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Protecting Our Children: A Reformation of South Carolina's Homicide by Child Abuse Laws

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PROTECTING OUR CHILDREN: A REFORMATION OF SOUTH CAROLINA'S HOMICIDE BY CHILD ABUSE LAWS

I. INTRODUCTION

"In the United States, a child is abused or neglected every [thirty-six] seconds."[1] The frequency of child abuse and neglect is even more unsettling when it comes to rates of abuse and neglect that lead to child fatalities.[2] In the past few years, too many children in South Carolina fell victim to what can only be described as heinous crimes.[3] These instances include—but are in no way limited to—a thirteen-month-old dying as a result of chronic malnutrition and dehydration, weighing only nine pounds at the time of her death;[4] a four-year-old

1. Kimberly Day, *The Fight Against Child Abuse: What it Would Take to Win*, 45 THE PROSECUTOR, no. 2, 2011, at 44, 44.
2. *Id.* at 44–45.
3. *See infra* notes 4–8.
4. *Homicide by Child Abuse Investigation*, MIDLANDS CRIME STOPPERS (Sept. 13, 2013), http://news.midlandscrimestoppers.com/2013/09/homicide-by-child-abuse-investigation.html.

autistic boy dying as a result of blunt-force head trauma;[5] and a three-year-old girl dying after she suffered prolonged physical and sexual abuse.[6] These types of situations, along with many others, are unfortunately common among children in the United States,[7] as well as children in South Carolina.[8]

Because of the unique character of child abuse fatality cases, prosecuting offenders under traditional murder laws proves difficult.[9] To combat this difficulty, several states—including South Carolina[10]—have implemented special statutes, usually referred to as "homicide by child abuse" statutes.[11] These special homicide statutes recognize the need for additional protection for children and, thus, separate child homicides from adult homicides.[12] Such statutes have received considerable praise from legal scholars as being an appropriate way to address child abuse fatalities.[13]

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5. Kelly Davis, *Richland Parents Held in 4-Year Old Son's Death*, THE STATE, July 4, 2013, at B1, *available at* http://www.thestate.com/2013/07/03/2846294/richland-county-pair-arrested.html.

6. Patricia Burkett, *Mom Testifies Against Former Boyfriend in Bennettsville Homicide by Child Abuse Case*, WBTW NEWS 13 (June 19, 2013, 1:15 PM), http://www.wbtw.com/story/22634123/mother-testifies-against-former-boyfriend-wednesday-in-bennettsville-homicide-by-child-abuse-case.

7. *Child Abuse & Neglect Deaths in America*, EVERY CHILD MATTERS EDUC. FUND 6 (July 2012), http://www.everychildmatters.org/storage/documents/pdf/reports/can_report_august2012_final.pdf ("More than 25 million reports of abuse and neglect have been made to official state child protection agencies in this past decade.")

8. Several other recent incidents in South Carolina for which offenders were charged with homicide by child abuse illustrate the prevalence of this crime in the state. *See* Davis, *supra* note 5; R. Darren Price, *Woman Arrested in Child's Death*, THE STATE, May 23, 2013, at B1, *available at* http://www.thestate.com/2013/05/23/2783477/columbia-woman-arrested-in-child.html; *Funeral Set for Toddler Allegedly Killed by Abuse*, LIVE 5 WCSC NEWS (Oct. 28, 2011), http://www.live5news.com/story/15643399/mother-arrested-after-toddler-dies-burns-found-in-genital-area; Will Jones, *Two Homicide by Child Abuse Cases Head to Grand Jury*, FOX CAROLINA NEWS (Aug. 30, 2011, 1:00 PM), http://www.foxcarolina.com/story/15194350/two-homicide-by-child-abuse-cases-head-t; Ray Rivera, *Man Gets Life in Prison for Homicide by Child Abuse in Son's Death*, WISTV NEWS 10 (Oct. 11, 2012, 3:41 PM), http://www.wistv.com/story/19795253/jury-finds-man-guilty-of-homicide-by-child-abuse-in-sons-death; Tony Santaella, *Teen Charged with Homicide by Child Abuse*, WLTX.COM (Apr. 11, 2012, 2:34 PM), http://www.wltx.com/news/story.aspx?storyid=183428.

9. Jerold P. McMillen, Note, *Prosecuting Child Abuse Homicides in Iowa: A Proposal for Change*, 44 DRAKE L. REV. 129, 131 (1995).

10. *See* S.C. CODE ANN. § 16-3-85 (2003).

11. *See* Ryan H. Rainey & Dyanne C. Greer, *Criminal Charging Alternatives in Child Fatality Cases*, 29 THE PROSECUTOR, no. 1, 1995, at 16, 16.

12. Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397, 423 (1999).

13. *See, e.g.*, McMillen, *supra* note 9, at 151 ("By adopting a homicide-by-abuse law, state efforts to prosecute the offenders who violate a child's trust will not be hindered by laws inadequately designed to punish the offender."); Charles A. Phipps, *Responding to Child Homicide: A Statutory Proposal*, 89 J. CRIM. L. & CRIMINOLOGY 535, 593 (1999) (stating that "child homicide statutes can provide a useful tool in the fight against child abuse"); Rainey & Greer, *supra* note 11 (noting that states responded to the difficultly of proving the requisite intent to obtain murder convictions by developing specialized child homicide statutes). Further, after two years of studying

This Note discusses the current epidemic of child abuse and neglect fatalities in the United States, and in South Carolina specifically, arguing that South Carolina's homicide by child abuse statute is not as effective as originally intended and that more can be done to protect the welfare of children in the state from both a legal and policy standpoint. Reducing the state's child abuse fatality rate is obviously important to South Carolina, as demonstrated by the General Assembly's adoption of a separate homicide charge designed specifically to address the issue. However, by reforming the current law to increase the coverage of protection, creating stricter mandatory reporting rules, and focusing on improving child protection services, South Carolina lawmakers could accomplish more.

Part II of this Note provides general background information on fatal child abuse, discusses the issues that accompany prosecuting such crimes, and summarizes the possible legal alternatives in addressing the problem. Part III sets forth the current law in South Carolina—mainly the homicide by child abuse statute and the corresponding mandatory reporting statute. Part IV compares South Carolina's law with the law in other states, particularly states that have similar homicide by child abuse statutes, to determine whether the language or structure of these statutes should be used to guide legal reform in South Carolina. Part V explores possible changes to the current South Carolina statutes and offers several policy recommendations to help South Carolina better combat the problem of fatal child abuse.

II. BACKGROUND

The reality that child abuse and neglect are common in the United States is hard to accept.[14] This Part discusses the prevalence of fatal child abuse, looking first at the overall prevalence of fatal child abuse in the United States and then looking specifically at fatal child abuse in South Carolina. Part II also sets forth the issues that accompany prosecuting such crimes and explores the various charges that may be brought against offenders.

A. Fatal Child Abuse in the United States

The National Child Abuse and Neglect Data System defines *child fatality* as "the death of a child caused by an injury resulting from abuse or neglect or where abuse or neglect was a contributing factor."[15] *Fatal child abuse* may refer

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child fatalities, the U.S. Advisory Board on Child Abuse and Neglect determined that the enactment of child homicide statutes should be a national priority. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES 70 (1995).

14. *See* EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 6.

15. *Child Abuse and Neglect Fatalities 2011: Statistics and Interventions*, CHILD WELFARE INFO. GATEWAY 2 (Feb. 2013), https://www.childwelfare.gov/pubs/factsheets/fatality.pdf.

to one of two situations: "repeated abuse over a period of time (e.g., battered child syndrome)" or "a single, impulsive incident (e.g., drowning, suffocating, or shaking a baby)."[16] *Fatal neglect*, on the other hand, refers to a situation in which the child's death does not result from anything that the caregiver does, but rather "from a caregiver's failure to act."[17] The neglect may be "chronic (e.g., extended malnourishment)" or may be "acute (e.g., an infant who drowns after being left unsupervised in the bathtub)."[18]

Every year, thousands of children in the United States die as a result of physical abuse, severe neglect, and other forms of maltreatment,[19] usually committed by their parents or someone who is "entrusted with their care" and responsible for their protection.[20] In fact, "[t]he United States has one of the worst records among the industrialized nations"[21]—losing approximately five

16 *Id.* at 4.

17. *Id.*

18. *Id.*

19. *See* Day, *supra* note 1, at 44. Between 2001 and 2010, the official number of child abuse and neglect fatalities was 15,510. *See* EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 1 (citations omitted). This number is almost three times as large as the combined military deaths from 2001 to 2010. *Id.* at intro. (citations omitted). "[H]omicide is the cause of death among children seven times more frequently than meningitis and twenty times more often than AIDS." Phipps, *supra* note 13, at 541–42 (citing Carolyn J. Levitt et al., *Abusive Head Trauma*, *in* CHILD ABUSE: MEDICAL DIAGNOSIS AND MANAGEMENT 1, 5 (Robert M. Reece ed., 1994)). While these situations are, of course, contextually distinguishable, they also demonstrate that child abuse and neglect fatalities are a prevalent and very serious cause of death in American society.

20. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-599, CHILD MALTREATMENT: STRENGTHENING NATIONAL DATA ON CHILD FATALITIES COULD AID IN PREVENTION 1 (2011), *available at* http://www.gao.gov/new.items/d11599.pdf; *see also* Phipps, *supra* note 13, at 542 ("Those who kill young children are nearly always caretakers or persons in a significant relationship to the child.").

21. *National Child Abuse Statistics: Child Abuse in America*, CHILD HELP, http://www.childhelp-usa.com/pages/statistics (last visited Mar. 5, 2014) (citing CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2012, at 51–60 (2012), *available at* http://www.acf.hhs.gov/programs/cb/research-data-technology/statistics-research/child-maltreatment; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20). According to a United Nations Children's Fund (UNICEF) report comparing incidents of physical abuse of children among the twenty-seven richest nations of the world, children in the United States, Mexico, and Portugal have the greatest chances of dying from maltreatment. U.N. CHILDREN'S FUND, A LEAGUE TABLE OF CHILD MALTREATMENT DEATHS IN RICH NATIONS: INNOCENTI REPORT CARD NO. 5, at 2 (2003), *available at* http://www.unicef-irc.org/publications/pdf/repcard5e.pdf. The report found that a small group of countries—Spain, Greece, Italy, Ireland, and Norway—have an exceptionally low incidence of child maltreatment deaths. *Id.* Compared to those leading countries, Belgium, the Czech Republic, New Zealand, Hungary, and France have child death rates that are four to six times higher. *Id.* The United States, Mexico, and Portugal have rates that are between ten and fifteen times higher than the leading countries. *Id.* Additionally, the U.S. child maltreatment death rate is three times higher than that of Canada, eleven times that of Italy, and more than double that of France, Japan, Germany, and Britain. Naomi Spencer, *Child Deaths from Abuse and Neglect Rise in the US*, WORLD SOCIALIST WEB SITE (Oct. 28, 2009), http://www.wsws.org/en/articles/2009/10/chld-o28.html.

children every day to abuse-related deaths.[22] *Infants*, children who are a year old or younger, and *toddlers*, children who are three years old or younger, "are the most vulnerable to such abuse and neglect"[23] because of "their dependency, small size, and inability to defend themselves."[24]

States use different mechanisms to count and report child abuse, and states also dissimilarly define what constitutes child abuse and neglect deaths.[25] Thus, the actual number of abused children in the United States—and the actual number of child abuse and neglect fatalities—is unknown.[26] Several researchers, however, have found that a significant undercounting of child abuse and neglect deaths has occurred and that the true number is several thousands more than the fatalities found for the 2001 to 2010 range.[27] Additionally, regardless of whether an exact number of recorded fatalities is ascertainable, the U.S. Department of Health and Human Services has reported an increase in the rates of child abuse fatalities during the past several years.[28]

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22. CHILD HELP, *supra* note 21 (citing CHILDREN'S BUREAU, *supra* note 21, at 51–60; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 1). The range of daily deaths is, on average, somewhere between four and seven. *Id.* (citing CHILDREN'S BUREAU, *supra* note 21, at 51–60; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 1). Whatever the actual number may be, many more American children die from abuse and neglect than children in the majority of other developed countries. *See* EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 8 (citing U.N. CHILDREN'S FUND, *supra* note 21, at 6).

23. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 1, 4; s*ee also* Phipps, *supra* note 13, at 541 (citing Levitt et al., *supra* note 19, at 5) (finding that children under the age of five are at the greatest risk for being killed by abuse or neglect).

24. CHILD WELFARE INFO. GATEWAY, *supra* note 15, at 4.

25. Day, *supra* note 1, at 46; *see also* CHILD WELFARE INFO. GATEWAY, *supra* note 15, at 3 (noting the variation among reporting requirements and definitions of child abuse and neglect).

26. Day, *supra* note 1, at 46.

27. EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 1 (citing Marcia E. Herman-Giddens et al., *Underascertainment of Child Abuse Mortality in the United States*, 282 J. AM. MED. ASS'N 463, 463–67 (1999); EDWARD E. COTTON, ADMINISTRATIVE CASE REVIEW PROJECT, CLARK COUNTY, NEVADA: REPORT OF DATA ANALYSIS, FINDINGS, AND RECOMMENDATIONS (Nov. 20, 2006), *available at* http://www.youthlaw.org/fileadmin/ncyl/youthlaw/litigation/Clark_K.2/Ed_Cotton_Report.pdf; Tessa L. Crume et al., *Underascertainment of Child Maltreatment Fatalities by Death Certificates, 1990–1998*, 110 PEDIATRICS e18 (2002), *available at* http://pediatrics.aappublications.org/content/110/2/e18.full.html). Congress has also found that deaths from child abuse and neglect are significantly underreported. *See* Protect Our Kids Act of 2012, H.R. 6655, 112th Cong. § 2 (as passed by House of Representatives, Dec. 19, 2012).

28. EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 3. In response to the prevalence of fatal child abuse in the United States, the House recently passed the Protect Our Kids Act of 2012, which is aimed at developing a national strategy, as well as recommendations for reducing fatalities from child abuse and neglect. *See* H.R. 6655, 112th Cong.

B. Fatal Child Abuse in South Carolina

Under South Carolina law, *child abuse* or *neglect* means "an act or omission by any person which causes harm to the child's physical health or welfare."[29] This harm occurs as follows:

> [W]hen a person: (a) inflicts or allows to be inflicted upon the child physical injury, including injuries sustained as a result of excessive corporal punishment; (b) fails to supply the child with adequate food, clothing, shelter, or health care, and the failure to do so causes a physical injury or condition resulting in death; or (c) abandons the child resulting in the child's death.[30]

Recently, state legislators admitted that South Carolina is struggling to protect children from being neglected or abused to death.[31] South Carolina has frequently ranked higher than many other states when it comes to child abuse and neglect fatalities.[32] Indeed, South Carolina's rates of abuse fatalities for a

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29. S.C. CODE ANN. § 16-3-85(B)(1) (2003).

30. *Id.* § 16-3-85(B)(2).

31. *See, e.g.*, Kim Severson, *South Carolina Soul-Searching on Welfare of Children*, N.Y. TIMES, June 14, 2013, at A14, *available at* http://www.nytimes.com/2013/06/14/us/south-carolina-soul-searching-on-welfare-of-children.html?_r=0 (quoting Representative Jenny Anderson Horne as saying, "We've had way too many dead children lately."). Further, some critics believe the high rate of child fatalities is the result of a recurring, systemic failure to protect South Carolina's vulnerable children. *See* Porter Barron, Jr., *In Harm's Way: Critics Say DSS Fails to Protect State's Most Vulnerable Children*, FREE TIMES (Oct. 9, 2013), http://www.free-times.com/cover/in-harms-way.

32. Between 1999 and 2012—the years that the U.S. Department of Health and Human Services released child maltreatment reports with specific data regarding child abuse and neglect fatalities—South Carolina ranked higher than the national rate for six years, approximately the same for two years, and lower for six years. *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 1999, at 41 (2001), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm99/cm99.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2000, at 57 (2002), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm00/cm2000.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2001, at 54 (2003), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm01/cm01.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2002, at 54 (2004), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm02/cm02.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2003, at 58 (2005), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm03/cm2003.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2004, at 68 (2006), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm04/cm04.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2005, at 65 (2007), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm05/cm05.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2006, at 70 (2008), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm06/cm06.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2007, at 59 (2009), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm07/cm07.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN

majority of the years between 2000 and 2010 were higher than the national average.[33] Notably, South Carolina's rates do not indicate a trend toward reducing fatal child abuse occurrences;[34] rather, the rates have fluctuated over this period instead of steadily decreasing.[35] The fluctuations in South Carolina's annual child abuse fatality rates suggest that rates will continue to rise and fall sporadically, unless changes are made to law and policy.[36]

C. Issues with Prosecuting Fatal Child Abuse

When attempting to charge and convict offenders who abuse a child to death, prosecutors have to overcome many hurdles.[37] First, prosecutors must tackle the emotional issue: no one wants to believe that caretakers—or, more specifically, parents—can engage in such violence against children.[38] Thus, prosecutors are tasked with the challenging job of successfully persuading jurors that caretakers are capable of physically abusing children to such extremes.[39] A major obstacle to such persuasion is establishing that the caretaker had the

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SERVS., CHILD MALTREATMENT 2008, at 59 (2010), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm08/cm08.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2009, at 59 (2010), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2010, at 63 (2011), *available at* http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2011, at 63 (2012), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm11.pdf; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2012, at 56 (2012), *available at* http://www.acf.hhs.gov/sites/default/files/cb/cm2012.pdf. In 2011 alone, fifteen children died as a result of abuse or neglect in South Carolina. *See* CHILD MALTREATMENT 2011, *supra*, at 63. Alabama and Maryland, states that have child populations similar to South Carolina, had fewer fatalities in 2011—eleven and ten, respectively. *See id.*

33. *See* sources cited *supra* note 32.

34. *See* sources cited *supra* note 32. The only noticeable pattern—or lack thereof—is that yearly rates rise and fall erratically. *See id.* Further, a state Department of Social Services deputy director announced in August of 2013 that there had already been thirty-one child fatalities since January 2013—an increase from previous years. *See* Porter Barron, Jr., *As Child Fatalities Rise, So Does Anger at DSS*, FREE TIMES (Oct. 2, 2013), http://www.free-times.com/news/100213-as-child-fatalities-rise-so-does-anger-at-dss. For example, in 2012, twenty-three children died. *See* CHILD MALTREATMENT 2012, *supra* note 32, at 56.

35. *See* sources cited *supra* note 32.

36. *See* sources cited *supra* note 32. Notably, a limitation to this research is that the data came from years after the homicide by child abuse statute was adopted in 1992. *See* S.C. CODE ANN. § 16-3-85 (2003); sources cited *supra* note 32. Several sources, however, have indicated that comprehensive child abuse and neglect fatality data is difficult to find. *See, e.g.*, Day, *supra* note 1, at 46; Phipps, *supra* note 13, at 540. Thus, while this Note cannot compare the rates from before and after the enactment of the statute, the rates since the enactment still have not steadily decreased between 1999 and 2012. *See* sources cited *supra* note 32.

37. Rainey & Greer, *supra* note 11, at 16.

38. *Id.*

39. *Id.*

requisite mental state for criminal culpability.[40] Judges and juries are often reluctant to accept that a caretaker acted with a particular mental state—for instance, malice—toward a child; rather, they prefer to believe that the child's death was a result of accidental behavior, not the caretaker's intent to kill or to cause physical harm to the child.[41] Accordingly, some jurors and judges will "resist verdicts that place a high degree of culpability on a caretaker."[42]

Traditional notions of parental rights and family preservation can also act as barriers to establishing that a possible abuse fatality has occurred.[43] Violence between adults is not treated the same as violence between adults and children in American society.[44] In particular, "if one adult assault[s] another, the crime [is] investigated regardless of the relationship between the parties."[45] On the other hand, "the same assault on a child is frequently dismissed as simple discipline."[46] This view of parental rights and family privacy is embedded in American culture.[47] The importance of family autonomy and privacy is based on two fundamental assumptions: (1) "that privacy strengthens families," and (2) "that parents will act in the best interests of their children."[48] However, these two assumptions are clearly not true in many situations, particularly in cases of child maltreatment, abuse, and neglect.[49] Thus, the tension between familial privacy—including the autonomous right to raise children in the manner that one desires—and a state's interest in zealously combating child abuse often makes sensitive child abuse situations even harder to address.[50] Likewise, "[a]ttempts

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40. *Id.*

41. Phipps, *supra* note 13, at 537.

42. *Id.* at 538.

43. Rainey & Greer, *supra* note 11.

44. *See id.*

45. *Id.* Domestic abuse situations prove to be an exception to this general rule, given the United States' history of ignoring domestic violence and viewing it as a private matter. *See, e.g.*, James Martin Truss, Comment, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1150–56 (1995) (citations omitted) (discussing the history of domestic violence in America and the judicial system's reluctance to intrude into "family matters").

46. Rainey & Greer, *supra* note 11. While this view is particularly evident in circumstances involving less serious physical abuse, it can also be present in circumstances involving serious injury or death. *Id.*

47. *See* John G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 572 (1992) (examining why American law and policy fiercely protects "privacy and autonomy within the family").

48. *Id.* at 569.

49. *Id.*

50. *See, e.g.*, Ariane De Vogue, *Supreme Court to Weigh Child Abuse Against Family's Privacy*, ABC NEWS (Feb. 28, 2011), http://abcnews.go.com/Politics/court-weigh-child-abuse-privacy/story?id=13015595 (describing a Supreme Court case that pits the privacy rights of students and their families against the state's interest in aggressively combating child abuse in which the issue was whether a child protection investigator should have obtained a warrant or parental consent before removing a nine-year-old from class and interviewing her about alleged abuse in the home).

to accommodate family autonomy and privacy interests" can "significantly compromise[] the protection" of children.[51]

Further, the sudden death of a child can hinder prompt and effective investigations,[52] which in turn delays the determination of whether the death constitutes an abuse fatality.[53] Authorities are often hesitant to intrude after a child dies suddenly or unexpectedly because of the assumption that the family is grieving.[54] Thus, in many cases, the cause of death may originally be labeled as "unknown or accidental" but later correctly identified as an intentional homicide.[55] The initial assumption of an accidental death hampers a thorough investigation because many pieces of evidence may be lost or destroyed and potential witnesses may be unavailable once a correct determination occurs.[56] As a result, many child deaths are not routinely investigated or autopsied, making it difficult to understand the magnitude of the problem.[57]

D. Potential Charges

Possibly the most problematic legal issue arises once a child abuse death case is properly identified and authorities must decide the crime with which to charge the offender.[58] An abuser may be charged and convicted of a lesser offense than murder because the abuser is found to possess only the intent to cause serious physical injury or the intent to abuse—not the intent to kill.[59]

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51. McMullen, *supra* note 47, at 569.

52. *See* Rainey & Greer, *supra* note 11.

53. *See id.*

54. *Id.*

55. McMillen, *supra* note 9, at 130; *see, e.g.*, State v. Jurgens, 424 N.W.2d 546, 552–53 (Minn. Ct. App. 1988) (detailing a case of a successful prosecution of a mother for second-degree murder more than twenty years after the death of her adopted son in which, at the time of the boy's death, the autopsy report listed the mode of death as "deferred," but the mode of death was later changed to "homicide" after a different coroner examined the report and concluded that the boy had been a victim of battered child syndrome). Additionally, a recent report on child abuse and neglect fatalities in the United States "estimate[d] that approximately 50 percent of deaths reported as unintentional injury deaths are reclassified after further investigation by medical and forensic experts as deaths due to maltreatment." CHILD WELFARE INFO. GATEWAY, *supra* note 15, at 3 (internal quotation marks omitted) (citing EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 4–5).

56. Rainey & Greer, *supra* note 11.

57. *Child Abuse and Neglect*, WORLD HEALTH ORG. (2002), http://www.who.int/violence_injury_prevention/violence/world_report/factsheets/en/childabusefacts.pdf.

58. *See* Rainey & Greer, *supra* note 11.

59. *See* McMillen, *supra* note 9, at 147–49 (citing ARK. CODE ANN. § 5-10-102 (2006); Midgett v. State, 729 S.W.2d 410, 410–14 (Ark. 1987); Burnett v. State, 697 S.W.2d 95, 98 (Ark. 1985), *overruled by Midgett*, 729 S.W.2d 410); *see also* Phipps, *supra* note 13, at 553–54 (discussing how courts sometimes lower jury convictions of first-degree murder to a lesser offense (quoting *Midgett*, 729 S.W.2d at 411, 413, 415–16)).

