**Misplaced Mercy:**

**Prosecution and Sentencing**

**of Parents Who Kill**

**Their Disabled Children**

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1. FOREWORD

When I read accounts posted by the International Coalition on Abuse and Disability of parents who had been ordered to perform community service as punishment for killing their disabled children, I was not surprised. The anecdotes compiled by ICAD reinforced what I had already learned about the abuse of people with disabilities through personal experience, disabled peers, research, and legal study on the topic. People with disabilities are devalued and feared in North American and most other cultures. Children with disabilities are *at least* twice as likely as non-disabled children to be abused.[[1]](#footnote-1) Infanticide of disabled newborns is common. The anecdotes spawned in me a desire to turn a vague impression into a more thorough examination and analysis of what I believed to be the differential treatment accorded by the criminal justice system to parents who have murdered their children, depending on the child's disability. This paper, a tiny first step, is the result.

I will begin by summarizing the social and legal underpinnings of the problem, then describe specific findings of unequal prosecution and sentencing. Following is a description of how each step in a criminal action can be affected by attitudes about disability. Finally, I will offer an analysis of constitutional, statutory, and common law aspects of disability protection, and propose some novel methods for enforcing criminal statutes on behalf of children with disabilities.

I. INTRODUCTION

**A. The Problem**

In order to confirm this differential treatment and offer some very preliminary explanations for it, it was necessary to use an interdisciplinary approach, incorporating sociological and legal analysis. It seems that no one has done either a statistical or legal analysis of the issue.

I conducted a search of newspaper accounts of parents who had killed their children with disabilities between 1982 and 1997, and watched the trends emerge. A strict comparison to a sample of parents who killed non-disabled children was not possible because these data are not available as such. However, the confirmation of my hypothesis was evident. Where parents killed children with disabilities and offered motives related to the child's disability, the convictions were often for lesser crimes than murder, and therefore punishments were light. Even where the deaths were perceived as exaggerated child abuse, punishments were comparatively mild.[[2]](#footnote-2) Three categories of "motives" emerged from the research: a mercy-killing rationale, where parents felt they were doing the child a favor by taking its life; a parental stress model, where lack of resources or feelings of loss related to raising a disabled child were the stated motive; and aggravated abuse.[[3]](#footnote-3)

Judicial and public reaction to these incidents reveal the stereotypical beliefs about people with disabilities, which in turn demonstrates clearly why these murders often go unpunished. Reactions could be said to lie on a spectrum, with eugenics appearing at both ends of the spectrum, only with different moral valuation attached.

Negative public sentiment “Positive” public sentiment

eugenics abuse of child parental assisted mercy eugenics

of disabled vulnerable abuse stress suicide killing of disabled

 population

While disability rights activists and many members of the public are outraged by proposals for eugenic measures directed at people with disabilities[[4]](#footnote-4) calls for the systematic extermination of disabled people continue to appear.[[5]](#footnote-5) People with disabilities are seen as a drain on our families' and society's resources, and these views are a potent undercurrent in the discussion of assisted suicide.[[6]](#footnote-6) While the argument for assisted suicide[[7]](#footnote-7) is characterized as one of individual choice, in reality, the lifestyle choices available to people with disabilities are limited by society's devaluation of disability and those who have it.[[8]](#footnote-8)

**B. Protection under law**

There are abundant statutes, declarations and common-law principles supporting a child's right to life and limiting parental discretion to infringe on that right. These range from the United Nations Declaration on the Rights of Disabled Persons,[[9]](#footnote-9) the U.N. Convention on the Rights of the Child,[[10]](#footnote-10) constitutional protections,[[11]](#footnote-11) statutes,[[12]](#footnote-12) and the common law, where although a parent has a right to use "reasonable and timely punishment as may be necessary to correct faults in his/her …children," such measures must be "within the bounds of moderation and for the purpose of the best interest of the child."[[13]](#footnote-13) The concept of "best interest of the child" is central to the question of substituted judgment, and this paper as a whole.

Prosecutors and judges often believe it is in the interest (if not the best interest) of a child with a disability to be deprived of life. Therefore, when statutes and decisions attempt to balance a parent's right to rear their children as they see fit, with the child's right to equal protection by public law enforcement and judicial systems, the scale is tipped because the definition of the child's right being protected is skewed. These institutions are not weighing whether to protect the child's actual or potential life, but a stereotyped image thereof, which doesn't merit much protection.

Because negative views of disability weigh in against the child in the protection equation, the component of disability rights must be added to any discussion of differential treatment of parents who've killed children with disabilities. Disability rights advocates argue that law enforcement and the courts must not perpetuate the belief that taking a child's life is in his/her best interest, because that belief is based on prejudice, fear, ignorance, and a negative valuation of disability. This is not, strictly speaking, a "pro-life" argument, which would deprive pregnant women of control over their bodies. It is an argument for *true* self-determination which includes the full range of life-options for people with disabilities. A disability rights model seeks to eliminate architectural, institutional, and attitudinal barriers and thus expand the choices available to families of disabled children. It requires states to enforce non-discrimination and civil rights laws to increase options, as well as criminal statutes against parents who terminate all options for their children.

**C. Failure to prosecute and the purpose of the criminal justice system**

The purposes of punishment for criminal acts are rehabilitation, retribution and prevention of further acts by the perpetrator, and by example, deterrence of similar acts by other people.[[14]](#footnote-14) Whether and to what extent the courts will punish homicides against children with disabilities depends on whether judges and prosecutors believe these goals would be achieved by such punishment.

Parents who kill their children because they think they're doing the child a favor would be subject to vigorous re-education if a disability-rights/Disability Pride view predominated in our culture.[[15]](#footnote-15) However since many people share and society's institutions reflect the view that life with a disability is worse than death, rehabilitation is seen as unnecessary. The parent is not seen as having done anything "wrong” to be corrected or punished. Where the parent is seen as merely exercising his/her parental prerogative to do what is best for the child, retribution is also viewed as unnecessary. Reactions to such homicides range from outright support of the perpetrator,[[16]](#footnote-16) to seeing the parent as misguided[[17]](#footnote-17) to the occasional moral outrage based on a hard-line right-to-life approach,[[18]](#footnote-18) (as opposed to a disability-rights model). Finally, the prevention goal cannot be achieved for the individual parent because the problem has been solved; the defective child has gone "to a better place."[[19]](#footnote-19) As a statement by society of its disapproval of such actions, punishment might act as a deterrent to the extent that parents of kids with disabilities see that harsh punishment as the norm, instead of anomalous.

Parents who kill their disabled children because of stress (either from lack of resources or grief over lost hopes for the child) also don’t fit well into society's goals for punishing criminals. As with the mercy killing model, the problem has seemingly been solved with the child's death. The "stress" has been removed because the perceived source of stress—the disabled child—is no longer present, therefore the perpetrator will not repeat the offense. Viewing the disabled child as the source of the stress (as opposed to inadequate resources and community supports, or lack of parenting skills) may lead the criminal justice system to ignore abusive family dynamics or parents' underlying incapacity for dealing with stress which could in turn, endanger other family members. Thus, the parent may be deprived of opportunities for rehabilitation. Finally, the outpourings of understanding shown in many of these cases[[20]](#footnote-20) show that far from condemning and seeking retribution for these homicides, members of the public offer sympathy and support for the parents.

Where the death is merely a result of aggravated abuse, the reaction is very mixed, ranging from indignation[[21]](#footnote-21) and disgust that people could harm this most vulnerable (and innocent, according to the stereotype)[[22]](#footnote-22) individual; to an almost dismissive attitude based on the lower valuation of the life of a disabled child.[[23]](#footnote-23) The degree to which a parent will be treated (rehabilitated, punished, deterred) like a parent of a non-disabled child, will depend on the views of the officials involved, and local public opinion.

Prosecutors in the U.S. are by and large elected officials, and have tremendous discretion[[24]](#footnote-24) and consider many factors in deciding whether, and to what degree, to prosecute a particular crime. The “legal sufficiency” policy states that if a case is legally sufficient then it is the prosecutor's responsibility to charge and prosecute. The “system efficiency” policy emphasizes speedy and early disposition of cases by any means possible. The “defendant rehabilitation” model is based on the assumption that the most effective treatment for a defendant is not to put them through the criminal justice and correctional system. Finally, the “trial sufficiency” policy evaluates cases on their strength to sustain a conviction.[[25]](#footnote-25)

In a recent report, a California group highlighted some of the reasons crimes against people with disabilities are less often investigated or prosecuted.[[26]](#footnote-26) The report cited the difficulty of investigating these cases, the lack among law enforcement of the skills and training required for these investigations, the isolation of people with disabilities, (actual or perceived) communication difficulties,[[27]](#footnote-27) and negative stereotypes and prejudice held by some law officers. Dick Sobsey of the International Coalition on Abuse and Disability states that "people with developmental disabilities…who could provide accurate testimony are denied the opportunity to give evidence because of their disabilities. …[P]rosecutors fail to bring cases to court because they fear that these witnesses will be excluded or disbelieved. Police in turn, are often reluctant to investigate…because they do not think that [these crimes] can be successfully prosecuted."[[28]](#footnote-28) Given the somewhat shaky justifications for punishment discussed above, and equivocal support of the public, District attorneys' reluctance to vigorously prosecute and punish parents who kill their disabled children is explicable. Possible avenues to encourage such prosecutions will be discussed *Infra*.

II. SURVEY AND ANALYSIS

 In their brief to the Supreme Court in *Vacco v. Quill*,[[29]](#footnote-29) Amici Curiae Not Dead Yet and American Disabled for Attendant Programs Today (ADAPT) offer two examples of "Amici's experiences" that "non-investigation and non-enforcement" of homicides against people with disabilities are "common practices."[[30]](#footnote-30)And while the International Coalition on Abuse and Disability and the Compassionate Healthcare Network have recorded many anecdotes of such cases, there has never been any kind of comprehensive study done comparing punishments meted out to parents depending on whether the child they killed did or did not have a disability. In order to verify perceptions, and expose and explore these trends, a study of some kind was necessary.

**Statistics on incidence of child murder and sentences of defendants in murder cases**

Constructing a picture of the sentencing of parents who kill their children requires piecing together bits from many sources. Between 1976 and 1994 there were 36,951 murders of people under 18 in the United States, or an average of 2,053 per year.[[31]](#footnote-31) The difference between the low in 1984 (1,463) and the high in 1993 (2,841) is primarily due to a dramatic increase in murders of children between the ages of 15 and 17 committed by strangers, acquaintances or unknown assailants.[[32]](#footnote-32)

In its report "Child Victimizers: Violent Offenders and their Victims" the Offices of Juvenile Justice and Delinquency Prevention of the Department of Justice found that the median prison sentence imposed for child murder or kidnapping was longer than for such offenses with an adult victim. Sentences for murder averaged 360 months (30 years) when children were the victims and 300 months for adult victims. Similarly, average sentences for negligent manslaughter of children was 180 months (15 years) and 156 months for killers of adults. Unfortunately, this measure was not cross-matched for the murderer's relationship to the victim. The study does show that 70% of the murders of infants were carried out by a family member.

Murder and non-negligent manslaughter carried the lowest rate of plea-bargained convictions, with 59%, compared to an average of 92%.[[33]](#footnote-33) In the general population, only 13% of murderers received probation as a part of their sentence.[[34]](#footnote-34) Of murderers sentenced in state crimes, 97% received prison (93%) or jail (4%) time, while only 3% received straight probation.[[35]](#footnote-35) Because these sentencing statistics cannot be cross-referenced with either the age or relationship of the victim, it is impossible to determine exactly what punishments are given to parents who kill non-disabled children. However, all measures cited above show far more severe sentences than those documented in almost 100 cases of child murder by parents appearing in news stories over the last 15 years.

**B. Survey results**

If the above statistics even remotely convey an accurate picture of convictions and sentencing of parents who murder their children, and the 95 cases found for the survey are at all representative, then treatment of parents who kill disabled children is a dramatic departure from that accorded other parents.

