NOTE

Murder by Child Abuse—Who's Responsible After *State v. Jackson*?

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I. INTRODUCTION

Three-year-old Breighonna Moore was severely abused and eventually murdered by her foster parents, Michael and Laurinda Jackson.[1] Breighonna died from a bilateral subdural hematoma.[2] Aside from the fatal head injury, she had bruises on both her ears, near her right eye, on her buttocks, on both her arms, on the lower quadrant of her abdomen, and on the left side of her crotch.[3] Breighonna also had a vaginal injury, lacerations and abrasions inside her mouth, and hemorrhages on both arms, her left thigh, and her scalp.[4] This horrific image is just one example of the suffering many children experience daily.

In 1997, an estimated 984,000 children were victims of maltreatment.[5] Furthermore, 1,196 children died as a result of this mal-

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1. Both Michael and Laurinda Jackson have pleaded guilty to second-degree murder. Statement of Defendant, Plea Guilty, State v. Jackson, No. 93-1-02060-7 (King County Super. Ct. Feb. 25, 2000); Statement of Defendant, Plea Guilty, State v. Jackson, No. 93-1-02061-5 (King County Super. Ct. Mar. 15, 2000).

2. State v. Jackson, 137 Wash. 2d 712, 718, 976 P.2d 1229, 1231 (1999).

3. 137 Wash. 2d at 718 n.1, 976 P.2d 1231 n.1.

4. *Id.*

5. ADMINISTRATION ON CHILDREN, YOUTH AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 1997: REPORTS FROM THE STATES TO THE NATIONAL CHILD ABUSE AND NEGLECT DATA SYSTEM, ¶ 4 (1999) <http://www.acf.ahhs.gov/programs/cb/stats/neands97/fc.htm>. This figure is based on reports from 44 states. *Id.* ¶ 4.1. Forty-three states reported 440,994 victims of neglect, 197,557 victims of

treatment.[6] Of the alarming number of children suffering maltreatment, 75.4% of the perpetrators were the victim's parents.[7] While the number of children maltreated is horrifying, even more shocking is the number of innocent children who have died at the hands of their abuser, often their own parent.

In Washington alone, approximately 23,303 children were victims of maltreatment in 1997; nine children died from maltreatment.[8] Of the 19,966 perpetrators of maltreatment reported in Washington, 15,824 were the child's parents and 542 were the child's foster parents.[9]

In many of these situations, the nonabusive parent is aware that the other parent is abusing the child or foster child. For various reasons, the nonabusive, or passive, parent does not stop the abuse. Most of the time, the passive parent is not held responsible for the death of a child caused by child abuse. "When a child dies from abuse at the hands of another, there is only a remote chance that a passive parent will face any charges at all."[10] This situation is intolerable. Because of the unique helplessness of children, anyone who is aware of abuse, especially a parent or foster parent, should be held responsible for that abuse.

While there are several arguments against holding a passive parent responsible, they do not weigh heavily enough when a child's life is at stake. One excuse for not holding a passive parent responsible is that it will disrupt any remaining shred of family harmony and will precipitate the dissolution of the family unit.[11] Another argument is that holding passive parents responsible would have a disproportionate effect on women.[12] Finally, it has been suggested that a child

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physical abuse, 98,339 victims of sexual abuse, 49,338 victims of psychological abuse or neglect, 18,894 victims of medical neglect, and 103,576 victims of unknown and other maltreatment. *Id.* ¶ 4.2.

6. *Id.* ¶ 6.1. "Forty-one States reported that there were 967 child maltreatment fatalities in 1997. Based on these numbers, it was estimated that there were 1,196 fatalities in the 50 States and the District of Columbia, a rate of 1.7 children per 100,000 children in the general population or 123 child fatalities per 100,000 victims of maltreatment." *Id.* Fourteen of these fatalities occurred while the child was in foster care. *Id.* ¶ 6.3.

7. *Id.* ¶ 7.1. This figure is based on data from 39 states.

8. *Id.* at Appendix D, Table 4.1 and Table 4.5.

9. *Id.* at Appendix D, Table 6.

10. Bryan A. Liang & Wendy L. Macfarlane, *Murder by Omission: Child Abuse and the Passive Parent*, 36 HARV. J. ON LEGIS. 397, 445 (1999).

11. Rachel S. Zahniser, Note, *Morally and Legally: A Parent's Duty to Prevent the Abuse of a Child as Defined by* Lane v. Commonwealth, 86 KY. L.J. 1209, 1231 (1997). *See also* Anne T. Johnson, *Criminal Liability for Parents Who Fail to Protect*, 5 LAW & INEQ. J. 359 (1987); Nancy A. Tanck, Note, *Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse*, 1987 WIS. L. REV. 659, 684-85 (1987).

12. Zahniser, *supra* note 11, at 1231. *See also* Johnson, *supra* note 11, at 375-81; Tanck,

may be better off with a single, nonabusive parent than in a foster home.[13] While valid, none of these arguments, whether examined separately or taken together, are sufficient.

None of these reasons can justify declining to prevent or report the abuse of a child. "There is . . . no logical or legal reason for failing to charge all parents, guardians, or caretakers with murder when they know of the abuse yet fail to protect their children."[14] "Children need protection. They cannot protect themselves."[15] The most important reason to hold passive parents responsible is to provide this protection.

Another important reason to hold passive parents responsible for the death of their child is to further the purposes of Washington's criminal laws. Under Washington law, one of the general purposes of the provisions governing the definitions of offenses is to "forbid and prevent conduct that inflicts or threatens substantial harm to individual or public interests."[16] The Model Penal Code also states that one of the general purposes of the provisions governing sentencing and treatment of offenders is "to prevent the commission of offenses."[17] Not holding a passive parent responsible for the death of his or her child frustrates these purposes because a passive parent's conduct of not protecting a child from abuse "inflicts or threatens substantial harm" to that child and does not prevent the death of the child.[18] These purposes are also furthered by holding a passive parent accountable for his or her inaction, even though the passive parent has

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supra note 11, at 685.

13. Tanck, *supra* note 11, at 685. A majority of the criticism about holding passive parents responsible notes that many passive parents are also victims themselves, i.e. battered women. This Note does not address the issue of Battered Women's Syndrome. For more information regarding criticisms of holding passive parents responsible, see Howard A. Davidson, *Child Abuse and Domestic Violence: Legal Connections and Controversies*, 29 FAM. L.Q. 357 (1995); Michelle S. Jacobs, *Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes*, 88 J. CRIM. L. & CRIMINOLOGY 579 (1998); Linda J. Panko, *Legal Backlash: The Expanding Liability of Women Who Fail to Protect Their Children from Their Male Partner's Abuse*, 6 HASTINGS WOMEN'S L.J. 67 (1995); Christine Adams, Note, *Mothers Who Fail to Protect Their Children from Sexual Abuse: Addressing the Problem of Denial*, 12 YALE L. & POL'Y REV. 519 (1994). *But see* Jean Peters-Baker, *Punishing the Passive Parent: Ending a Cycle of Violence*, 65 UMKC L. REV. 1003 (1997).

14. Liang & Macfarlane, *supra* note 10, at 399.

15. Johnson, *supra* note 11, at 375.

16. WASH. REV. CODE § 9A.04.020(1)(a) (2000).

17. MODEL PENAL CODE § 1.02(2)(a) (1962). Washington declined to adopt subsections of section 1.02 of the Model Penal Code, stating that these purposes "should be located with the provisions dealing with those matters." JUDICIARY COMM. OF WASHINGTON STATE LEGISLATURE COUNCIL, REVISED WASHINGTON CRIMINAL CODE 3 cmt.1 (Comm. Print 1970) [hereinafter WASHINGTON LEGISLATIVE COUNCIL'S JUDICIARY COMM.].