Thus, the range of charges that can be brought against an abuser results in differences in how states charge, convict, and penalize offenders.[60]

One approach is to address the crime through a traditional first-degree murder charge.[61] This approach is difficult, however, because first-degree murder traditionally requires a "showing of willfulness, deliberation, and premeditation."[62] Defining and applying the concepts of premeditation and deliberation is difficult in the context of child abuse fatalities[63] because obtaining "direct, subjective evidence of a caretaker's intent to injure or kill a child" is arduous, if not impossible.[64] Fatal child abuse situations differ from killings unrelated to child abuse in several respects: child abuse typically occurs secretly in the privacy of one's home; the child victims are usually completely dependent upon the abuser and unable to defend themselves; the child victims are often too young to inform others of their situation or to ask for help;[65] the death of the child makes the child incapable of testifying against the abuser, the effects of which are exacerbated if there are no other witnesses; and children often lack obvious external injuries in abuse cases—unlike a gunshot or knife wound, injuries resulting from child abuse require careful observation by a medical examiner.[66] Likewise, it can be difficult to convict under a second-degree murder charge, "which traditionally requires a showing of killing with malice aforethought."[67] As noted above, the factfinder may not want to believe that the defendant acted with hatred or ill will toward the child and might not be persuaded of the defendant's culpability.[68] Instead, the judge or jury might find that the death was a result of the uncontrollable frustration of coping with a crying child.[69]

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60. *See* Rainey & Greer, *supra* note 11; *see also* Phipps, *supra* note 13, at 586 (noting the wide disparity of sentences that can be imposed for similar acts).

61. *See, e.g.*, McMillen, *supra* note 9 (discussing the difficulty in obtaining direct evidence of an abuser's intent to kill when an abuser is charged with first-degree murder for child abuse homicide (citing State v. Hughes, 457 N.W.2d 25, 26 (Iowa Ct. App. 1990))).

62 *Id.*

63. Phipps, *supra* note 13, at 552 (citing 2 WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 7.7(a), at 237 (1986)).

64. McMillen, *supra* note 9, at 131 & n.19 (citing LAFAVE & SCOTT, *supra* note 63, § 7.7(a), at 237). *Midgett v. State*, 729 S.W.2d 410 (Ark. 1987), provides an example of a failure to convict an abuser under a traditional first-degree murder charge. In that case, although the defendant had abused his son in an especially egregious manner, his charge was lowered from first-degree to second-degree because no evidence showed that he acted with the requisite intent to kill. *Id.* at 411 (citing ARK. CODE ANN. §§ 41-1502(1)(b), 41-1503(1)(c) (1977)). Rather, the court concluded that he, in fact, had the intent to keep the boy alive so that he could continue to abuse him. *Id.* at 414. The case was timely overturned by an Arkansas statute that made knowingly causing the death of a child fourteen years of age or younger first-degree murder "under circumstances manifesting extreme indifference to the value of human life." ARK. CODE. ANN. § 5-10-102(a) (2006).

65. State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484–85 (2008) (Toal, C.J., dissenting).

66. *See* Phipps, *supra* note 13, at 538.

67. McMillen, *supra* note 9.

68. *See supra* notes 38–42 and accompanying text.

69. McMillen, *supra* note 9.

Charging under traditional manslaughter laws is problematic as well.[70] An involuntary manslaughter charge—which traditionally requires accidental or unintentional action[71]—is likely unwarranted in a child abuse fatality case because the injuries that result from physical abuse can hardly be categorized as accidental or unintentional.[72] Likewise, a voluntary manslaughter charge—which traditionally requires provocation[73]—is often unwarranted, especially in jurisdictions that specifically find that a child's crying does not constitute adequate provocation.[74] Further, manslaughter convictions may result in a lower punishment that seems unequal to the egregious nature of the crime.[75]

Another possible approach is to address the crime through the felony murder doctrine by "permit[ting] felony child abuse to act as the underlying felony that triggers a felony-murder charge."[76] However, some legislatures and courts oppose this approach, viewing the scope of the felony murder doctrine narrowly and limiting the underlying felonies to only those that are independent from the homicide itself[77]—which necessarily precludes child abuse. Under this view, the felony murder approach is inappropriate because it "abuses the limited purpose of the felony-murder rule and violates the defendant's right to due process."[78]

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70. *See id.* at 134–35 (citing State v. Taylor, 452 N.W.2d 605, 605–07 (Iowa 1990); State v. Hughes, 457 N.W.2d 25, 27–28 (Iowa Ct. App. 1990)).

71. *See, e.g.*, State v. Tyler, 348 S.C. 526, 529, 560 S.E.2d 888, 889 (2002) (stating that involuntary manslaughter involves, *inter alia*, "the unintentional killing of another without malice" (citing State v. Chatman, 336 S.C. 149, 152, 519 S.E.2d 100, 101 (1999))).

72. McMillen, *supra* note 9, at 134–35 (citing *Taylor*, 452 N.W.2d at 605–07; *Hughes*, 457 N.W.2d at 27–28).

73. *See, e.g.*, State v. Smith, 363 S.C. 111, 115, 609 S.E.2d 528, 530 (2005) ("Voluntary manslaughter is the unlawful killing of a human being in the sudden heat of passion upon sufficient legal provocation." (quoting State v. Cooley, 342 S.C. 63, 67, 536 S.E.2d 666, 668 (2000))) (internal quotation marks omitted).

74. *See* McMillen, *supra* note 9, at 135 (citing *Taylor*, 452 N.W.2d at 605–07); *see also* Phipps, *supra* note 13, at 561 ("Courts uniformly hold that a child's behavior cannot provoke a fatal response from a reasonable person.").

75. *Compare* S.C. CODE ANN. § 16-3-50 (2003) ("A person convicted of manslaughter . . . must be imprisoned not more than thirty years or less than two years."), *with id.* § 16-3-60 ("A person convicted of involuntary manslaughter must be imprisoned not more than five years.").

76. *See* McMillen, *supra* note 9, at 132; *see, e.g.*, FLA. STAT. § 782.04(1)(a)(2)(h) (Supp. 2014) (enumerating fatal child abuse as one of the underlying felonies for felony murder charge).

77. *See* McMillen, *supra* note 9, at 132; *see, e.g.*, People v. Smith, 678 P.2d 886, 888 (Cal. 1984) (holding that felony child abuse cannot serve as the underlying felony to support a conviction of second-degree murder on a felony murder theory because the merger doctrine bars a felony murder charge when the underlying felony is an integral part of the homicide (citing People v. Burton, 491 P.2d 793, at 801 (Cal. 1971))); *see also* Phipps, *supra* note 13, at 567 ("If the underlying felony is not sufficiently distinct, it merges with felony murder and thus cannot act as the underlying offense.").

78. McMillen, *supra* note 9, at 132.

III. CURRENT SOUTH CAROLINA LAW

To overcome the difficulty of convicting under the above charges, some states have developed specialized child homicide statutes that eliminate the intent to kill requirement for situations in which a child's death results from abuse.[79] Instead, a prosecutor must only show that the perpetrator physically abused or neglected the victim and that the abuse or neglect was the cause of the child's death.[80] Further, every state has laws requiring certain people—or all people, depending on the expansiveness of the statute—to report concerns of child abuse and neglect to the proper state authorities.[81] This Part sets forth the current South Carolina laws designed to address fatal child abuse.

A. Homicide by Child Abuse Statute

In 1992, "in light of the insidious nature"[82] of child abuse and neglect fatalities, the South Carolina General Assembly enacted a new homicide offense—homicide by child abuse—codified in section 16-3-85 of the South Carolina Code:

> A person is guilty of homicide by child abuse if the person: (1) causes the death of a child under the age of eleven while committing child abuse or neglect, 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, and the child abuse or neglect results in the death of a child under the age of eleven.[83]

Under South Carolina law, "Homicide by child abuse is a felony charge," and a person who is convicted of the crime or pleads guilty to the crime may be imprisoned for a maximum of life in prison, but not less than a term of twenty years.[84] Further, a person who is convicted of aiding or abetting the crime "must be imprisoned for a term not exceeding twenty years nor less than ten years."[85] A judge must take into account any aggravating circumstances when sentencing the defendant—"including, but not limited to, a defendant's past pattern of child

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79. Rainey & Greer, *supra* note 11.

80. *Id.*; *see also* Phipps, *supra* note 13, at 579 ("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.").

81. *See Mandated Reporting*, CHILD WELFARE INFO. GATEWAY, https://www.childwelfare.gov/responding/mandated.cfm (last visited Mar. 25, 2014).

82. State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 485 (2008) (Toal, C.J., dissenting).

83. S.C. CODE ANN. § 16-3-85(A) (2003).

84. *Id.* § 16-3-85(C)(1).

85. *Id.* § 16-3-85(C)(2).

abuse or neglect of a child under the age of eleven, and any mitigating circumstances," excluding a child's crying.[86]

B. Mandatory Reporting Requirements

South Carolina's persons required to report statute[87] stipulates that certain professionals are required to report: when, in serving in a professional capacity, a person receives information giving the person reason to believe that a child has been or may be abused or neglected, that person must report the potential abuse or neglect.[88] The statute also provides that other people who have "reason to believe that a child's physical or mental health or welfare has been or may be adversely affected by abuse and neglect *may* report" their suspicion of the abuse or neglect.[89] Further, the statute provides that if "[a] person required to report a case of child abuse or neglect . . . knowingly fails to do so," that person is "guilty of a misdemeanor and, upon conviction, must be fined not more than [$500], imprisoned not more than six months, or both."[90]

The South Carolina Code also contains a statute abrogating privileged communications and setting forth the exceptions to this abrogation.[91] This statute provides that "[t]he privileged quality of communication between husband and wife," as well as any professional and the professional's patient or client—except that between attorney and client or clergy member and penitent—"is abrogated and does not constitute grounds for failure to report."[92]

IV. STATE LAW COMPARISONS

South Carolina is one of the few states that has a distinct homicide by child abuse statute that separates child homicides from adult homicides.[93] This Part compares South Carolina's homicide by child abuse statute with the statutes in

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86. *Id.* § 16-3-85(D). A child's crying does not constitute provocation under the statute and thus should not be considered as a mitigating circumstance. *Id.*

87. S.C. CODE ANN. § 63-7-310 (Supp. 2013).

88. *Id.* § 63-7-310(A). This section of the Code includes a list of professionals in the medical, religious, education, and law enforcement fields, all of whom are required to report under the Statute. *Id.*

89. *Id.* § 63-7-310(C) (emphasis added).

90. S.C. CODE ANN. § 63-7-410 (2010).

91. *Id.* § 63-7-420.

92. *Id.*

93. *See* S.C. CODE ANN. § 16-3-85 (2003). Delaware, Utah, Washington, and West Virginia also have distinct statutes. *See* DEL. CODE ANN. tit. 11, §§ 633–34 (2007); UTAH CODE ANN. § 76-5-208 (LexisNexis 2012); WASH. REV. CODE ANN. § 9A.32.055 (West 2009); W. VA. CODE § 61-8D-2a (LexisNexis 2010). Some other states do not distinguish homicide by child abuse from other forms of homicide. *See, e.g.*, CAL. PENAL CODE § 189 (Supp. 2014) (failing to distinguish between various types of murder under the statute). Finally, others include child abuse within their murder statutes. *See, e.g.*, IDAHO CODE § 18-4003(d) (2004) (including a provision in the degrees of murder statute for murder of a child under twelve years of age).

Delaware, Utah, and Washington—all of which have similar statutory frameworks but have had lower rates of fatalities for the past several years[94]—to determine if the structure or language of any of those statutes might improve South Carolina's laws.

