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EXPANDING HOMICIDE LIABILITY FOR A PARENT'S
OMISSION

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Earlier this year, Jennifer and James Crumbley were convicted of manslaughter and sentenced to 10-15 years for not stopping their teenage son, Ethan, from killing four students at his high school. This is the first known occurrence of an American prosecutor obtaining a homicide conviction relying on a parental omission—or failure to act—where the victim was not the parent's own child. Parental omissions historically have only triggered homicide charges if the parent fails to protect their child, not others, from harm. Unlike the general population, parents owe a special duty to their child because they are the ones tasked to oversee the child's care. The Crumbley verdict has dislodged this longstanding criminal precedent. It has expanded a parent's common law duty to include protection of the would-be victims of their child's criminal acts. Recently, Georgia has brought manslaughter charges against the parent of a school shooter under similar circumstances. This Essay provides the first legal assessment of this prosecutorial theory and analyzes the various doctrinal, constitutional, and policy considerations surrounding its use.

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INTRODUCTION

All criminal homicide prosecutions require an actus reus.¹ Actus reus is Latin for the physical or external part of the crime.² There are two ways a prosecutor can satisfy this requirement: either by proving that the defendant committed a voluntary affirmative act or failed to act when they had a duty to do so.³ A prosecutorial theory of liability relying on an affirmative act requires some conscious bodily movement, such as shooting a gun or stabbing with a knife.⁴ Criminal prosecutions relying on the theory of an omission with a duty will logically occur less often because they require the defendant to have a special relationship or status with the victim (e.g., parent to child, spouse to spouse, contract based, etc.).⁵ This Essay discusses the legal implications of the much-publicized *People v. Crumbley* case, the first time an American prosecutor obtained a manslaughter conviction relying on a parental omission—or failure to act—where the victim was not the parent’s own child.⁶

The common law parental duty of criminal liability has a long tradition in Anglo-American law.⁷ Parents legally owe a duty of protection and care to *their* minor child.⁸ It is not unusual for prosecutors, in fact, to bring homicide charges if parents fail to protect or help their child and the minor dies because of this omission—no different than if the parents had caused the death by a voluntary act.⁹

¹ See, e.g., A.C.E. Lynch, *The Mental Element in the Actus Reus*, 98 L. Q. REV. 109, 111 (1982) (The concepts of actus reus and mens rea are said to be “the corner-stone of discussion on the nature of criminal liability”); *State v. Utter*, 479 P.2d 946 (Wash. Ct. App.1971) (citing sources for the proposition that actus reus is a fundamental component to every homicide crime). For a detailed discussion on this requirement and related issues, see Ian P. Farrell & Justin F. Marceau, *Taking Voluntariness Seriously*, 54 B.C. L. Rev. 1545 (2013).

² See *Actus Reus*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/legal/actus%20reus> [<https://perma.cc/J5KA-F465>].

³ See, e.g., MODEL PENAL CODE § 2.01(1) (“A person is not guilty of an offense unless his liability is based on conduct that includes a voluntary act or the omission to perform an act of which he is physically capable.”).

⁴ See, e.g., *State v. Utter*, 479 P.2d 946, 948 (Wash. Ct. App. 1971) (citations omitted) (“[A]n ‘act’ involves an exercise of the will. It signifies something done voluntarily.”).

⁵ See *infra* Section I.A.

⁶ See, e.g., Erik Ortiz & Corky Siemaszko, *Crumbley Convictions Set a Legal Precedent for Parents That Could Reach Beyond Shootings*, NBC NEWS (Mar. 16, 2024) <https://www.nbcnews.com/news/us-news/crumbley-convictions-set-legal-precedent-parents-reach-shootings-rcna143571> (last visited Sept. 9, 2024).

⁷ See *infra* Section I.B.

⁸ See *id.*

⁹ See *infra* notes 36–38 and accompanying text.

However, this parental duty has not, until now, included an obligation to protect persons who may be physically harmed by their child. This kind of expanded duty has erstwhile only applied to civil cases where the victims are seeking monetary damages from the parents.¹⁰ The *Crumbley* verdict—for better or worse—has blurred the lines between these civil and criminal parental duties.¹¹

Section I focuses on the history of criminal omissions and the rationale for imposing these kinds of duties. This section explores the doctrinal roots of the parental duty of care and its narrow application. Section II details the *Crumbley* convictions and analyzes how the prosecutor imported the civil parental duty standard into the criminal context. This Section also briefly discusses the recent Georgia case where prosecutors have brought manslaughter charges against the father of a school shooter under similar circumstances. The Essay concludes by discussing the potential constitutional hurdles and policy issues with deploying this expanded duty in the criminal context.