18. *See* WASH. REV. CODE § 9A.04.020(1)(a) (2000); MODEL PENAL CODE § 1.02(a) (1962).

a history of violence.[19] A passive parent would feel more compelled to remove his or her child from an abusive situation if he or she could be charged with a felony.[20] Unfortunately, when a child dies from abuse, there is presently only a remote chance that the passive parent will be held accountable.[21]

Currently, under Washington law, a passive parent is not legally responsible for the death of his or her child from abuse. *State v. Jackson*[22] is a horrific illustration of the gaps in Washington's law regarding the issue of who is responsible for the death of a child by abuse. Because passive parents should be held responsible for the death of their child from abuse, and because Washington's current laws are inadequate, Washington's legislature should create a special statute that would hold both abusive and passive parents culpable for the death of a child resulting from abuse.[23] Section II of this Note will discuss *State v. Jackson*, including an analysis of both the majority and dissenting opinions. Section III will demonstrate that Washington's current laws are inadequate to hold passive parents responsible for the death of their child. Finally, Section IV will describe several proposals that would help fill the gaps of Washington's law.

II. *STATE V. JACKSON*—AN UNFORTUNATE EXAMPLE

A. Summary of the Case

In November of 1992, Michael and Laurinda Jackson became the foster parents of two-year old Breighonna Moore; shortly thereafter they received another foster child, an infant boy.[24] In the early morning hours of March 12, 1993, Michael Jackson, accompanied by Breighonna and the Jackson's other foster child, dropped his wife off at work.[25] He returned home with the children and spent the morning at home and at the park.[26] Around noon that day, Michael Jackson drove Breighonna to the emergency room at Valley Medical Center in Renton, Washington and told the emergency medical technician that

19. Liang & Macfarlane, *supra* note 10, at 442.

20. Tanck, *supra* note 11, at 684.

21. Liang & Macfarlane, *supra* note 10, at 416.

22. 137 Wash. 2d 712, 976 P.2d 1229 (1999).

23. This Note will focus on holding a passive parent responsible for the death of his or her child by abuse; it will not address child abuse that does not result in deaths or address child abuse in the context of Battered Women's Syndrome.

24. *Jackson*, 137 Wash. 2d at 716, 976 P.2d at 1230-31.

25. *Id.* at 716, 976 P.2d at 1231.

26. *Id.*

his "daughter" had been "swinging on a swing and had fallen and hit her head, and she wasn't breathing very well."[27]

Breighonna was immediately examined by Dr. Edward Bigler.[28] After this exam, Dr. Bigler concluded that Breighonna was in critical condition as a result of a "very serious injury" to the brain.[29] When questioned by Dr. Bigler and other staff about how Breighonna suffered these injuries, Michael Jackson replied that Breighonna was swinging in the park, he turned his back for a moment, and when "he turned around [he] found [Breighonna] lying unconscious below the swing."[30] Dr. Bigler concluded that Breighonna's injuries were not consistent with Michael Jackson's story; therefore, he asked the hospital's emergency intervention team to contact Children's Protective Services.[31]

Breighonna's serious condition required her to be transferred to Harborview Hospital in Seattle.[32] Before Breighonna was transferred, Dr. Bigler informed personnel at Harborview that there was a possibility of child abuse.[33] At Harborview, Dr. Valerie Newman examined Breighonna, who was still unconscious and unresponsive.[34] Dr. Newman consulted with several other staff physicians and the consensus was that surgical intervention would be futile and Breighonna was going to die.[35] Around midnight, Dr. Newman met with the Jacksons and told them that she did not expect Breighonna to live through the morning.[36] Dr. Newman then inquired how Breighonna had suffered her injuries.[37] Michael Jackson reiterated the story he told Dr. Bigler, but added that "a few days prior or possibly a week prior [Breighonna] had been getting a hair cut and had bumped her head on the sink" at the salon.[38]

Breighonna died on March 13, 1993, and an autopsy was performed by Dr. Michael Dobersen.[39] The autopsy revealed that

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27. *Id.* (quoting Videotape Recorded Proceedings (VRP) at 68).
28. *Id.* at 716-17, 976 P.2d at 1231.
29. *Id.* (quoting VRP at A). Breighonna's injuries included a growing contusion on her forehead, bruises on both ears, a faint bluish mark in the lower abdomen, discoloration on her buttocks, and an abrasion on her vagina. Dr. Bigler also noticed that Breighonna's right pupil was enlarged and both eyes were not responding to light. *Id.*
30. *Id.* (quoting VRP at 34).
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 717-18, 976 P.2d at 1231 (quoting VRP at 166).
39. *Id.* at 718, 976 P.2d at 1231.

Breighonna's death was caused by "a bilateral subdural hematoma resulting from a blunt impact."[40] Because of the severity of the injuries[41] and the fact that the injuries were inconsistent with Michael Jackson's explanation, Dr. Dobersen classified Breighonna's death as a homicide.[42]

The next day, Michael Jackson gave a statement to Detective Mullinax of the King County Police.[43] In this statement, Michael Jackson repeated the story of Breighonna falling off a swing, but his statement slightly varied from the statement given to various medical personnel.[44] He also described the incident where Breighonna bumped her head on a sink at the hair salon.[45]

On that same day, Detective Hatch of the King County Police took a statement from Laurinda Jackson.[46] She confirmed her husband's story of Breighonna hitting her head on the salon sink.[47] She also admitted to Detective Hatch that she had spanked Breighonna several times because Breighonna was having problems with her toilet training.[48] Michael Jackson, in a later interview with Detective Mullinax, also admitted, "he had once spanked" Breighonna.[49]

Michael and Laurinda Jackson were charged[50] with second degree felony murder,[51] based on the predicate felonies of second degree assault[52] and first-degree criminal mistreatment.[53] During the

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40. *Id.*

41. Dr. Dobersen listed all of Breighonna's injuries that he observed, including a bilateral subdural hematoma, a vaginal injury, a bruise near the right eye, bruises on both ears, lacerations and abrasions inside her mouth, bruises on her buttocks, bruises on both arms, a bruise on the left side of her crotch, a bruise on the lower quadrant of her abdomen, hemorrhages on both arms, several hemorrhages on her scalp, and a hemorrhage on her left thigh. *Id.* at 718 n.1, 1976 P.2d at 1231 n.1.

42. *Id.* at 718, 976 P.2d at 1231 (quoting VRP 340).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 718, 976 P.2d at 1232.

47. *Id.*

48. *Id.*

49. *Id.* (quoting VRP at 629). This interview was held in Jacksonville, Florida, on March 24, 1993, following the Jacksons' arrest in that city. *Id.* at 718-19 n.2, 976 P.2d at 1232 n.2.

50. *Id.* at 718-19, 976 P.2d at 1232.

51. "A person is guilty of murder in the second degree when: . . . (b) He commits or attempts to commit any felony . . . and, in the course of and in furtherance of such crime . . . he, or another participant, causes the death of a person other than one of the participants . . . ." WASH. REV. CODE § 9A.32.050(1)(b) (2000).