A. Delaware

The main difference between the Delaware statutes and the South Carolina statute is that Delaware separates *murder by abuse or neglect* into degrees based on the mental culpability of the perpetrator.[95] Under Delaware's framework,

> A person is guilty of murder by abuse or neglect in the first degree when the person recklessly causes the death of a child: (1) through an act of abuse and/or neglect of such child; or (2) when the person has engaged in a previous pattern of abuse and/or neglect of such child.[96]

However, Delaware law also provides the following:

> A person is guilty of murder by abuse or neglect in the second degree when, with criminal negligence, the person causes the death of a child: (1) through an act of abuse and/or neglect of such child; or (2) when the person has engaged in a previous pattern of abuse and/or neglect of such child.[97]

In Delaware, a person convicted of first-degree murder by abuse or neglect may be punished by death or by life imprisonment without the possibility of probation, parole, or any other reduction;[98] on the other hand, the maximum sentence for a person convicted of second-degree murder by abuse or neglect is twenty-five years,[99] with a minimum sentence of ten years.[100] Thus, Delaware finds a perpetrator who acted with recklessness more culpable than one who acted with negligence and imposes sentences accordingly.[101] Both statutes cover

94. *See* sources cited *supra* note 32 (noting that, between 2003 and 2012, South Carolina had a higher annual rate of fatalities than Delaware, Utah, and Washington).

95. *Compare* DEL. CODE ANN. tit. 11, §§ 633–634 (2007) (classifying murder by child abuse as either first or second degree murder), *with* S.C. CODE ANN. § 16-3-85(C)(1) (2003) (treating all homicide by child abuse charges the same).

96. DEL. CODE ANN. tit. 11, § 634(a).

97. *Id.* § 633(a).

98. DEL. CODE ANN. tit. 11, § 4209(a) (Supp. 2013).

99. DEL. CODE ANN. tit. 11, § 4205(b)(2) (2007). Second-degree murder by abuse is a class B felony under Delaware law. *Id.* § 633(d).

100. *Id.* § 633(d).

101. *See supra* notes 98–100 and accompanying text.

children up to age thirteen[102] and include a past pattern of abuse as a potential element of the crime.[103]

The benefit of separating murder by child abuse or neglect into two degrees is that it offers a more comprehensive approach and covers more instances of fatal child abuse[104]—both reckless murder and negligent murder.[105] Practically, the separate statutes give prosecutors a tool to either argue that a perpetrator acted recklessly and deserves a higher punishment, or that a perpetrator acted negligently and deserves a lower punishment.[106] Thus, the Delaware statutes effectively cover two degrees of fatal injuries inflicted upon children and impose penalties for each offense that the state deems appropriate and proportional.[107] Moreover, the Delaware statutes cover children under the age of fourteen,[108] therefore including three more years than South Carolina's statute, which only covers children under the age of eleven.[109]

Delaware's reporting statute provides that any "person who knows or in good faith suspects child abuse or neglect shall make a report . . . ."[110] An oral report must be made immediately by telephone or otherwise.[111] Anyone who fails to report under the statute "is liable for a civil penalty not to exceed $10,000 for the first violation, and not to exceed $50,000 for any subsequent violation."[112] Privileged communication, other than between attorney and client or priest and penitent, is not recognized.[113]

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102. DEL. CODE ANN. tit. 11, §§ 633(b)(2), 634(b)(2).

103. *See id.* §§ 633(a)(2), 634(a)(2). Under both statutes, a *previous pattern* of abuse or neglect means two or more incidents of conduct that constitute abuse, neglect, or both and that are not so closely related to each other or connected in time and place to constitute a single event. *Id.* §§ 633(b)(3), 634(b)(3).

104. *See* Phipps, *supra* note 13, at 593 (concluding that the best approach, when feasible, "is to consider the range of fatal injuries inflicted upon children and draft comprehensive statutes that adopt penalties appropriate to the various offenses").

105. *See* DEL. CODE ANN. tit. 11, §§ 633–634.

106. *See supra* notes 98–100 and accompanying text.

107. *See supra* notes 98–100 and accompanying text.

108. DEL. CODE ANN. tit. 11, §§ 633(b)(2), 634(b)(2).

109. S.C. CODE ANN. § 16-3-85(A)(1) (2003).

110. DEL. CODE ANN. tit. 16, § 903 (2003).

111. *Id.* § 904.

112. DEL. CODE ANN. tit. 16, § 914 (Supp. 2012).

113. DEL. CODE ANN. tit. 16, § 909 (2003).

B. Utah[114]

Utah's child abuse homicide statute, section 76-5-208, applies if the circumstances do not amount to aggravated murder under section 76-5-202.[115] Similar to Delaware's statutes,[116] Utah's statute separates the levels of mental culpability.[117] Under the statute, "[c]riminal homicide constitutes child abuse homicide if, under circumstances not amounting to aggravated murder . . . the actor causes the death of a person under 18 years of age and the death results from child abuse . . . ."[118] Section 76-5-109, which is referenced in the statute, further divides *child abuse* into two separate offenses: infliction of *serious physical injury* upon a child and infliction of *physical injury* upon a child.[119] If the death results from serious physical injury inflicted recklessly, the perpetrator is guilty of a first-degree felony,[120] but if the death results from serious physical injury inflicted negligently, the perpetrator is guilty of a second-degree felony.[121] Further, if the death results from physical injury inflicted intentionally, knowingly, recklessly, or negligently, the perpetrator is guilty of a second-degree felony.[122] Thus, to an even greater extent than Delaware, Utah distinguishes between different levels of offenses and apportions punishment accordingly.[123] Notably, the Utah statute covers all children under eighteen,[124] which is more expansive than the statutory frameworks in both Delaware[125] and South Carolina.[126]

Utah's reporting statute provides that any person "who has reason to believe that a child has been subjected to abuse or neglect or who witnesses a child being

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114. Utah has three different statutes that address fatal child abuse and neglect. *See* UTAH CODE ANN. § 76-5-202(1)(d) (LexisNexis Supp. 2013) ("Criminal homicide constitutes aggravated murder if the actor intentionally or knowingly causes the death of another" and the "homicide was committed incident to an act, scheme, course of conduct, or criminal episode during which the actor committed or attempted to commit . . . child abuse . . . ."); UTAH CODE ANN. § 76-5-203(2)(d) (LexisNexis 2012) ("Criminal homicide constitutes murder if . . . the actor is engaged in the commission, attempted commission, or immediate flight from the commission or attempted commission of any predicate offense [including child abuse], or is a party to the predicate offense . . . ."); *id.* § 76-5-208 (stating the law for child abuse homicide). For the purposes of this Note, only section 76-5-208 will be discussed.

115. UTAH CODE ANN. § 76-5-208 (LexisNexis 2012).

116. *See supra* notes 96–97 and accompanying text.

117. *See* UTAH CODE ANN. § 76-5-208(1).

118. *Id.* Section 76-5-208(1) then proceeds to enumerate the various *mens rea*. *See id.*

119. *See* UTAH CODE ANN. §§ 76-5-109(2)–(3).(LexisNexis 2012). Section 76-5-109(2) refers to child abuse that results in serious physical injury, whereas section 76-5-109(3) refers to child abuse that results in physical injury. *See id.*

120. *See* UTAH CODE ANN. § 76-5-208(2).

121. *Id.* § 76-5-208(3).

122. *Id.*

123. *See supra* notes 98–101, 117–22 and accompanying text.

124. UTAH CODE ANN. § 76-5-208(1).

125. *See supra* note 102 and accompanying text.

126. *See supra* note 83 and accompanying text.

subjected to conditions that reasonably may result in abuse or neglect" must immediately notify the proper authorities.[127] Further, Utah has a specific statute providing "that any person who has reason to believe that a child has died as a result of abuse" must immediately notify authorities.[128] Any person who fails to report under these statutes is guilty of a class B misdemeanor[129] and may be sentenced to imprisonment for a term not exceeding six months.[130] Privileged communication, other than between clergyman or priest and penitent, is not recognized.[131]

C. Washington

Washington's homicide by abuse statute[132] is the most similar to South Carolina's statutory framework.[133] Washington, unlike Delaware[134] and Utah,[135] does not distinguish between different offenses or levels of mental culpability; rather, the statute provides that a person is guilty of homicide by abuse if,

> [U]nder circumstances manifesting an extreme indifference to human life, the person causes the death of a child or person under sixteen years of age, a developmentally disabled person, or a dependent adult, and the person has previously engaged in a pattern or practice of assault or torture of said child, person under sixteen years of age, developmentally disabled person, or dependent person.[136]

Thus, Washington utilizes the same mental culpability—"manifesting an extreme indifference to human life"[137]—as South Carolina.[138] Homicide by abuse in Washington is a class A felony,[139] punishable—at a maximum—with life imprisonment.[140] Notably, the coverage of Washington's statute is more expansive than the statutes in Delaware,[141] Utah,[142] and South Carolina[143] because it covers all children under sixteen years of age, as well as

127. UTAH CODE ANN. § 62A-4a-403(1)(a) (LexisNexis 2011).
128. UTAH CODE ANN. § 62A-4a-405 (LexisNexis Supp. 2013).
129. UTAH CODE ANN. § 62A-4a-411 (LexisNexis 2011).
130. UTAH CODE ANN. § 76-3-204(2) (LexisNexis 2012).
131. UTAH CODE ANN. § 62A-4a-403(2) (LexisNexis 2011).
132. WASH. REV. CODE ANN. § 9A.32.055 (West 2009).
133. *See* S.C. CODE ANN. § 16-3-85 (2003).
134. *See supra* notes 96–97 and accompanying text.
135. *See supra* notes 117–22 and accompanying text.
136. WASH. REV. CODE ANN. § 9A.32.055(1).
137. *Id.*
138. *See supra* note 83 and accompanying text.
139. WASH. REV. CODE ANN. § 9A.32.055(3).
140. WASH. REV. CODE ANN. § 9A.20.021(1)(a) (West Supp. 2013).
141. *See supra* note 109 and accompanying text.
142. *See supra* note 124 and accompanying text.
143. *See supra* note 83 and accompanying text.

developmentally disabled persons and dependent adults.[144] Washington's statute, however, is more restrictive than the Utah[145] and South Carolina[146] statutes because it requires a prior pattern of abuse.[147]

Washington's reporting statute is also the most similar to South Carolina's,[148] in that it provides a list of professionals who are required to report known or suspected abuse but does not impose a mandatory requirement on all persons.[149] Under the statute, an oral report must be made immediately, by telephone or otherwise, to the proper law enforcement agency or social services department.[150] Washington's statute provides that communications between physician or surgeon and patient, in addition to those between attorney and client and priest and member of the clergy, are privileged.[151]

D. Beneficial Aspects of South Carolina's Statute, Comparatively

The examination of states that have statutes similar to South Carolina's homicide by child abuse statute demonstrates that South Carolina's statute has several beneficial aspects. For instance, Washington's statute employs narrower language than South Carolina's by requiring proof of multiple prior incidents of abuse.[152] While such language effectively targets offenders who have a pattern of past violent behavior, it precludes prosecution of a one-time violent act that results in death—such as violent shaking or suffocation of a child under circumstances in which no evidence of prior injuries exists.[153] Likewise, West Virginia's statute imposes the requirement that the actor be a parent or caretaker,[154] unlike South Carolina's statute, which is silent on the identity of the abuser.[155] Although this requirement effectively addresses the majority of offenders, it nonetheless precludes other guilty actors—such as a boyfriend or girlfriend who takes care of the child for a temporary period of time.[156] Thus, by not requiring proof of a past pattern of abuse, or that the abuser is the child's

144. WASH. REV. CODE ANN. § 9A.32.055(1) (West 2003).

145. *See* UTAH CODE ANN. § 76-5-208(1) (LexisNexis 2012).

146. S.C. CODE ANN. § 16-3-85(A) (2003).

147. WASH. REV. CODE ANN. § 9A.32.055(1).

148. *See supra* notes 87–89 and accompanying text.

149. WASH. REV. CODE ANN. § 26.44.030 (West Supp. 1013).

150. WASH. REV. CODE ANN. § 26.44.040 (West 2005).

151. WASH. REV. CODE ANN. § 5.60.060 (West Supp. 2013).

152. WASH. REV. CODE ANN. § 9A.32.055 (West 2009) ("A person is guilty of homicide by abuse if . . . the person has previously engaged in a pattern or practice of assault or torture of said child, or person under sixteen years of age . . . .").

153. Phipps, *supra* note 13, at 592.

154. W. VA. CODE ANN § 61-8D-2a (LexisNexis 2010). This Note has not discussed West Virginia's statute in depth because West Virginia's rates of fatal child abuse were higher than South Carolina's rates for the past several years. *See* sources cited *supra* note 32.

155. *See* S.C. CODE ANN. § 16-3-85 (2003).