A search of Lexis news archives between 1982 and 1997 found 95 separate cases where parents killed their disabled children.[[36]](#footnote-36) One hundred and six persons were victimized, and 98 of them were killed. Because the underlying issues were very similar, I did not exclude adults killed by elderly parents; there were 25 victims over 18 years of age, the oldest being 56. In 42 of the accounts, the victim's disability was either definitely or probably related to the parents' action. There were 12 murder-suicides.

Of the sample, sentencing information was available for 35 cases.[[37]](#footnote-37) Of these, 15 of those responsible for homicide of disabled children received *no jail or prison time*.[[38]](#footnote-38) Eight received up to five years in prison (including one woman whose three-month sentence allowed her to leave her cell each day to attend work, go to therapy and visit her remaining children).[[39]](#footnote-39) Nine of those convicted received sentences of 5-20 years, and only three received longer sentences. It is also interesting to note that some of the harshest sentences were meted out to people who appeared to have a disability themselves.[[40]](#footnote-40) For example, Debra Sue Robles had a history of psychiatric hospitalizations, suicide attempts and incidents of self-mutilation stretching back to the age of 13. In declining to commit her to a psychiatric hospital in lieu of jail time, the judge said, "It's obvious that mental health intervention has been useless and may be useless for the rest of her life." She received a sentence of 30 years to life.[[41]](#footnote-41) Robert Blair claimed that an angel told him to kill his son and when his wife tried to stop him, he killed her too. He got two life terms.[[42]](#footnote-42)

Of the 42 cases for which information on the outcome was available, 13 were convictions, 15 were pleas of guilty, and six pleaded no contest. It's unclear how many of the "guilty" and "no contest" pleas were the result of plea agreements, but there were often indications of this. A further four cases resulted in acquittals, mistrials or overturned convictions. For example, the Mississippi Supreme Court said Bessie Clayton should not have been held responsible for caring for her child given the "specialized skill" (tube feeding) such care required.[[43]](#footnote-43) Finally, there were two documented cases where, despite extremely suspicious circumstances, the child's death was attributed to "natural causes." For example, Linda Williams left her six-month old daughter with cerebral palsy in a hot car for several hours, yet charges were not lodged because the baby was ruled to have died of natural causes.[[44]](#footnote-44)

Parents' (actual, perceived or attributed) motives for killing their children seemed to have a significant effect on their treatment by the criminal justice system. Obviously, the issue of intent is essential in proving the specific charge, but even parents who admitted planning and carrying out the deaths of their children were by and large shown tremendous leniency. If a parent was believed to have killed a disabled child either because s/he believed the child's quality of life was substandard, or the parent was reacting to stress attributed to the child's disability, the system was likely to show more sympathy than outrage.

***1. "Mercy Killing"/"assisted suicide"***

The notion that life with a disability is a fate worse than death is ubiquitous in western society.[[45]](#footnote-45) Studies have shown that physicians consistently rate the quality of life of persons with disabilities as lower than the disabled people experience their lives, and certainly lower than the lives of non-disabled people.[[46]](#footnote-46) The lives of people with disabilities are seen as "small"[[47]](#footnote-47) and unsatisfying, perhaps because non-disabled people project their own expectations onto others, particularly people with cognitive disabilities. Disabilities are generalized and multiplied in the minds of the non-disabled public, people with one disability are assumed to have others, and any disability is seen as completely incapacitating.[[48]](#footnote-48) People with disabilities are also believed to be in physical pain, and that wherever such pain exists, it is always debilitating and makes life unbearable.[[49]](#footnote-49) People with disabilities are also seen as a strain on society and their families, a view which led to the extermination of upwards of 300,000 disabled people under the Third Reich.[[50]](#footnote-50)

These beliefs are expressed openly by those who have killed their disabled children. Traci Messenger, wife of Gregory Messenger who terminated his premature infant's life support, stated, "We did what was best for our baby."[[51]](#footnote-51) Parents are also afraid of lifestyle changes which could affect their disabled children after their death. Geraldine Sagel, who pled guilty to aggravated battery when she attempted to kill her adult son, because she "felt it her responsibility to make sure he was *at peace* before she died," (emphasis added). She said, "I didn't want to leave him behind … on the mercy of the world" because she "love[d] him too much for that." She was sentenced to 30 months' probation.[[52]](#footnote-52) These beliefs underlie virtually all law and policy directed at people with disabilities.[[53]](#footnote-53)

Parents' act of "mercy killing" therefore are not construed as deprivation of the child's right to life, but as a gift of liberation from a life considered intolerable by the very fact of disability. For example, Patricia Rosio was sentenced to three months in the Milwaukee County House of Correction for starving her severely disabled son to "end his misery."[[54]](#footnote-54) Michelle Jones, whose daughter Nickie had arthritis, claimed that her daughter "lost the will to live because of her illness," but claimed that Nickie, who starved to death "looked fine" to her.[[55]](#footnote-55)

The most dramatic example arises from a case in Canada. Robert Latimer, a farmer from Wilkie, Saskatchewan was tried and convicted of murder in the death of his 12-year-old daughter Tracy Lynn, who had cerebral palsy. One day while his wife and other children were at church, Latimer put his daughter in the cab of his pick-up truck, rigged a hose to blow exhaust into the truck's cab, and started the engine. At first Latimer denied the action, then he admitted killing Tracy, but claimed it was a mercy killing, that she was in pain.[[56]](#footnote-56) The original conviction of first degree murder was overturned last winter when the Canadian Supreme Court found that jury tampering by the prosecution merited a new trial, on second degree murder charges. However, it is the public's overwhelming support of Latimer which has alarmed many disability rights activists. Dick Sobsey, in his article "A Tale of Two Murders"[[57]](#footnote-57) compares the public reactions to the trial of Susan Smith for killing her (non-disabled) children, with the Latimer case. He notes that sympathy cards and gifts from all over North America poured into the South Carolina community, in response to the shocking loss of the Smith children, but that sympathy generated in response to the murder of Tracy Lynn Latimer was reserved for her father. "Perhaps when we ask 'for whom the bell tolls?' we should …realize that it tolls a lot louder for some children than others,"[[58]](#footnote-58) Sobsey said.

***2. Parental Stress***

"There are few events more tragic than the birth of a physically handicapped or mentally retarded child. To some parents the anguish is even greater than that caused by the death of a child itself."[[59]](#footnote-59)

Prosecutors and courts are likely to grant a great deal of leniency to parents whose act of homicide is linked to stress over a child's disability. Such stress seems to come in three varieties: inadequate supports to care for a child with disabilities, parental grief over lost hopes and dreams for a disabled child; and older parents who face death or their own disabilities causing an inability to care for an adult disabled child.

*a. Lack of resources*

A neighbor of Irene Bernstein, who pleaded no contest to third degree murder in the shooting death of her 2 1/2-year-old son and was sentenced to five years' probation and 750 hours of community service, supported the lenient sentence: "Until you've walked in her shoes, you should not condemn."[[60]](#footnote-60)

People with a disability are seen as a burden on their families and on society. "You're looked upon as a second-rate citizen," said Larry McAfee.[[61]](#footnote-61) "People say, ‘you're using my taxes. You don't deserve to be here. You should hurry up and leave.'" Services and supports for people with disabilities have been accorded by society not as a right, but as charity, generally inadequate[[62]](#footnote-62) and subject to withdrawal at any time. "Based on the notion of inferiority, people with disabilities suffer from policies ranging from indifference to benign neglect. … They are given charity and yet not afforded many of the rights and opportunities [enjoyed by] people with able bodies."[[63]](#footnote-63) Thus families of people with disabilities face (at best) inadequate financial resources, piecemeal supports, and a societal assumption that care of a disabled person is the lifelong burden of family members.

Cordelia Watts shot her son hours after the family lost a $10 million damage suit against the manufacturer of the motorcycle helmet he was wearing when he was injured in a motorcycle crash.[[64]](#footnote-64) Tanya Walker, whose twin five-year-old daughters nearly starved to death, said baby formula for the twins was no longer available from the county medical services and she could not afford to replace it.[[65]](#footnote-65) The prosecutor in the murder of Anginetta Clayton stated that the family was impoverished.[[66]](#footnote-66) Elayna Simpson complained that her son, Noah, was a financial and emotional drain, yet she turned down Supplemental Security Income, and refused to utilize respite care services. "If he's going to be a gimp, why are we doing all of these things?" she asked the staff at his school. Simpson was sentenced to 15 years to life in prison.[[67]](#footnote-67)

While it may not be appropriate to hold parents responsible for society’s deficiencies, it is certainly not acceptable for society to assuage its collective conscience by letting parents who kill disabled children off the hook. In the words of the prosecutor in the Simpson case, "We recognize there are children…with special needs that create additional burdens on their parents. But if you have a child with special needs, and can't cope, you don't kill the child."[[68]](#footnote-68)

*b. Grief and loss*

Parents' grief and loss at the birth of a child with disabilities can arise from disappointed dreams and expectations, the prospect of facing unexpected and difficult life challenges and discrimination-by-association, and the devaluation of disability in society. These are substantial losses. However, it is the devaluation of disability which underlies this grief, prompts parents to kill, and leads the criminal justice system to excuse them for it.

Daniel McKay, who admitted slamming his newborn son's head on the floor then throwing the body into a corner, found enough support for two juries to fail to convict him. His son had a cleft palate and a heart condition.[[69]](#footnote-69) Dianna Phan was guilt stricken since her child was born with brain-damage, and "wanted to free herself and make it so the baby would no longer suffer," according to her suicide note.[[70]](#footnote-70) Oscar Lezama and Rocio Cazares"may have been depressed" because their three-month-old baby had cerebral palsy according to prosecutors.[[71]](#footnote-71) Finally, without further information, officials wondered if the severity of 19-year-old Suzanna Shea's autism might have been a factor in her murder by her father Edward Shea.[[72]](#footnote-72) Even where the cause is unknown or uncertain, the disability is the focus for the blame.

*c. Subsequent care issues*

Many middle-aged and elderly people whose children are disabled raised their children in an era when people with disabilities were more stigmatized, isolated, hidden and more often institutionalized. With retirement and their own oncoming disabilities, these parents are presented with a seemingly insoluble problem of finding future care for their disabled children. Unfamiliar with current resources and living options available, unable to accept a changing understanding of disability, and faced with opposition even from their disabled children who without knowledge of the alternatives are afraid to upset the known routine, these parents are truly daunted by their perceived lack of choice. Dorothea Sweeten killed her son "because there would be nobody to take care of him."[[73]](#footnote-73) Paul Riffe was worried about who would take care of his daughter Paula after he died, so he killed her.[[74]](#footnote-74) Esther Helton also believed she was in bad health and was despondent over the idea of leaving her daughter "as a burden to someone else."[[75]](#footnote-75)

Yet there is often a proprietary quality to these parents' statements, and their assumptions about the value of their children's lives are unmistakable. Patricia Kirisits beat, stabbed and strangled her daughter Julie because, as she said, "I could never stand anybody else caring for her. She has the mental capacity of a 6-year-old." She referred the 23-year-old as her "little girl." Julie was slated to move to a group home.[[76]](#footnote-76) And a police officer, commenting on Reed Blevins (who shot his wife and son in an argument over who would take care of the son), said: "he's 77 and he's probably had a pretty tough physical life, and felt 'what's wrong with his boy? How come he's defective and can't be productive'."[[77]](#footnote-77)

***3. Aggravated Abuse***

When looking at homicides of disabled children as an extreme form of abuse, it is important also to look at the entire family system. Child abuse is often coexistent with spouse/partner abuse, and the death of a disabled child at the hands of her parent may only be the culmination of a long-standing pattern of abuse within the family. This thoughtful response is not featured among the cases examined.[[78]](#footnote-78)

Case in point: Dorothea Sweeten (*supra* at n. 73) killed her husband, who had physically and emotionally abused her for years, as well as her son. Josephine Dowell, age 70, pled guilty to second degree murder in the death of her son, Mark (35).[[79]](#footnote-79) She had given him an overdose of seizure medicine then attempted suicide herself. The court found that she had committed the act out of selfish motivations, that she blamed her son for her husband's infidelities. Yet judge John Thompson sentenced her to only one year in prison, and five of probation, saying that jailing her would serve no purpose, and she had "been punished by the pain she has undergone since her son's death."[[80]](#footnote-80) A judge called the beating death by Dorothea Milligan of her grandson (of whom she had custodial care) "a pathetic situation" and sentenced her to three years, possibly to be suspended, or served in an alcohol treatment facility.[[81]](#footnote-81) Timothy and Kathleen Carroll, whose family experienced the mysterious deaths of five children in nine months, were charged with neglect in the death of their six-year-old daughter Hannah, and no charges were laid when an adult son killed 12-year-old Josiah by smothering him.[[82]](#footnote-82) And finally, when charges against Billy Ray and Alice Appleby were *raised to* reckless homicide in the starvation death of their daughter Robin who had mental retardation, a spokesperson for the Council for Retarded Citizens issued an ironic message. April Kerr, said she felt the charge sent the right message that we as a society value the mentally retarded as much as anyone else.[[83]](#footnote-83)

The statistics, and the stories behind them, are overwhelming. They each reflect the ugliness with which most societies view, and therefore treat, people with disabilities. Stories from abroad[[84]](#footnote-84)—of Chinese orphanages and neo-Nazi attacks,[[85]](#footnote-85) as well as continuing institutional abuses documented in the United States[[86]](#footnote-86) show that abuse and murder of people with disabilities is not limited by geography or family relationship.