52. "A person is guilty of assault in the second degree if he or she, under circumstances not amounting to assault in the first degree: (a) Intentionally assaults another and thereby recklessly inflicts substantial bodily harm; . . . or (f) Knowingly inflicts bodily harm which by design causes such pain or agony as to be the equivalent of that produced by torture." WASH. REV. CODE §

trial, Dr. Bigler, Dr. Newman, and Dr. Roberta Winch, a doctor that examined Breighonna at Harborview, all testified that Breighonna's injuries were inconsistent with a fall from a swing.[54] In addition to the testimony of the doctors who examined Breighonna, Dr. Feldman, a pediatrician with a specialty in injuries related to child abuse, reviewed Breighonna's file and testified Breighonna died from a head injury that stemmed from a blunt impact trauma that, in his opinion, occurred the morning of March 12, 1993.[55] Dr. Feldman also agreed that falling from a swing could not have caused Breighonna's injuries.[56] In addition to the testimony of all the doctors, Ausilene Griswold testified that on February 26, 1993, she cut Breighonna's hair and Breighonna did not hit her head on a sink.[57]

A number of people who observed Breighonna's injuries testified that the injuries were not accidental and that Michael and Laurinda Jackson made up stories attempting to explain these earlier injuries.[58] For example, Dannette Wold testified that she noticed an "unusual owie" on Breighonna's forehead and when she asked about it, Michael Jackson responded that it was none of her business, he was the parent, he would take care of it, and he did not need to answer to the rest of the world.[59] Linda Shanes testified that Breighonna had a "rather large-sized scab on her forehead"; when she asked Michael and Laurinda about the injury, Michael and Laurinda looked at each other "as if they weren't really sure whether they should tell [her] or what to say, if they should say anything at all."[60] After this, Michael told Linda that Breighonna had "gotten popped" by hot water when they were making mashed potatoes.[61]

Over the objection of the Jacksons, the trial court gave a jury instruction that stated "unless there is a legal duty to act, more than mere presence and knowledge of the criminal activity of another must

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9A.36.021(1) (2000).

53. "A parent of a child, the person entrusted with the physical custody of a child . . . is guilty of criminal mistreatment in the first degree if he or she recklessly . . . causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life." WASH. REV. CODE § 9A.42.020(1) (2000).

54. *Jackson*, 137 Wash. 2d at 719, 976 P.2d at 1232.

55. *Id.*

56. *Id.*

57. *Id.*

58. *See* Brief of Respondent at 4-8, State v. Jackson, No. 35179-6-I, 87 Wash. App. 801, 944 P.2d 403 (1997).

59. VRP at 941, 944, State v. Jackson, No. 93-1-02060-7 (King County Super. Ct., 1994). Dannette Wold also testified that the reason she asked about the "owie" was because she "wasn't sure what could have caused" the injury. *Id.* at 942.

60. *Id.* at 679-80.

61. *Id.* at 680.

be shown to establish that a person present is an accomplice; a legal duty exists for a parent to come to the aid of their small children if physically capable of doing so."[62] The jury found both Michael and Laurinda Jackson guilty of second degree murder.[63] In special interrogatories, the jury indicated that Michael and Laurinda Jackson each committed the crimes of assault in the second degree and criminal mistreatment in the first degree, and that these crimes "resulted in the death of Breighonna Moore."[64]

The defendants appealed and the Washington Court of Appeals, Division One, reversed and remanded the case for a new trial.[65] The court of appeals concluded that the trial court erred "by instructing the jury, in essence, that a parent is an accomplice in the commission of a crime if the parent fails to fulfill his or her 'duty' to 'aid' their child who is being assaulted or criminally mistreated by another."[66] The court held that sufficient evidence was presented to support a finding of guilt of second degree assault and that Laurinda Jackson was a principal or an accomplice to second degree felony murder.[67] The State petitioned for review and the Washington State Supreme Court affirmed the court of appeals in all respects.[68]

B. Reasoning of the Majority Opinion[69]

The court began its analysis with the jury instruction that was given:

> Participant means an accomplice. A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of the crime, he or she either:

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62. *Jackson*, 137 Wash. 2d at 719, 976 P.2d at 1232 (quoting Clerk's Papers (CP) at 57). This is a technical passive parent case because evidence was presented that Laurinda Jackson also abused Breighonna. However, an accomplice liability instruction was given because the final blow to Breighonna's head that caused her death occurred on the morning of her death, and Laurinda Jackson was at work when Michael Jackson struck the final blow. *See* State v. Jackson, 87 Wash. App. 801, 817-19, 944 P.2d 403, 412-13 (1997).

63. *Jackson*, 137 Wash. 2d at 719, 976 P.2d at 1232.

64. *Id.* (quoting CP at 76-77, 142-43).

65. *Id.* at 719-20, 976 P.2d at 1232.

66. *Id.* at 720, 976 P.2d at 1232.

67. *Id.* However, the court of appeals also held that there was insufficient evidence to support the trial court's finding of first degree criminal mistreatment. *Id.* On this issue the court of appeals dismissed the charge of first degree criminal mistreatment. State v. Jackson, 87 Wash. App. at 809, 944 P.2d at 408. This will be discussed later in this Note. *See infra* Sections II and III.

68. *Jackson*, 137 Wash. 2d at 716, 976 P.2d at 1230.

69. This Note only deals with the issue of accomplice liability. It does not discuss the issue of whether the jury instruction was harmless error, whether the evidence at trial supported a charge of criminal mistreatment, or whether evidence was sufficient to support Laurinda Jackson's conviction.

> (1) solicits, commands, encourages, or requests another person to commit the crime or (2) aids or agrees to aid another person in planning or committing the crime.
>
> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. *Unless there is a legal duty to act*, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice; *a legal duty exists for a parent to come to the aid of their small children if physically capable of doing so.*[70]

The court stated that this instruction varies significantly from Washington Pattern Jury Instruction (WPIC) 10.51,[71] which reads,

> [A person who is an accomplice in the commission of a crime is guilty of that crime whether present at the scene or not.] [sic]
>
> A person is an accomplice in the commission of a crime if, with knowledge that it will promote or facilitate the commission of a crime, he or she either: (1) solicits, commands, encourages, or requests another person to commit the crime; or (2) aids or agrees to aid another person in planning or committing a crime.
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> The word "aid" means all assistance whether given by words, acts, encouragement, support, or presence. A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. However, more than mere presence and knowledge of the criminal activity of another must be shown to establish that a person present is an accomplice.[72]

The State argued that a foster parent who fails to come to the aid of a foster child when that child is being assaulted or criminally mistreated violates his or her duty to protect that child, thereby making that parent an accomplice.[73] The defendants responded that Washington's accomplice liability statute does not impose criminal liability on a person who fails to act when he or she has a legal duty to act.[74]

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70. *Jackson*, 137 Wash. 2d at 720-21, 976 P.2d at 1233 (quoting CP at 57) (emphasis added).

71. *Id.* at 720, 976 P.2d at 1232.

72. WASHINGTON PRACTICE WASHINGTON PATTERN JURY INSTRUCTIONS: CRIMINAL WPIC 10.51 (2d ed. 1994).

73. *Jackson*, 137 Wash. 2d at 721, 976 P.2d at 1233.

74. *Id.*

The court agreed that parents have a legal duty to care for and protect their children, and that failure to do so may result in civil detriment, such as termination of parental rights.[75] However, a parent's or foster parent's failure to come to the aid of his or her child is not a crime unless the criminal statute includes failure to act when a legal duty to act exists.[76] The court then examined Washington's accomplice liability statute to determine whether a person who fails to act when he or she has a legal duty to act can be an accomplice, subject to criminal liability.[77]

Washington's accomplice liability statute states:

> A person is an accomplice of another person in the commission of a crime if (a) With knowledge that it will promote or facilitate the commission of the crime, he (i) solicits, commands, encourages, or requests such other person to commit it; or (ii) aids or agrees to aid such other person in planning or committing it; or (b) His conduct is expressly declared by law to establish his complicity.[78]

The court stated "[i]t is readily apparent that this statute does not extend accomplice liability to a person, much less a parent or foster parent, based on the person's failure to fulfill a duty to come to the aid of another."[79] Because no language in the statute indicates accomplice liability for failure to act, the court decided that the jury instruction "was a notable expansion on the reach of the statute."[80]

In coming to this conclusion, the court discussed two reasons why the legislature's decision not to extend accomplice liability to parents who fail to act was deliberate.[81] First, Washington's accomplice liability statute is based on the accomplice liability provision in the Model Penal Code,[82] which includes a provision that a person is an accomplice if that person has a legal duty to act and fails to act.[83]

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75. *Id.*
76. *Id.*
77. *Id.*
78. WASH. REV. CODE § 9A.08.020(3) (2000).
79. *Jackson*, 137 Wash. 2d at 722, 976 P.2d at 1233.
80. *Id.*
81. *Id.* at 723-24, 976 P.2d at 1234.
82. *Id.* at 722, 976 P.2d at 1234.
83. MODEL PENAL CODE § 2.06(3) (1962) states:

> A person is an accomplice of another person in the commission of an offense if: (a) with the purpose of promoting or facilitating the commission of the offense, he (i) solicits such other person to commit it; or (ii) aids or agrees or attempts to aid such other person in planning or committing it; *or (iii) having a legal duty to prevent the commission of the offense, fails to make proper effort so to do; or* (b) his conduct is expressly declared by law to establish his complicity.