I. THE HISTORY AND CONTOURS OF A PARENT'S CRIMINAL DUTY OF CARE

A. *A Duty Owed to the Victim Based on Special Relationship*

The use of an omission with duty as a prosecutorial theory traces its origins to English common law and can be viewed, at least in part, as a transformation of a moral obligation into a legal one.¹² One of the most famous English cases, *Regina v. Instan*, puts it in the following way: “A legal common law duty is nothing else than the enforcing by law of that which is a moral obligation without legal enforcement.”¹³ In this case, the court affirmed the manslaughter conviction on the theory that the defendant failed in her duty to take care of her sick aunt.¹⁴ The duty was based on the fact that the defendant lived with her aunt and that the victim had previously provided for her aunt before becoming

¹⁰ See *infra* notes 61–65 and accompanying text.

¹¹ See *infra* Section II.B.

¹² See, e.g., *R v. Instan* [1893] 1 QB 450 (finding that because the victim provided for the defendant while they lived together, the defendant owed duty of care); *R v. Nicholls* [1874], 13 Cox CC 75 (finding that if a person takes on the care of a child, they are legally obligated to care for it); Graham Hughes, *Criminal Omissions*, 67 Yale L. J. 590, 590–97 (1958) (discussing the common law history of omissions and its early role in homicide prosecutions).

¹³ *Instan*, 1 QB at 453.

¹⁴ *Id.* at 454.

ill.¹⁵ Other English cases and early American cases similarly construed this duty narrowly and applied it only when there was some special relationship or connection with the victim.¹⁶ In *People v. Beardsley*, a case commonly taught in criminal law courses, the court cites to the American and English Encyclopedia of Law and prescribes the duty as follows:

So one who from domestic relationship, public duty, voluntary choice, or otherwise, has the custody and care of a human being, helpless either from imprisonment, infancy, sickness, age, imbecility, or other incapacity of mind or body is bound to execute the charge with proper diligence, and will be held guilty of manslaughter, if by culpable negligence he lets the helpless creature die.¹⁷

In this case, the court overturned the defendant's manslaughter conviction for failing to aid or help the victim when she died of an overdose.¹⁸ It concluded that none of the criteria above were met and so the defendant had no special status with or responsibility for the victim such that he had a legal duty to help.¹⁹

Today, courts have distilled these earlier rulings and maxims to certain distinct situations where a duty to help is imposed and failing to do so could result in criminal prosecution for homicide.²⁰ These include where the statute imposes the duty,²¹ where one stands in a certain relationship to another,²² where one is a landowner with an invitee,²³

¹⁵ *Id.* at 450.

¹⁶ See generally *id.*; *Nicholls*, 13 Cox CC 75; *Territory v. Manton*, 19 P. 387 (Mont. 1888) (upholding manslaughter conviction for husband who left his intoxicated wife in the snow at night from which she later died); *State v. Smith*, 65 Me. 257 (Me. 1876) (upholding manslaughter conviction for husband who failed to clothe and shelter his wife who was mentally ill and wife later died); *State v. Behm*, 34 N.W. 319 (Iowa 1887) (affirming manslaughter conviction for mother who neglected her child).

¹⁷ *People v. Beardsley*, 113 N.W. 1128, 1129–30 (Mich. 1907) (citation omitted).

¹⁸ *Id.* at 1131.

¹⁹ *Id.* (“The cases cited and digested establish that no such legal duty is created based upon a mere moral obligation.”).

²⁰ See Paul H. Robinson, *Criminal Liability for Omissions: A Brief Summary and Critique of the Law in the United States*, 29 N.Y. L. SCH. L. REV. 101, 111–17 (1984) (discussing six general common law categories where a duty can be imposed).

²¹ See, e.g., 720 Ill. Comp. Stat. 5/7–15 (“It is the policy of the State of Illinois that all law enforcement officers must, as soon as reasonably practical, determine if a person is injured, whether as a result of a use of force or otherwise, and render medical aid and assistance consistent with training and request emergency medical assistance if necessary.”); *infra* Section I.C.

²² See, e.g., *Pennsylvania v. Konz*, 450 A.2d 638, 641 (Pa. 1982) (discussing the limited duty owed to a spouse); *infra* Section I.B. (discussing duty of a parent to their child).