III. THROUGH THE CRIMINAL PROCESS

**Investigation**

The Carroll case discussed in n. 27 highlights one of the reasons crimes against people with disabilities are rarely prosecuted; both actual and imagined difficulties exist in working with disabled victims who have survived to testify. Assuming a report is made, which is rare,[[87]](#footnote-87) most police are not trained to work with people who do not communicate in verbal English. The communication techniques and skills necessary for working with people with disabilities are not widely known in police departments. In addition, because most people with disabilities are continuously rewarded by their caretakers for compliant behavior and punished for assertiveness and defiance, they are both more likely to be victimized and less likely to complain. Because they are often extremely isolated, [[88]](#footnote-88) insulated and culturally ignorant, with little information about appropriate caring behavior, people with disabilities may not understand that they are being victimized at all; it's just the way it is. Because they learn (implicitly or explicitly) that they are less valuable than non-disabled others or even a burden, they may not understand that they deserve to be treated with respect and dignity, and given the opportunity, education and resources to exercise self-determination in all aspects of their lives. Thus, the dependent status of people with disabilities which is perpetuated by the lack of economic and social access also serves to increase their vulnerability to abuse, and make investigation of such abuse more difficult and less likely.

Even where communication barriers can be overcome, each person in the chain of investigation must do his or her part for the case to be sufficient for charging. If a child dies of “natural causes” such as pneumonia or seizure brought on by malnutrition, being left for hours in a hot car, or even if a private doctor quietly disconnects life support on order of his father, the term "natural causes" begins to take on a decidedly unnatural aspect. The Artist Formerly Known as Prince issued such an order last October to have his week-old son[[89]](#footnote-89) disconnected from life support. The attending physician listed the death as due to "natural causes" and the body was cremated the same day. Even though the birth and death records were falsified, the local district attorney's investigation seemed to have concluded with the doctor’s report.[[90]](#footnote-90) Added to the intense effort to prevent any public disclosure of the events surrounding the birth and death of this baby, the whole affair leaves a rather unpleasant feeling. As Dick Sobsey commented, it’s as if someone cut the lines to a skydiver’s parachute then attributed the death to “natural causes.”[[91]](#footnote-91)

**B. Charging decisions**

This section discusses the source and scope of the prosecutor’s power to make charging decisions, and elements of intent which relate to the specific crime to be charged.

***1. The prosecutor's discretion***

In the United States, the prosecutor's function is to instigate law enforcement to protect the citizenry, and to balance the interests of the defendant, the victim and society.[[92]](#footnote-92) The court's duty is to protect society, i.e. persons, their reputations, their property and their general liberty.[[93]](#footnote-93)

In continental Europe, the process of investigating and prosecuting crime is laid out very specifically in statutes.[[94]](#footnote-94) The prosecutor assembles evidence on both sides and files a complaint in the court. If a victim is dissatisfied with the prosecutor's decision not to press charges, s/he can either file an administrative complaint (the prosecutor is a public servant subject to a hierarchical employment system) or bring the issue directly to court.[[95]](#footnote-95) Prosecutorial decisions are made very differently in the U.S. for several reasons. First, the sources of law which a D.A. must draw from in deciding whether to press charges are both scattered and diverse. There is much less structure and more room for interpretation. Also, the individual district attorney has more latitude and less accountability in his/her decision making. Finally, since virtually all prosecutors in the U.S. are elected officials, each is subject to political pressures which might affect such a decision.[[96]](#footnote-96)

In making prosecutorial decision, the D.A. acts not only on legal grounds, but on equitable and practical ones as well. A prosecutor must balance conflicting statutory, correctional and constitutional objectives.[[97]](#footnote-97) In order to succeed on legal grounds, the prosecutor must examine the available evidence to determine whether s/he can prove "beyond a reasonable doubt" that the crime was committed. Without full support from all members of the investigative team, the amount and type of evidence gathered will not be adequate. Thus, the reluctant coroners discussed above were able to derail entire cases.

Policy and political factors which will affect the decision to prosecute are numerous and varied.[[98]](#footnote-98) Public sentiment toward the victim, the perpetrator, and the crime will affect the prosecutor’s treatment of it. If the defendant is a "pillar of the community" prosecution will be less likely.[[99]](#footnote-99) If the public views a disabled victim as less valuable, if not a drain on society, and believes the quality of that person's life was inherently poor, they are less likely to support prosecution of a parent who claims his/her action was a mercy killing, and the prosecutor who pursues it.[[100]](#footnote-100) On the other hand, if the public sees the disabled person as an innocent victim of a heinous abuse, they may rail against a decision not to prosecute, or to bring lesser charges. The severity of the penalty may also affect the public’s support, and therefore the likelihood, of a prosecution. Given personal feelings and opinions, the prosecutor must assess whether s/he and the staff will be able to generate the personal investment required to sustain the investigation. Given the level of public support and other priorities, the D.A. will decide whether the case is worth investing the state's resources. And finally, the prosecutor must predict how a judge or jury will react to the case.[[101]](#footnote-101)

Legal considerations include the nature of the evidence available; is there enough to convict, or just lay the charge? Will a judge or jury believe a witness whose speech is barely understandable, or who has a cognitive disability? To understand the potential for discrimination in this decision-making process, try replacing "person with a disability" in each question with high-school valedictorian or long-time library volunteer.

The traditional writ of *nolle prosequi* and its newer incarnation, Rule 48(a) are the embodiment of the power of a prosecutor not to go forward with a particular case. In the earliest U.S. decision on the subject, the court stated; “the power to enter a *nolle prosequi* is to be exercised at the discretion of the attorney who prosecutes for the government, and for its exercise he alone is responsible.”[[102]](#footnote-102) Later, motions to dismiss or reduce charges were substituted, but the “rubber stamp” approval of these made them tantamount to a *nolle prosequi*.[[103]](#footnote-103) The introduction of F.R.Crim.Proc. 48(a) codified the practice, providing no criteria for the court’s decision.[[104]](#footnote-104)

It is not often apparent from news accounts when District attorneys have elected not to prosecute. However, there are some such accounts.

When the murder involved attempts to collect insurance or monopolize trusts[[105]](#footnote-105) law enforcement moved swiftly, if not surely. Cocke County Tennessee Assistant District Attorney Phil Owens requested an autopsy on the body of Ross Aaron Naquin, “due to the suspicious nature of the death, the remarkably fast removal of the body, the amount of money involved [a $500,000 settlement] and other factors.”[[106]](#footnote-106) On the other hand, Esther Helton, who shot her 46-year-old daughter Linda Sue to death, though charged with murder, had her case continued indefinitely.[[107]](#footnote-107) More typical were the cases of Eva Nell Thomas and Janet Portman. Thomas pled no contest to manslaughter. An additional charge of child abuse was dropped, though the coroner ruled that Brenda Thomas' death resulted from pneumonia arising from complications of a blow to the head. The modified charge would merely establish if she had failed to seek proper medical care for Brenda.[[108]](#footnote-108) Portman was originally charged with wanton murder in the beating her two-year-old foster son Brian.[[109]](#footnote-109) However the prosecution agreed to amend the charge after a pathologist said that Portman’s account of Brian’s death (that he banged his head on the floor) “was consistent with the post mortem findings.” Yet there was evidence that Portman had beaten Brian on more than one previous occasion, and her husband Michael was also accused of having beaten the boy.[[110]](#footnote-110) Ms. Portman ultimately pled to second degree criminal abuse.

The prosecutor in the trial of Gregory Messenger[[111]](#footnote-111) expressed typical ambivalence about his role, and his statements demonstrate the all-too-frequent loss of the interest of the victim in these cases. Prosecutor Mike Ferency said the case was "very emotional and very difficult for everyone involved." However, “not bringing a prosecution would have been equally unacceptable. If there’s a value to this process, it would be that the public is given a greater awareness about the decision-making and about patients’ rights.”[[112]](#footnote-112)

***2. Intent and the nature of the charge***

The degree of culpability dictates the nature of the charge to be brought. How the states of mind—purposely, knowingly, recklessly or negligently—are defined in these cases is often a reflection of society’s view of disability. In many of the cases, parents readily admit that they were intending to end the lives of disabled children. Yet because of the child’s disability, this intent changes from that which warrants a charge of murder to one which does not constitute the necessary *mens rea.* In *Criminal Law and Its Processes*[[113]](#footnote-113) the authors offer a hypothetical case to demonstrate the elusiveness of the distinction between purpose and knowledge. “Suppose a desperate husband finally, after long resistance, yields to the pleas of his bed-ridden and incurably ill wife to leave poison by her bedside so that she might take her life…”[[114]](#footnote-114) In this hypothetical case, how does popular belief about life with a disability affect the husband’s *mens rea*?

**C. Findings of law and fact/jury trials**

Josiah Carroll's brother, Isaiah, indicated during the investigation of Josiah's murder that he saw his older brother James hurt Josiah by putting a blanket or pillow over his face while he lay in bed. However, James' Carroll's defense attorney said doctors testified that Isaiah's communication skills are "unreliable."[[115]](#footnote-115) This exemplifies the problem highlighted earlier by Dick Sobsey that, where the witnesses to crimes against people with disabilities are themselves disabled, their testimony is given less credibility, thereby limiting the available evidence. The usual evidentiary problems related to child witnesses testifying to abuse are compounded when the child witness has a disability.

Mary Mitchell's daughter Fiona was among those whose cases were diffused by factual findings by the coroner. Though Fiona died of malnutrition, the Medical examiner attributed her death to her having had meningitis and said it was “amazing she lived as long as she did.” Mary Mitchell pleaded no contest to criminally negligent homicide and was given a two-year suspended sentence.[[116]](#footnote-116)

Stereotypes about the responsibilities of family make their way into "factual" findings as well. Sharon Richmond was sentenced to five years in jail for child endangering in the death of her son Matthew. Judge Richard Niehaus said her maternal instinct should have forced her to seek help for her son, after her boyfriend put him in a tub of scalding water. The boyfriend, Richard Klein, was convicted of involuntary manslaughter.[[117]](#footnote-117)

In making rulings of law, courts' logic is often obscure. The prosecutor of Urselyne Day said, "[t]he fact that the child was disabled, and the mother applied for, and received federal disability benefits created an obligation to provide for this child's most basic needs."[[118]](#footnote-118) Apparently this obligation was not very strong; Day was charged with involuntary manslaughter in her daughter Carrie's death by starvation. In finding Thomas Osburn guilty of second degree murder in the death of his girlfriend's nine-year-old daughter, Tara Kelly,Judge Robert Kennedy found that Osburn had shown a “depraved indifference to human life.” However, Judge Kennedy acquitted Osburn of intentional murder in the girl’s beating and suffocation death.[[119]](#footnote-119)

IV. LEGAL ISSUES AND SOLUTIONS

Given the inadequate prosecutions described above, it seems necessary to reinforce what should be a fundamental principle; that people with disabilities have a right to life, the protection of which by law enforcement is mandated under the constitution and statutes of the United States. Further clarification is needed of the right to be free from the substituted judgments of parents of disabled people as to their quality and worthiness of that life. Finally, mechanisms for obtaining these rights on an individual and class-wide scale are proposed.

