 1998); OR. REV. STAT. ANN. §§ 163.115(1)(b)(J), 163.115(1)(c), 163.118(1)(c), 163.125(1)(c) (Supp. 1998). Under 12: IDAHO CODE § 18-4003(d) (1997); 18 PA. CONS. STAT. ANN. § 2504(b) (West 1998). Under 11: N.Y. PENAL LAW § 125.25(4) (McKinney 1998); S.C. CODE ANN. § 16-3-85(A) (Law. Co-op. Supp. 1998). Under 8: CAL. PENAL CODE § 273ab (West Supp. 1999).

Louisiana has three different ages, depending on the offense. The offense listed above is a felony murder statute that most closely resembles the other child homicide statutes listed here.

<sup>194</sup> Although few cases of beating deaths involve children older than 12, such abusive incidents do occur within families, and thus an older age is justified on these grounds. *See, e.g.,* Peter Pae, *Va. Woman Sentenced to 12 Years in Daughter's Killing*, WASH. POST, Oct. 5, 1996, at B1 (describing starvation, torture, beating and murder of

**TABLE 2.**  
AGE GROUP TO WHICH CHILD HOMICIDE STATUTES APPLY

Number of states	Statute applies to child under age:
10	18
2	17
2	16
2	14
2	12
2	11
1	8

The relevant language from current felony murder and homicide by abuse statutes is provided in the appendix. The appendix makes it clear that few statutes are identical, although most fit broadly into one of the two categories identified above.

#### B. APPELLATE REVIEW OF SPECIAL CHILD HOMICIDE STATUTES

Homicide by abuse statutes have not resulted in a substantial body of case law, with state-specific issues of statutory interpretation such as jury instructions on lesser included offenses comprising the majority of issues.<sup>195</sup> In contrast to convictions

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12-year-old by the girl's mother and the mother's boyfriend). *See also supra* notes 22-26 and accompanying text.

<sup>195</sup> *See, e.g., State v. Smith*, 935 P.2d 841 (Ariz. Ct. App. 1997) (holding that a crime of omission—failure to seek medical care—can be the underlying felony, especially since the felony was specifically enumerated in the child homicide statute); *People v. Preller*, 54 Cal. App. 4th 93 (Cal. Ct. App. 1997) (analyzing syntax of CAL. PENAL CODE § 273ab); *Green v. State*, 680 So. 2d 1067 (Fla. Dist. Ct. App. 1996) (holding that defendant may be convicted of both felony murder and aggravated child abuse); *State v. Altum*, 941 P.2d 1348 (Kan. 1997) (instruction for second-degree murder and involuntary manslaughter not required in prosecution for first degree felony murder when facts indicated defendant killed 14-month-old child either by shaking or by violent



under murder or manslaughter statutes, challenges to the sufficiency of the evidence are rare, and numerous convictions have been upheld.<sup>196</sup> Those issues that have arisen have been uniformly weak and disposed of by courts with minimal discussion. For example, in *State v. Thompson*,<sup>197</sup> the defendant attacked the Iowa child homicide statute on the grounds that the trial court's explanation to the jury of the meaning of "manifesting extreme indifference to human life" was inadequate. The Iowa Supreme Court disagreed, finding instead that a judge "has no duty to explain non-technical terms or phrases that are readily comprehended."<sup>198</sup> This case is representative of the trend—most child

blows to the head); *Kolberg v. State*, 704 So. 2d 1307, 1315 (Miss. 1997) (defendant entitled to instruction on felony manslaughter (MISS. CODE ANN. § 97-3-19(2)(f) (Supp. 1998)) because at the time of conviction the elements of felony manslaughter were "indistinguishable" from capital murder in the course of committing child abuse); *Grady v. State*, 947 P.2d 1069 (Okla. Crim. App. 1997) (discussing whether the jury was properly instructed as to the elements of first degree murder in the commission of child abuse); *Revilla v. State*, 877 P.2d 1143, 1149 (Okla. Crim. App. 1994) (second degree murder and second degree manslaughter instructions not required when evidence showed that acts were committed with the "design to effect death"). Cf. *Bannister v. State*, 930 P.2d 1176 (Okla. Crim. App. 1996) (reversing conviction based on improper jury instructions; finding "willful" in the child homicide statute to mean an intent to injure).

<sup>196</sup> See, e.g., *Kolberg v. State*, 704 So. 2d 1307 (Miss. 1997) (finding sufficient evidence to convict under child homicide statute, but reversing on other grounds); *Wisdom v. State*, 918 P.2d 384 (Okla. Crim. App. 1996) (death penalty for first degree homicide by abuse is not cruel and unusual); *Drew v. State*, 771 P.2d 224 (Okla. Crim. App. 1989) (child homicide statute constitutional); *Schultz v. State*, 749 P.2d 559 (Okla. Crim. App. 1988) (holding merger doctrine inapplicable to child homicide statute); *State v. Butterfield*, 874 P.2d 1339 (Or. Ct. App. 1994) (refusing to hold murder by abuse statute facially void for vagueness); *State v. Pollard*, 888 P.2d 1054 (Or. Ct. App. 1994) (homicide by abuse statute not overbroad); *State v. Russell*, 848 P.2d 743 (Wash. Ct. App. 1993) (homicide by abuse statute not unconstitutionally vague).

<sup>197</sup> 570 N.W.2d 765 (Iowa 1997). The Iowa statute is unique in that it is a first degree murder statute and still requires proof of "malice aforethought." It differs from the aggravated murder statutes discussed *supra*, note 171, in that malice aforethought is defined as "a state of mind which leads to an intentionally wrongful act done out of hatred or with an evil or unlawful purpose." 570 N.W.2d at 769. First degree child abuse murder requires the additional elements of a child victim, the killing occurring during an assault, and circumstances that manifest extreme indifference to human life. *Id.*

<sup>198</sup> *Id.* at 768 (quoting *State v. Dominguez*, 512 A.2d 1112, 1113 (N.H. 1986)).

homicide statutes have not been successfully attacked on any basis that would undermine their fundamental validity.<sup>199</sup>

The one exception to this rule is found in Tennessee, where several versions of a child homicide statute have been the target of successful attacks. In 1988, the Tennessee legislature amended its first degree murder statute to include as a capital offense the killing of a child under the age of thirteen "if the child's death results from one or more incidents of a protracted pattern or multiple incidents of child abuse committed by the defendant against such child, or if such death results from the cumulative effects of such pattern or incidents."<sup>200</sup> In *State v. Hale*,<sup>201</sup> the court held that Tennessee's equivalent of due process under the state constitution prohibited the imposition of the death penalty under such circumstances.