156. Phipps, *supra* note 13, at 592.

parent or custodian, the broad language of South Carolina's statute covers a larger range of child abuse fatalities.[157]

Notwithstanding, the prominence of fatal child abuse in South Carolina[158] suggests that the homicide by child abuse statute and the accompanying mandatory reporting statute have not had the positive impact on lowering fatality cases or the deterrent effect on offenders one would hope that statutes dealing with the death of children would have. Thus, South Carolina should consider reforming the homicide by child abuse laws in accordance with the beneficial aspects of the Delaware, Utah, and Washington statutes.

V. RECOMMENDED CHANGES TO SOUTH CAROLINA'S STATUTES AND PUBLIC POLICY

Rather than allow law and policy to remain stagnant in the midst of a severe, ongoing problem,[159] South Carolina should reform the current law to embrace a more comprehensive approach, create stricter mandatory reporting rules, and focus on improving state child protection services. This Part discusses these general recommendations in greater depth.

A. Proposed Changes to the Homicide by Child Abuse Statute

Several changes should be made to the current statute to clarify the scope of the law, heighten its deterrent effect, and cover more incidents of fatal child abuse or neglect.[160] First, the South Carolina General Assembly should amend the statute to increase the age of coverage under the law.[161] Currently, proposed legislation before the General Assembly would increase the age of coverage from the existing age range, eleven and under, to a more inclusive age range of eighteen and under.[162] The South Carolina General Assembly should adopt this amendment because, even though infants and toddlers are the most vulnerable to abuse,[163] instances of child abuse and neglect involving children older than

157. *See* S.C. CODE ANN. § 16-3-85.

158. *See supra* notes 4–6, 8 and accompanying text.

159. *See, e.g.*, Severson, *supra* note 31, at A14 (stating that South Carolina implemented a legislative audit of its state Department of Social Services, specifically the child protective division, after numerous reports of child starvation, improper medical attention, and at least one report of a child being put back into a home at which the child experienced more sexual abuse).

160. Numerous bills currently pending in the South Carolina General Assembly would accomplish these goals. *See* H.R. 3024, 120th Leg. 1st Sess. (S.C. 2013); H.R. 3250, 120th Leg., 1st Sess. (S.C. 2013); H.R. 3073, 120th Leg., 1st Sess. (S.C. 2013); H.R. 3371, 120th Leg., 1st Sess. (S.C. 2013).

161. *See* H.R. 3250, 120th Leg., 1st Sess. (S.C. 2013) (increasing the age of coverage from eleven to eighteen).

162. *Id.*

163. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 20, at 1.

twelve do occur, especially within families.[164] An increased age of coverage is justified not only to account for these situations[165] and to increase the scope of the coverage of the homicide law to reach a broader range of fatalities,[166] but also to ensure that a child older than eleven is not afforded less protection than a child under eleven.[167] The Delaware, Utah, and Washington statutes all provide protections for children within a larger age range than South Carolina's statute,[168] and Utah's statute specifically covers children up to eighteen.[169]

Additionally, an increased age of coverage is consistent with the South Carolina Children's Code, in which a *child* is defined as a person under the age of eighteen.[170] Although the homicide statute falls under a different title[171] than the Children's Code,[172] there is no logical reason for the Children's Code—which includes the statutes governing the reporting of abuse and neglect[173]—to define *child* as a person under the age of eighteen, while the specific homicide by child abuse statute protects only children under eleven years of age.[174] As currently written, a child between the ages of twelve and eighteen is protected under the Children's Code but not under the homicide by abuse statute.[175] The General Assembly, however, neglected to provide a rationale for this distinction.

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164. *See* Phipps, *supra* note 13, at 580 n.194; *see also* EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 3 (finding that six percent of child abuse and neglect fatality victims in 2010 were between the ages of twelve and seventeen (citing CHILD MALTREATMENT 2010, *supra* note 32, at 59)).

165. *See* EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 3 (citing CHILD MALTREATMENT 2010, at 59).

166. *See* H.R. 3250, 120th Leg., 1st Sess. (S.C. 2013) (increasing the age of coverage from eleven to eighteen).

167. *See* Liang & Macfarlane, *supra* note 12, at 427.

168. *Compare* DEL. CODE ANN. tit. 11, § 634 (2007) (stating that a person is guilty of murder by abuse or neglect when the victim is under fourteen years of age), *and* UTAH CODE ANN. § 76-5-208(1) (LexisNexis 2012) (stating that child abuse homicide occurs when an actor causes the death of a person under eighteen years of age), *and* WASH. REV. CODE ANN. § 9A.32.055 (West 2009) (finding a person guilty of homicide by abuse if the child is under sixteen years of age), *with* S.C. CODE ANN. § 16-3-85(A)(1) (2003) (stating that a person is guilty of homicide by child abuse if the victim is under the age of eleven).

169. UTAH CODE ANN. § 76-5-208(1) (LexisNexis 2012).

170. S.C. CODE ANN. §§ 63-1-40(1), 63-7-20(3) (2010); *see also* Liang & Macfarlane, *supra* note 12, at 427 (noting that the South Carolina Code defines a child as a person under the age of eighteen, while the child abuse statute applies only to children under the age of eleven). The Children's Code governs areas including, but not limited to, adoption, foster care, child support, child protection, and juvenile justice. *See* S.C. CODE ANN. §§ 63-7-10, 63-7-2310, 63-9-10, 63-17-310, 63-19-10 (2010).

171. *See* S.C. CODE ANN. § 16-3-85 (2003).

172. *Id.* § 63-1-10 (2010).

173. *See id.* §§ 63-7-310 through -450 (2010 & Supp. 2013).

174. *Compare* S.C. CODE ANN. §§ 63-1-40(1), 63-7-20(3) (2010) (defining a child as a person under eighteen), *with* S.C. CODE ANN. § 16-3-85(A)(1) (2003) (stating that a person is guilty of homicide by child abuse if the victim is under the age of eleven).

175. *Compare* S.C. CODE ANN. §§ 63-1-40(1), 63-7-20(3) (2010) (defining a child as a person under eighteen), *with* S.C. CODE ANN. § 16-3-85(A)(1) (2003) (stating that a person is guilty of homicide by child abuse if the victim is under the age of eleven).

Thus, the age protection under the homicide statute should be changed to reflect the inclusiveness of the age protection under the Children's Code.[176]

Second, the South Carolina General Assembly should amend section 16-3-85(A)(1)[177] to increase the penalty for committing homicide by child abuse as a principal actor to life without parole, similar to the Delaware statute's penalty for first-degree murder by abuse.[178] The proposed legislation would raise the penalty from the existing sentence range, twenty years to life, to life without the possibility of parole or even death.[179] The South Carolina General Assembly should adopt this legislation because increasing the penalty will serve as a greater deterrent and will accomplish two other purposes: (1) ensuring that the punishment for killing a child is as severe as the punishment for killing an adult[180] and (2) lowering the risk of repeat offenders.[181] Although life without parole is an extreme penalty,[182] such severity is warranted in cases in which the offender, as required by the statute, acted with extreme indifference to human life.[183]

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176. *See* H.R. 3250, 120th Leg., 1st Sess. (S.C. 2013); S.C. CODE ANN. §§ 63-1-40(1), 63-7-20(3) (2010).

177. *See* S.C. CODE ANN. § 16-3-85(A)(1) (2003) (providing that "[a] person is guilty of homicide by child abuse if the person causes the death of a child under the age of eleven while committing child abuse or neglect, and the death occurs under circumstances manifesting an extreme indifference to human life"); *id.* § 16-3-85(C)(1) (providing that a conviction of homicide by child abuse is a felony punishable by life in prison).

178. *See, e.g.*, DEL. CODE ANN. tit. 11, § 634(a)(1)–(2) (2007) (stating when a person is guilty of murder by abuse or neglect); *id.* tit. 11, § 4209(a) (a person convicted of first-degree murder by abuse or neglect may be punished by death or by life imprisonment without the possibility of probation, parole, or any other reduction).

179. *See* H.R. 3073, 120th Leg., 1st Sess. (S.C. 2013). The amendment may be referred to as "Brianna's Law," in memory of Brianna Bright, a five-month-old who died from blunt force head trauma committed by her father. *See id.*; Andrew Moore, *Child Abuse Bill Gaining Support*, THE JOURNAL (Jan. 7, 2010), http://archive.upstatetoday.com/?p=58244.

180. *Compare* H.R. 3073, 120th Leg., 1st Sess. (S.C. 2013) (increasing the penalty for homicide by child abuse to life without parole or death), *with* S.C. CODE ANN. § 16-3-20(A) (2003 & Supp. 2013) ("A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.").

181. *See, e.g.*, Will Jones, *Two Homicide by Child Abuse Cases Head to Grand Jury*, FOX CAROLINA NEWS (Aug. 2, 2011, 12:34 PM), http://www.foxcarolina.com/story/15194350/two-homicide-by-child-abuse-cases-head-t. Daron Davis, convicted of homicide by child abuse in 1995 for the death of his eleven-month-old daughter, was sentenced to twenty years in prison, but only served half that time. *Id.* After early release, he was charged with killing his five-month-old daughter. *Id.*

182. *See* Julian H. Wright, Jr., *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 VAND. L. REV. 529, 567 (1990) (stating that life without parole is a "hard sanction").

183. *See* S.C. CODE ANN. § 16-3-85(A)(1) (2003). Under South Carolina law, "extreme indifference is a mental state akin to intent characterized by a deliberate act culminating in death." State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002). Thus, the accidental death of a child would not subject a person to life without parole or death. *See* S.C. CODE ANN. § 16-3-85(A)(1), (C)(1)–(2) (2003).

Likewise, the General Assembly should amend section 16-3-85(A)(2)[184] to increase the penalty of committing the crime as an aider and abettor in accordance with the penalty for a principal under section 16-3-85(A)(1).[185] To aid and abet the crime of child abuse, one has to have helped, assisted, or facilitated the commission of the crime; promoted the accomplishment of the abuse; helped in advancing or bringing the abuse about; or encouraged, counseled, or incited the commission of the abuse.[186] In light of the proposed legislation that would increase the penalty for a principal actor under section 16-3-85(A)(1),[187] the General Assembly must consider increasing the current penalty for an aider and abettor under section 16-3-85(A)(2) from ten to twenty years[188] to a higher sentence as well. Under South Carolina law, a person who aids in the commission of a felony is subject to the same punishment as the principal felon.[189] The 1993 amendment to section 16-1-40—which amended several other statutes as well—provides a general rationale for the statutes that govern the sentencing of a person convicted of a crime, namely to prescribe sanctions that, *inter alia*, "assure just punishment that is commensurate with the seriousness of the criminal conduct, . . . deter criminal conduct[, and] provide for punishment that is necessary to hold the offender accountable for the crime and promote respect for the law."[190]

Punishing an aider to the same extent as the principal is consistent with these general rationales.[191] First, crimes against children are arguably some of the most serious crimes that one can commit, and the punishment for such crimes

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184. *Id.* § 16-3-85(A)(2) ("A person is guilty of homicide by child abuse if the person . . . knowingly aids and abets another person to commit child abuse or neglect, and the child abuse or neglect results in the death of a child under the age of eleven.").

185. *Id.* § 16-3-85(C)(1).

186. State v. Smith, 359 S.C. 481, 491, 597 S.E.2d 888, 894 (Ct. App. 2004) (quoting BLACK'S LAW DICTIONARY 68 (6th ed. 1990)). In *Smith*, sufficient evidence was found to support a conviction for aiding and abetting homicide by child abuse. *Id.* at 492, 597 S.E.2d at 894. The victim sustained injuries, which were a result of severe beating with intentional force to the back of the victim's head, during a time frame when the codefendants—the victim's mother and the mother's boyfriend—were the only adults with the victim. *Id.* at 487–88, 597 S.E.2d at 891–92. The codefendants admitted to investigators that they were never separated from each other or the victim during the time when her injuries occurred. *Id.* at 484, 597 S.E.2d at 890. Thus, because the codefendants were the only two people who could have caused the injuries, the jury found each defendant guilty of homicide by child abuse and aiding and abetting. *See id.* at 488, 597 S.E.2d at 892. *But see* State v. Lewis, 403 S.C. 345, 356–57, 743 S.E.2d 124, 130 (Ct. App. 2013) (reversing the aiding and abetting conviction of the codefendant boyfriend because he and the victim's mother were in separate rooms during the incident and not within eyesight of each other, thus negating the requisite elements that the boyfriend acted overtly and "knowingly" engaged in aiding and abetting).