²³ *Commonwealth v. Welansky*, 55 N.E.2d 902, 909 (Mass. 1944) (affirming homicide conviction where defendant had duty of care over patrons on premises controlled by defendant and failed to maintain safety standards).

where one assumed a contractual duty to another,²⁴ where one has voluntarily assumed the care of another and so secludes the helpless person to prevent others from rendering aid,²⁵ and finally where one creates a risk of harm to the putative victim and fails to assist them.²⁶

It is important to note that Anglo-American criminal law does not recognize a general duty to help another person who is in peril.²⁷ In other words, if you come across a stranger who is badly hurt on the street and do not provide aid or help, you cannot be charged for homicide if the person ultimately dies.²⁸ A few jurisdictions, however, have enacted so-called “Bad Samaritan” laws that impose a statutory duty to call the police or otherwise provide minimal help if it is reasonable to do so, but these laws are rarely, if ever, used.²⁹ Moreover, violating these statutes only constitutes a misdemeanor or imposes a fine and thus does not carry the kind of punishment associated with a homicide conviction.³⁰ Legal scholars have debated the validity and effectiveness of a legally mandated general duty to help—much of

²⁴ See, e.g., *Pennsylvania v. Pestnikas*, 617 A.2d 1339 (Pa. Super. Ct.1992) (affirming homicide conviction where defendant entered into oral contract to provide food and medical care for victim).

²⁵ See *California v. Oliver*, 258 Cal. Rptr. 138, 144 (Cal. Ct. App. 1989) (affirming defendant’s conviction for involuntary manslaughter, finding that a duty to act was created when defendant brought an extremely intoxicated victim to her home—a private place where she alone could provide care—and allowed him to overdose on heroin).

²⁶ See, e.g., *Maryland v. DiGennaro*, 3 A.3d 1201 (Md. 2010) (affirming defendant’s manslaughter conviction when defendant caused victim’s death by failing to take appropriate remedial action after accidentally releasing nearly two tons of gravel being delivered to the quarry on the highway).

²⁷ See, e.g., *Buch v. Amory Mfg. Co.*, 44 A. 809, 811 (N.H. 1898) (“The duty to protect against wrong is, generally speaking, and excepting certain intimate relations in the nature of a trust, a moral obligation only, not recognized or enforced by law.”); Note, *The Failure to Rescue: A Comparative Study*, 52 COLUM. L. REV. 631, 631 (1952) (noting it is “[t]he Anglo-American view that there is no general duty to aid one in peril”); Robinson, *supra* note 20, at 117 (“American law has not traditionally imposed a general duty to rescue.”).

²⁸ See, e.g., *Toadvine v. Cincinnati, New Orleans & Texas Pac. Ry. Co.*, 20 F. Supp. 226 (E.D. Ky. 1937) (no duty to warn someone about to walk into a dangerous machine); *Yania v. Bigan*, 155 A.2d 343 (Pa. 1959) (no duty to assist a co-worker who voluntarily jumps into a gravel pit or strip mine).

²⁹ See, e.g., HAW. REV. STAT. § 663-1.6 (2024); MINN. STAT. § 604A.01(1) (2024); 11 R.I. GEN. LAWS § 56-1 (2024); VT. STAT. ANN. tit. 12, § 519(a) (2024); WIS. STAT. § 940.34 (2024); Melody J. Stewart, *How Making the Failure to Assist Illegal Fails to Assist: An Observation of Expanding Criminal Omission Liability*, 25 AM. J. CRIM. L. 385, 424 (1998) (“General failure-to-assist laws are examples of laws easily made but rarely enforced.”).

³⁰ See, e.g., HAW. REV. STAT. § 663-1.6 (2024); MINN. STAT. § 604A.01(1) (2024); 11 R.I. GEN. LAWS § 56-1 (2024); VT. STAT. ANN. tit. 12, § 519(a) (2024); WIS. STAT. § 940.34 (2024).

which is not relevant for my purposes.³¹ The key takeaway here is that states have historically been reluctant to impose a criminal duty to help or protect unless there is some connection or relationship between the defendant and victim.

B. *The Common Law Criminal Parental Duty of Care to Minor Child*

The parental duty of care for their minor child is one of the longstanding and paradigmatic common law duties triggering criminal punishment.³² Early English and American cases uniformly highlighted the fact that failing to take care of one's child can serve as an actus reus for a homicide charge if the omission causes their death.³³ As one early case puts it when upholding a parent's homicide conviction, "[i]t is a plain precept of universal law that young and tender beings should be nurtured and brought up by their parents, and this precept have all nations enforced."³⁴ This duty does not require the parent to cater to "every trifling complaint with which the child may be afflicted" but rather act reasonably and perform any action that is necessary to keep the child safe from danger.³⁵

Prosecutors have used this common law parental duty in various homicide cases across the country, including where the parent failed to

³¹ See, e.g., Stewart, *supra* note 29, at 404–06 (discussing the arguments in favor of a general duty, such as liberal-communitarian theory and utilitarian justifications, contrasted with those arguments against such a duty, such as the illegitimate scope of government intrusion and uncertainty of the need to intervene).