In *Hale*, the defendant had engaged in numerous episodes of beating the child, some of which resulted in bruising and some of which, by the defendant's admission, would have resulted in death had the child's mother not intervened.<sup>202</sup> The defendant ultimately killed the two-year-old child by inflicting blows that caused deep tears to the child's liver and bowels.<sup>203</sup> Because first degree murder was a capital offense, the court relied on previous death penalty cases that prohibited imposition of the death penalty through introduction of prior acts of a defendant as aggravating factors in the sentencing phase of a capital case. The court held that the child homicide statute similarly allowed a capital conviction on the basis of misdemeanor child

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<sup>199</sup> See *supra* note 196. One potential argument that has not resulted in published appellate decisions is that because a child homicide statute is narrower than murder and manslaughter offenses, it supersedes those offenses and precludes charging under traditional murder or manslaughter statutes. See, e.g., *State v. Collins*, 348 P.2d 214, 215 (Wash. 1960) (holding a vehicular homicide statute supersedes manslaughter statute on the grounds that "where a general and subsequent special statute relates to the same subject, the provisions of the latter must prevail."). To avoid this argument, it is advisable for the statute to articulate whether the legislature intends a child homicide statute to supersede other statutes. See, e.g., DEL CODE ANN. tit. 11, §§ 633(c), 634(c) (Supp. 1998) ("Prosecution under this section does not preclude prosecution under any other section of the Code").

<sup>200</sup> TENN. CODE ANN. § 39-2-202(a) (2) (Supp. 1988).

<sup>201</sup> 840 S.W.2d 307 (Tenn. 1992).

<sup>202</sup> *Id.* at 310.

<sup>203</sup> *Id.*

abuse offenses for which the defendant had not been convicted. The court found that Tennessee's equivalent of due process under the state constitution prohibited the imposition of the death penalty under such circumstances.<sup>204</sup>

Subsequently, the Tennessee legislature amended the child homicide statute, defining the offense as a "reckless" killing of a child under thirteen when the death results from aggravated child abuse, and an unpublished 1998 opinion upheld the validity of this definition.<sup>205</sup> The "reckless" element was removed in 1995, transforming it into a straightforward felony murder statute with aggravated child abuse as the underlying felony.<sup>206</sup> The statute expressly states that "[n]o culpable mental state is required for conviction . . . except the intent to commit the enumerated offenses or acts."<sup>207</sup> Presumably this version of the statute would be even less objectionable than the one at issue in *Roberson* and would likewise be upheld.

## V. RECOMMENDATIONS

### A. ARE SPECIAL CHILD HOMICIDE STATUTES NECESSARY?

#### 1. *Arguments Against Special Child Homicide Statutes*

A number of legitimate arguments can be formulated in opposition to child homicide statutes. One argument is that the elements of murder are by design more difficult to prove because murder is one of the most serious offenses for which a person can be prosecuted. From this perspective, child homicide is no different from any other homicide: the burden is on the prosecutor to demonstrate that the fatal act is committed with an intent to kill or knowledge that death would result. Decisions of such importance that are fact-driven should not be legislated, but should be based upon a fact-finder's evaluation of all the evidence offered to prove intent in an individual case.

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<sup>204</sup> *Id.* at 308.

<sup>205</sup> *State v. Roberson*, No. 02C01-9702-CC-0083, 1998 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. Jan. 23, 1998).

<sup>206</sup> TENN. CODE ANN. § 39-13-202(b) (Supp. 1998).

<sup>207</sup> *Id.*

A second argument against child homicide statutes is that special statutes for child victims of abuse make children less than full persons. These statutes could label children as undeserving of the full protection of the law afforded adults. Rather than enacting special statutes, the argument goes, energy should be devoted to educating the public as to the existence of child homicide and training prosecutors to respond to the conduct with serious criminal charges.

A third argument against child homicide statutes is that they cannot affect several of the other major obstacles to prosecuting child homicide. Child homicide statutes do nothing, for example, to ease the prosecutor's burden to prove the *corpus delicti* of the crime or to eliminate the existence of lesser included offenses. When a baby is suffocated or shaken, the prosecutor must still prove the death was caused by a criminal act and that the defendant was the person responsible, and the jury may still return a conviction of involuntary manslaughter. As seen previously,<sup>208</sup> proof of the mechanisms by which small children are killed is difficult, and juries will find the process difficult even with child homicide statutes.

## 2. *Arguments in Favor of Special Child Homicide Statutes*

Just as children receive special protection by the criminal law in numerous other arenas,<sup>209</sup> a strong argument supporting child homicide statutes is that they simply extend these special protections to children who are victims of homicide. All states have some form of criminal battery offense, but all states also have child physical abuse offenses that apply only to child victims.<sup>210</sup> The circumstances surrounding child homicide—whether a single act of anger that kills a child or a pattern of abuse that leads to death—are unlike adult homicides. Recognition of the unique harm to children and the unique manner by which harm is inflicted upon children has made

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<sup>208</sup> See *supra* notes 30-65 and accompanying text.

<sup>209</sup> See generally, U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD ABUSE AND NEGLECT STATE STATUTE SERIES (1998) (collecting various statutes affecting prosecution of child abuse).

<sup>210</sup> See U.S. DEP'T OF HEALTH & HUMAN SERVICES, 5 CHILD ABUSE AND NEGLECT STATE STATUTES SERIES: PHYSICAL ABUSE (1998).

harm is inflicted upon children has made physical abuse statutes uniformly accepted, and extension of these protections to children who are killed is consistent with this practice.

The history of treatment of child victims by the justice system further supports child homicide statutes. Unfortunately, many compelling arguments for child homicide statutes are framed in the context of individual cases in which the public perceives injustices to a child victim. An Arkansas statute was precipitated by an opinion of the state Supreme Court reducing a first degree murder conviction to second degree murder.<sup>211</sup> New York, Oregon, and Tennessee enacted child homicide statutes after convictions perceived as egregiously low for the conduct of the defendants.<sup>212</sup> This pattern will no doubt continue. The history of the treatment of child deaths, however, should put states without such statutes on alert; legislators may have the opportunity to better consider statutes when not in a position of responding to a bad case. Nonetheless, both history and current events combine to provide a strong case for the enactment of child homicide statutes to prevent future injustices.