187. *See* H.R. 3073, 120th Leg., 1st Sess. (S.C. 2013).

188. S.C. CODE ANN. § 16-3-85(C)(2) (2003).

189. *See* S.C. CODE ANN. § 16-1-40 (2003) ("A person who aids in the commission of a felony . . . is guilty of a felony and, upon conviction, must be punished in the manner prescribed for the punishment of the principal felon.").

190. 1993 S.C. Acts 3233.

191. *See id.*

should reflect the degree of reprehensibility.[192] Second, punishing an aider to the same extent as the principal serves as strict deterrence because aiders may be less likely to help the principal commit a crime if they can be punished as principals.[193] Third, if an aider and abettor chooses to engage in the abuse, rather than intervene or report the crime, the aider should derivatively incur the principal's punishment because the aider's own actions contributed to the principal's violation.[194] Additionally, the principal and the aider and abettor arguably are equally culpable.[195] In some circumstances, the principal may not have been able to accomplish the crime had the aider and abettor not assisted the principal in the first place.[196] Further, because of the nature of child abuse, the dependency and vulnerability of the victim, the ongoing pattern of abuse escalating over time, and the inability of the victim to seek help,[197] both the principal and the aider and abettor play a significant role in ending an abused child's life.[198] Thus, the statutory penalties for the two crimes should reflect that culpability, and one should not hold a lesser penalty than the other.[199] Nevertheless, the homicide by child abuse statute currently allows for a lesser penalty for accomplices than for principals.[200] The General Assembly neglected to provide a rationale for this distinction.[201] Thus, the General Assembly must

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192. *See* David W. Shaaf, *What if the Victim is a Child? Examining the Constitutionality of Louisiana's Challenge to* Coker v. Georgia, 2000 U. ILL. L. REV. 347, 378 (2000) ("Crimes against young children are reprehensible and deserving of serious punishment.").

193. *See* Nancy A. Tanck, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse*, 1987 WIS. L. REV. 659, 684 (1987).

194. *See* Liang & MacFarlane, *supra* note 12, at 411.

195. *See id.* at 400.

196. *See, e.g.*, State v. Smith, 359 S.C. 481, 486–88, 597 S.E.2d 888, 891–92 (Ct. App. 2004) (illustrating a case in which an aider and abettor, the mother's boyfriend, provided a substantial amount of assistance). In *Smith*, the victim sustained injuries during the time when the mother and boyfriend were the only two people who could have caused injury. *Id.* at 488, 597 S.E.2d at 892. The victim had two skull fractures that caused immediate neurological problems that would have been obvious to the mother and boyfriend, and doctors concluded that the victim's injuries were a result of severe beating with intentional force to the back of the victim's head. *Id.* at 487, 597 S.E.2d at 891. The boyfriend knew the victim had experienced projectile vomiting during this time, but had not relayed that information to medical personnel, and the mother and boyfriend attempted to cover up what had happened to the victim—neither the mother nor the boyfriend told medical personnel about the serious injury that was inflicted on the victim even though they both had the opportunity to do so. *Id.* at 488, 597 S.E.2d at 892.

197. State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484–85 (2008) (Toal, C.J., dissenting).

198. *See* Jean Peters-Baker, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 UMKC L. REV. 1003, 1023 (1997).

199. *See* Liang & Macfarlane, *supra* note 12, at 409 (stating that "there remains a need for a statute that holds all parents adequately accountable for both acts and omissions resulting in the death of their children by abuse").

200. *Compare* S.C. CODE ANN. § 16-3-85(C)(1) (2003) (providing that the principal may be imprisoned for twenty years to life), *with* § 16-3-85(C)(2) (providing that that the aider and abettor must be imprisoned for ten to twenty years); *see also* Liang & Macfarlane, *supra* note 12, at 425–26 (identifying this discrepancy).

201. *Compare* S.C. CODE ANN. § 16-3-85(C)(1) (2003) (providing that the principal may be imprisoned for twenty years to life), *with* § 16-3-85(C)(2) (providing that that the aider and abettor

change its approach—namely by increasing the penalty under both section 16-3-85(A)(1) and 16-3-85(A)(2)—to provide consistency under current South Carolina law.

Third, while the statute inherently criminalizes the specific infliction of abuse, as well as the failure to protect a child from abuse that results in the death of that child,[202] the construction of the statute might not articulate this clearly enough for a layman to understand.[203] Thus, the General Assembly should add a separate "failure to act" section to the statute to make its language clearer, and to ensure that South Carolinians understand the duties they have and the possible culpability they will encounter if they fail to intervene.[204] This addition could be placed in section 16-3-85(A) with the following language: "A person is guilty of homicide by child abuse if the person: (3) fails to intervene when another person causes the death of a child under the age of [eighteen] while committing child abuse or neglect." This will clear up any discrepancies as to what perpetrators can be charged with and will clarify what penalties a perpetrator will encounter.[205]

Additionally, a separate failure to act section is necessary because, as the statute is currently written, a person who fails to protect a child from abuse may be guilty as a principal under section 16-3-85(A),[206] while a person who knowingly aids and abets—which requires an overt act[207]—is guilty only as an accomplice under section 16-3-85(B) and is thus subject to less of a penalty.[208] It exceeds logical reason to hold an aider and abettor who *overtly acts* less culpable than a passive parent or witness who *allows* the abuse to occur. Thus, the statute should clarify that a person will be held responsible for committing the act, aiding or abetting the act, and failing to intervene with the act, and all

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must be imprisoned for ten to twenty years without indicating why that penalty is less than the penalty for the principal).

202. State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 485 (2008) (Toal, C.J., dissenting).

203. *See* S.C. CODE ANN. § 16-3-85(A)–(B) (2003). One has to put different pieces of the statute together to come to the realization that a failure to act also results in culpability. *Id.* Particularly, one has to connect (A)(1), which imposes liability on a principal actor for causing the death while committing child abuse or neglect, to (B)(1), which defines *child abuse or neglect* as an act or omission that causes harm to the child's physical health or welfare, to (B)(2), which defines *harm* as occurring when one inflicts physical injury upon the child or allows such physical injury to be inflicted. *Id.*

204. *See, e.g.*, OKLA. STAT. tit. 21, § 701.7(C) (West 2002) (making no distinction between those who act and those who fail to act in homicide by child abuse, and charging both with first-degree murder).

205. *See, e.g.*, *id.* (charging the principal and aider with first-degree murder for homicide by child abuse).

206. *See* S.C. CODE ANN. § 16-3-85(A)(1), (B)(1), (C)(1) (2003).

207. *See, e.g.*, State v. Lewis, 403 S.C. 345, 354, 743 S.E.2d 124, 128 (2013) ("Under accomplice liability theory, a person must personally commit the crime or be present at the scene of the crime and intentionally, or through a common design, aid, abet, or assist the commission of that crime through some overt act." (quoting State v. Mattison, 388 S.C. 469, 479, 697 S.E.2d 578, 584 (2010))).

208. *See* S.C. CODE ANN. § 16-3-85(A)(2), (C)(2) (2003).

three crimes should subject the offender to the same penalty. This way, South Carolina can demonstrate to potential offenders that it will not tolerate the infliction of abuse, the assistance of such abuse, or the ignoring of such abuse, and that a person who engages in any of these will be held equally accountable.[209]

Finally, the General Assembly should amend the statute to include a negligence offense. One of the benefits of South Carolina's statute is that it eliminates the need for a prosecutor to show intent to kill; rather, the prosecutor must show that the perpetrator acted with extreme indifference to human life.[210] Because *extreme indifference to human life* is defined as "a mental state akin to intent characterized by a deliberate act culminating in death,"[211] the statute effectively covers violent acts of aggression by an adult against a child without requiring proof of malice aforethought—particularly with respect to premeditation or deliberation of the death.[212] The statute, however, does not currently account for acts of negligence.[213]

This gap in the law is illustrated by the South Carolina Supreme Court's reversal of a single mother's conviction in 2013.[214] In 2008, a single mother of three was convicted by a jury of homicide by child abuse for the death of her fifteen-month-old son, who died from an overdose of prescription medicine; she was sentenced to thirty-five years of imprisonment.[215] An autopsy of her son revealed that he had six times the prescribed amount of the drug hydroxyzine—which was prescribed to him for his eczema—in his body at the time of death.[216] Although the mother's conviction was affirmed by the court of appeals,[217] the South Carolina Supreme Court reversed, concluding that the State failed to introduce direct or substantial circumstantial evidence that she acted with extreme indifference to human life.[218] Particularly, the court stated that the State did not submit sufficient evidence to prove that the mother consciously engaged

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209. This is in line with Chief Justice Toal's explanation of the public policy upon which the statute is grounded—that "an adult is not only prohibited from physically abusing a child, but also is prohibited from deliberately sitting by and allowing a child's life to be threatened by the abuse of another." State v. Fletcher, 379 S.C. 17, 27–28, 664 S.E.2d 480, 485 (2008) (Toal, C.J., dissenting); *see also* Barron, *supra* note 31 (providing an example of a situation that recently occurred in South Carolina in which a mother came home to her child being abused, but ignored it and took a shower instead of intervening, while the abuse continued and escalated to the child's death).

210. *See* S.C. CODE ANN. § 16-3-85(A)(1) (2003).

211. State v. Jarrell, 350 S.C. 90, 98, 564 S.E.2d 362, 367 (Ct. App. 2002).

212. *See* Phipps, *supra* note 13, at 591.

213. *See* McKnight v. State, 378 S.C. 33, 48, 661 S.E.2d 354, 361 (2008) (noting that extreme indifference does not encompass negligence).

214. *See* State v. Avery, No. 2013-MO-016 (S.C. June 12, 2013).

215. *Id.*

216. Sarita Chourey, *High Court to Hear Beaufort Toddler Death Suit*, BLUFFTON TODAY (Apr. 9, 2013), http://www.blufftontoday.com/bluffton-news/2013-04-10/high-court-hear-beaufort-toddler-death-suit#.UnqI_SvF24c.

217. *Avery*, No. 2013-MO-016.

218. *Id.*

in a life-threatening act with indifference as to whether her son lived or died.[219] The court noted that the State's sole evidence of the mother's mental state—other than that "it is common knowledge that death may occur from improper dosage"—was the medicine bottle label indicating that one-half teaspoon of the medicine "should be taken by mouth every six hours as needed."[220] According to the court, this "[did] not amount to substantial circumstantial evidence from which a jury could conclude [the mother] acted without care as to whether [her son] lived or died so as to manifest extreme indifference to human life."[221] As a result, her conviction was reversed.[222]

While the circumstances of that case clearly warrant sympathy,[223] the law must be objective when holding people accountable for their actions.[224] In this instance, a young child died as a result of his mother's act.[225] Thus, if the prosecution arguably could have more effectively sought a negligence claim than an extreme indifference claim, then the statute should have provided the means to do so. The advantage of the Delaware and Utah statutes is that they recognize that not all homicides carry the same degree of culpability.[226] South Carolina should restructure its statute to similarly account for both degrees of culpability—extreme indifference and negligence. This additional offense could be included after sections 16-3-85A(1) and 16-3-85(2), as well as the proposed subsection (3),[227] and would have a lesser penalty than inflicting, aiding, or ignoring physical abuse with extreme indifference.[228]

B. Proposed Changes to the Mandatory Reporting Statute

The homicide by child abuse statute should also be supplemented by stronger mandatory reporting requirements.[229] Either one or both parents are the

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219. *See id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *See id.*

224. *See* People v. Herskowitz, 364 N.Y.S.2d 350, 356 (1975), *aff'd*, 382 N.Y.S.2d 293 (N.Y. App. Div. 1976), *aff'd*, 364 N.E.2d 1127 (N.Y. 1977) ("Justice under the law must be objective and impersonal.") (citing People v. Feliciano, 173 N.Y.S.2d 123, 126 (1958)).

225. *See Avery*, No. 2013-MO-016.

226. *See* DEL. CODE ANN. tit. 11, §§ 633(a)(1)–(2), 634(a)(1)–(2) (2007) (differentiating between murder by abuse or neglect in the first degree and second degree); UTAH CODE ANN. § 76-5-208 (LexisNexis 2012) (distinguishing between child abuse homicide in the first degree and second degree).

227. *See* S.C. CODE ANN. § 16-3-85 (2003).