³² See, e.g., Arthur Leavens, *A Causation Approach to Criminal Omissions*, 76 CAL. L. REV. 547, 553 (1988) ("Authorities agreed from the outset that there were certain core omissions [that] were properly regarded as criminal, perhaps the paradigm being a parent's failure to rescue his or her child."); Graham Hughes, *Criminal Omissions*, 67 Yale L. J. 590, 621 (1958) (finding that the concept of criminal liability for a failure to perform a legal duty came from nineteenth century England, which imposed homicide punishment for parents who neglected their child resulting in death). It seems that this kind of liability for homicide due to a parent's neglect can be found as far as back as Roman Law in the East. See GEORGE HARMENOPOULOS, A MANUAL OF BYZANTINE LAW 33 (Edwin Hanson Freshfield trans., 1930) ("A person murders his child not only by suffocating it but by deserting it, starving it, or by exposing it in a public place for alms. . .").

³³ See, e.g., R v. Conde [1867], 10 Cox CC 547; R v. Bubb & Hook [1850], 4 Cox CC 455; Rex v. Gibbins & Proctor, [1918] 13 Crim. App. 134; State v. Behm, 34 N.W. 319 (Iowa 1887); People v. Pierson, 68 N. E. 243, 244 (N.Y. 1903).

³⁴ *Pierson*, 68 N.E. at 246. This duty would of course apply to other adults who have assumed the relation in loco parentis. *Id.* at 244.

³⁵ *Id.*; see also People v. Rolon, 73 Cal. Rptr. 3d 358, 367 (2008) ("We are satisfied that the better rule is that parents have a common law duty to protect their children and may be held criminally liable for failing to do so: a parent who knowingly fails to take reasonable steps to stop an attack on his or her child may be criminally liable for the attack if the purpose of nonintervention is to aid and abet the attack.").

protect their child from physical abuse by others,³⁶ failed to secure necessary medical treatment for their child,³⁷ or failed to provide the child with necessary food and water.³⁸ The shared thread in all these prosecutions is that the parents failed in their duty to protect their child, not others, from harm.

C. *Criminal Parental Responsibility Statutes*

As noted above, legislation is one way for jurisdictions to expand a common law duty and create distinct crimes based on relevant omissions.³⁹ In the parental context, all fifty states have passed some version of a criminal liability statute that targets parents for their child's unlawful act.⁴⁰ These statutes have expanded a parent's common law duty to include a duty to prevent harm caused by their child.⁴¹

The most common parental liability statute—sometimes referred to as contributing to the delinquency of a minor—punishes parents in certain circumstances for failing to prevent their child from engaging in criminal activity.⁴² The purpose of these statutes is to “induce increased parental control of their children.”⁴³ The parents in these scenarios are not prosecuted for the child's crime but for their inability to prevent it. For example, “[i]f a child is caught stealing, parents are not charged under a burglary statute, but under a parental liability statute for ‘allowing’ their child to steal. The sentence is not related to the theft, but to the parents’ omission to properly supervise . . . their child.”⁴⁴

³⁶ See, e.g., *Commonwealth v. Howard*, 402 A.2d 674 (Pa. 1979) (upholding parent's manslaughter conviction for failing to protect minor child from boyfriend's physical abuse); *State v. Tucker*, 861 P.2d 37 (Haw. Ct. App. 1993) (upholding mother's homicide conviction for failing to stop mistreatment of her child by another).

³⁷ *State v. Neumann*, 832 N.W.2d 560 (Wis. 2013) (upholding conviction of parents who used prayer instead of medical intervention to treat child's illness).

³⁸ *People v. Burden*, 140 Cal. Rptr. 282, 291 (Ct. App. 1977) (upholding homicide conviction for parent failing to provide infant child with food and water).

³⁹ See *supra* note 29 and accompanying text.

⁴⁰ Brian Neill, *A Retributivist Approach to Parental Responsibility Laws*, 27 OHIO N.U. L. REV. 119, 121 (2000) (“Today, all fifty states make contributing to the delinquency of a minor an offense.”).

⁴¹ See, e.g., James Herbie DiFonzo, *Parental Responsibility for Juvenile Crime*, 80 OR. L. REV. 1, 38 (2001).

⁴² CAL. PENAL CODE § 272 (West 2024); KY. REV. STAT. ANN. § 530.060 (West 2024); N.Y. PENAL LAW § 260.10 (McKinney 2024); OR. REV. STAT. § 163.577 (2024).

⁴³ DiFonzo, *supra* note 41, at 38.

⁴⁴ Toni Weinstein, Note, *Visiting the Sins of the Child on the Parent: The Legality of Criminal Parental Liability Statutes*, 64 S. CAL. L. REV. 859, 867 (1991).