**A. Constitutional Basis of Rights**

People with disabilities are not seen as a suspect class for purposes of the equal protection clause of the 14th amendment.[[120]](#footnote-120) In Youngberg v. Romeo[[121]](#footnote-121) the Supreme court stated that people with cognitive disabilities have a right to reasonably safe conditions when under the state's care. However, as the court so vigorously reminds us, when an action is taken by a parent against his/her child, the state is not responsible for the discriminatory nature of that action.[[122]](#footnote-122) Thus, any discussion of constitutional protections must focus on the state's obligation to prosecute crimes against people with disabilities with equal vigor.

There are three major Supreme Court cases which describe the nature and extent of the "right to life" of a person with a disability, and the obligation of the state to enforce that right. These decisions have discussed a wide range of topics: the parents' interests as against those of the child; the parents' privacy rights and decision making power over their children's welfare as against the state's obligation to protect children; the rights of people with disabilities to equal treatment or affirmative measures to protect their rights; the role of hospitals and state child protection agencies in enforcing these rights; the limits of statutory protections; the distinction between assisted suicide and deprivation of lifesaving nourishment or treatment; and whether there is a problem at all. Though none of the cases directly addresses whether equal protection mandates that states prosecute and punish murders of disabled children as harshly as murders of non-disabled children, each case has useful pieces to offer in building the specific model of a constitutional right to equal enforcement of the laws.

***1.* Bowen v. American Hospital Association**

In *Bowen v. American Hospital Association*,[[123]](#footnote-123) the court examined regulations promulgated by the Secretary of Health and Human Services in response to the Baby Doe case in 1982.[[124]](#footnote-124) The regulations required hospitals to post notices in maternity wards informing staff that § 504 of the Rehabilitation Act prohibits withholding of medical care from newborns with disabilities.[[125]](#footnote-125) State child protection agencies were also obliged to use their "full authority…to prevent instances of unlawful medical neglect of handicapped infants."[[126]](#footnote-126)

In finding the regulations invalid, the Supreme Court said that withholding treatment when no parental consent has been given cannot violate § 504 of the Rehabilitation Act [[127]](#footnote-127) because without the parents' consent the infant is not “otherwise qualified” and is not being denied care “solely by reason of his handicap.” The court affirms that “state law vests decisional responsibility in the parents…subject to review in exceptional cases by the state acting in *parens patriae*.”[[128]](#footnote-128) This right arises under “traditional law concerning the family, buttressed by the emerging constitutional right of privacy,” which “protects a substantial range of discretion for parents.”[[129]](#footnote-129) The state may “supervene parental decisions …to ensure that choices made are not so detrimental to a *child’s interests* as to amount to neglect and abuse,” and suggesting that parents may choose from “professionally accepted treatment options.”[[130]](#footnote-130) (Emphasis added.)

The Court found no need for regulations because it found no problem of disabled infants being denied medical care at a disproportionate rate.[[131]](#footnote-131) The court did not see doctors’ attitudes about disability as having a negative effect on the parents’ decision making process.[[132]](#footnote-132) The Court does allow that “[o]f course, § 504 would be violated only if the hospital failed to report medical neglect of a handicapped infant when it would report such neglect of a similarly-situated non-handicapped infant.”[[133]](#footnote-133)

The Court also confronted—but did not effectively resolve—a basic paradox in disability rights law, the seemingly conflicting requirements of equal treatment and affirmative measures to enable people with disabilities to obtain equal opportunity.[[134]](#footnote-134) While recognizing the States’ obligation to enforce child protection laws, the court doesn’t see a necessity for additional measures to ensure equal protection for children with disabilities, because it does not acknowledge a disparate impact of state law enforcement policies on disabled newborns.

The *Bowen* decision may be circumvented in several ways. To the extent that activists can prove the effect of prejudice on the advice given to parents by physicians, hospitals’ rate of reporting medical neglect of disabled versus non-disabled infants, and lackadaisical prosecution of those who murder disabled children, a major component of the decision will be refuted. Also, a different application of the Americans with Disabilities Act and the Rehabilitation Act could avoid the kind of coverage problems the Court found in *Bowen*.[[135]](#footnote-135) As the disability community develops a better understanding of the very peculiar oppression faced by people with disabilities, and is able to document and communicate this understanding to the wider public, courts will understand the need for this sort of protection. The ultimate outcome of this change will be a willingness of the Supreme Court to re-examine its refusal to include people with disabilities as a suspect classification for equal protection purposes.[[136]](#footnote-136)

***2.* Cruzan v. Missouri Department of Health**

In *Cruzan v. Missouri Department of Health*,[[137]](#footnote-137) the Supreme Court established an individual’s right to refuse life-sustaining treatment. The Court also offered strong endorsement to states' attempts to preserve its interests, which the court sees as “the preservation of life, the protection of the interests of innocent third parties, the prevention of suicide, and the maintenance of the ethical integrity of the medical profession.”[[138]](#footnote-138) "As a general matter, the states—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime."[[139]](#footnote-139) The Court also recognized that "'there will, of course, be some unfortunate situations in which family members will not act to protect a patient.' (citation omitted) A state is entitled to guard against potential abuses in such situations."[[140]](#footnote-140) The court does not, however, mandate that states vigorously protect their interests, nor oblige each state to make protection of life paramount among its interests. Neither does the Court address the state’s failure to protect these interests.

***3. Assisted suicide—*Vacco *and* Glucksberg**

It is important to remember that virtually all of the murder victims in this study were aware and responsive, and did not have life-threatening conditions.[[141]](#footnote-141) Therefore when parents spoke of committing “mercy killings,” the death was untimely and avoidable. Yet because many of these parents do assert that they are acting in the best interest of their children, it is appropriate to examine the Supreme Court’s recent holdings regarding assisted suicide.

The Court provides some guidance in the assisted suicide cases,[[142]](#footnote-142) making a clear differentiation between withholding medical treatment, and administering a lethal treatment.[[143]](#footnote-143) The court passes up an opportunity to re-evaluate the equal protection status of people with disabilities and instead uses a substantive due process approach to the challenges to the Washington State and New York laws banning assisted suicide. The Court addresses issues related to an individual's "medical condition" in the context of assisted suicide by highlighting Washington State's rejection of a "sliding scale" approach,[[144]](#footnote-144) and its adoption of a policy that "all persons' lives, from beginning to end, regardless of physical or mental condition, are under the full protection of the law."[[145]](#footnote-145) The court reiterates that the state has an interest in preventing suicide, protecting the integrity and ethics of the medical profession, and protecting vulnerable groups (including disabled persons) from abuse, neglect and mistakes.[[146]](#footnote-146) Justice Rhenquist opines that Washington's assisted suicide ban reflects and reinforces the state's policy of "protecting disabled and terminally ill people from prejudice, negative and inaccurate stereotypes, and societal indifference.'"[[147]](#footnote-147) The court sounds a strong caution about the potential dangers of misuse of assisted suicide, citing the experience in the Netherlands, where the practice is legal.[[148]](#footnote-148)

In these cases, the Supreme Court provides more ammunition for a potential challenge to a state’s failure to act on a stated interest in protecting the lives of people with disabilities, based on their physical vulnerability, and that caused by the devaluation of disability in society through stereotypes.

**B. Statutory protections**

While looking at statutory protection, it’s important to remember that such an examination should really be unnecessary; homicide committed purposely, knowingly, recklessly or negligently is a felony, and should be treated as such by the criminal justice system.[[149]](#footnote-149) Because it often is not, a survey of specific statutes related to abuse of people with disabilities is warranted.

***1. Child abuse and abuse of people with disabilities***

Under the 1984 amendments to the Child Abuse Prevention and Treatment Act,[[150]](#footnote-150) states must have procedures to respond to reports of medical neglect, and the law requires medical treatment, feeding and hydration of disabled newborns except where the child is “chronically and irreversibly comatose” or where treatment would be futile.[[151]](#footnote-151)

While child abuse laws will not apply to adults with disabilities killed by their parents, other federal statutes create protection and advocacy services for people with disabilities, but their primary focus is on people in institutions.[[152]](#footnote-152) Many states, in addition to laws banning assisted suicide, have statutes specifically designed to protect people with disabilities from abuse. [[153]](#footnote-153) For example, Massachusetts provides statutory and regulatory remedies similar to those under federal law, including establishment of the Disabled Person's Protection Commission (DPPC).[[154]](#footnote-154) In addition, Massachusetts’ General Laws c. 297 is one of a few criminal statutes particularly aimed at prosecuting abuse of people with disabilities. Chapter 297 provides in part:

“[w]hoever, being a caretaker of an elder or person with a disability, wantonly or recklessly permits bodily injury to such elder or person with a disability, or …permits another to commit an assault and batter upon such…person…which…causes bodily injury, shall be punished by imprisonment …for not more than five years or … not more than 2 1/2 years or by a fine of not more than $5,000 or both.”[[155]](#footnote-155)

It’s important to note that this statute does not appear to require intent to abuse. Thus, someone who believes they are committing a mercy killing would nonetheless be held criminally responsible. Requiring such accountability may not change in society’s view, but it is a first step to remedying unequal prosecution of crimes against people with disabilities.

***2. The Americans with Disabilities Act***

In their brief to the Supreme Court, *Amici Curiae* ADAPT and Not Dead Yet propose that the state’s failure to enforce homicide statutes equally against those who kill people with disabilities is a violation of the Americans with Disabilities Act.[[156]](#footnote-156)

The ADA[[157]](#footnote-157) prohibits discrimination against people with disabilities in employment, public accommodations (including private hospitals) and state and local government programs (such as law enforcement) and services. It also mandates that state and local government programs be made accessible to and usable by disabled persons, including making reasonable modifications to policies, practices and procedures to enable qualified individuals with disabilities to participate.[[158]](#footnote-158) The ADA also bars discrimination based on one’s association with a person with a disability.[[159]](#footnote-159)

Having established that people with disabilities are singled out for unequal treatment,[[160]](#footnote-160) *amici* then argue that people with disabilities are denied equal access to suicide prevention services, and “the presence or absence of a severe disability determines whether and the extent to which state and local governments investigate or enforce abuse, neglect and homicide statutes in cases reported as assisted suicides.”[[161]](#footnote-161)

The regulations under title II of the ADA apply to law enforcement agencies as public entities.[[162]](#footnote-162) Title II entities may not “provide a qualified individual with a disability with an aid, benefit or service that is not as effective…as that provided to others.”[[163]](#footnote-163) Certainly a person who has died is qualified as the subject of a homicide investigation, and if the inquiry into her death is not as thorough as the investigation of a non-disabled person’s death, the public entity has violated the antidiscrimination provisions of the ADA. The Supreme Court did not address this argument in its decisions in the *Vacco* and *Glucksberg* cases.