Finally, concerns for consistency support special statutes. Case law reflects the wide disparity of sentences that can be imposed for similar acts. While child homicide statutes cannot equalize sentencing among the states, they can allow for child homicide cases within a state to be covered by the same statute with the same sentencing ranges. Related to concerns for consistency are concerns about racial, economic, and gender biases. While it is premature to draw broad conclusions from single cases, the *Woodward* case presents an uncomfortable question for many: would the media attention and outcome of the case have been different if the defendant were not a teenage, white, British au pair?<sup>213</sup> To the extent that child homicide statutes do

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<sup>211</sup> See Taylor, *supra* note 16 (giving history of the Arkansas statute).

<sup>212</sup> See Bendetowies, *supra* note 1 (giving history of the New York statute); Stewart, *supra* note 16 (giving history of the Oregon statute); Wade, *supra* note 16 (giving history of the Tennessee statute).

<sup>213</sup> See generally RANDALL KENNEDY, RACE, CRIME, AND THE LAW 256-384 (1997) (discussing effect of race and racial prejudice in criminal trials); Veronica D. Abney, *The Lessons of the Louise Woodward Case*, APSAC ADVISOR, Winter 1997, at 4 (letter to the editor) ("One could speculate that if Louise was a member of a poor and less valued

not require a jury to look into the mind of a defendant, these statutes may lessen the possibility of jurors and judges being influenced by preconceptions about the violent nature of certain classes of individuals. Again, the focus is more on the act of killing a child and less on the mind of the defendant.<sup>214</sup>

The numerous cases identified throughout this article highlight the difficulties judges and juries face in fitting the facts of child homicide into traditional charging statutes. Rather than focusing on the more subjective element of whether a person intends death to result, child homicide statutes focus a trial on the objective facts surrounding the act of killing a child by violent means.

In spite of the foregoing arguments, a categorical recommendation that all states adopt special child homicide statutes is not justifiable. For example, in states in which child homicides are adequately punished under existing law and in which courts sustain such convictions, special statutes may be unnecessary. Likewise, it is possible for a special statute to make prosecution more difficult or to affect the ability of prosecutors to charge more serious crimes for more serious offenses. As a result, each state must consider the effectiveness of existing law and practice before embracing a special statute.

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ethnic group, the media might have been compelled to present her as unattractive, frightening and malicious, and Judge Zobel might have never contemplated a sentence of time served.”); Jordana Hart, *Typical Sentence is 15-20 Years, Review Reveals*, BOSTON GLOBE, Nov. 16, 1997, at A34 (comparing convictions and sentences for shaking or beating babies to death in Massachusetts from 1989 to 1997); Derrick Z. Jackson, *In Texas, A Child-Care Case with a Different Complexion*, BOSTON GLOBE, Nov. 19, 1997, at A23 (comparing the Louise Woodward conviction and sentence to a 12-year-old African-American in Austin who received a 25 year sentence for the death of a two-year-old child in her care). See also WILCZYNSKI, *supra* note 20, at 115-46 (discussing different treatment of male and female perpetrators in England).

<sup>214</sup> It should be emphasized that child homicide statutes in no way eliminate the mens rea requirement. At a minimum, the felony murder model requires a knowing or purposeful act underlying the homicide, and a homicide by abuse statute requires proof of at least a reckless act committed with extreme indifference to human life. The more comprehensive models, such as those found in Utah, Oregon, and Louisiana, provide a range of possible offenses based on the various possible mental states of a defendant. For a discussion of mental state in the context of other child abuse crimes, see Charles A. Phipps, *Children, Adults, Sex and the Criminal Law: In Search of Reason*, 22 SETON HALL LEGIS. J. 1, 30-33 (1997).

In many states, however, recurrent difficulties in obtaining just convictions, or consistently hostile appellate courts will make special child homicide statutes appropriate. Based in part on these persistent problems and after spending more than two years studying the issues and listening to testimony from professionals and members of the public, the U.S. Advisory Board on Child Abuse and Neglect determined enactment of child homicide statutes to be a national priority.<sup>215</sup> Children deserve and need special protection, and child homicide statutes represent a legitimate response to the societal ill posed by people who kill children in their care. When properly evaluated and implemented, child homicide statutes can provide a useful tool in combating child abuse.

## B. MODEL CHILD HOMICIDE STATUTES

### 1. *The Comprehensive Oregon Model*

A thorough statutory scheme exists in Oregon, which in 1997 enacted five separate homicide offenses against children.<sup>216</sup> The most serious offense, aggravated murder,<sup>217</sup> while not a child homicide statute as defined in this article,<sup>218</sup> provides the most serious punishment for an intentional homicide of a child under fourteen. Thus, the Oregon legislature considers the intentional killing of a child under fourteen to be more serious than an intentional killing of a person above that age.

A significant component of the Oregon child homicide statutory scheme is a felony murder statute. A person who kills a child under the age of fourteen in the course of committing assault in the first or second degree commits murder.<sup>219</sup> Assault

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<sup>215</sup> U.S. DEP'T OF HEALTH & HUMAN SERVICES, *supra* note 5, at 70.

<sup>216</sup> S. 614, 69th Leg., 1997 Reg. Sess. (Or. 1997). Louisiana also expanded its child homicide provisions in 1997 to create a similarly comprehensive scheme. *See* 1997 La. Acts 899 (adding cruelty to juveniles as underlying felony in second degree felony murder statute). Because the Oregon statutes are slightly more thorough they are evaluated here. However, legislators interested in the Oregon model should also consider the Louisiana model.

<sup>217</sup> OR. REV. STAT. ANN. § 163.095(1)(f) (Supp. 1998).

<sup>218</sup> *See supra* notes 169-74 and accompanying text.

<sup>219</sup> OR. REV. STAT. ANN. § 163.115(1)(b)(J) (Supp. 1998).

in the first degree is the intentional infliction of serious physical injury by means of a deadly or dangerous weapon;<sup>220</sup> assault in the second degree includes the intentional or knowing infliction of physical injury by means of a deadly or dangerous weapon.<sup>221</sup> An important aspect of this statute is the definition of physical injury as "impairment of physical condition or substantial pain."<sup>222</sup> Thus, a person who uses a deadly or dangerous weapon to impair the physical condition or inflict substantial pain on a child can be convicted of murder when a child dies as a result of that conduct.