(emphasis added).

Nevertheless, the legislature specifically chose not to include the omission provision in the Model Penal Code.[84] The court referred to a statement of the Legislative Council's Judiciary Committee, explaining why the legislature specifically left out the omission provision.[85] The committee stated that:

> (1) as drafted, the language is over-broad and might be held to encompass situations where accessorial liability should not attach; (2) the rest of the section will cover all situations to which the excluded subdivision was addressed without raising the above-stated objection; and (3) the other jurisdictions examined all excluded this subdivision.[86]

Second, the court reasoned the legislature deliberately left the omission provision out of the accomplice statute because the legislature imposed liability for failure to act in other criminal statutes.[87] These statutes include first degree criminal mistreatment,[88] second degree criminal mistreatment,[89] and duty to report abuse of a child.[90] Because the legislature included omission to act in these statutes, the court "conclude[d] that [the legislature's] failure to include liability for a failure to act in the accomplice liability statute was deliberate."[91]

On the basis of these two reasons, the court decided that the legislature "deliberately chose to not include omission liability in the accomplice statute."[92] The court also indicated that the State had not cited any Washington statutes or cases to support its notion that accomplice liability should be extended.[93] Instead, the State relied on the argument that a parent's failure to act makes that person an accomplice to a crime because the common law imposes a duty on a parent to protect his or her child.[94] The court agreed that a parent has a duty at common law to protect his or her child, but it did not agree that a parent's failure to act makes that parent an accomplice and

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84. *Jackson*, 137 Wash. 2d at 723, 976 P.2d at 1234.

85. *Id.*

86. WASHINGTON LEGISLATIVE COUNCIL'S JUDICIARY COMM., *supra* note 17, at 44-45 cmt. 1.

87. *Jackson*, 137 Wash. 2d at 723-24, 976 P.2d at 1234.

88. WASH. REV. CODE § 9A.42.020 (2000). See section III.C for the language of statute.

89. WASH. REV. CODE § 9A.42.030 (2000). See section III.D for the language of statute.

90. WASH. REV. CODE § 26.44.030 (2000). See section III.E for the language of statute.

91. *Jackson*, 137 Wash. 2d at 724, 976 P.2d at 1234. In *United Parcel Service, Inc. v. State Dep't of Revenue*, 102 Wash. 2d 355, 361, 687 P.2d 186, 191 (1984), the court stated that it is an "elementary rule that where the legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent."

92. *Jackson*, 137 Wash. 2d at 724, 976 P.2d at 1234.

93. *Id.* at 724, 976 P.2d at 1235.

94. *Id.* at 724-25, 976 P.2d at 1235.

criminally liable.[95] The court held, "The fact that a common law duty may have been violated does not constitute a crime."[96]

The State also argued that Washington should follow other jurisdictions that have expressly included omission liability under their statutes.[97] The court stated that although liability for failure to act may be good public policy, it "should resist the temptation to rewrite an unambiguous statute to suit [the court's] notions of what is good public policy."[98] The statute should be fixed by the legislature, not the court.[99]

Finally, the court addressed the dissent's opinion that the majority failed to consider the second part of Washington's accomplice liability statute.[100] Because neither side advanced the position of the dissent, the court stated it would "have been improper for this court to discuss the theory that the dissent advocates."[101]

C. Reasoning of the Dissent

In his dissent, Justice Talmadge claimed that the majority "erroneously analyze[d] accomplice liability under Washington law and ignore[d] long-standing principles of Washington law obligating parents or persons standing in loco parentis to come to the aid of their children."[102] According to Justice Talmadge, the flaw in the majority's reasoning was that "it fails to give appropriate attention to" the Revised Code of Washington (RCW) 9A.08.020(3)(b), which states that a person is an accomplice if "his conduct is expressly declared by law to establish his complicity."[103] Justice Talmadge asserted that this provision explained the statement made by the Legislative Council's Judiciary Committee that "the rest of the section will cover all situations to which the excluded subdivision was addressed without raising the above-stated objection."[104]

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95. *Id.* at 725, 976 P.2d at 1235.

96. *Id.* In *State v. Wissing*, 66 Wash. App. 745, 755, 833 P.2d 424, 429 (1992), the court held that Washington courts do not recognize common law crimes.

97. *Jackson*, 137 Wash. 2d at 724, 976 P.2d at 1234.

98. *Id.*

99. *Id.*

100. *Id.* at 725-26, 976 P.2d at 1235. The dissent's opinion will be discussed fully in the next section.

101. *Id.* at 726, 976 P.2d at 1235. *See* John Doe v. Puget Sound Blood Ctr., 117 Wash. 2d 772, 785, 819 P.2d 370, 377 (1991) (refusing to provide a precedential ruling on a privacy issue because the court "should not engage in conjectural resolution of issues present, but not briefed.").

102. *Jackson*, 137 Wash. 2d at 732, 976 P.2d at 1238 (Talmadge, J., dissenting).

103. *Id.* at 733, 976 P.2d at 1239 (quoting WASH. REV. CODE § 9A.08.020(3)(b)).

104. *Id.* at 733-34, 976 P.2d at 1239.

Continuing his analysis, Justice Talmadge stated the Legislative Council's Judiciary Committee statement also comports with comment 6(e) to section 2.06 of the Model Penal Code, which states, "Subsection 3(b) preserves all special legislation declaring that particular behavior suffices for complicity, whether or not it would suffice under the standards of Subsection (3)(a)."[105] Because of this, the dissent reasoned that "the Legislature expressly contemplated a person could be an accomplice if the person's conduct was expressly declared by law to establish that person's complicity in the crime."[106]

Justice Talmadge argued that Washington has laws of complicity, making a passive parent an accomplice.[107] For example, Washington's law regarding the duty of a witness of an offense against a child or any violent offense states:

> (1) A person who witnesses the actual commission of . . . (c) An assault of a child that appears reasonably likely to cause substantial bodily harm to the child, shall as soon as reasonably possible notify the prosecuting attorney, law enforcement, medical assistance, or other public officials. . . . (4) Failure to report as required by subsection (1) of this section is a gross misdemeanor.[108]

The dissent further asserted that Washington's accomplice liability statute captures statutes like the above within its scope.[109] Therefore, if either Laurinda Jackson or Michael Jackson watched the other abuse Breighonna and did not report the abuse, the witnessing party would be guilty of a misdemeanor.[110] Also, under Justice Talmadge's reasoning, the Jacksons would be guilty under Washington's accomplice liability statute.[111]

Justice Talmadge asserted that not only does Washington's law regarding a duty to report child abuse establish the Jackson's complicity, but both common law and administrative law "expressly establish a parent's complicity in the conduct of another abusive parent."[112] Under Washington common law, failure of parents to fulfill their duty to take care and protect their children may result in the imposition of

105. *Id.* at 734, 976 P.2d at 1239 (quoting MODEL PENAL CODE AND COMMENTARIES §2.06 cmt. 6(e) (Official Draft and Revised Comments 1985)).