***3. International human rights law***

As noted earlier, the United Nations Convention on the Rights of the Child (*Supra* n. 10), the U.N. Declaration on the Rights of People with Disabilities, (*supra* n. 9) and the U.N. Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW) General Recommendation No. 19[[164]](#footnote-164) all provide that people have a right to life and to be free from violence. Violence against a person is considered a violation of the individual’s human rights, and the declarations attempt to redefine such violence not merely as personal, but as political as well.[[165]](#footnote-165) Though again, the right is only as strong as the enforcement thereof, and compliance with laws against domestic violence here and abroad is sorely lacking.[[166]](#footnote-166) In her article “Finding a Mechanism to Enforce Women’s Right to State Protection from Domestic Violence in the Americas” Katherine Culliton proposes bringing individual and class-wide complaints before the Inter-American Human Rights Commission as a means of gaining leverage to increase enforcement of domestic violence statutes through the potential power of the Organization of American States.[[167]](#footnote-167) Domestic violence directed against women shares many characteristics with abuse of people with disabilities, and the failure of law enforcement to prosecute these crimes also retains similar elements. Where women in Brazil are faced with the “honor defense”[[168]](#footnote-168) people with disabilities face the “mercy killing” defense; both are exemplary of state policy codifying, encouraging or condoning violation of human rights.[[169]](#footnote-169) Where domestic abuse survivors in Chile must produce a report from the Instituto Medico-Legal,[[170]](#footnote-170) a coroner stands as the gatekeeper between a disabled victim and the prosecution of his or her parent. Finally, those who abuse women are shown similar leniency.[[171]](#footnote-171) A major incentive for using international human rights fora is that “individuals or advocates acting on their behalf may have standing to enforce their rights by bringing complaints to the available adjudicatory bodies.”[[172]](#footnote-172)

**D. Common Law principles, parental prerogative and substituted judgment**

Because many of the parents in this study stated that their actions were motivated by a concern for the best interests of their children, it is important to understand the nature of the parents’ right. The common law principle that parents have a right to make decisions “in their child’s best interest” is overridden – in the hospital nursery, anyway – by the Child Abuse Prevention and Treatment Act Amendments of 1984.[[173]](#footnote-173) Regulations promulgated under the Act state that a decision to withhold medically indicated treatment may not be based on subjective opinions about the future “quality of life” of a retarded or disabled person.[[174]](#footnote-174)

However, outside the hospital context the law reverts to the parent making a substituted judgment on behalf of the child as to his or her best interest. In *Belchertown State School v. Saikiewicz*,[[175]](#footnote-175) the Massachusetts Supreme Judicial Courts suggests a subjective standard for substitute decision making, the goal of which is to determine with as much accuracy as possible the wants and needs of the individual involved. On the other hand, New York’s highest court *In Re Storar*[[176]](#footnote-176) found it “unrealistic to attempt to determine whether [an incompetent person] would want to continue potentially life prolonging treatment,” and said a parent “may not deprive a child of life-saving treatment, however well intentioned.”

A number of commentators have discussed the process whereby parents and physicians substitute their judgment for that of the child as to whether the child’s life is worth living.[[177]](#footnote-177) The role of prejudice in the assessment of quality of life, and the fact that the decision makers are hardly disinterested parties are important points in these discussions. It seems rare that parents engage in a careful process of substituted judgment looking only at what their child him/herself might want.[[178]](#footnote-178)

**E. Challenging prosecutorial discretion**

“In most jurisdictions, an individual seeking to compel a criminal prosecution has only three alternatives: using political means, communicating with a grand jury, and bringing an action for mandamus. None of these ad hoc alternatives, however, has proven very effective.”[[179]](#footnote-179)

None of these is likely to succeed in moving a prosecutor to enforce homicide laws.[[180]](#footnote-180) There does seem to be some impetus for reforming the current system of prosecutorial decision-making, but the outcome is unclear. Innovations requiring prosecutors to follow standards and procedures, non-feasance statutes, court intervention, and reassessment of current doctrine to grant standing to individuals to challenge a district attorney’s prosecutorial decision are among the changes on the horizon.

Prosecutors who fail entirely to enforce a criminal law may be subject to criminal nonfeasance in several states.[[181]](#footnote-181) Court review of prosecutorial decisions was theoretically available under the federal system only when the district attorney failed to exercise appropriate discretion, i.e. for “corruption or malfeasance in office.”[[182]](#footnote-182) Prosecutions for criminal nonfeasance are rare, “both because they require total non-enforcement of a category of crime and because prosecutors are obviously reluctant to prosecute themselves or their predecessors.”[[183]](#footnote-183) Similarly, some states have passed statutes allowing individuals to bring private actions for failure to enforce criminal statutes.[[184]](#footnote-184) Many of these statutes have been repealed, and some have been found unconstitutional.[[185]](#footnote-185) Yet they have begun to tackle issues related to standing, separation of powers and what remedies would be available to an aggrieved person.

Some reforms have been self-imposed, where district attorneys have established standards and guidelines for operation of their departments.[[186]](#footnote-186) Such guidelines are an effort to balance the needs for consistent law enforcement and flexibility in responding to individual cases. Another marker of reform is that statutes and individual courts are beginning to require prosecutors to produce a written explanation for a decision not to prosecute.[[187]](#footnote-187) While Congress did not adopt this recommendation as proposed by the Advisory Committee on the Federal Rules of Criminal Procedure, the few decisions which have dealt with this matter have advocated such a rule.[[188]](#footnote-188)

Individual civil suits against a district attorney who fails to prosecute the murder of a disabled child are unlikely to arise and will not succeed. Since the victim was killed by those closest to her, it’s unlikely anyone will plead her case. Her representatives will have no standing[[189]](#footnote-189) because the harm is not capable of repetition, and “a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another.”[[190]](#footnote-190) However Green refers to *NAACP v. Levi*, 418 F.Supp 1109 (D.D.C. 1976) where the district court sidestepped the categorical language of *Linda R.S*. The court held that the plaintiffs were able to show an adequate nexus between the failure of officials to investigate the death of a black man in police custody and the injury to his widow by such action. Short of a statute specifically conferring standing, this theory may be the best avenue for disability advocates to redress non-prosecution.

Many statutes which require judicial supervision of prosecutorial decisions have been found unconstitutional because they present separation of powers problems; they diminish executive power by lessening prosecutorial discretion, and augment judicial power by handing over some of the prosecutorial control.[[191]](#footnote-191) Stuart Green proposes to avoid this and problems associated with private prosecutions by creating a “procedure by which individuals may challenge executive inaction and obtain a declaratory judgment if a court finds abuse of prosecutorial discretion.”[[192]](#footnote-192) Such a statute would itself confer standing on, for example, representatives of a homicide victim and derive its authority from the constitutional imperative that the president shall “take care that laws be faithfully executed.”[[193]](#footnote-193)

V. CONCLUSION

This report attempts to offer preliminary documentation to verify that people who commit crimes against people with disabilities are prosecuted less vigorously and receive lighter punishments than those who commit similar crimes against non-disabled people. Hopefully by confirming these long-held suspicions, advocacy can proceed both to develop a more extensive body of statistics, and generate creative strategies for addressing the problem. The changes necessary to improve the situation cannot be restricted to a legal context. Economic, political and social institutions must change, and fundamental beliefs about disability must evolve. A multi-faceted approach to such advocacy efforts is often effective:

• Disability advocates must recognize, document and publicize the degree of abuse which affects people with disabilities. Such violence must be named as a crime of oppression within the disability, law enforcement, and judicial communities.

• Work closely with movements addressing other forms of oppression, to educate each other and build coalitions around the common threats we all face.

• Legal reforms should be implemented, such as passing state laws allowing an action for declaratory relief to survivors to challenge local prosecutors’ failure to pursue murders against people with disabilities.

• Currently-available statutory protections should be used to greatest advantage in combating murder of people with disabilities.

• People with disabilities must continue to work together in cross-disability coalitions to have an impact on policies which shape our lives. This includes advocating for the full range of supports for families with disabled children, and options for dignified, fulfilling lives. It also includes becoming active in the political arena as a whole, expanding our perspective and political identity, so as not to be discredited as “singing a one note song.”

• Mobilizing and organizing the political strength of the 12% of the population with severe disabilities, to make its political will heard when electing district attorneys.

• In addition to legal reforms, people with disabilities must reconstitute the court of public opinion. In the past ten years, much has changed to aid in this effort, such as the passage of the Americans with Disabilities Act and some successes in portraying life with a disability in a more realistic fashion in the mass media. This effort to improve the social status of disability must continue.

While understanding this problem may not go far toward its solution, it is an important start.