The next three offenses apply when a person has previously engaged in a "pattern or practice of assault or torture of the victim." The accompanying mental state distinguishes murder from manslaughter offenses under this "pattern or practice" offense: proof of the act committed "recklessly under circumstances manifesting extreme indifference to the value of human life" constitutes murder,<sup>223</sup> proof of recklessness alone constitutes first degree manslaughter,<sup>224</sup> and proof of criminal negligence constitutes second degree manslaughter.<sup>225</sup> These three statutes allow a jury to consider degree of recklessness of a person who engages in a pattern of abuse of a child and to convict the person of the offense that reflects the behavior in an individual case. In each case, however, the accompanying mental state is lower than a "knowing" or "purposeful" killing that would be required by a typical murder statute.

A comprehensive scheme such as this has several advantages over a single child homicide statute. First is the clear public policy expression that the state considers child homicide to be a serious evil. A legislature that contemplates the acts sufficiently to incorporate them logically within their overall homicide statutes

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<sup>220</sup> *Id.* § 163.185(1) (Supp. 1998).

<sup>221</sup> *Id.* § 163.175(1)(b) (Supp. 1998). An issue that will no doubt be resolved in the courts is whether human hands constitute a "deadly or dangerous weapon" when an adult kills a child with bare hands by beating, shaking, or suffocation. Other states may wish to define or eliminate this requirement.

<sup>222</sup> *Id.* § 163.015(7) (Supp. 1998).

<sup>223</sup> *Id.* § 163.115(1)(c) (Supp. 1998).

<sup>224</sup> *Id.* § 163.118(1)(c) (Supp. 1998).

<sup>225</sup> *Id.* § 163.125(1)(c) (Supp. 1998).



demonstrates that enactment of the statutes is more than symbolic.

A second advantage is the elevation of all comparable offenses. A jury in a state with a single child homicide statute may still return a verdict of a lesser included offense such as manslaughter. When a jury convicts of a lesser offense in Oregon, however, it is more likely to be one of the lesser child homicide offenses with a more stringent penalty than would apply if the victim were not a child.

A third advantage of the Oregon framework is that it recognizes that not all homicides carry the same degree of culpability, even when the victim is a child. A person who intentionally kills a child after careful planning is punished more severely than one who acts with extreme indifference to human life but without a specific intent to kill. Further, the means by which children are killed—such as violent shaking and hitting—do not automatically evidence a single intent (such as intent to kill) for all perpetrators. The mental state of the actor in each case is factually dependent: the facts of one case may prove that a person shook a child with a specific intent to kill; the facts of another case may prove a person shook a child with no intent to kill, but with extreme indifference to the value of the child's life. The multiple degrees of culpability are reflected in the Oregon statutes.

The most significant disadvantage of the Oregon scheme is its complexity. It may not be practical for a state to amend every homicide offense to address the problem of child homicide. In such cases, one of the following statutes may be an acceptable compromise.

## 2. *Felony Murder and Homicide by Abuse Statutes*

A felony murder statute, with the advantages of familiarity and simplicity, may be the best option available in some states.<sup>226</sup> A felony murder statute covers most instances of fatal child abuse, easing the burden of proving that a person intended to kill or should have known the act would result in the death of a

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<sup>226</sup> See *supra*, text accompanying notes 171-77.

child. So long as the underlying felony does not impose a requirement of proof of intent to cause permanent or serious bodily injury, a felony murder statute accomplishes the objective of a child homicide statute and offers a simple solution. Expanding on a basic felony murder statute, the Utah approach considers the mental state of the actor in committing the underlying felony, thus allowing a response that is more closely related to the facts of an individual case.<sup>227</sup> While maintaining the felony murder principle, the Utah approach increases available punishment for actors who act with greater culpability.<sup>228</sup>

A homicide by abuse statute represents another alternative when a comprehensive approach is not feasible. Such statutes have several strengths. First, homicide by abuse statutes are more narrowly drawn to the act of child homicide than are most felony murder statutes. Requiring proof of "extreme indifference to the value of human life," historically associated with the crime of murder,<sup>229</sup> more closely reflects a violent act of aggression by an adult against a child without going as far as to require proof of "malice aforethought." Similarly, the acts of criminal child abuse referenced in homicide by abuse statutes provide clear definitions of child abuse-related acts that are covered by the statute. Again, the Oregon homicide by abuse statute provides a well-reasoned definition of the offense:

[C]riminal homicide constitutes murder by abuse when a person, recklessly under circumstances manifesting extreme indifference to the value of human life, causes the death of a child under 14 years of age . . . and: (A) The person has previously engaged in a pattern or practice of assault or torture of the victim or another child under 14 years of age . . . ; or (B) The person causes the death by neglect or maltreatment.<sup>230</sup>

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<sup>227</sup> See *supra* notes 178-81 and accompanying text.

<sup>228</sup> Cases which formerly resulted in convictions of negligent homicide, a misdemeanor, now result in a third degree felony conviction. Telephone interview with Rob Parrish, Utah Deputy Attorney General (July 10, 1998).

<sup>229</sup> See *supra* notes 97-103 and accompanying text.

<sup>230</sup> OR. REV. STAT. ANN. § 163.115(1)(c) (Supp. 1998).

Significantly, a 1997 amendment re-defined "pattern or practice" as one or more episodes, eliminating a previous requirement that more than one assault be proven.<sup>231</sup> Further, "assault" is defined as "intentionally, knowingly, or recklessly [causing] physical injury to another person,"<sup>232</sup> removing potential arguments as to whether the underlying conduct separately constituted "child abuse." Thus, murder is the killing of a child by recklessly inflicting physical injury upon the child under circumstances manifesting an extreme indifference to the value of human life. This single Oregon statute covers the vast majority of homicides of young children caused by child abuse and provides a workable model for states unable to adopt the entire comprehensive Oregon scheme.

While other homicide by abuse statutes appear to have been enacted with a comparable intent as the Oregon statute, many are drafted with unnecessarily narrow language that limits their usefulness. For example, statutes requiring proof of multiple prior episodes of abuse preclude prosecution of the person who violently shakes a child to death or who suffocates a child to death under circumstances in which there is no evidence of prior injuries.<sup>233</sup> Although understandably drafted to target the caretaker who abuses a child—perhaps with the battered child in mind—these statutes preclude prosecution of the one-time violent act that results in death. Moreover, statutes requiring the actor to be a parent or caretaker,<sup>234</sup> while appropriately addressing the majority of offenders of this crime, may preclude other equally culpable actors such as the boyfriend who takes care of the child for a brief period of time.