These types of statutes can potentially hold parents responsible for child specific illegal acts, such as truancy or curfew violations, as well as general criminal activity.⁴⁵ But these stand-alone crimes are rarely used by prosecutors and, even when applicable, are typically only classified as misdemeanors and thus do not carry the prison term or stigma of a homicide conviction.⁴⁶

Another, newer and potentially more serious, statutory crime of omission enacted by some states punishes a parent who fails to properly secure a gun that may be found by their minor child.⁴⁷ The sentences for violating this duty can range from a fine to imprisonment depending on whether the child harms or kills someone with the unsecured gun or if the parent is aware of a substantial risk of such harm.⁴⁸ These kinds of statutory crimes provide an additional tool for prosecutors—albeit one that carries less punishment than a homicide charge—to use against parents who fail to control their child from harming someone else.

II. IMPORTING CIVIL PARENTAL DUTIES INTO THE CRIMINAL CONTEXT

A. *The Crumbley Homicide Convictions*

Jennifer and James Crumbley were convicted of four counts of manslaughter for failing to prevent their 15 year-old teenage son, Ethan, from intentionally shooting and killing four students at his high school.⁴⁹ Michigan's involuntary manslaughter charge is like other states' and requires that the defendant caused the victim's death, by either performing some act or by failing to act, under circumstances that

⁴⁵ Linda A. Chapin, *Out of Control? The Uses and Abuses of Parental Liability Laws to Control Juvenile Delinquency in the United States*, 37 SANTA CLARA L. REV. 621, 639–648 (1997) (discussing the various types of illegal acts that can be prosecuted under delinquency statutes).

⁴⁶ See *supra* note 42. But see N.M. STAT. ANN. § 30-6-3 (2024) (treating delinquency crime as a felony). These laws are infrequently charged because of the “difficulty inherent in proving parental knowledge in states which require some act or omission of the parent.” Tami Scarola, Note, *Creating Problems Rather Than Solving Them: Why Criminal Parental Responsibility Laws Do Not Fit Within Our Understanding of Justice*, 66 FORDHAM L. REV. 1029, 1046 n.167 (1997); see also Pamela K. Graham, Comment, *Parental Responsibility Laws: Let the Punishment Fit the Crime*, 33 LOY. L.A. L. REV. 1719, 1735 (2000).

⁴⁷ FLA. STAT. § 784.05(3) (2024); MICH. COMP. LAWS § 28.429 (2024); GA. CODE ANN. § 16-11-101.1(c) (2024).

⁴⁸ See *supra* note 47.

⁴⁹ See Jacey Fortin & Anna Betts, *Parents of Michigan School Shooter Sentenced to 10 to 15 Years in Prison*, N.Y. TIMES (Apr. 9, 2024), <https://www.nytimes.com/2024/04/09/us/crumbley-sentencing-oxford-high-shooting.html> (last visited Sept. 9, 2024).

show the defendant was grossly negligent or had a culpable indifference to the safety of others.⁵⁰

The *Crumbley* prosecutor focused on key omissions made by the parents that led to the students' deaths: the parents neglected to get their son required mental health treatment, disregarded potential signs of intended violence, failed to properly secure the gun, and, most notably, failed to remove him from school the day of the shooting after school officials raised concerns that morning.⁵¹ It is important to note that the evidence also showed that the parents were "grossly negligent" or had reason to believe their son posed a risk to others.⁵²

Interestingly, the prosecutor did not also charge the defendants with contributing to the delinquency of a minor, a crime available under Michigan law.⁵³ This may have been strategic. Because a delinquency charge is only a misdemeanor in Michigan, its exclusion foreclosed the jury from finding the parents guilty of this lesser charge and not guilty of manslaughter. By bringing only the manslaughter charge, the jury's decision was either to find the parents guilty of the homicide or acquit them of any criminal wrongdoing. Michigan also criminalizes a parent's failure to store a firearm with a minor present, but this law was enacted only recently and could not be used against the Crumbleys.⁵⁴

⁵⁰ See Mich. Non-Standard Jury Instr. Crim. § 25:26; Mich. Model Crim. Jury Instr. § 16.13; *People v. Pittinger*, 307 N.W.2d 715, 717 (Mich. Ct. App. 1981). The jury found that the parents were aware of the risk Ethan posed to others (i.e., the required mens rea in the statute was satisfied), based on a variety of factors, including his behavior and texts leading up to the shootings as well as issues raised by school officials. See *People v. Crumbley*, No. 362210, 2023 WL 2617524, at *5–7 (Mich. Ct. App. Mar. 23, 2023).

⁵¹ See *Crumbley*, 2023 WL 2617524, at *2–4; The prosecutor also relied on voluntary affirmative acts, such as James Crumbley buying Ethan a gun and Jennifer Crumbley taking him to the shooting range days before the shooting. *Id.* at *3. Prosecutors are free to present both kinds of actus reus. Since a jury only needs to find that one act or inaction led to the victim's death, this strategy may increase the chances of conviction. See, e.g., *People v. Albers*, 672 N.W.2d 335, 340–41 (Mich. Ct. App. 2003) (noting liability can attach either by an affirmative act or failure to perform legal duty).