1. Nora Baledarian, Project Director, Spectrum Institute, quoted in *Struggling to Raise Disabled Kids Modesto Area Mom Charged in Starvation Case Puts Focus on Parents’ Plight*, Los Angeles Daily News, October 6, 1996. See also *The Invisible Victims–A Disturbing Report* by the Victims of Violent Crime Committee of the (California Criminal Justice Task Force for Persons with Developmental Disabilities, a project of the Arc of California. For an in-depth discussion of abuse of people wit6h disabilities, See Sobsey, Dick, *Violence and Abuse in the Lives of People with Disabilities: An End to Silent Acceptance*, Paul H. Brookes Publishing, 1994. [↑](#footnote-ref-1)
2. See Section II infra at p. 7 [↑](#footnote-ref-2)
3. These will be discussed at length later in the paper. I offer them now as a basis for thinking about why society acts—or fails to act—as it does on these matters. [↑](#footnote-ref-3)
4. See Gallagher, Hugh Gregory, *‘Slapping up Spastics:’ The Persistence of Social Attitudes Toward People with Disabilities*, Issues in Law & Medicine, Vol. 10, No. 4, p. 401, describing his book *By Trust Betrayed: Patients, Physicians and the License to Kill in the Third Reich,* [↑](#footnote-ref-4)
5. Dick Sobsey, Director of the International Coalition on Abuse and Disability reported in February of 1995 on articles published in the Los Angeles MENSA chapter newsletter *Lament* which called for extermination of people with disabilities. In one article Jon Evans wrote "A piece of meat in the shape of a man but without a mind is not a human being, whether the body be deathly ill, damaged by accident, mentally blank because of brain deficiency, or criminally insane." Another article opined that Hitler's great harm had not been the killing of six million Jews, but rather that in doing so he had done damage to a rational discussion of creating a master race. Nikki Frey, editor of the newsletter, was originally supported by a unanimous vote of the MENSA board of directors in December 1994. She stated in the Los Angeles Times “I would not print anything I thought was truly harmful or offensive. …Nobody wants to have a deformed child." Following protests from some MENSA members, Frey was discharged. [↑](#footnote-ref-5)
6. George DeLury, who "assisted" his wife's "suicide" (she had multiple sclerosis) stated "People have to think about it in advance and be prepared to act to save their families a great deal of distress…" See *Euthanasia Chic*, The Wall Street Journal, May 1, 1996 and letter to the editor, May 17, 1996. [↑](#footnote-ref-6)
7. Assisted Suicide is an appropriate topic for discussion, since many parents assert that they are engaging in "mercy killing" when they slay their children. However, except as it pertains to disability rights, I have chosen to skirt the related topic of depriving disabled newborns of treatment. [↑](#footnote-ref-7)
8. *Amici Curiae* Brief of Not Dead Yet and American Disabled for Attendant Programs Today in support of Petitioners Dennis C. Vacco, before the Supreme Court, No. 95-1858, Sec. 1.A. [↑](#footnote-ref-8)
9. Proclaimed by the General Assembly, resolution 3447 (XXX) of 9 December 1975. [↑](#footnote-ref-9)
10. Article 2.1 provides that states shall respect and enforce the convention without discrimination (including on the basis of disability). Article 4 requires enforcement of the convention. Article 6.1 is a recognition of the inherent right to life. Article 19.1 requires member states to take "all appropriate legislative, administrative social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect…while in the care of parents…" [↑](#footnote-ref-10)
11. *Bellotti v. Baird*, 433 U.S. 622, 633 (1979) "A child, merely on account of his minority, is not beyond the protection of the constitution." Also "under the police power the state has authority to protect children from abuse and exploitation, whether perpetrated by parents or others." See Price Cohen, Cynthia, and Davidson, Howard A., Ed. *Children's rights in America: U.N. Convention on the Rights of the Child Compared with United States Law*, ABA Center on Children and the Law, 1990, p. 90 [↑](#footnote-ref-11)
12. Child Abuse Prevention and Treatment Act, Pub.L. 93-247, 88 Stat.4 (1974) as amended by the Child Abuse Amendments of 1984, Pub. L. 98-457, 98 Stat. 1749-55 (1984), codified at 42 U.S.C. § 5101. Also, every state has statutes barring child abuse, and, of course, criminalizing homicide. [↑](#footnote-ref-12)
13. *State v. Thorpe*, 429 A.2d 785 (1981) "[A] parent may inflict corporal punishment to discipline and correct the child, but may not do so to vent his/her own anger or frustration on the child." [↑](#footnote-ref-13)
14. See *United States v. Bergman*, 416 F.Supp. 496 (S.D.N.Y. 1976). [↑](#footnote-ref-14)
15. The disability pride movement holds that disability is a normal and natural part of the human experience and that it is the physical, institutional and attitudinal barriers in society—rather than our disabilities—which limit us and reduce our quality of life. In other words, there is nothing wrong with disability, it's society's unwillingness to accommodate a broad range of humanity which is a problem. This view is by no means shared by all people with disabilities, who having been steeped in the same assumptions as non-disabled persons, carry the same beliefs, which are only confirmed by the lack of access and opportunity they experience every day. [↑](#footnote-ref-15)
16. See discussion of the case of Robert Latimer, a Canadian farmer who killed his 12-year-old daughter who had cerebral palsy, infra at 12. [↑](#footnote-ref-16)
17. Of Juana Leija, “At the time it happened she thought what she was doing was right”. Leija threw her children into a bayou, two of them drowned, the other five were rescued. No judgment was passed, which enabled her to apply to regain custody of the living children. UPI Wire Story, June 18, 1987, Dateline, Houston. in Sentencing Geraldine Sagel, Judge William D. Block commented; "sometimes a mother's love puts people in strange situations." *A Mother’s Love Cited in Shooting of Son, 51*, The Bergen Record, February 19, 1988, A.P. wire story, dateline Waukegan IL, p. A11. [↑](#footnote-ref-17)
18. Raspberry, William, *Questions on a Baby’s Death*, The Washington Post, July 6, 1993, Op.Ed., p. A15. [↑](#footnote-ref-18)
19. *In Disabled Child’s Death, Mom’s Sentence Suspended*, The Nashville Banner, May 7, 1996, p. B4. [↑](#footnote-ref-19)
20. See Sobsey, Dick, *A Tale of Two Murders,* posted on the Electronic Bulletin Board of the International Coalition on Abuse and Disability, November 23, 1994. [↑](#footnote-ref-20)
21. *Child Abusers Get Up To 20 Years in Jail,* The Harrisburg Patriot, October 6, 1993, p. B1. [↑](#footnote-ref-21)
22. Several stories and articles invoke the stereotype of the “happy” child with Down’s Syndrome, see e.g. *A loving Father’s Act of Madness* the (London) Daily Mail, July 29, 1994 p. 1. ”He is a lovely little boy, a very happy soul like all Down’s babies.” Foot, Philippa, *Euthanasia*, 6 Phil. & Pub. Affairs 85 (1977) “Most [children born with Down’s Syncrome] are able to live on for quite a time in a reasonably contented way, remaining like children all their lives but capable of affectionate relationships and able to play games and perform simple tasks.” [↑](#footnote-ref-22)
23. For example, several suspicious deaths were ruled to be from natural causes where it seemed more likely that law enforcement simply did not want to prosecute. See discussion of survey results, *Infra*. [↑](#footnote-ref-23)
24. Pizzi, William T. *Understanding Prosecutorial Discretion in the United states, the Limits of Comparative Criminal Procedure as an Instrument of Reform,* 54 Ohio St. L.J. 1325 (1993) [↑](#footnote-ref-24)
25. Jacoby, Joan E., *The Prosecutor's Charging Decision: A policy Perspective*, National Institute of Law Enforcement and Criminal Justice, Department of Justice, (1983) pp. 16-18. [↑](#footnote-ref-25)
26. Victims of Crime Committee of the Criminal Justice Task Force for Persons with Developmental Disabilities, sponsored by The Arc of California [↑](#footnote-ref-26)
27. During a custody hearing in June of 1993, Isaiah Carroll indicated that he had seen his older brother James try to suffocate his brother Josiah. However because he “communicates by gesturing and using a communication device” doctors felt his communication skills were “unreliable.” *Adoptive Parents Testify in Death of Disabled Son*, The Columbus Dispatch, December 20, 1994, p. 6C. [↑](#footnote-ref-27)
28. Sobsey, Dick, *Equal Protection of the Law for Crime Victims With Developmental Disabilities*, (forthcoming article) University of Alberta, Edmonton, Alberta, [↑](#footnote-ref-28)
29. No. 95-1858 [↑](#footnote-ref-29)
30. Amici Brief of Not Dead Yet and ADAPT in support of petitioners at n. 34. [↑](#footnote-ref-30)
31. Greenfield, Lawrence A., *Child Victimizers: Violent Offenders and their Victims*, NCJ-153258, March, 1996, Bureau of Justice Statistics, Department of Justice (page numbers not available). The report is based on a representative sample of state prisoners, and homicide data assembled by law enforcement agencies. [↑](#footnote-ref-31)
32. Id. [↑](#footnote-ref-32)
33. Langan, Patrick A and Cohen, Robyn L., *State Court Sentencing of Convicted Felons, 1992*, Bureau of Justice Statistics, Dept. of Justice, May 1996, Pub. No. NCJ-152696 [↑](#footnote-ref-33)
34. Sourcebook of Criminal Justice Statistics 1995, p. 508, Table 5.59 recording for 1992 [↑](#footnote-ref-34)
35. Id at p. 503 table 5.52. [↑](#footnote-ref-35)
36. Though nearly 2,000 articles were examined, the search was somewhat perfunctory, given time restrictions. [↑](#footnote-ref-36)
37. This area bears more investigation, as multiple articles concerning the same crime were not examined. Taking the most recent article, though likely to, did not always yield the final disposition of the case. In order to get a complete tally, it would be necessary to write to each county court, a task beyond the scope of this project. [↑](#footnote-ref-37)
38. This number includes acquittals, pardons, probation-only and suspended sentences, as well as one placement for psychiatric hospitalization and one house arrest. [↑](#footnote-ref-38)
39. *Mom Who Starved Son Gets Light Term*, Chicago Tribune via wire services, December 13, 1992, p. 31 (Dateline Milwaukee) [↑](#footnote-ref-39)
40. This is not to say that people with disabilities should not be held accountable for crimes they commit. I present these notable examples merely to raise the question; why are two of the three persons who received the longest terms also among the few disabled perpetrators of these crimes? [↑](#footnote-ref-40)
41. *Psychiatric Report Fails to lessen Term*, The Los Angeles Times, June 25, 1986, Part 2 pg. 2. See also *Mildly Retarded Man Gets Life in Beating Death of Young Son*, Dallas Morning News, October 25, 1996, p. 34A. This case is offered by way of comparison; the child in question did not have a disability. [↑](#footnote-ref-41)
42. Atlanta Journal and constitution, October 31, 1996, Nation in Brief, p. 08A [↑](#footnote-ref-42)
43. *Welfare Officials Granted Custody of Child Same Day She Died*, AP Wire story, January 24, 1989 [↑](#footnote-ref-43)
44. *Abuse Charges Dropped*, Washington Post, May 20, 1984, p. C2. Her daughter's name was not given. See also the case of Mary Mitchell, *infra*. [↑](#footnote-ref-44)
45. *Amici Curiae* Brief of Not Dead Yet and ADAPT, No. 95-1858, § 1.A. See also Field, Martha A., *Killing 'the Handicapped'—Before and After Birth*, 16 Harv. Women's L.J. 79 (1993) at 86-88. See also Drimmer, Jonathan C., *Cripples, Overcomers and Civil Rights, Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, (citation unavailable) [↑](#footnote-ref-45)
46. See Brief of *Amici Curiae* Not Dead Yet and ADAPT, n. 37. See also App. B, Affidavit by Carol Gill Ph.D. in Clinical Psychology, in *Lee v. Oregon*, 869 F.Supp. 1491 (Ore. E. 1994) [↑](#footnote-ref-46)
47. *Woman Kills Retarded Daughter Fearing a Lack of Future Care*, UPI wire story, October 23, 1990. [↑](#footnote-ref-47)
48. It is common for non-disabled people to speak loudly to blind people, and assume that people with speech disabilities also have mental retardation. [↑](#footnote-ref-48)
49. Affidavit by Carol Gill, App. B to brief by Not Dead Yet. [↑](#footnote-ref-49)
50. Gallagher, Hugh Gregory *'Slapping up Spastics': the Persistence of Social Attitudes Toward People with Disabilities*, Issues in Law & Medicine, March 22, 1995, Vol. 10, No. 4 p. 401. [↑](#footnote-ref-50)