106. *Id.*

107. *Id.*

108. WASH. REV. CODE § 9.69.100 (2000).

109. *Jackson*, 137 Wash. 2d at 734, 976 P.2d at 1239 (Talmadge, J., dissenting).

110. *Id.*

111. *Id.*

112. *Id.* at 734, 976 P.2d at 1240.

criminal culpability or in the termination of parental rights.[113] The Jacksons agreed to follow the common law and the Washington Administrative Code provisions relating to foster parents, and agreed in writing not to use any type of physical punishment and to report any abuse.[114] Also, applicable administrative laws prohibit the use of corporal punishment and affirmatively required the Jacksons to protect people in their custody from child abuse or neglect.[115]

Justice Talmadge continued his dissent by stating the majority's analysis "reads section 3(b) out of the statute."[116] According to Justice Talmadge, "[t]he Legislature plainly meant something by its enactment of RCW 9A.08.020(3)(b). If the law expressly declares certain conduct establishes a person's complicity in the crime, the person is guilty as an accomplice."[117] Because of the statutory requirement to report an assault on a child, Washington's common law duty of parents to care for and protect their children, and the administrative law provisions regarding foster parents, Justice Talmadge stated that the "complicity required by section 3(b) is present here."[118] Under Justice Talmadge's reasoning, the trial court properly instructed the jury on accomplice liability and the Jacksons' conviction should have been upheld.[119]

D. Analysis of Washington's Accomplice Statute—Who Was Right?

In this case, both the majority and the dissent were correct in their interpretation of Washington's accomplice liability statute. The majority concentrated its efforts on RCW 9A.08.020(3)(a),[120] while the dissent focused on RCW 9A.08.020(3)(b).[121] Even though both sides interpreted the respective sections correctly, the analysis provided in the majority opinion is more persuasive.

First, the State charged Michael and Laurinda Jackson with second degree felony murder, alleging second degree assault and first degree criminal mistreatment as the predicate felonies.[122] As the

113. *Id.* at 734-35, 976 P.2d at 1240.

114. *Id.* at 735, 976 P.2d at 1240.

115. WASH. ADMIN. CODE § 388-73-048(1) (1999), states, "Corporal punishment is prohibited," and WASH. ADMIN. CODE § 388-73-050 (1999), states, "Licensees shall protect persons, while in the licensee's care, from child abuse or neglect as defined in RCW 26.44.020(12)."

116. *Jackson*, 137 Wash. 2d at 735, 976 P.2d at 1240 (Talmadge, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.* at 735-36, 976 P.2d at 1240.

120. *See id.* at 720-26, 976 P.2d at 1233-36.

121. *See id.* at 732-36, 976 P.2d at 1238-40 (Talmadge, J., dissenting).

122. *Id.* at 718-19, 976 P.2d at 1232.

dissent advocates, Michael and Laurinda may have been guilty under Washington's law requiring a witness to report any observed child abuse,[123] but even if they were, the majority was correct in not addressing this issue because the parties did not brief it. In *Doe v. Puget Sound Blood Center*,[124] the Washington Supreme Court held that it "should not engage in conjectural resolution of issues present, but not briefed."[125] Michael and Laurinda Jackson were not charged with failure to report abuse, and the State did not brief this issue or advance it during oral argument. As a result, under *Puget Sound Blood Center*, the court should not have addressed this issue on appeal. Thus, the majority did not read "section 3(b) out of the statute" as the dissent claimed.[126] Rather, the court could not have addressed section 3(b) because the issue was not properly presented.

Second, the majority was correct in finding that Washington's accomplice liability statute does not include criminal liability for failure to act when there is a legal duty to act.[127] Under *Rhoad v. McLean Trucking Co.*,[128] when the intent of the legislature is clear, "this court should not read into a statute matters which are not there nor modify a statute by construction."[129] The court provided two reasons why the legislature did not intend to extend liability to omissions: the legislature did not adopt the language from the Model Penal Code regarding accomplice liability and the legislature included the failure to act in other statutes, but not the accomplice liability statute.[130]

Because the legislature did not adopt section 2.06(3)(a)(iii) of the Model Penal Code and, instead, imposed liability for omission in other statutes, the court properly concluded that the legislature's intent was not to extend the accomplice liability statute to omissions. Because the legislature's intent is clear, under *Rhoad*, it was proper not to read "matters which are not there" into the accomplice liability statute and not to modify the accomplice liability statute by including liability for omissions.[131]

Even though the dissent properly interpreted Washington's accomplice liability statute, Michael and Laurinda Jackson were not

123. WASH. REV. CODE § 9.69.100 (2000).
124. 117 Wash. 2d 772, 819 P.2d 370 (1991).
125. *Id.* at 785, 819 P.2d at 377.
126. *See Jackson*, 137 Wash. 2d at 735, 976 P.2d at 1240 (Talmadge, J., dissenting).
127. *Id.* at 722, 976 P.2d at 1233.
128. 102 Wash. 2d 422, 686 P.2d 483 (1984).
129. *Id.* at 426, 686 P.2d at 485.
130. *Jackson*, 137 Wash. 2d at 723-24, 976 P.2d at 1234.
131. *See id.* at 734, 976 P.2d at 1234 (quoting *Rhoad*, 102 Wash. 2d at 426, 686 P.2d at 485).

charged for failure to report abuse. In fact, when the dissent questioned the State's counsel during oral arguments, it was evident from the State's response that it had not given any consideration to RCW 9A.08.020(3)(b).[132] Although the dissent was logically correct in its analysis, the majority was correct to not follow this analysis.

Both the majority and the dissent were correct in a sense, but the majority's reasoning properly controlled the case based on the issues before the court. The next problem to analyze is why Washington laws failed to hold these two people responsible for the tragic death of Breighonna Moore.

III. WHY DO WASHINGTON LAWS FAIL?

Several statutes in Washington appear at first glance to hold passive parents culpable for the death of their children by abuse. Unfortunately, in *State v. Jackson*, the gaps in these laws did not help Breighonna Moore during her life. An analysis of Washington law demonstrates that passive parents often are not held responsible for the death of their child by abuse.

A. The Inadequacy of the Accomplice Liability Statute

Washington's accomplice liability statute states that a person is an accomplice if he or she, with knowledge that it will further the commission of a crime, encourages another person to commit a crime, or aids in the planning and commission of a crime, or if the accomplice's conduct is "expressly declared by law to establish his complicity."[133] This statute is inadequate because in *Jackson*, the Washington Supreme Court held that this statute did not include liability for failing to act.[134] By setting this precedent, a passive parent cannot be held criminally liable as an accomplice for the death of his or her child. The only way to change this is through the legislature. This holding is a perfect example of the gaps in Washington law.

B. The Inadequacy of the Criminal Mistreatment Statutes

Under Washington's criminal mistreatment statutes, a person is guilty of first-degree criminal mistreatment if a person having physical custody of a child recklessly causes "great bodily harm to a child" by withholding any of the "basic necessities of life."[135] Under this stat-

132. *Id.* at 726 n.8, 976 P.2d at 1235 n.8.

133. WASH. REV. CODE § 9A.08.020(3) (2000).

134. *Jackson*, 137 Wash. 2d at 726, 976 P.2d at 1235.

135. WASH. REV. CODE § 9A.42.020(1) (2000).

A parent of a child, the person entrusted with the physical custody of a child or

ute, a passive parent can be held responsible for withholding any of the "basic necessities of life" from his or her child. Unfortunately, this statute is inadequate because Washington defines the "basic necessities of life" as "food, water, shelter, clothing, and medically necessary health care."[136] This statute does not protect children from child abuse; it only protects children from parents who fail to provide them with the "basic necessities of life" as defined in the statute.