⁵² Dalia Faheid & Eric Levenson, *Jurors Found a Teen School Shooter's Father and Mother Guilty of Manslaughter. Here's What the Verdicts Mean for Parents*, CNN (Mar. 15, 2024, 10:01 AM), <https://www.cnn.com/2024/03/15/us/james-jennifer-crumbley-verdict-parents/index.html> [<https://perma.cc/X827-HGRL>]; *Crumbley*, 2023 WL 2617524, at *5–7 (noting evidence of a culpable mental state based on Ethan's behavior and texts leading up the shootings as well as the issues raised by the school officials).

⁵³ MICH. COMP. LAWS § 750.145 (2024); see Anna Marchiony, *A Parent's Legal Duty: The Crumbleys' Culpability for Failing to Stop a School Shooting*, U. CIN. L. REV. (Dec. 13, 2023), <https://uclawreview.org/2023/12/13/a-parents-legal-duty-the-crumbleys-culpability-for-failing-to-stop-a-school-shooting> [<https://perma.cc/59UX-UB4Y>].

⁵⁴ MICH. COMP. LAWS § 28.429 (2024).

B. *Expanding the Criminal Common Law Parental Duty*

This is the first known occurrence where a prosecutor obtained a conviction of manslaughter relying on a parent's omission where the victim was not the parent's own child. A prior Michigan case involving a similar scenario illustrates the precedent setting nature of the instant case.⁵⁵ In *People v. Albers*, the defendant was also convicted of involuntary manslaughter when she failed to stop her child from starting a fire that killed another child in the same apartment complex.⁵⁶ The prosecutor in that case, similarly, relied on an omission with a duty as the key actus reus for the crime.⁵⁷ However, there was no mention of the defendant violating a parental duty; rather the prosecutor argued that the parent violated a contractual duty between herself and the victim both of whom lived in the same apartment building.⁵⁸

The Crumbleys did not have a contractual or other special relationship with the victims of the shootings that could justify the imposition of another common law duty. Indeed, the evidence suggested that they did not know the victims at all.⁵⁹ The only connection was indirect—through their son. This explains why the government's theory focused on the parental duty. To support a more expansive interpretation, the prosecutor invoked the parallel, but broader, common law civil parental standard but without labeling it as such.⁶⁰ In the criminal complaint, the prosecutor recited near verbatim the relevant language from the Restatement (Second) of Torts, which requires parents to “control [their] minor child as to prevent [them] from

⁵⁵ *Albers*, 672 N.W.2d 336.

⁵⁶ *Id.* at 338.

⁵⁷ *Id.* at 340. The other prosecutorial theory of liability focused on the voluntary affirmative act of leaving out a cigarette lighter that was accessible to her child. *Id.*

⁵⁸ *See id.* The government pointed to the fact that the defendant signed a lease agreement, and the victim lived in the building. *Id.* at 338, 341. While not provided in the case, it is likely that the agreement imposed a duty on the lessee to take reasonable steps to protect other tenants in the building. A contractual based duty is one of the long-standing common law criminal duties. *See People v. Beardsley*, 113 N.W. 1128, 1129 (Mich. 1907) (“It must be a duty imposed by law or by contract . . .”).

⁵⁹ *See People v. Crumbley*, No. 362210, 2023 WL 2617524, at *1 (Mich. Ct. App. Mar. 23, 2023).

⁶⁰ *Id.* at *7 (“Felony complaints against defendants . . . alleged . . . failure to exercise reasonable care to control his or her minor child so as to prevent him from intentionally harming others or from so conducting himself so as to create an unreasonable risk of bodily harm to others knowing that he or she has the ability to control his or her child and knowing of the necessity and opportunity to do so.”).

intentionally harming others.”⁶¹ Following the prosecutor’s lead, the trial judge also quoted the civil standard (again, without labeling it) when instructing the jury on the theory of liability: “In Michigan, a parent has a legal duty to exercise reasonable care to control their minor child so as to prevent the minor child from intentionally harming others or prevent the minor child from conducting themselves in a way that creates an unreasonable risk of bodily harm to others.”⁶²

But a violation of this common law parental duty is only supposed to trigger tort liability and civil damages, not criminal sanctions.⁶³ Its purpose, in other words, is to compensate the victims, not punish the parents.⁶⁴ The families of the Columbine school shooting victims in Colorado, in fact, relied on this civil parental standard to sue the parents of the shooters and ultimately settled for millions.⁶⁵ This is what makes the *Crumbley* case such a watershed moment. What typically would have been monetary judgment against the parents has become a prison sentence. It is not clear if the defendants will challenge this theory on appeal but, either way, the door has now opened for prosecutors to target parents for not stopping their children from committing murder.⁶⁶

In fact, Georgia, in a recent school shooting, has charged the father of the shooter with involuntary manslaughter (among other

⁶¹ RESTATEMENT (SECOND) OF TORTS § 316 (AM. L. INST. 1965); *see also* *Dortman v. Lester*, 155 N.W.2d 846, 848–49 (Mich. 1968) (“A parent is under a duty to exercise reasonable care [under the Restatement] so to control his minor child as to prevent it from intentionally harming others or from so conducting itself as to create an unreasonable risk of bodily harm to them . . .”).