51. *Jury Acquits Man Who Took His Premature Baby Off Life Support*, Chicago Tribune, February 3, 1995, p. 10. Despite the fact that the child was premature, it was uncertain what his fate would be. As Martha Field stated in her article *Killing ‘the Handicapped’ Before and After Birth*, "'preemies' also have the possibility of …being 'normal', and which way they will develop is often not apparent until some time after birth." Field, Martha, *Killing ‘the Handicapped’ Before and After Birth*, 16 Harv. Women’s L.J. 79 at 91-92. [↑](#footnote-ref-51)
52. *A Mother’s Love Cited in Shooting of Son, 51*, The Bergen Record February 19, 1988 p. A11 via wire services Dateline Waukegan, IL. [↑](#footnote-ref-52)
53. Drimmer, *Cripples, Overcomers and Civil Rights* [↑](#footnote-ref-53)
54. Terms of the sentence allowed Ms. Rosio to leave the jail each day to work, go to school, attend therapy sessions and visit with her remaining children. [↑](#footnote-ref-54)
55. UPI Wire Story, March 11, 1988 [↑](#footnote-ref-55)
56. While some articles discussed in detail the reasons she was in pain, none discussed the mitigating measures which were and could have been taken to alleviate the pain, and the fact that many people live with chronic pain. [↑](#footnote-ref-56)
57. Sobsey, *A Tale of Two Murders* [↑](#footnote-ref-57)
58. Id. See also Eckstein, Cheryl, *Tracy Lynn Latimer, Better Off Dead? — A Breach of Compassion*, published by the Compassionate Health Network, March 1995. [↑](#footnote-ref-58)
59. Sarokin, District Judge *Rabinowitz v. New Jersey State Bd. of Educ.*, CA No. 81-1226, 550 F.Supp. 481, 482 (1982) [↑](#footnote-ref-59)
60. *Pa. Mother Gets Probation for Killing Son*, USA Today, November 19, 1987, P. 03A. [↑](#footnote-ref-60)
61. Brief of Amici Curiae, § 1.A. By the time Larry McAfee (who has quadriplegia) won the legal battle for “the right” to die in 1989, he had been contacted by advocates with disabilities and an independent living program in Georgia, which helped him organize resources to enable him to live in the community. Thus empowered, he ultimately chose not to exercise that right. [↑](#footnote-ref-61)
62. The current Supplemental Security Income benefit in Massachusetts for a blind individual (including the state supplement) is $620.37 per month. The benefits for persons with other disabilities are lower. [↑](#footnote-ref-62)
63. Drimmer, *Cripples, Overcomers and Civil Rights* [↑](#footnote-ref-63)
64. *Lawsuit Lost, Mother Kills Son*, Chicago Tribune, July 12, 1985, News p. 8 [↑](#footnote-ref-64)
65. *Struggling to Raise Disabled children…* Los Angeles Daily News, October 6, 1996 p. N20. [↑](#footnote-ref-65)
66. the Associated Press, January 24, 1989, Dateline Oxford, MS [↑](#footnote-ref-66)
67. *Death of Noah Troubles Families*, Cleveland Plain Dealer, January 24, 1993, p. 1B. [↑](#footnote-ref-67)
68. Id. [↑](#footnote-ref-68)
69. *2nd Mistrial in Vet’s Killing of Baby*, Bergen County Record, October 11, 1987, p. A47. [↑](#footnote-ref-69)
70. *Girl Dead of Gunshot Before Being Hit by Car*, Los Angeles Times, November 7, 1991, p. 5. [↑](#footnote-ref-70)
71. *Father Gets Prison Term in Death of Baby*, Los Angeles Times, (Orange County edition) May 9, 1992, Part B. p. 5. [↑](#footnote-ref-71)
72. *Lincoln Park Man Indicted in Slayings*, The Bergen Record, October 30, 1991, p. A01 [↑](#footnote-ref-72)
73. *Husband, Retarded Son Shot, Ex-Officer Held*, The Washington Times, January 26, 1990, p. B5, Dateline Knoxville [↑](#footnote-ref-73)
74. UPI Wire Services, Texas News Briefs, December 18, 1984 [↑](#footnote-ref-74)
75. Arkansas Democrat Gazette, January 12, 1986. [↑](#footnote-ref-75)
76. *Woman Kills Retarded Daughter Fearing a Lack of Future Care*, UPI wire story, October 23, 1990. [↑](#footnote-ref-76)
77. *Husband’s Fit of Rage Blamed in Killing of Woman, Adult Son*, Sacramento Bee, February 22, 1997, p. B2. [↑](#footnote-ref-77)
78. See infra at n. 115 [↑](#footnote-ref-78)
79. San Diego Union Tribune, July 1, 1993, p. B-1 [↑](#footnote-ref-79)
80. Id. [↑](#footnote-ref-80)
81. *3 Years for Grandmother in Baby’s Death*, The Bergen Record, June 2, 1990 p. A03 [↑](#footnote-ref-81)
82. *Adoptive Parents Testify in Death of Disabled Son*, The Columbus Dispatch, December 20, 1994, p. 6C. [↑](#footnote-ref-82)
83. *Parents Admit Guilt in Daughter’s Death*, Louisville Courier-Journal, February 20, 1997, p. 01A. Robin's cause of death was listed as a seizure disorder brought on by malnutrition. The way the death was reported plays down the seriousness of the underlying crime. [↑](#footnote-ref-83)
84. The survey found about 15 additional accounts of disabled children killed by their parents in countries from Canada to Japan. In all of these, the child's disability was given as the reason for the parents' actions. [↑](#footnote-ref-84)
85. Gallagher, *‘Slapping up Spastics’*, Issues in Law & Medicine, Vol. 10, No. 4, p. 401. [↑](#footnote-ref-85)
86. *U.S. Government Plutonium Experiments on U.S. Citizens*, News from the Libertarian Party, November 21, 1996, describing “The Science Club” experiments where children at the Fernald State School were fed irradiated oatmeal to test the effects of radioactivity. See also Woodward, John R., *It Can Happen Here*, Disability Rag and ReSource, Vol. 15, No. 1, Jan/Feb 1994, pp. 16-18, describing an experiment conducted in the early ‘80s which studied the effect on parents of disabled newborns of optimistic or pessimistic projections of their children’s life quality. The study resulted in the deaths of dozens of babies with spina bifida. Finally, one of the longest-running civil actions, *Wyatt v. Stickney,* concerning conditions in state institutions for people with cognitive disabilities, had its latest iteration in 1996. The suit was originally filed in 1967. [↑](#footnote-ref-86)
87. Sobsey, Dick, *Equal Protection of the Law for Crime Victims with Developmental Disabilities*, (forthcoming article) University of Alberta, Edmonton, Alberta [↑](#footnote-ref-87)
88. In one case, neighbors said they did not even know the defendants had a disabled child. *Mom Charged in Trailer Fire, Death of Disabled Boy*, Orlando Sentinel, March 4, 1997, p. A18. [↑](#footnote-ref-88)
89. The child, known as “boy Gregory” had a skull malformation known as Pfeiffer syndrome, type 2, but it was as yet unclear how and to what extent he would be affected by the condition. [↑](#footnote-ref-89)
90. This information was obtained via e-mail correspondence with Dick Sobsey of the International Coalition on Abuse and Disability. [↑](#footnote-ref-90)
91. Id. [↑](#footnote-ref-91)
92. Moran, Kenneth T. and Cooper, John L., *Discretion and the Criminal Justice Process*, Associated Faculty Press, Port Washington, NY, 1983. p. 7 [↑](#footnote-ref-92)
93. Id. [↑](#footnote-ref-93)
94. Pizzi, William T., *Understanding Prosecutorial Discretion in the United States*, 54 Ohio St. L.J. 1325 (1993) at 1331. [↑](#footnote-ref-94)
95. Id at 1331-2 [↑](#footnote-ref-95)
96. Id. [↑](#footnote-ref-96)
97. Goldstein, *The Passive Judiciary*, LSU Press, 1981, p. 3 [↑](#footnote-ref-97)
98. For a discussion of political and legal considerations, see Moran, Kenneth T. and Cooper, John L., *Discretion and the Criminal Justice Process*, Associated Faculty Press, Port Washington, NY, 1983, pp. 53-55 [↑](#footnote-ref-98)
99. *Id*. A number of cases were brought against parents who were prominent either locally or nationally. See e.g. *2 may face charge in Death of Son, 13*, Houston Chronicle, October 30, 1986, p. 6 (Dateline, Virginia Beach, VA) describing parents of adoptive children who traveled in a converted school bus and befriended fans of the 700 Club by appearing on the show. See also *Ex Foster Parent Held in Handicapped Son’s Death*, Chicago Tribune, October 19, 1992, p. 3 (Dateline, LaFarge, WI) describing the arrest of an ex-official of a disability services organization. One wonders whether the investigation into the death of Boy Gregory might have been more vigorous if his father had not been so famous and therefore economically powerful. [↑](#footnote-ref-99)
100. “Even the husband of the victim and her family do not want defendant to go to prison.” said the prosecutor in the murder of Gail Terrell by her mother, Barbara Monroe. *Mother Proposes Guilty Plea in Daughter’s Killing*, UPI wire story, August 21, 1990, Dateline Smyrna, GA. [↑](#footnote-ref-100)
101. *Id.* [↑](#footnote-ref-101)
102. *The Passive Judiciary*, p. 12. [↑](#footnote-ref-102)
103. *Id* at 14. [↑](#footnote-ref-103)
104. *Id* at 18. For a discussion of ways to enforce prosecutor’s obligation to carry through such prosecutions, see Sec. IV, Legal issues and remedies [↑](#footnote-ref-104)
105. This was true in four of the cases. [↑](#footnote-ref-105)
106. *Death of Retarded Child Prompts Probe*, UPI wire Story, June 16, 1986, Dateline Newport TN. [↑](#footnote-ref-106)
107. Arkansas Democrat-Gazette, January 23, 1986 [↑](#footnote-ref-107)
108. *Sand Springs Mother Found Guilty in Death of Handicapped Daughter*, Tulsa World, March 18, 1997, p. A7 [↑](#footnote-ref-108)
109. *Foster Parent Pleads Guilty in Boy’s Death*, The Louisville Courier-Journal, August 16, 1989, p. 1B. Quoting Assistant District Attorney John Stewart. [↑](#footnote-ref-109)
110. He was acquitted by a jury. [↑](#footnote-ref-110)
111. Messenger and his wife Traci were acquitted of murder, though he admitted fending off hospital staff to disconnect his premature son's life support. [↑](#footnote-ref-111)
112. *Jury Acquits Doctor Who Took his Premature Baby Off Life Support*, Chicago Tribune, AP Wire Story, February 3, 1995 p. 10. [↑](#footnote-ref-112)
113. Kadish, Sanford H. and Schulhofer, Stephen J. *Criminal Law and Its Processes*, Little Brown & Company, fifth edition, 1989 [↑](#footnote-ref-113)
114. p. 227. Disability rights activist Fred Fay might take exception to this hypothetical. He a founder of Justice for All, a disability advocacy and political action group. He has advised three presidential, and numerous senatorial and gubernatorial campaigns on disability rights policy, is a founder of the American Coalition of Citizens with Disabilities, one of the main players in the passage of the Americans with Disabilities Act, and a husband and father. He also has quadriplegia and a spinal tumor which make it impossible for him to leave his bed. [↑](#footnote-ref-114)
115. *Supra* at note 27 [↑](#footnote-ref-115)
116. *In Disabled Child’s Death, Mom’s Sentence Suspended*, The Nashville Banner, May 7, 1996, p. B4 [↑](#footnote-ref-116)
117. *Mother gets 5 years*, The Cincinnati Enquirer, June 17, 1997, p. B01 [↑](#footnote-ref-117)
118. *Woman Accused of Starving Retarded Adult Daughter*, Gannett News Service, September 25, 1992, Dateline Lansing, MI. Quoting Atty. Gen. Frank Kelley. [↑](#footnote-ref-118)
119. *Man Sentenced in Death of Retarded Girl*, UPI Wire, October 15, 1985, Dateline, Rochester NY. [↑](#footnote-ref-119)
120. *City of Cleburn v. Cleburn Living Center*, 473 U.S. 431 (1985) [↑](#footnote-ref-120)
121. 457 U.S. 307 [↑](#footnote-ref-121)
122. See *Bowen v. American Hospital Association, infra* [↑](#footnote-ref-122)
123. 476 U.S. 610, 106 S.Ct. 2101, 1986 [↑](#footnote-ref-123)
124. In that case, an infant with Down's Syndrome was refused surgery to clear an obstructed esophagus, and nutrition and hydration as well. Though several offers of adoption were made, parents obtained a court order to deny the treatment, and the child died six days later. [↑](#footnote-ref-124)
125. Id at 614-5 [↑](#footnote-ref-125)
126. Id at 616 [↑](#footnote-ref-126)
127. 29 U.S.C. § 794 “No otherwise qualified handicapped individual …shall solely by reason of his [or her] handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.” [↑](#footnote-ref-127)
128. Id at 627 [↑](#footnote-ref-128)
129. Id at 628 n. 13, quoting the President’s Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research 1983 report. [↑](#footnote-ref-129)
130. Id. [↑](#footnote-ref-130)
131. Id at pp. 632-637. [↑](#footnote-ref-131)
132. Id at p. 636 n. 22. “The secretary neither found nor implied that physicians’ predispositions against treating handicapped infants had resulted in parental refusals to consent to treatment.” [↑](#footnote-ref-132)
133. Id at p. 639 n. 23 [↑](#footnote-ref-133)
134. Id at p. 639-640. While this paradox in some ways resembles affirmative action as applied to women and people of color, what is necessary to enable people with disabilities to participate in society—in the face of the physical, communication and attitudinal barriers and the culture’s expectation of its citizens—is simply, more. The Supreme Court has consistently declined to find a right to that “more,” e.g. habilitation (Youngberg v. Romeo 457 U.S. 307, 102 S.Ct. 2452 (1982)) and equal access to communication. *Board of Ed. v. Rowley*, 458 U.S. 176 (1982). [↑](#footnote-ref-134)