When carefully drafted, homicide by abuse statutes represent a significant step in the protection of children. It is important, however, to consider the effect of numerous limitations on the applicability of these statutes.

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<sup>231</sup> *Id.* § 163.115(6)(c) (Supp. 1998).

<sup>232</sup> *Id.* § 163.115(6)(a) (Supp. 1998).

<sup>233</sup> See *supra* notes 184-88 and accompanying text.

<sup>234</sup> See *supra* note 189 and accompanying text.

## VI. CONCLUSION

A child homicide statute should provide a strong statement that society recognizes child homicide as a problem and is willing to respond to the problem in a responsible manner. Consequently, a state should enact a child homicide statute only after thoughtful consideration as to the purpose, content, and effect of such a statute. In this way, child homicide statutes can provide a useful tool in the fight against child abuse.

As discussed in this article, the best approach is to consider the range of fatal injuries inflicted upon children and draft comprehensive statutes that adopt penalties appropriate to the various offenses. When this is not feasible, a single carefully drafted child homicide statute may sufficiently address the majority of child homicide facts.

Ultimately, the goal of all such statutes should be creating a punishment that is proportionate to the conduct of killing a child by other than accidental means. The value of a child's life should be no less than the value of an adult's. Child homicide statutes can demonstrate that society does in fact value these lives.

## Appendix

### Child Homicide Statutes

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#### ALASKA

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Code section	ALASKA STAT. § 11.41.100(a) (2) (1998)
Offense	First degree murder
Mental state	A person knowingly engages, under circumstances manifesting extreme indifference to the value of human life, in a pattern or practice of assault or torture of a child
Is this a felony murder statute?	No
Is past pattern an element?	Yes
Is care or custody an element?	No
Applies to children under age:	16
Statutory excerpt <sup>235</sup>	A person commits the crime of murder in the first degree if the person knowingly engages, under circumstances manifesting extreme indifference to the value of human life, in a pattern or practice of assault or torture of a child under the age of 16, and one of the acts of assault or torture results in the death of the child; for purposes of this paragraph, a person "engages in a pattern or practice of assault or torture" if the person inflicts serious physical injury to the child by at least two separate acts, and one of the acts results in the death of the child.

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#### ARIZONA

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Code section	ARIZ. REV. STAT. ANN. § 13-1105 (West Supp. 1997)
Offense	First degree murder
Mental state	No specific mental state other than that required to prove the underlying felony
Is this a felony murder statute?	Yes—underlying felony of child abuse

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<sup>235</sup> Although statutes from a few states are reprinted in their entirety in this appendix, most statutes have been substantially edited to retain only the language relevant to child homicide. Readers who wish to further explore an individual state's scheme must consult the state's code.

Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	<p>(A) (2) A person commits first degree murder if acting either alone or with one or more other persons such person commits or attempts to commit child abuse and in the course of and in furtherance of such offense or immediate flight from such offense, such person or another person causes the death of any person.</p> <p>(B) Homicide, as defined in subsection A, paragraph 2 of this section, requires no specific mental state other than what is required for the commission of any of the enumerated felonies.</p>

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**CALIFORNIA**


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Code section	CAL. PENAL CODE § 273ab (West Supp. 1999)
Offense	Assault resulting in death of a child under 8
Mental state	Assault by means of force that to a reasonable person would be likely to produce great bodily injury
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	Yes
Applies to children under age:	8
Statutory excerpt	Any person who, having the care or custody of a child who is under eight years of age, assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. Nothing in this section shall be construed as affecting the applicability of § 187(a) or § 189.

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 DELAWARE
 

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Code section	DEL. CODE ANN. tit. 11, § 633 (1995 & Supp. 1998)
Offense	Second degree murder by abuse or neglect
Mental state	Criminal negligence
Is this a felony murder statute?	No
Is past pattern an element?	Yes
Is care or custody an element?	No
Applies to children under age:	14
Statutory excerpt	<p>(a) A person is guilty of murder by abuse or neglect in the second degree when, with criminal negligence, that person causes the death of a child and that person has engaged in an act or previous pattern of abuse and/or neglect of such child.</p> <p>(b) For the purpose of this section: (1) "Child" shall refer to any person who has not yet reached that person's 14th birthday. (2) "Abuse" and "neglect" shall have the same meaning as set forth in § 1103 of this title. (3) "Previous pattern" of abuse and/or neglect shall mean two or more incidents of conduct: (a) That constitute an act of abuse and/or neglect; and (b) Are not so closely related to each other or connected in point of time and place that they constitute a single event.</p> <p>(c) A conviction is not required for an act of abuse or neglect to be used in prosecution of a matter under this section including an act used as proof of the previous pattern as defined including one which may be in paragraph (b) (3) of this section. A conviction for any act of abuse or neglect including one which may be relied upon to establish the previous pattern of abuse and/or neglect does not preclude prosecution under this section. Prosecution under this section does not preclude prosecution under any other section of the Code.</p>

(d) Murder by abuse and/or neglect in the second degree is a class B felony.

Notwithstanding any provision of this title to the contrary, the minimum sentence for a person convicted of murder by abuse or neglect in the second degree in violation of this section shall be 10 years at Level V.

Code section

DEL. CODE ANN. tit. 11, § 634 (1995)

Offense

First degree murder by abuse or neglect

Mental state

Recklessly

Is this a felony murder statute?

No

Is past pattern an element?

Yes

Is care or custody an element?

No

Applies to children under age:

14

Statutory excerpt

(a) A person is guilty of murder by abuse or neglect in the first degree when that person recklessly causes the death of a child and has engaged in an act or previous pattern of abuse and/or neglect of such child.

(b) For the purpose of this section: (1)

“Child” shall refer to any person who has not yet reached that person’s 14th birthday.

(2) “Abuse” and “neglect” shall have the same meaning as set forth in § 1103 of this title. (3) “Previous pattern” of abuse and/or neglect shall mean 2 or more incidents of conduct: (a) That constitute an act of abuse and/or neglect; and (b) Are not so closely related to each other or connected in point of time and place that they constitute a single event.