⁶² *Jennifer Crumbley Trial: What the Jury Must Decide*, FOX 2 DET. (Feb. 5, 2024, 12:13 PM), <https://www.fox2detroit.com/news/jennifer-crumbley-trial-what-the-jury-must-decide> [<https://perma.cc/U2T7-94PX>] (detailing the judge’s instructions to the jury). For a video of the jury instructions, *see* WXYZ-TV Detroit Channel 7, *Judge Gives Jury Instructions in Jennifer Crumbley Trial*, YOUTUBE (Feb. 5, 2024), <https://www.youtube.com/watch?v=wnrMMkyJzWQ>.

⁶³ *See* RESTATEMENT (SECOND) OF TORTS § 316 (AM. L. INST. 1965) (discussing cases involving monetary damages); *Dortman*, 155 N.W.2d. at 847; *Taylor v. Gordon*, No. 239630, 2003 WL 1878809, at *1 (Mich. Ct. App. Apr. 15, 2003) (explaining the civil common law parental duty of care); *see also* *Parental Liability Laws by State*, CHARLESTON SCH. OF L., <https://charlestonlaw.libguides.com/c.php?g=1226408&p=8986064> [<https://perma.cc/7ER9-X2SU>] (Apr. 11, 2024).

⁶⁴ *See, e.g.,* *Gompers v. Buck’s Stove & Range Co.*, 221 U.S. 418, 441 (1911) (distinguishing the different objectives of a criminal action compared with a civil suit).

⁶⁵ *See* Michael Janofsky, *\$2.53 Million Deal Ends Some Columbine Lawsuits*, N.Y. TIMES (Apr. 20, 2001), <https://www.nytimes.com/2001/04/20/us/2.53-million-deal-ends-some-columbine-lawsuits.html> (last visited Sept. 9, 2024).

⁶⁶ The prosecutor also relied on more traditional voluntary affirmative acts to establish liability, which may make it harder to succeed on appeal. *See supra* note 51.

charges) under what seems to be comparable circumstances.⁶⁷ While the facts are developing at the time of this Essay, it appears that after learning about possible online threats his son allegedly made, the father still gifted his then 13-year-old son a gun and allowed him to possess it until the son used the weapon to kill his classmates.⁶⁸ A prosecutor can use these facts to develop a prosecutorial theory along the lines of the *Crumbley* case. The father similarly failed to properly secure the gun or otherwise stop the shooting even though he knew his son posed a risk to others.⁶⁹

C. Constitutional and Policy Considerations

Expanding the common law parental duty in this way could face constitutional and policy hurdles. The constitutional due process clause requires that a defendant only be prosecuted for conduct for which they have fair notice.⁷⁰ In other words, the defendant should know or be reasonably expected to know that this type of homicide prosecution is possible. The question here is whether a parent can be fairly apprised of the severe consequences of failing to stop their child from killing someone else if there was no pre-existing criminal common law duty or statute supporting this kind of homicide prosecution.⁷¹ Based on

⁶⁷ See Emily Cochrane & Jacey Fortin, *Father of Accused Georgia Shooter Charged With Two Counts of Second-Degree Murder*, N.Y. TIMES (Sept. 5, 2024), <https://www.nytimes.com/2024/09/05/us/georgia-school-shooting-colt-gray-father.html> (last visited Sept. 9, 2024).

⁶⁸ *Id.*

⁶⁹ Cf. Ed White, *With Father of Suspect Charged in Georgia Shooting, Will More Parents be Held Responsible?*, AP NEWS (Sept. 7, 2024, 9:03 AM), <https://apnews.com/article/georgia-school-shooting-father-charged-05e8cfb5aff0b99350c3265981c1ecec> (last visited Sept. 9, 2024) (discussing similarities between the Georgia and *Crumbley* cases).

⁷⁰ See *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (“[I]t is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.”); *United States v. Lanier*, 520 U.S. 259, 266 (1997) (“[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope.”); see also Alexander L. Ledbetter, Note, *If I Have a Duty, I Need Notice to Satisfy Due Process*, 61 ST. LOUIS U. L.J. 787, 803–804 (2017) (discussing the requirement of fair notice for liability based on an omission of a duty that is not expressly provided for by statute).