135. See discussion *infra*. [↑](#footnote-ref-135)
136. For a discussion of the equal protection argument, see Field, *Killing “the Handicapped” Before and After Birth,* 16 Harv. Women’s L.J. 79 at 97 et seq. [↑](#footnote-ref-136)
137. 497 U.S. 261, 110 S.Ct. 2841 (1990) [↑](#footnote-ref-137)
138. Id at 271 [↑](#footnote-ref-138)
139. Id at 281 [↑](#footnote-ref-139)
140. Id. [↑](#footnote-ref-140)
141. The principles applicable to assisted suicide and termination of life support generally concern persons who are either terminally ill or are in a persistent vegetative state. [↑](#footnote-ref-141)
142. *Washington v. Glucksberg*, slip op. No. 96-110 (1997) and *Vacco v. Quill*, slip op. No. 95-1858 (1997) [↑](#footnote-ref-142)
143. *Glucksberg*, slip op at 7 "The decision to commit suicide with the assistance of another…and…the decision to refuse unwanted medical treatment…are widely and reasonably regarded as quite distinct. In *Cruzan* we recognized that most states outlawed assisted suicide…and we certainly gave no intimation that the right to refuse unwanted medical treatment could be somehow transmuted into a right to assistance in committing suicide." [↑](#footnote-ref-143)
144. Where the state’s interest in preserving life depends on the “medical condition and the wishes of the person whose life is at stake. Id at 8, citing *Compassion in Dying v. Washington,* 79 F.3d 790, 817 (1996) [↑](#footnote-ref-144)
145. Id at 8. [↑](#footnote-ref-145)
146. Id at 8-9. [↑](#footnote-ref-146)
147. Id at 9. (If these factors don’t add up to suspect classification…) [↑](#footnote-ref-147)
148. “The Dutch government’s own study revealed that in 1990, there were 2,300 cases of voluntary euthanasia…400 cases of assisted suicide and more than 1,000 cases of euthanasia without an explicit request. …[T]he study found an additional 4,941 cases where physicians administered lethal morphine overdoses without the patient’s explicit consent.” citing *Physician assisted Suicide and Euthanasia in the Netherlands: a Report to Chairman Charles T Canady*, Id at 10. [↑](#footnote-ref-148)
149. Model Penal Code § 210.1 [↑](#footnote-ref-149)
150. 42 U.S.C.A. §§ 51101-5103 [↑](#footnote-ref-150)
151. Field, *Killing the Handicapped*, 16 Harv. Women’s L. J. at 102, citing 42 U.S.C.A. § 5102(3). [↑](#footnote-ref-151)
152. This includes the Developmental Disabilities Assistance and Bill of Rights Act (DDABRA), 42 U.S.C. 6061, and the Civil Rights of Institutionalized Persons Act of 1980 (CRIPA), 42 U.S.C. § 1997 et seq. Under the DDABRA, private, non-profit organizations are awarded contracts to provide protection and advocacy services to people with disabilities within each state, in a competitive process. [↑](#footnote-ref-152)
153. *State v. Brenner* 486 So.2d 101 (Louisiana, 1986) n. 2. “At least thirteen other states have passed statutes attempting to protect the infirm residents of long term care facilities from abuse or neglect: Alabama, Ala.Code §§ 38-9-7, et seq., "Any person who abuses, neglects or exploits a person in violation of the provisions of this chapter shall be guilty of a misdemeanor and shall, upon conviction, be punished by imprisonment for not more than six months or a fine of not more than $500.00 or both. (Acts 1977, No. 780, p. 1340, SS 5, 11.)", s 38-9- 7(b); Arizona, Ariz.Rev.Stat.Ann. s 46-454; Connecticut, Conn.Gen.Stat.Ann. SS 19a-517; 19a-518; District of Columbia, D.C. Code SS 6-2501, et seq.; Florida, Fla.Stat.Ann. SS 400.102, 400.121; Illinois, Ill.Ann.Stat. ch. 38 s 12-19, "Any person or any owner or licensee of a long term care facility who abuses a long term care facility resident is guilty of a Class 3 felony. Any person or any owner or licensee of a long term care facility who grossly neglects a long term care facility resident is guilty of a Class 4 felony", 38 s 12-19(a);Massachusetts**,** Mass.Gen.Laws Ann. ch. 111 SS 72F, et seq.; Minnesota, Minn.Stat.Ann. SS 609.23, 609.231, "Whoever, being in charge of or employed in any facility required to be licensed under the provisions of sections 144.50 to 144.58, or 144A.02, intentionally abuses, ill-treats, or culpably neglects any patient or resident therein to his physical detriment may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.", s 609.231; Missouri, Mo.Rev.Stat. s 198.070, "Any person who knowingly abuses or neglects a resident of a facility shall be guilty of a class D felony", s 198.070, subd. 11; Montana, Mont.Code Ann. SS 53-5-501, et seq.; "Any individual who purposely or knowingly abuses, neglects, or exploits an older person is guilty of a misdemeanor and upon conviction may be fined an amount not to exceed $500 or be imprisoned in the county jail for a term not to exceed 6 months, or both.", s 53-5-525(2); Nevada, Nev.Rev.Stat. SS 200.5092, et seq.; Oklahoma, Okla.Stat.Ann. tit. 63 SS 1-1902, 1-1939, "The owner and licensee are liable to a resident for any intentional or negligent act or omission of their agents or employees which injures the resident. Also, any state employee that aids, abets, assists, or conspires with an owner or licensee to perform an act that causes injury to a resident shall be individually liable.", s 1-1939, subd. A.; Wisconsin, Wis.Stat.Ann. s 940.29: "Any person in charge of or employed in any of the following facilities who abuses, neglects or ill-treats any person confined in or a resident of any such facility or who knowingly permits another person to do so is guilty of a Class E felony…" [↑](#footnote-ref-153)
154. M.G.L. c. 190C. The Disabled Persons Protection Commission (DPPC) is empowered to investigate or delegate for investigation reports of abuse against people with disabilities. Having found reasonable cause to believe abuse is occurring, DPPC then makes referrals for intervention by various state agencies serving the specific disability group of which the person is a member. [↑](#footnote-ref-154)
155. Chapter 297 § 4. Lesser penalties are applied to those who are not caretakers (§§ b and c) and where the assault is not “wanton and reckless.” Greater penalties are levied against those who cause serious bodily injury, distinguished by its permanence. The law refers to those with a responsibility to people with disabilities in a variety of capacities, either through family, contractual, or fiduciary relationships, or under a voluntary assumption of responsibility. [↑](#footnote-ref-155)
156. Amici Curiae Brief of Not Dead Yet and ADAPT in support of petitioners, in *Vacco v. Quill*, No. 95-1858 section I.B. [↑](#footnote-ref-156)
157. 42 U.S.C. 12101 et seq. [↑](#footnote-ref-157)
158. 42 U.S.C. § 12182(b)(2)(A)(ii), 28 C.F.R. § 35.130(b)(7). This includes provision of auxiliary aids and services to ensure effective communication, and may include removing architectural barriers or moving programs or services to wheelchair-accessible locations. [↑](#footnote-ref-158)
159. 42 U.S.C. § 12182(b)(1)(E), 28 C.F.R. § 35.130(g). [↑](#footnote-ref-159)
160. Id., Section I.A. [↑](#footnote-ref-160)
161. Id [↑](#footnote-ref-161)
162. Defined at 28 C.F.R. § 35.104 a public entity includes a state or local government or a department or agency thereof. [↑](#footnote-ref-162)
163. § 35.130(b(1)(iii) [↑](#footnote-ref-163)
164. 11th Sess., U.N. Doc. CEDAW/C/1992/L.1/Add 15 (1992) [↑](#footnote-ref-164)
165. Culliton, Katherine M., *Finding a Mechanism to Enforce Women’s Right to State Protection from Domestic Violence in the Americas*, 34 Harv. Int’l L.J. 507, 509 (1993). [↑](#footnote-ref-165)
166. Id at 508 [↑](#footnote-ref-166)
167. Id at 512. While the issue of “state action” is still a problem, Culliton asserts that “recent developments in international human rights law show that the sphere of state responsibility for human rights violations has expanded considerably.” [↑](#footnote-ref-167)
168. Id at 516. The ‘honor defense’ permits men to murder their allegedly unfaithful wives or girlfriends with impunity, and the ‘privileged homicide’ doctrine reduces charges for men who plead that “‘violent emotions’ caused them to kill their partners.” [↑](#footnote-ref-168)
169. Id. [↑](#footnote-ref-169)
170. Id. [↑](#footnote-ref-170)
171. Id at 518, 521 [↑](#footnote-ref-171)
172. Id at 522 [↑](#footnote-ref-172)
173. 42 U.S.C.A. §§ 5101-5106, 5111-5113, 5115. See discussion *Supra* [↑](#footnote-ref-173)
174. Mnookin, Robert H. Weisberg, D. Kelly, *Child, Family and State: Problems and Materials on Children and the Law*, Third edition, Little Brown & Co. 1995, p. 605 [↑](#footnote-ref-174)
175. 373 Mass. 728, 370 N.E.2d 417 (1977) [↑](#footnote-ref-175)
176. 52 N.Y.2d 363, 420 N.E.2d 64 (1981) [↑](#footnote-ref-176)
177. Foot, Philippa, *Euthanasia* 6 Phil. & Pub. Affairs 85, (1977); Mnookin, Robert H., *Two puzzles*, 1984 Ariz. St. L.J. 667; Duff, Raymond S. and Campbell, August B., *Moral and Ethical Dilemmas in the Special-Care Nursery*, 289 New Eng. J. Med. 890 (1973); Robertson, John A., *Involuntary Euthanasia of Defective Newborns: A Legal Analysis*, 27 Stan. L. Rev. 213 (1975); Field, *Killing ‘the Handicapped’*, 16 Harv. Women’s L. J. 79 [↑](#footnote-ref-177)
178. Describing an infant who is an incompletely separated Siamese twin: “We haven’t called the [Infant Care Review] Committee because it’s really very clear… There’s no possibility for this baby to live any meaningful life,” because of “the possibility of two underdeveloped brains.” Except for a feeding tube, the baby needed no help with body functions. *Parents say Siamese Baby Should Be Left to Die*, The Bergen Record, January 26, 1988, p. C24, from wire services, dateline, Miami. [↑](#footnote-ref-178)
179. Green, Stuart P. *Private Challenges to Prosecutorial Inaction: A Model Declaratory Judgment Statute*, 97 Yale L.J. 488, 1988 at 492-93 [↑](#footnote-ref-179)
180. Id at notes 23-26. Political pressure by a community of people with disabilities is difficult to muster because publicized incidents of murder of disabled children are still sparse, so local “patterns” are impossible to show. Where, in an individual case a prosecutor is seen as showing mercy on distraught parents, it will be difficult to generate community sentiment against such leniency. The author also points out that virtually no jurisdiction allows private complainants to make a case directly to a grand jury. Finally, the author notes, “getting a judge to issue a writ of mandamus generally is difficult and a writ ordering a prosecutor to prosecute, extraordinarily so.” [↑](#footnote-ref-180)
181. Goldstein, *The Passive Judiciary*, p. 9, citing *State v. Winne*, 96 A.2d 63, 72 (N.J. 1953); Without such a statute, “an honest but negligent prosecutor would have it within his power to cripple or nullify the enforcement of the criminal law in his county or to choose at his pleasure the portion of the criminal law he would enforce.” [↑](#footnote-ref-181)
182. Id at 17. [↑](#footnote-ref-182)
183. Id at 10. [↑](#footnote-ref-183)
184. Green, *Private Challenges to Prosecutorial Inaction*, at 488 n. 4. [↑](#footnote-ref-184)
185. Id. [↑](#footnote-ref-185)
186. Goldstein, *the Passive Judiciary* at 52, citing Department of Justice, *Principles of Prosecution*, (July 1980) rpt. in 27 Cr. L. 3277-92 (Aug 6, 1980). See also Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 UCLA L. Rev. 1 (1971 (cited in Green, *Private Challenges to Prosecutorial Inaction*, at 489 n. 13) [↑](#footnote-ref-186)
187. Green, *Private Challenges to Prosecutorial Inaction* at 489 n. 13. [↑](#footnote-ref-187)
188. Goldstein, *The Passive Judiciary*, at 17-18. See *United States v. Doe*, 101 F.Supp 609 (D. Conn. 1951) (“The court may not properly approve a dismissal…unless satisfied that the government lacks sufficient evidence to warrant a prosecution.”) *United States v. Greater Blouse, Skirt and Neckwear Contractors Association*, 228 F.Supp 483 (S.D.N.Y. 1964) (“Public exposure of the reasons for the abandonment of” a prosecution was essential in order to “prevent abuse of the uncontrolled power of dismissal previously enjoyed by prosecutors.”) [↑](#footnote-ref-188)
189. In order to have standing to bring a case in federal court, a plaintiff must show injury-in-fact, that defendant’s action was the cause of the injury, and that the court can give redress. [↑](#footnote-ref-189)
190. *Linda R.S. v. Richard D*, 410 U.S. 614, 619, (1973). [↑](#footnote-ref-190)
191. Green, *Private Challenges to Prosecutorial Inaction* at 498. [↑](#footnote-ref-191)
192. Id at 499 [↑](#footnote-ref-192)
193. Id at 500, citing constitutional article II, section 3, clause 4. [↑](#footnote-ref-193)