The Jacksons were originally charged with and found guilty of first degree criminal mistreatment, but the Washington Supreme Court upheld the court of appeals decision to dismiss these convictions because of insufficient evidence.[137] The State contended that the Jacksons failed to provide Breighonna "shelter," including the protection of a child from assault.[138] This argument was rejected by the court of appeals, which held that "shelter" means "housing or protection from the elements"; not protection from an assault.[139] Because there was no proof that the Jacksons withheld "housing or protection from the elements" from Breighonna, the supreme court upheld the court of appeals decision to dismiss the felony murder charge against the Jacksons to the extent that it was based on the predicate felony of first degree criminal mistreatment.[140] Furthermore, the court of appeals held that because Breighonna's injuries were inoperable, the Jacksons withheld medical care, but the evidence was insufficient to show that withholding the medical care caused Breighonna great bodily harm.[141] Undoubtedly, after *Jackson*, this statute does not apply to child abuse.

Thus, *Jackson* demonstrates this statute does little to protect children from physical or sexual abuse, and it does even less to hold either the abusive parent or passive parent responsible for their child's death.

Washington's second-degree criminal mistreatment statute holds that persons having physical custody of a child are guilty when their activity either "creates an imminent and substantial risk of death or great bodily harm" or "causes substantial body harm by withholding

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dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the first degree if he or she recklessly, as defined in RCW 9A.08.010, causes great bodily harm to a child or dependent person by withholding any of the basic necessities of life.

Id.

136. WASH REV. CODE § 9A.42.010(1) (2000).

137. *Jackson*, 137 Wash. 2d at 728, 976 P.2d at 1237.

138. *Id.* at 728, 976 P.2d at 1236.

139. *Id.* at 728, 976 P.2d at 1237.

140. *Id.*

141. State v. Jackson, 87 Wash. App. at 808-09, 944 P.2d at 408.

any of the basic necessities of life."[142] A reasonable statutory interpretation would seem to include a situation where a passive parent could be guilty for allowing a child to be abused by the other parent, because the passive parent would be "creat[ing] an imminent and substantial risk of death or great bodily harm" to that child. Unfortunately, courts have not interpreted the statute as such. In *State v. Dunn*,[143] the court of appeals held that the statute requires the following: (1) the defendant must be a parent or guardian; (2) the victim must be a child or dependant; (3) the defendant must have acted recklessly, the defendant's actions must have created an imminent and substantial risk of death or great bodily harm, and (4) the defendant must have caused the death or harm by withholding the basic necessities of life.[144] The court defined the basic necessities of life as "food, shelter, clothing, and health care."[145] On the basis of *Dunn*, a court cannot hold a passive parent liable for the physical abuse of his or her child because the abuse is not caused by withholding the basic necessities of life.[146] As in first degree criminal mistreatment, a passive parent is only responsible when he or she fails to provide the child with the basic necessities, and protection from child abuse is not one of those basic necessities.

C. The Inadequacy of the Duty to Report Statutes

In Washington, the duty to report offenses against children requires a person to report an assault against a child if it appears that assault is "reasonably likely to cause substantial bodily harm to the child."[147] However, a person is not required to report the assault against a child if that person has a reasonable belief that making the report will endanger himself or herself, or any other person in the household.[148]

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142. WASH. REV. CODE § 9A.42.030(1)(a) and (b) (2000).

> A parent of a child, the person entrusted with the physical custody of a child or dependent person, or a person employed to provide to the child or dependent person the basic necessities of life is guilty of criminal mistreatment in the second degree if he or she recklessly, as defined in RCW 9A.08.010, either (a) creates an imminent and substantial risk of death or great bodily harm, or (b) causes substantial bodily harm by withholding any of the basic necessities of life.

Id.

143. 82 Wash. App. 122, 916 P.2d 952 (1996).

144. *Id.* at 127, 916 P.2d at 954.

145. *Id.*

146. *Id.*

147. WASH. REV. CODE § 9.69.100(1)(c) (2000).

148. WASH. REV. CODE § 9.69.100(4) (2000).

This statute is also inadequate because the State may decide not to charge a passive parent under it; even if a passive parent is charged, the penalty only amounts to a gross misdemeanor. In *Jackson*, the State did not charge either Laurinda Jackson or Michael Jackson under this statute.[149] However, if, for example, Laurinda Jackson observed Michael Jackson beating Breighonna, she would be guilty of a gross misdemeanor under this statute.

In addition to being convicted under the statute itself, the dissent asserted that the Jacksons, if guilty under this statute, should also be liable as accomplices.[150] Even though the accomplice statute would apply, a strong argument can be made the Jacksons would only be accomplices to failing to report child abuse, and not accomplices to felony murder.[151]

Washington also has a statute requiring teachers, healthcare professionals, law enforcement officers, and similar people who work with children to make a report to proper law enforcement agencies if they have "reasonable cause to believe that a child has suffered abuse or neglect."[152] This statute also applies to any adult who has "reasonable cause to believe that a child who resides with them" has "suffered severe abuse."[153] "Severe abuse" includes

149. One possible reason for not charging the Jacksons under this statute could be that they were already charged with felony murder. *See Jackson*, 137 Wash. 2d at 715, 976 P.2d at 1230.

150. *Jackson*, 137 Wash. 2d at 734, 976 P.2d at 1239 (Talmadge, J., dissenting). RCW 9A.08.020(3)(b) states a person is an accomplice if "[h]is conduct is expressly declared by law to establish his complicity."

151. Justice Talmadge's dissent is not clear as to whether Michael or Laurinda Jackson would be an accomplice for failing to report child abuse or felony murder. This issue has not been addressed in Washington. The conclusion Justice Talmadge advocated seems to be that the accomplice liability statute would hold Michael or Laurinda Jackson as an accomplice to felony murder. However, it seems more logical that if the accomplice liability statute applied, the passive parent would only be an accomplice to a failure to report child abuse, not felony murder. Because the Jacksons were not charged under this statute, until this issue is addressed by the court or by the legislature, one can only speculate whether accomplice liability would really be effective in holding a passive parent criminally liable for the death of his or her child.

152. WASH. REV. CODE § 26.44.030(1)(a) (2000).

> When any practitioner, county coroner or medical examiner, law enforcement officer, professional school personnel, registered or licensed nurse, social service counselor, psychologist, pharmacist, licensed or certified child care providers or their employees, employee of the department, juvenile probation officer, placement and liaison specialist, responsible living skills program staff, HOPE center staff, or state family and children's ombudsman or any volunteer in the ombudsman's office has reasonable cause to believe that a child has suffered abuse or neglect, he or she shall report such incident, or cause a report to be made, to the proper law enforcement agency or to the department as provided in RCW 26.44.040.

Id.

153. WASH. REV. CODE § 26.44.030(1)(c) (2000).

> [a]ny single act of abuse that causes physical trauma of sufficient severity that, if left untreated, could cause death; any single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness.[154]

A person is guilty of a gross misdemeanor if he or she knowingly fails to make a report.[155]

This statute is similar to the statutory duty to report child abuse discussed above.[156] The same inadequacies associated with the failure to report abuse statute apply to this statute as well. As with the failure to report child abuse statute, the State did not charge either Laurinda Jackson or Michael Jackson under this statute. However, even if the Jacksons were charged and convicted under this statute, they would only be guilty of a gross misdemeanor.[157]

Also, a court could hold a passive parent criminally liable as an accomplice under this reporting statute.[158] The accomplice statute would apply, but, like the failure to report child abuse statute discussed above, the argument can be made that the Jacksons would only be accomplices to a failure to report child abuse, and not to felony murder.[159]

D. The Inadequacy of the Homicide by Abuse Statute

Washington's homicide by abuse statute states that a person is guilty of homicide by abuse if the person causes the death of a child and the person has engaged in a pattern or practice of assault or torture of the child.[160] While this statute holds the abusive parent responsible, it has two flaws that make it inadequate to hold a passive parent responsible. First, this statute applies only to the abusive parent. It includes nothing about the culpability of passive parents.