⁷¹ Scholars have argued that criminal parental statutes (like those described in Section I.C) fail to provide notice because they are vague or otherwise do not tell parents what standard the law expects them to meet. See Weinstein, *supra* note 44, at 895 (“The language of section 272 [California’s parental liability statute], which criminalizes a breach of ‘the duty to exercise reasonable care, supervision, protection, and control,’ fails to adequately and specifically define what parental action or inaction is criminally proscribed.”). Under this line of reasoning, *a fortiori*, the instant expansion of the common law duty would seem to be unconstitutional as it fails to have even a statutory foundation.

historical precedent, parents would only seem to be on notice that an omission could lead to homicide charges if a parent's failure caused their own child's death.

On the other hand, it may be expected that the parental common law duty in the criminal context would organically expand, particularly to include protection of other minors. Most states already impose a duty—both criminal and civil—on parents to control their child from causing physical harm to others (e.g., contributing to delinquency of minor statutes, failure to properly store a gun legislation, common law civil duty to control).⁷² It is true that violating this kind of duty currently only triggers civil suits or non-homicide charges. Perhaps, however, it makes sense to separate the specific crime or tort from the underlying duty. While the use of an expanded parental duty in a homicide prosecution is new, the duty itself is not. And since there is nothing novel about using an omission to establish a homicide charge, taken together these facts suggest that parents should be on notice of the potential for this kind of prosecution.

There are also policy considerations at play here. It is telling that the charges arose in the context of a school shooting. Deterring gun violence at schools has been a difficult task.⁷³ This type of theory could give prosecutors a new tool in this fight—going after the parents of underage shooters. One could argue that these parents should be punished for ignoring warning signs that their child was violent.⁷⁴ That said, perhaps these kinds of prosecutions unfairly blame the parent, particularly when the defendant is a teenager: “[A]s children develop, parental influence increasingly competes with other types of influence such as from peers, the community and popular culture, and, therefore, this approach [of punishing parents] is too simplistic.”⁷⁵

This expansion also opens the door to wider prosecutions beyond homicide which may or may not be desirable. The parental civil duty is general in nature and, so, its expansion in the criminal context could be used to punish parents who fail to exercise reasonable control

⁷² See *supra* Section I.C; *supra* note 63 and accompanying text; cf. Marchiony, *supra* note 53 (discussing the various Michigan statutes surrounding parental duties).

⁷³ See Max Kaufman, Note, *Criminalizing Threats Against Schools: A Divergence of Mens Rea and Punishment Severity in Recent State Legislation*, 91 FORDHAM L. REV. 2391, 2397–400 (2023) (discussing and evaluating various ways states have tried to stop school shootings).

⁷⁴ This type of prosecution, therefore, could serve the two main goals of criminal punishment. See Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943, 950–52 (2000) (describing the deterrence and retributive theories of criminal punishment).

⁷⁵ Susan L. Pollet, *Responses to Juvenile Crime Consider the Extent of Parents' Responsibility for Children's Acts*, N.Y. STATE BAR J., July–Aug. 2004, at 26–27.

when their child assaults or physically hurts someone else.⁷⁶ Actually, this is what Georgia has done in the aforementioned case against the father of the school shooter; in addition to the homicide charges, the State has also brought eight counts of child cruelty against him to account for the victims who were physically hurt but not killed.⁷⁷ Since the language in these kinds of criminal statutes makes no reference to school shootings, there is nothing stopping prosecutors from charging parents with them in any setting where a parent fails to stop their child from assaulting or physically hurting someone else.⁷⁸

CONCLUSION

The purpose of this Essay is not to resolve the constitutional hurdles or evaluate the various policy considerations but rather highlight the uniqueness of this theory of liability and its potential impact. It remains to be seen whether and how the Georgia prosecutor or other prosecutors will use this strategy and, more importantly, whether appellate courts will approve of this kind of expanded parental duty. Given the continued tragedy of school shootings, this type of prosecution could be a step in the right direction. It may be time for the common law parental duty to evolve to include the protection of other children, not just their own.

⁷⁶ See *supra* note 61 and accompanying text.

⁷⁷ See Jacey Fortin, *What we Know About the Apalachee High School Shooting*, N.Y. TIMES (Sept. 6, 2024), <https://www.nytimes.com/2024/09/06/us/apalachee-high-school-georgia-shooting.html> (last visited Sept. 12, 2024).

⁷⁸ See GA. CODE ANN. § 16-5-70 (2024) (describing elements of a cruelty to children claim); MICH. COMP. LAWS § 750.136b (2024) (describing elements of a child abuse claim). This type of expanded parental duty could also be used to charge parents in circumstances where their child harms another adult. See, e.g., WIS. STAT. § 940.23 (2024) (punishing anyone who recklessly causes physical injury to another); N.Y. PENAL LAW § 120.05(4) (McKinney 2024) (punishing anyone who recklessly causes physical injury to another with a weapon).