(c) A conviction is not required for an act of abuse or neglect to be used in prosecution of a matter under this section including an act used as proof of the previous pattern as defined including one which may be in paragraph (b) (3) of this section. A conviction for any act of abuse or neglect including one which may be relied upon to establish the previous pattern of abuse and/or neglect does not preclude prosecution under this section. Prosecution under



this section does not preclude prosecution under any other section of the Code.

(d) Murder by abuse or neglect in the first degree is a class A felony.

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**FLORIDA**


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Code section	FLA. STAT. ANN. § 782.04(1)(a)(2)(h) (West Supp. 1999)
Offense	First degree murder
Mental state	No additional mental state
Is this a felony murder statute?	Yes—underlying felony of aggravated child abuse
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	The unlawful killing of a human being when committed by a person engaged in the perpetration of, or in the attempt to perpetrate, any aggravated child abuse, is murder in the first degree and constitutes a capital felony, punishable as provided in § 775.082.

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**IDAHO**


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Code section	IDAHO CODE § 18-4003(d) (1997)
Offense	First degree murder
Mental state	No additional mental state
Is this a felony murder statute?	Yes—underlying felony of aggravated battery of a child under 12
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	12
Statutory excerpt	Any murder committed in the perpetration of, or attempt to perpetrate, aggravated battery on a child under twelve years of age is murder of the first degree.

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**IOWA**


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Code section	IOWA CODE § 707.2(5) (Supp. 1998)
Offense	First degree murder
Mental state	Under circumstances manifesting extreme indifference to human life
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	A person commits murder in the first degree when the person commits murder under any of the following circumstances: the person kills a child while committing child endangerment under § 726.6(1) (b), or while committing assault under § 708.1 upon the child, and the death occurs under circumstances manifesting an extreme indifference to human life.

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**KANSAS**


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Code section	KAN. STAT. ANN. § 21-3401(b) (1995)
Offense	First degree murder
Mental state	No additional mental state
Is this a felony murder statute?	Yes—underlying felony of abuse of a child
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	Murder in the first degree is the killing of a human being committed in the commission of, attempt to commit, or flight from an inherently dangerous felony as defined in § 21-3436 and amendments thereto. [Abuse of a child is listed as an inherently dangerous felony under this code section.]

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 LOUISIANA
 

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Code section	LA. REV. STAT. ANN. § 14:30(A)(5) (West 1997)
Offense	First degree murder
Mental state	Specific intent to kill or inflict great bodily harm
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	12
Statutory excerpt	First degree murder is the killing of a human being when the offender has the specific intent to kill or to inflict great bodily harm upon a victim under the age of twelve.
Code section	LA. REV. STAT. ANN. § 14:30.1(A)(2)(b) (West 1997 & Supp. 1999)
Offense	Second degree murder
Mental state	Expressly applies even if there is no intent to kill or inflict great bodily harm
Is this a felony murder statute?	Yes—underlying felony of cruelty to juveniles
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	17
Statutory excerpt	Second degree murder is the killing of a human being when the offender is engaged in the perpetration of cruelty to juveniles, even though he has no intent to kill or to inflict great bodily harm.
Code section	LA. REV. STAT. ANN. § 14:32 (West 1997)
Offense	Negligent homicide
Mental state	Criminal negligence (penalty for negligent homicide is enhanced if a person kills a child committing battery upon the child)
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	10
Statutory excerpt	(A) Negligent homicide is the killing of a human being by criminal negligence.

(B) The violation of a statute or ordinance shall be considered only as presumptive evidence of such negligence.

(C) Whoever commits the crime of negligent homicide shall be imprisoned with or without hard labor for not more than five years, fined not more than five thousand dollars, or both. However, if the victim was killed as a result of receiving a battery and was under the age of ten years, the offender shall be imprisoned at hard labor, without benefit of probation or suspension of sentence, for not less than two nor more than five years.

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## MINNESOTA

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Code section	MINN. STAT. § 609.185(5) (Supp. 1999)
Offense	First degree murder
Mental state	Under circumstances manifesting an extreme indifference to human life
Is this a felony murder statute?	No
Is past pattern an element?	Yes
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	Whoever does any of the following is guilty of murder in the first degree and shall be sentenced to imprisonment for life: causes the death of a minor while committing child abuse, when the perpetrator has engaged in a past pattern of child abuse upon the child and the death occurs under circumstances manifesting an extreme indifference to human life.

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**MISSISSIPPI**


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Code section	MISS. CODE ANN. § 97-3-19(2) (f) (Supp. 1998)
Offense	Capital murder
Mental state	With or without any design to effect the death of another
Is this a felony murder statute?	Yes—underlying felonies of felonious child abuse or battery of a child
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases: When done with or without any design to effect death, by any person engaged in the commission of the crime of felonious abuse and/or battery of a child in violation of § 97-5-39(2), or in any attempt to commit such felony.

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**NEW YORK**


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Code section	N.Y. PENAL LAW § 125.25(4) (McKinney 1998)
Offense	Second degree murder
Mental state	Recklessly engages in conduct which creates a grave risk of serious physical injury or death under circumstances evincing a depraved indifference to human life
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	11
Statutory excerpt	A person is guilty of murder in the second degree when under circumstances evincing a depraved indifference to human life, and being eighteen years old or more the defendant recklessly engages in conduct which creates a grave risk of serious physical injury or death to another person less than

eleven years old and thereby causes the death of such person.

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### NORTH DAKOTA

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Code section	N.D. CENT. CODE § 12.1-16-01(1)(c) (1997)
Offense	Murder
Mental state	No additional mental state
Is this a felony murder statute?	Yes—underlying felony of abuse or neglect of a child
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	A person is guilty of murder, a class AA felony, if the person acting either alone or with one or more other persons, commits or attempts to commit a felony offense against a child under § 14-09-22 [abuse or neglect of a child], and, in the course of and in furtherance of such crime or of immediate flight therefrom, the person or any other participant in the crime causes the death of any person.

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### OKLAHOMA

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Code section	OKLA. STAT. ANN. tit. 21, § 701.7(C) (West Supp. 1999)
Offense	First degree murder
Mental state	Willful or malicious injuring, torturing, maiming or using unreasonable force or willfully cause, procure, or permit child abuse to be inflicted upon the child
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	A person commits murder in the first degree when the death of a child results from the willful or malicious injuring, torturing, maiming or using of unreasonable force by said person or who shall willfully cause, procure or permit any of said acts to be

done upon the child pursuant to Section 7115 of Title 10 of the Oklahoma Statutes [child abuse]. It is sufficient for the crime of murder in the first degree that the person either willfully tortured or used unreasonable force upon the child or maliciously injured or maimed the child.