228. *Compare* DEL. CODE ANN. tit. 11, § 633(a), (d) (2007) (stating that when a person is guilty of murder by abuse or neglect in the second degree with criminal negligence, the minimum penalty is ten years), *with id.* tit. 11, §§ 634(a), 4209(a) (2007) (mandating the punishment for a conviction of murder by abuse or neglect in the first degree as death or life without parole).

229. *See* H.R. 3024, 120th Leg., 1st Sess. (S.C. 2013) (proposing to require any person, not just the listed professionals, to report suspected child abuse or neglect).

perpetrators in the majority of fatal child abuse and neglect cases;[230] thus, the people who are responsible for the proper care of their child and in the best position to protect their child have often failed in their duties.[231] The victims of child abuse and neglect are also unique in that they are also "often unwilling, or unable, to report the crimes being committed against them."[232] Thus, if other people who know or suspect that a child is being abused or neglected do not report their knowledge or suspicion to state authorities, the child essentially receives no help in escaping the situation.[233]

South Carolina's General Assembly should take four steps to remedy this problem. First, in accordance with the legislative trend in the United States,[234] the General Assembly should amend the mandatory reporting statute to expand the category of people who are required to report.[235] Both the Delaware and Utah statutes take this approach.[236] Currently, proposed legislation would require any person in South Carolina—not just the listed professionals—to report suspected child abuse or neglect.[237] The General Assembly should adopt this amendment because anyone who witnesses or suspects child abuse, not just professionals, should be required to report it. Oftentimes, people who are in a close relationship with the abuser—such as friends, neighbors, or relatives—know that the abuse is occurring because they witness it or suspect that the abuse is occurring because they recognize the indicators.[238] Thus, these people may provide a victim the only shot at getting help;[239] requiring them to report, and

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230. *See* CHILD MALTREATMENT 2011, *supra* note 32, at 59. In 2011, four-fifths (78.3%) of child abuse and neglect fatalities were caused by one or more of the child's parents. *Id.*

231. *See id.*

232. THOMSON REUTERS, 50 STATE STATUTORY SURVEYS: MANDATORY CHILD ABUSE REPORTING 1 (2013).

233. *See* Brian G. Fraser, *A Glance at the Past, a Gaze at the Present, a Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes*, 54 CHI.-KENT L. REV. 641, 665 (1978).

234. *See* Nancy E. Stuart, *Child Abuse Reporting: A Challenge to Attorney-Client Confidentiality*, 1 GEO. J. LEGAL ETHICS 243, 247 (1987) ("At least eighteen states have enacted such all-encompassing legislation.").

235. *See* H.R. 3024, 120th Leg., 1st Sess. (S.C. 2013) (proposing to require any person, not just the listed professionals, to report suspected child abuse or neglect).

236. *See* DEL. CODE ANN. tit. 16, § 903 (2003); UTAH CODE ANN. § 62A-4a-403(1)(a) (LexisNexis 2011).

237. *See* H.R. 3024, 120th Leg., 1st Sess. (S.C. 2013).

238. *See* Fraser, *supra* note 233, at 646; *see also* State v. Fletcher, 379 S.C. 17, 21–22, 664 S.E.2d 480, 481–82 (2008) (involving a case in which a friend and coworker of the abuser witnessed two events of potential child abuse, one when the young child was found in the attic drenched with sweat, and the other when the young child was found handcuffed by his feet to a bed).

239. *See* Fraser, *supra* note 233, at 658 (stating that these people have the opportunity to identify child abuse before it becomes too severe because they have daily contact with the child); *see also Fletcher*, 379 S.C. at 27, 664 S.E.2d at 485 (Toal, C.J., dissenting) ("Child victims are often completely dependent upon the abuser, unable to defend themselves, and often too young to alert anyone to their horrendous plight or ask for help.").

penalizing them if they fail to do so, may encourage all people who have a chance to help to do so.[240]

Further, the amendment should be adopted because, under current South Carolina law, non-offending parents are not required to report.[241] Not including parents as mandatory reporters fails to hold them accountable for the high duty of care that they owe to their children.[242] Additionally, not requiring parents to report permits those who are in the best position to see and prevent abuse to remain silent.[243] Thus, requiring *any person* or *everyone* to report accomplishes two purposes: (1) it ensures that any citizen who knows or reasonably suspects that abuse is occurring has a duty to report and (2) it inherently includes parents, thus reflecting the idea that parents have a heightened duty to protect their children.[244]

Second, the South Carolina General Assembly should amend the mandatory reporting statute to include a time period in which reports must be made after receipt of information giving someone reason to believe that a child has been or may be abused or neglected. Currently, proposed legislation would require a person to report within twenty-four hours or during the next working day.[245] The General Assembly should adopt this legislation in South Carolina because child abuse and neglect situations are ones in which urgency is critical.[246] When it

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240. Under the current framework, "Generally, a person has no duty to act to stop a crime." Rainey & Greer, *supra* note 11, at 17. This principle, however, fails to adequately address situations in which children, who are naturally weaker and susceptible to their abuser, are in danger. *Id.* When someone suspects or knows of the abuse and fails to prevent it by reporting, the child victim is "left with no effective means of securing help." *Id.* Therefore, an exception to the "no duty to stop a crime" principle does not seem unreasonable in this context, and expanding the category of people who must report may encourage those who have the opportunity to help to do so, thus lowering rates of death. *See* Fraser, *supra* note 233, at 665 (stating that "the person who chooses not to report, personally assures the child's future" harm.). Moreover, in contrast to various other crimes, there *are* mandatory reporting requirements for child abuse already. *See* S.C. CODE ANN. § 63-7-310 (2010 & Supp. 2013).

241. *See generally* S.C. CODE ANN. § 63-7-310(A) (2010 & Supp. 2013) (requiring that certain professionals report known or suspected abuse or neglect, but not imposing such a requirement on parents).

242. Suzanne M. Nicholls, Note, *Responding to the Cries of the Innocent: Holding Non-offending Parents Criminally Responsible for Failing to Protect the Abused Child*, 30 T. JEFFERSON L. REV. 309, 328 (2007) (citing State v. Williquette, 385 N.W.2d 145, 150, 152 (Wis. 1986)).

243. *Id.* at 330 (citing Jessica Ann Toth Johns, Comment, *Mandated Voices for the Vulnerable: An Examination of the Constitutionality of Missouri's Mandatory Child Abuse Reporting Statute*, 72 UMKC L. REV. 1083, 1087 (2004)).

244. *See id.* (citing Johns, *supra* note 243).

245. *See* H.R. 3371, 120th Leg., 1st Sess. (S.C. 2013).

246. The Delaware, Utah, and Washington statutes all recognize this time sensitivity by requiring that a report be made immediately. *See* DEL. CODE ANN. tit. 16, § 904 (2003 & Supp. 2012) (requiring an immediate oral report); UTAH CODE ANN. § 62A-4a-403(1)(a) (LexisNexis 2011) (requiring immediate notification); WASH. REV. CODE ANN. § 26.44.040 (West 2005) (requiring an immediate oral report). Although the Delaware and Utah statutes do not specifically define *immediately*, Washington's statute stipulates that *immediately* means that "[t]he report must be made at the first opportunity, but in no case longer than forty-eight hours after there is reasonable

comes to child abuse fatalities, "the abusive conduct is not usually confined to a single instance, but rather is a systematic pattern of violence progressively escalating and worsening over time."[247] Oftentimes, the abuse may begin with a single strike to the child, but then moves to striking the child more frequently and leaving a bruise, and then to breaking a bone, continuing to escalate until the child is ultimately killed.[248] Thus, requiring a short period for mandatory reporting gives authorities the chance to intervene before the abuse or neglect escalates to death.

Third, the South Carolina General Assembly should amend the mandatory reporting statute to increase the penalty for failing to report. The current monetary penalty, a maximum fine of $500,[249] is not nearly as severe as Delaware's penalty, which imposes a maximum fine of $10,000 for the first violation and a maximum fine of $50,000 for subsequent violations.[250] The inclusion of penalty provisions in child protection statutes may, of course, have possible drawbacks—for instance, the fear of possible liability might result in over-reporting or reporting of unsubstantiated cases, which might burden the state's investigative services and take away resources from the detection of actual maltreatment.[251] However, the primary purpose of mandated reporting systems is to create a "reliable means to identify and investigate possible child maltreatment," not to be "the absolute in risk assessment."[252] The grave consequences that may result from a failure to report certainly outweigh the possibility of over-reporting,[253] and increased penalty provisions are simply another way to encourage those who can help a suffering child to do so. Indeed, penalty provisions may decrease resistance to filing reports when it is justified under the circumstances.[254] Professionals who are required to report—such as doctors or teachers—may have a close relationship with the child's family, and even the child's abuser, and thus will feel less like "traitors if, because of

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cause to believe that the child has suffered abuse or neglect." WASH. REV. CODE ANN. § 26.44.030(1)(g) (West Supp. 2013).

247. State v. Fletcher, 379 S.C. 17, 27, 664 S.E.2d 480, 484–85 (2008) (Toal, C.J., dissenting).

248. Keli Goff, *Could a Child Abuse Registry have Saved Adrian Peterson's Son?*, WASH. POST SHE THE PEOPLE BLOG (Oct. 15, 2013, 4:20 PM), http://www.washingtonpost.com/blogs/she-the-people/wp/2013/10/15/could-a-child-abuse-registry-have-saved-adrian-petersons-son/ (quoting Teresa Huizar, Exec. Dir. of the Nat'l Children's Alliance).

249. S.C. CODE ANN. § 63-7-410 (2010). The penalty can also be a maximum of six months imprisonment or both the monetary fine and imprisonment. *Id.*

250. DEL. CODE ANN. tit. 16, § 914 (2003 & Supp. 2012).

251. Majorie R. Freiman, Note, *Unequal and Inadequate Protection Under the Law: State Child Abuse Statutes*, 50 GEO. WASH. L. REV. 243, 262 (1982) (citing G. GERBNER ET. AL., CHILD ABUSE: AN AGENDA FOR ACTION 143, 145 (1980)).

252. Starla J. Williams, *Reforming Mandated Reporting Laws After Sandusky*, 22 KAN. J. L. & PUB. POL'Y 235, 265 (2013) (citing Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 851 (2010)).

253. *Id.* (citing Hafemeister, *supra* note 252, at 829).

254. Freiman, *supra* note 251, at 262.

liability for inaction, they have no choice but to report."[255] Accordingly, increasing the penalty for failing to report may result in people being more inclined to report.

The fourth, and possibly most controversial, step that the South Carolina General Assembly should take is to abrogate all confidential communications under the reporting statute, rather than exclude attorney–client[256] and clergy member–penitent privileges.[257] Underreporting of child abuse is a significant problem because, *inter alia*, "despite the existence of mandatory reporting laws in every state, many people, including attorneys, are either unwilling to report or unaware of the procedures."[258] The distinctive attribute of child abuse—that it involves an ongoing pattern of behavior that gets more severe as it continues—

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255. *Id.*

256. *See, e.g.*, Stuart, *supra* note 234, at 266 ("A statutory duty to report child abuse should be imposed on attorneys."). It is important to distinguish the difference between requiring attorneys to report ongoing abuse and abuse that has occurred in the past, the latter of which has more protection under the rules of attorney–client confidentiality. *See* MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (1980). To clarify, an attorney would be required to report instances of ongoing or future abuse. The ABA Model Rule of Professional Conduct 1.6(b) and the South Carolina Rule of Professional Conduct 1.6(b) provide that a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2011); RULE 413, SCACR, R. 1.6 (2010). Thus, "Attorneys should already view the crime of child abuse as a future crime and reveal their clients' intentions under the future crime exception in the ethical rules." Stuart, *supra* note 234, at 266. Because the duty to reveal such information is discretionary, however, it is inevitable that some lawyers will not disclose the abuse. *See id.* To eliminate this discretion, a statutory duty explicitly requiring attorneys to report child abuse and a statute abrogating the attorney–client privilege should be enacted. *See id.* However, the duty to report should not also impose a duty to testify against clients; rather, attorneys should be required to "reveal only as much as is necessary to protect child abuse victims." *Id.*