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154. *Id.*

155. WASH. REV. CODE § 26.44.080 (2000).

156. *See* WASH. REV. CODE § 9.69.100 (2000).

157. *See* WASH. REV. CODE § 26.44.080 (2000).

158. WASH. REV. CODE § 9A.08.020(3)(b) states a person is an accomplice if "[h]is conduct is expressly declared by law to establish his complicity."

159. *See supra* note 151.

160. WASH. REV. CODE § 9A.32.055(1) (2000).

> A person is guilty of homicide by abuse if, under circumstances manifesting an extreme indifference to human life, the person causes the death of a child or person under sixteen years of age, . . . and the person has previously engaged in a pattern or practice of assault or torture of said child, person under sixteen years of age . . . .

Id.

Second, this statute only applies if the abuser "has previously engaged in a pattern or practice of assault or torture of said child."[161] Michael and Laurinda Jackson were not charged under this statute, perhaps because there was no evidence of prior abuse. The statute is effective if there is a pattern of abuse, but questions arise when a pattern cannot be established because the first beating is fatal. Even though this statute would seem to effectively address child abuse, the problems described above make this statute inadequate to hold a passive parent responsible.

Despite all these laws that would seem to apply to the Jacksons' situation, each, as demonstrated, failed to hold the Jacksons responsible for Breighonna's tragic death. Thus, under current Washington law, a parent who stands by and does nothing while observing his or her child's abuse, or even the child's death, is not adequately punished for the abuse and murder of the child. This result requires correction.

IV. WHAT SHOULD WASHINGTON DO TO FILL THE GAPS?

As shown above, the court has no power under Washington law to remedy this problem. In *Jackson*, the court stated its position on changing the law clearly: "The State's public policy argument is better addressed to the Legislature, which may, of course, choose [sic] to impose accomplice liability for a defendant's failure to act. If the legislature does, however, it should do so expressly."[162] The solution to these inadequacies lies in the legislature. Below are several solutions that address Washington's problem of not holding passive parents responsible for the abuse or death of a child.

A. Adopt Section 2.06(3)(a)(iii) of the Model Penal Code

One possible solution would be to add section 2.06(3)(a)(iii) of the Model Penal Code to Washington's accomplice liability statute.[163] This section states that a person is an accomplice if "having a legal duty to prevent the commission of the offense, [he or she] fails to make proper effort so to do."[164] This provision has been used in other states to hold a passive parent responsible for the death of his or her child by abuse.[165] However, while including this language would hold

161. *Id.*

162. 137 Wash. 2d. at 725, 976 P.2d at 1235.

163. Several states have included this provision of the Model Penal Code. *See* ALA. CODE § 13A-2-23 (2000); ARK. CODE ANN. § 5-2-403 (Michie 1999); DEL. CODE ANN. tit. 11, § 271 (1999); HAW. REV. STAT. § 702-222 (1999); KY. REV. STAT. ANN. § 502.020 (Banks-Baldwin 2000); N.J. STAT. ANN. § 2C:2-6 (West 2000); TEX. PENAL CODE ANN. § 7.02 (West 1999).

164. MODEL PENAL CODE § 2.06(3)(a)(iii) (1962).

165. *See, e.g.*, Lane v. Commonwealth, 956 S.W.2d 874 (Ky. 1997).

a passive parent responsible, the broad language may pose additional problems. Under Washington law, a person has a legal duty to report any child abuse observed,[166] and Washington law establishes a class of people, much broader than parents, who have a legal duty to report child abuse when they have reasonable cause to believe that such abuse has occurred.[167] If the language of section 2.06(3)(a)(iii) of the Model Penal Code was added to Washington's current accomplice liability statute, all of the people listed in the above statutes could potentially be held as accomplices because Washington has established a legal duty for these people. The situations illustrate the Legislative Council's Judiciary Committee comment that the statute could "be held to encompass situations where accessorial liability should not attach."[168] While adding this provision is possible, it is not the best solution because of the potential for its overreaching criminal liability.

B. Charge Passive Parents Under Both of Washington's Failure to Report Abuse Statutes

Another possible solution is to charge passive parents under the two failure to report abuse statutes.[169] This may seem like a simple solution, but in fact, it is not at all adequate to solve the problem. Under both statutes, the penalty is a gross misdemeanor.[170] A passive parent who witnesses and allows the abuse or death of his or her child deserves a harsher punishment than a gross misdemeanor. Because the penalty does not fit the crime, this solution, while possible, is not the best solution to this problem.

C. Expand the Definition of "Basic Necessities of Life" Under Washington's Criminal Mistreatment Laws to Include "Protection from Abuse"

If Washington expanded the definition of the "basic necessities of life" to include "protection from child abuse," passive parents could be held responsible under Washington's criminal mistreatment laws. This could be done in one of two ways. First, the legislature could add "protection from abuse" to the definition of the "basic necessities

166. WASH. REV. CODE § 9.69.100 (2000).

167. WASH. REV. CODE § 26.44.030(1)-(3) (2000).

168. WASHINGTON LEGISLATIVE COUNCIL'S JUDICIARY COMM., *supra* note 17, at 44 cmt. 1.

169. WASH. REV. CODE § 9.69.100 (2000); WASH. REV. CODE § 26.44.030 (2000).

170. WASH. REV. CODE § 9.69.100(4) (2000); WASH. REV. CODE § 26.44.080 (2000).

of life."[171] Second, the courts could choose to interpret the word "shelter" broadly enough to include protection from abuse.[172] Because the courts have already declined to broaden the interpretation of the word "shelter,"[173] the only option available is for the legislature to add "protection from abuse" to the definition of the "basic necessities of life."

If "protection from abuse" was included, a passive parent could be charged directly under Washington's criminal mistreatment statute for withholding the "basic necessities of life."[174] Second, a passive parent could be charged as an accomplice because of the strong argument that withholding "protection from abuse" is "conduct expressly declared by law to establish complicity."[175]

E. Adopt a New Statute Designed to Hold Both the Abuser and Passive Parent Responsible for the Death of Their Child

All of the solutions suggested so far may solve the problem of a passive parent's criminal liability. But, the drawbacks to these solutions illustrate that Washington needs a special statute to adequately punish passive parents for their role in the abuse or death of their child. The solutions suggested thus far are not adequate or comprehensive enough to solve this problem.

Therefore, Washington should create a special statute to deal with the murder of a child from child abuse. Bryan A. Liang[176] and Wendy L. Macfarlane[177] have proposed a statute that "allows for the murder prosecution of principals, accomplices, and others who cause the death of a child, either by direct abuse or by a failure to protect the child from abuse."[178] Their proposed statute would solve the problems with and fill the gaps of Washington law. Not only would this

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171. WASH. REV. CODE § 9A.42.010(1) defines the "basic necessities of life" as "food, water, shelter, clothing, and medically necessary health care."

172. The *Jackson* court expressly declined to extend "shelter" to include protection from child abuse. 137 Wash. 2d at 729, 976 P.2d at 1237.

173. *See Jackson*, 137 Wash. 2d at 729, 976 P.2d at 1237; State v. Dunn, 82 Wash. App. 122, 127, 916 P.2d 952, 954 (1996).