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**OREGON**


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Code section	OR. REV. STAT. ANN. § 163.095(1) (f) (Supp. 1998)
Offense	Aggravated murder
Mental state	Mental state required for murder
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	14
Statutory excerpt	As used in § 163.105 and this section, "aggravated murder" means murder as defined in § 163.115 which is committed under, or accompanied by, any of the following circumstances: The victim of the intentional homicide was a person under the age of 14 years.
Code section	OR. REV. STAT. ANN. § 163.115(1) (b) (J) (Supp. 1998)
Offense	Murder
Mental state	No additional mental state
Is this a felony murder statute?	Yes—underlying felonies of first or second degree assault of a child under 14
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	14
Statutory excerpt	(1) (b) (J) Except as provided in § 163.118 and 163.125, criminal homicide constitutes murder when it is committed by a person, acting either alone or with one or more persons, who commits or attempts to commit any of the following crimes and in the course of and in furtherance of the crime the person is committing or attempting to commit, or during the immediate flight therefrom, the person, or another partici-

pant if there be any, causes the death of a person other than one of the participants: Assault in the first degree, as defined in § 163.185, and the victim is under 14 years of age, or assault in the second degree, as defined in § 163.175 (1)(a) or (b), and the victim is under 14 years of age; or

(6) As used in this section: (a) "Assault" means to intentionally, knowingly or recklessly cause physical injury to another person. "Assault" does not include the causing of physical injury in a motor vehicle accident that occurs by reason of the reckless conduct of a defendant. (b) "Neglect or maltreatment" means a violation of § 163.535, 163.545 or 163.547 or a failure to provide adequate food, clothing, shelter or medical care that is likely to endanger the health or welfare of a child under 14 years of age or a dependent person. This paragraph is not intended to replace or affect the duty or standard of care required under chapter 677. (c) "Pattern or practice" means one or more previous episodes. (d) "Torture" means to intentionally inflict intense physical pain upon an unwilling victim as a separate objective apart from any other purpose.

Code section	OR. REV. STAT. ANN. § 163.115(1)(c) (Supp. 1998)
Offense	Murder
Mental state	Recklessly and with extreme indifference to human life
Is this a felony murder statute?	No
Is past pattern an element?	Yes
Is care or custody an element?	No
Applies to children under age:	14
Statutory excerpt	(1)(c) Except as provided in § 163.118 and 163.125, criminal homicide constitutes murder by abuse when a person, recklessly under circumstances manifesting extreme indifference to the value of human life, causes the death of a child under 14 years of age or a dependent person, as defined in



§ 163.205, and: (A) The person has previously engaged in a pattern or practice of assault or torture of the victim or another child under 14 years of age or a dependent person; or (B) The person causes the death by neglect or maltreatment.

(2) An accusatory instrument alleging murder by abuse under subsection (1)(c) of this section need not allege specific incidents of assault or torture.

(6) As used in this section: (a) "Assault" means to intentionally, knowingly or recklessly cause physical injury to another person. "Assault" does not include the causing of physical injury in a motor vehicle accident that occurs by reason of the reckless conduct of a defendant. (b) "Neglect or maltreatment" means a violation of § 163.535, 163.545 or 163.547 or a failure to provide adequate food, clothing, shelter or medical care that is likely to endanger the health or welfare of a child under 14 years of age or a dependent person. This paragraph is not intended to replace or affect the duty or standard of care required under chapter 677. (c) "Pattern or practice" means one or more previous episodes. (d) "Torture" means to intentionally inflict intense physical pain upon an unwilling victim as a separate objective apart from any other purpose.

Code section	OR. REV. STAT. ANN. § 163.118(1)(c) (Supp. 1998)
Offense	First degree manslaughter
Mental state	Recklessly
Is this a felony murder statute?	No
Is past pattern an element?	Yes
Is care or custody an element?	No
Applies to children under age:	14
Statutory excerpt	(1)(c) Criminal homicide constitutes manslaughter in the first degree when a person recklessly causes the death of a child under 14 years of age or a dependent person, as

defined in ORS 163.205, and: (A) The person has previously engaged in a pattern or practice of assault or torture of the victim or another child under 14 years of age or a dependent person; or (B) The person causes the death by neglect or maltreatment, as defined in § 163.115.

(2) Manslaughter in the first degree is a Class A felony.

(3) It is an affirmative defense to a charge of violating subsection (1)(c)(B) of this section that the child or dependent person was under care or treatment solely by spiritual means pursuant to the religious beliefs or practices of the child or person or the parent or guardian of the child or person.

Code section

OR. REV. STAT. ANN. § 163.125(1)(c) (Supp. 1998)

Offense

Second degree manslaughter

Mental state

Criminal negligence

Is this a felony murder statute?

No

Is past pattern an element?

Yes

Is care or custody an element?

No

Applies to children under age:

14

Statutory excerpt

(1)(c) Criminal homicide constitutes manslaughter in the second degree when a person, with criminal negligence, causes the death of a child under 14 years of age or a dependent person, as defined in ORS 163.205, and: (A) The person has previously engaged in a pattern or practice of assault or torture of the victim or another child under 14 years of age or a dependent person; or (B) The person causes the death by neglect or maltreatment, as defined in § 163.115.

(2) Manslaughter in the second degree is a Class B felony.

(3) It is an affirmative defense to a charge of violating subsection (1)(c)(B) of this section that the child or dependent person was

under care or treatment solely by spiritual means pursuant to the religious beliefs or practices of the child or person or the parent or guardian of the child or person.

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**PENNSYLVANIA**


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Code section	18 PA. CONS. STAT. ANN. § 2504 (West 1998)
Offense	Involuntary manslaughter
Mental state	Recklessly or grossly negligent; involuntary manslaughter is raised from a misdemeanor to a second degree felony if the victim is under 12
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	12
Statutory excerpt	(a) A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a recklessly or grossly negligent manner, or the doing of a lawful act in a recklessly negligent manner, he causes the death of another person.  (b) Involuntary manslaughter is a misdemeanor of the first degree. Where the victim is under 12 years of age and is in the care, custody or control of the person who caused the death, involuntary manslaughter is a felony of the second degree.