257. *See* Paul Winters, Comment, *Whom Must the Clergy Protect? The Interests of At-Risk Children in Conflict with Clergy-Penitent Privilege*, 62 DEPAUL L. REV. 187, 226 (2012) ("Abrogation of the clergy exemption from mandatory reporting laws will advance the interests of at-risk children."). *But see* J. Michael Keel, Comment, *Law and Religion Collide Again: The Priest-Penitent Privilege in Child Abuse Reporting Cases*, 28 CUMB. L. REV. 681, 713 (1998) ("A child abuse reporting statute that abrogates all privileges, including the priest-penitent privilege, runs afoul of the Free Exercise Clause . . . ."). South Carolina ranks as the sixth most religious state in the nation. Frank Newport, *Mississippi Maintains Hold as Most Religious U.S. State*, GALLUP POLITICS (Feb. 13, 2013), http://www.gallup.com/poll/160415/mississippi-maintains-hold-religious-state.aspx#1. According to *Silent Tears*—a 2013 privately financed report based on interviews with hundreds of people who work closely with abused children in South Carolina—churches frequently stand between victims of child abuse and help. Kim Severson, *South Carolina is Faulted on Child Services*, N.Y. TIMES, July 10, 2013, at A12, *available at* http://www.nytimes.com/2013/07/10/us/south-carolina-is-faulted-on-child-services.html?_r=1&. Specifically, the study found that church communities in South Carolina were unlikely to report abuse—particularly sex abuse. *Id.* The study also found that church communities in South Carolina might, at times, even cover up known abuse by urging victims to forgive their abusers instead of reporting them to proper authorities. *Id.*

258. Stuart, *supra* note 234, at 244; *see also* Day, *supra* note 1, at 48 ("Originally intended to protect living child victims from publicity, confidentiality laws have become a hindrance to professionals who are working to save children.").

warrants the abrogation of all confidential communications.[259] Mandatory reporting is not as effective if privilege applies to certain relationships, and issues arise when some privileges are abrogated but others are retained.[260] Although both the privacy of the attorney–client and clergy member–penitent communications are appropriately protected in other scenarios, the "heinous nature of child abuse seriously undermines whatever benefits society receives from protected disclosure."[261] The state's interest in protecting at-risk children from potentially fatal abuse should trump the state's interest in protecting penitent or client abusers.[262] Additionally, abrogating all confidential communications logically follows from the adoption of an *any person* reporting provision, which commits the entire community, without exceptions, to the protection of helpless children.[263] Thus, complete abrogation of privileged communications reflects the view that protecting children from fatal abuse is a compelling and overriding state interest,[264] and it places equal responsibility on anyone who suspects or knows of abuse.[265]

C. Proposed Policy Recommendations

Strengthening criminal enforcement can only be meaningful if South Carolina also strengthens community support and Department of Social Services (DSS) monitoring.[266] In particular, expanding the category of people who are required to report and implementing a period within which they must report will not improve anything if DSS does not act on such reports.[267] Recently, DSS has

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259. *See* Stuart, *supra* note 234, at 246 (citing Fraser, *supra* note 233, at 657).

260. *See generally* Winters, *supra* note 257 (urging abrogation of the clergy reporting exemption and promoting an "any person" reporting requirement); *see also* Stuart, *supra* note 234, at 266 (comparing attorneys and other professionals and arguing that any distinction in reporting requirements is unwarranted).

261. Winters, *supra* note 257, at 205.

262. *Id.* at 192.

263. *See id.* at 226.

264. *See* Stuart, *supra* note 234, at 264.

265. *See* Winters, *supra* note 257, at 223–24.

266. *See, e.g.*, R. Darren Price, *Neighbors of Slain Pelion Infant: Mother Threatened to Throw Baby Against a Wall*, THE STATE, Dec. 12, 2012, at B1, *available at* http://www.thestate.com/2012/12/15/2557134/neighbors-of-slain-pelion-infant.html (providing an example of lacking community support and a possible failure of DSS monitoring when a mother had openly talked over a period of weeks about harming her infant child).

267. The South Carolina Supreme Court imposed a duty on DSS and its social workers to investigate and intervene when a report of child abuse is made, ruling that a violation of that duty may give rise to a private cause of action. Jensen v. Anderson Cnty. Dep't of Soc. Servs., 304 S.C. 195, 198–99, 403 S.E.2d 615, 617 (1991). Nevertheless, several recent incidents reveal that DSS failed in its duty to investigate and intervene when notified. *See, e.g.*, John Monk, *'Demon' Parents Get Life for Killing Boy, 4*, THE STATE (May 29, 2014), at A1, *available at* http://www.thestate.com/2014/05/28/3472668/prosecutor-dss-ignored-many-pleas.html (noting that former DSS Director Lillian Koller admitted that the agency failed to take action before a four-year-old boy died from repeated physical abuse and starvation, even though the agency had received several

been attacked for allegedly putting children in harm's way in an effort to lower the number of cases it has to manage.[268] In South Carolina, DSS has an extremely high level of cases, and employees manage on average 1,001 cases each—the highest caseload in the country.[269] Thus, some DSS employees have reported that they are "encouraged to funnel at-risk children into the Voluntary Case Management [(VCM)] program," which was originally intended for very low-level cases and not for cases involving sexual abuse or domestic violence.[270] The VCM employees are not prepared or trained to deal with such dangerous cases, which puts the already at-risk children in an even more vulnerable position.[271] Further, DSS has been criticized for lowering its number of children in foster care at the expense of either sending children back to abusive environments or not accepting children who need protection in the first place.[272] The circumstances surrounding these allegations against DSS, if true,[273] are simply unacceptable.

To reduce the state's child abuse fatality rates, South Carolina needs to increase funding for child protection measures.[274] Compared to other states, South Carolina spends less on child protection services, spending only $14.72

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complaints that he was being abused); Price, *supra* note 266 (discussing how the mother of a two-month-old girl talked about hurting the child in the weeks before the infant was killed and how the neighbors allegedly called DSS after hearing the threats, but claimed that no one from the agency ever came to help).

268. *See* Barron, *supra* note 31; *see also* Prentiss Findlay, *S.C. Rep. Horne Keeps Pressure on DSS over Handling of Child Abuse, Neglect Cases*, POST & COURIER (Nov. 28, 2012, 12:14 AM), http://www.postandcourier.com/article/20121128/PC16/121129431 (noting that the chairman of the Richland County Court Appointed Special Advocates, a volunteer guardian ad litem program, stated that "[w]ithout ambiguity, child protective services in the state of South Carolina are horrific").

269. Barron, *supra* note 31. The national average is 280 cases per employee. *Id.*

270. Barron, *supra* note 34 (quoting former DSS Deputy Director Linda Martin and an unnamed VCM service provider).

271. *See id.*

272. *See* Monk, *supra* note 267 (describing a case in which DSS, after receiving complaints, placed a two-month-old boy in foster care, where he flourished, but then returned the boy to his parents when he was three years old after they completed a DSS program, and the parents later abused him to death); *see also* Barron, *supra* note 34 (describing three cases in which a child was killed, despite the family having been reported to child protective services at DSS).

273. A Legislative Audit Council investigation is currently under way with a report of its findings expected in 2014. Barron, *supra* note 31.

274. *See* Day, *supra* note 1, at 48 (stating that it is "impossible to make a true impact [on reducing fatalities] without the necessary funding for child protective services"); *see also* Findlay, *supra* note 268 (suggesting that all of the problems with South Carolina's DSS "[go] back to money"). Admittedly, allocating more resources and funds to child protection measures will take resources and funds away from other state initiatives. However, fewer state priorities are more deserving than the protection of vulnerable children. In 2010, South Carolina had a lower ratio of state and local expenditures on child welfare to federal expenditures than forty-four other states, as well as Washington, D.C. and Puerto Rico. *See* Kerry DeVooght et al., *Federal, State, and Local Spending to Address Child Abuse and Neglect in SFYs 2008 and 2010*, fig.5, THE ANNIE E. CASEY FOUNDATION, http://www.childtrends.org/wp-content/uploads/2013/03/Child_Trends-2012_06_20_FR_CaseyCWFinancing.pdf (showing that over sixty percent of child protection expenditures in South Carolina were federal rather than state funds).

per capita in 2009, when the highest-ranking state spent $181 per person.[275] This puts a strain on child services and results in a consistently high rate of abuse and neglect cases.[276] Further, "In states with little funding, social workers are overburdened by high caseloads, low pay, and stressful work environments, resulting in high turnover and poor organization at the agencies."[277] Thus, allocating more funds to child protection services ensures that employees can investigate all abuse and neglect reports—not just some—because social workers would have more manageable caseloads.[278] Moreover, child protection agencies would more likely be able to retain experienced staff members and invest heavily in proper training, as well as provide timely abuse treatment and other victim services.[279]

Additionally, with increased funds, child protection agencies would be able to provide training and support for others who might be "on the front lines" when it comes to responding and reporting child abuse and neglect situations, such as "education, law enforcement, and health professionals."[280] Such professionals may not be aware of their own obligations, or understand how to report known or suspected abuse and neglect.[281] Likewise, agencies could better educate the population in general on the reporting process, the responsibilities citizens may have under the statutes, and the consequences they may suffer if they fail to comply.[282]

Strengthening the formal child protective services in the state might also help South Carolina heighten the state focus on alleviating poverty, improving education, and reducing teen pregnancies.[283] The majority of fatal child abuse

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275. Spencer, *supra* note 21.

276. *See id.*

277. *Id.* According to recent data from South Carolina's DSS, the agency mishandled numerous cases involving allegations of child abuse and neglect throughout the state. Kirk Brown, *Reviews Show S.C. Social Services Agency Mishandled Cases*, ANDERSON INDEP.-MAIL (May 31, 2014, 3:54 PM), http://www.independentmail.com/news/2014/may/31/reviews-show-sc-social-services-agency-cases/. For example, a December 2013 review of the agency's own data revealed problems—including lack of documentation and failure to conduct proper assessments—in eleven of the fifteen cases in Anderson County. *Id.* The data also revealed policy violations in ninety-seven cases that agency employees deemed to be unfound allegations, including paperwork flaws, missed deadlines, a lack of consultation among supervisors, and failure to contact medical professionals and law enforcement agencies. *Id.* DSS completely overlooked at least one of these complaints and conducted the other investigations poorly. *Id.*

278. EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 9.

279. *Id.*

280. *Id.* at 10.

281. *Id.*

282. For instance, to reach younger generations, an explanation of the reporting law and procedures could be integrated into the educational curriculum—perhaps during health classes. To reach adults, pamphlets explaining the procedure could be sent out yearly in the mail or made available year round at doctors' offices or grocery stores, rather than information only being offered online, particularly since online information is not easily accessible to everyone.

283. Jon M. Garon, *For the Benefit of the Infant: An Introduction to the Symposium to End Child Abuse*, 28 HAMLINE J. PUB. L. & POL'Y (SPECIAL ISSUE) i, iv (2006).

situations are a product of environments with low income, low education, and high teen pregnancy or unstable family structures.[284] With greater funding, child protective services would be able to focus on promoting safe and stable families by increasing the amount of substance abuse and mental health treatment programs offered, as well as the amount of teen pregnancy prevention and prenatal care programs.[285] Likewise, caseworkers would be able to improve both the quantity and quality of home visits to ensure that such programs are working to keep children safe.[286] Through such initiatives, child protective services would have the ability to provide support services and appropriate supervision to young parents, and potentially abusive and neglectful parents, so that they can learn how to cope with the stresses of parenthood and how to safely care for their children.[287] Further, child protective services could provide support and supervision for children who have been abused, but fortunately survived, to help them overcome the past abuse and refrain from later repeating the cycle of abuse onto others.[288]

VI. CONCLUSION

Children constitute a unique class of citizens and deserve heightened protection under state laws. While South Carolina is on the right track, positive changes can be made to the homicide by child abuse statute, the corresponding mandatory reporting statute, and public policy to better protect children from fatal child abuse and neglect. By changing and clarifying South Carolina law, by expanding the category of people required to report, and by heightening state monitoring and the focus on major risk factors that lead to child abuse and neglect fatalities, South Carolina will be better equipped to protect its children. If the goal is to reduce fatal child abuse rates to zero percent, South Carolina still has room for improvement.

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284. *See* EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 12; WORLD HEALTH ORG., *supra* note 57, at 1; CHILD WELFARE INFO. GATEWAY, *supra* note 15, at 6.

285. *See* EVERY CHILD MATTERS EDUC. FUND, *supra* note 7, at 14.

286. *See id.*

287. *See id.* at 9.

288. *See id.* at 12 (explaining that adults who were abused as children often abuse children themselves).