174. WASH. REV. CODE § 9A.42.020 (2000).

175. WASH. REV. CODE § 9A.08.020 (2000).

176. Professor Liang is a Dr. Arthur W. Grayson Distinguished Visiting Professor of Law and Medicine, Southern Illinois University School of Law. B.S., Massachusetts Institute of Technology, 1983; Ph.D., Harris School of Public Policy Studies, University of Chicago, 1989; M.D., Columbia University College of Physicians & Surgeons, 1991; J.D., Harvard Law School, 1995.

177. Ms. Macfarlane is Deputy District Attorney, Domestic Violence Unit, Ventura County, California. B.A., University of California, Santa Barbara, 1995; J.D., Pepperdine University School of Law, 1997.

178. Liang & Macfarlane, *supra* note 10, at 445.

proposed statute clearly define the responsibilities of passive parents, but it would also account for the weaknesses of the current legal system.[179] Liang and Macfarlane propose the following statute murder by child abuse:

> A. A parent, guardian or custodian is guilty of murder by abuse or neglect in the *first degree* if that person *maliciously or intentionally engages in abuse or neglect* that results in the death of a child under that person's care, custody, or control.
>
> B. A parent, guardian or custodian is guilty of murder by abuse or neglect in the *first degree* if that person *knowingly allows any third person to maliciously or intentionally engage in abuse or neglect* that results in the death of a child under the care, custody or control of that parent, guardian or custodian.
>
> C. A parent, guardian or custodian is guilty of murder by abuse or neglect in the *first degree* if that person *recklessly allows any third person to maliciously or intentionally engage in abuse or neglect* that results in the death of a child under the care, custody or control of the parent, guardian or custodian, when the parent, guardian or custodian *has knowledge that the third person has engaged in an act or previous pattern of abuse or neglect* of such child.
>
> D. A parent, guardian or custodian is guilty of murder by abuse or neglect in the *second degree* if that person *recklessly engages in abuse or neglect* that results in the death of a child under the care, custody or control.
>
> E. A parent, guardian or custodian is guilty of murder by abuse or neglect in the *second degree* if that person *knowingly allows any third person to recklessly engage in abuse or neglect* that results in the death of a child under the care, custody or control of the parent, guardian or custodian.
>
> F. For the purpose of this section:
>
> 1. "Child" shall mean any person under 18 years of age.
>
> 2. "Abuse" shall mean causing substantial physical pain, illness or any impairment of physical condition by other than accidental means.

179. *Id.*

> 3. "Neglect" means threatening or impairing the physical, mental or emotional health and well-being of a child by failing or refusing to supply such child with necessary food, clothing, shelter or medical care.
>
> 4. "Previous pattern" of abuse and/or neglect shall mean one or more incidents of conduct that
>
> a. Constitute an act of abuse and/or neglect, and
>
> b. Are not so closely related to each other or connected in point of time and place that they constitute a single event.
>
> 5. A conviction is not required for an act of abuse or neglect to be used in prosecution under this section including an act used as proof of the previous pattern as defined in F(4). A conviction for any act of abuse or neglect including one which may be relied upon to establish the previous pattern of abuse and/or neglect does not preclude prosecution under this section. Prosecution under this section does not preclude prosecution under any other section of the Code.
>
> G. It shall not be a defense for any person charged with murder under this statute that they could not or did not entertain a criminal intent.[180]

This proposed statute fills in many of the gaps in Washington law and does not leave room for a court's inventive interpretation. First, sections B and C solve the problem caused by not including an omission to act in Washington's accomplice liability statute. These sections explicitly allow the state to charge passive parents with first-degree murder when their child dies from the abuse of a third person.[181] This solves the problem of over-breadth expressed by the Legislative Council's Judiciary Committee because the language restricts the criminal liability to parents, guardians, and custodians.

Second, the proposed statute fixes the problem with Washington's current homicide by abuse statute. Unlike Washington's statute, the proposed statute holds both abusive and passive parents responsible for the death of their child from abuse or neglect.[182] Furthermore, the proposed statute alleviates the problem with Washington's

180. *Id.* at 446-47 (emphasis added).
181. *Id.* at 446.
182. *Id.*

requirement that the abuser have "previously engaged in a pattern or practice of assault or torture of said child."[183] First, sections A and B of the proposed statute do not include the term "previous pattern."[184] This means the state may charge an abuser and a passive parent with first-degree murder after the first incidence of deadly abuse. Second, the proposed statute defines "previous pattern" as "one or more incidents of conduct."[185] Unlike Washington's requirement for a pattern, the proposed statute allows criminal liability after just one incident.

Finally, sections A through E all include the term "abuse or neglect," and section F's definition of "abuse" and "neglect" solves the problems with Washington's definition of "basic necessities of life" under the criminal mistreatment statute. The proposed definition of "neglect" is basically the same definition as the one Washington has adopted for "basic necessities of life."[186] Washington law stops here, but the proposed statute goes on to fix the current problem of not including "protection from abuse" by also including the term "abuse." The proposed statute defines abuse as "substantial physical pain, illness or any impairment of physical condition by other than accidental means."[187] This definition covers what Washington's "basic necessities of life" fails to cover—the physical abuse of a child. By including "abuse" along with "neglect," the proposed statute fills the rest of the gaps in Washington's laws.

Adopting the proposed statute would still fill the gaps in Washington law and allow the state to hold both abusive and passive parents criminally culpable for the death of their child from abuse. Under this proposed statute, a court would find both Michael and Laurinda Jackson guilty of murder by child abuse.

Legislators should conclude that "there is . . . no logical or legal reason for failing to charge all parents, guardians, or caretakers with murder when they know of the abuse yet fail to protect their children."[188] Therefore, Washington should adopt the proposed statute or a similar one. Washington laws are inadequate for protecting children; the tragic death of Breighonna brings all these problems to light.

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183. WASH. REV. CODE § 9A.32.055(1) (2000).

184. Liang & Macfarlane, *supra* note 10, at 446.

185. *Id.*

186. The proposed statute defines "neglect" as "threatening or impairing the physical, mental or emotional health and well-being of a child by failing or refusing to supply such child with necessary food, clothing, shelter or medical care." *Id.* at 446-47. Washington defines "basic necessities of life" as "food, water, shelter, clothing, and medically necessary health care. WASH. REV. CODE § 9A.42.010(1) (2000).

187. Liang & Macfarlane, *supra* note 10, at 446.

188. *Id.* at 399.

IV. CONCLUSION

Jackson demonstrates the inadequacies of Washington law in its efforts to deter child abuse. A passive parent who watches his or her child being abused should be as culpable as the abusive parent, especially if the child dies. All of Washington's laws could not protect Breighonna Moore from a tragic death, nor could these laws bring her killers to justice. Because of the inadequacy of these laws, Washington needs to adopt a statute holding both the abusive and passive parent responsible.

The Washington Legislature has declared,

> The children of the state of Washington are the state's greatest resource and the greatest source of wealth to the state of Washington. Children of all ages must be protected from child abuse. Governmental authorities must give the prevention, treatment, and punishment of child abuse the highest priority, and all instances of child abuse must be reported to the proper authorities who should diligently and expeditiously take appropriate action, and child abusers must be held accountable to the people of the state for their actions.[189]

To further this statement and to give the problem of child abuse the "highest priority," Washington should adopt the proposed statute. It is the best solution to fill in the gaps existing in current law because it holds both abusive and passive parents accountable for the death of their child. "The cruel death inflicted by two foster parents on a three-year-old girl, a child who had already seen enough trouble in her all too brief life, was a tragedy."[190] Washington needs to hold passive parents responsible for the death of their children by abuse or, as in Breighonna's case, no one is held accountable for the tragic death of a child.

189. Child Abuse Reporting, 1985 Wash. Laws 259, new sec., § 26.44 (1965).

190. *Jackson*, 137 Wash. 2d at 735-36, 976 P.2d at 1240 (Talmadge, J., dissenting).