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**SOUTH CAROLINA**


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Code section	S.C. CODE ANN. § 16-3-85 (Law Co-op. Supp. 1998)
Offense	Homicide by child abuse
Mental state	Under circumstances manifesting an extreme indifference to human life
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	11

Statutory excerpt	<p>(A) A person is guilty of homicide by child abuse who: (1) causes the death of a child under the age of eleven while committing child abuse or neglect as defined in § 20-7-490 and the death occurs under circumstances manifesting an extreme indifference to human life; or (2) knowingly aids and abets another person to commit child abuse or neglect as defined in § 20-7-490 and the child abuse or neglect results in the death of a child under the age of eleven.</p> <p>(B) Homicide by child abuse is a felony and a person who is convicted of or pleads guilty to homicide by child abuse: (1) under subsection (A) (1) may be imprisoned for life but not less than a term of twenty years; or (2) under subsection (A) (2) must be imprisoned for a term not exceeding twenty years nor less than ten years.</p> <p>(C) In sentencing a person under this section the judge shall consider any aggravating circumstances, including, but not limited to, a defendant's past pattern of child abuse or neglect of a child under the age of eleven, and any mitigating circumstances; however, a child's crying does not constitute provocation so as to be considered a mitigating circumstance.</p>
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**TENNESSEE**


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Code section	TENN. CODE ANN. § 39-13-202 (Supp. 1998)
Offense	First degree murder
Mental state	No mental state need be proven other than that required by the underlying felony
Is this a felony murder statute?	Yes—underlying felonies of aggravated child abuse or aggravated child neglect
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	18
Statutory excerpt	(a) (2) First degree murder is a killing of another committed in the perpetration of

or attempt to perpetrate any aggravated child abuse or aggravated child neglect.

(b) No culpable mental state is required for conviction under subdivision (a) (2) or (a) (3) except the intent to commit the enumerated offenses or acts in such subdivisions.

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## UTAH

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Code section	UTAH CODE ANN. § 76-5-202(1)(d) (Supp. 1998)
Offense	Capital murder
Mental state	Intentionally or knowingly causes death in the commission of child abuse
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	14
Statutory excerpt	Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another under any of the following circumstances: the homicide was committed while the actor was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit child abuse of a child under the age of 14 years, as otherwise defined in § 76-5-109(2) (a).
Code section	UTAH CODE ANN. § 76-5-203(1)(d) (Supp. 1998)
Offense	Murder
Mental state	No additional mental state
Is this a felony murder statute?	Yes—underlying felony of child abuse
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	14
Statutory excerpt	Criminal homicide constitutes murder if the actor while in the commission, attempted commission, or immediate flight from the commission or attempted commission of child abuse, as defined in § 76-5-109(2) (a), when the victim is younger than

	14 years of age, causes the death of another person other than a party as defined in § 76-2-202.
Code section	UTAH CODE ANN. § 76-5-208 (Supp. 1998)
Offense	Child abuse homicide
Mental state	Degree of felony depends on the mental state of the actor
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	No
Applies to children under age:	17
Statutory excerpt	(1) Criminal homicide constitutes child abuse homicide if the actor causes the death of a person under 17 years of age and the death results from child abuse, as defined in subsection 76-5-109(1): (a) if done recklessly as provided in Subsection 76-5-109(2) (b); (b) if done with criminal negligence as provided in Subsection 76-5-109(2) (c); or (c) if done with the mental culpability as provided in Subsection 76-5-109(3) (a), (b), or (c).  (2) Child abuse homicide as described in Subsection (1) (a) is a second degree felony.  (3) Child abuse homicide as described in Subsections (1) (b) and (c) is a third degree felony.

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**WASHINGTON**


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Code section	WASH. REV. CODE ANN. § 9A.32.055 (West 1988)
Offense	Homicide by abuse
Mental state	Under circumstances manifesting an extreme indifference to human life
Is this a felony murder statute?	No
Is past pattern an element?	Yes
Is care or custody an element?	No
Applies to children under age:	16
Statutory excerpt	A person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the per-

son causes the death of a child or person under sixteen years of age and the person has previously engaged in a pattern or practice of assault or torture of said child, or person under sixteen years of age.

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**WEST VIRGINIA**


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Code section	W. VA. CODE § 61-8D-2a (1997)
Offense	Death of a child by a parent
Mental state	Maliciously and intentionally inflicts substantial physical pain by other than accidental means
Is this a felony murder statute?	No
Is past pattern an element?	No
Is care or custody an element?	Yes
Applies to children under age:	18
Statutory excerpt	<p>(a) If any parent, guardian or custodian shall maliciously and intentionally inflict upon a child under his or her care, custody or control substantial physical pain, illness or any impairment of physical condition by other than accidental means, thereby causing the death of such child, then such parent, guardian or custodian shall be guilty of a felony.</p> <p>(b) If any parent, guardian or custodian shall knowingly allow any other person to maliciously and intentionally inflict upon a child under the care, custody or control of such parent, guardian or custodian substantial physical pain, illness or any impairment of physical condition by other than accidental means, which thereby causes the death of such child, then such other person and such parent, guardian or custodian shall each be guilty of a felony.</p> <p>(c) Any person convicted of a felony described in subsection (a) or (b) of this section shall be punished by a definite term of imprisonment in the penitentiary which is not less than ten nor more than forty years. A person imprisoned pursuant to the provi-</p>

sions of this section is not eligible for parole prior to having served a minimum of ten years of his or her sentence or the minimum period required by the provisions of § 62-12-13, whichever is greater.

(d) The provisions of this section shall not apply to any parent, guardian or custodian or other person who, without malice, fails or refuses, or allows another person to, without malice, fail or refuse, to supply a child under the care, custody or control of such parent, guardian or custodian with necessary medical care, when such medical care conflicts with the tenets and practices of a recognized religious denomination or order of which such parent, guardian or custodian is an adherent or member.

The provisions of this section shall not apply to any health care provider who fails or refuses, or allows another person to fail or refuse, to supply a child with necessary medical care when such medical care conflicts with the tenets and practices of a recognized religious denomination or order of which the parent, guardian or custodian of the child is an adherent or member, or where such failure or refusal is pursuant to a properly executed do not resuscitate form.



