THE TRIAL OF CONRAD MURRAY: PROSECUTING PHYSICIANS FOR CRIMINALLY NEGLIGENT OVER-PRESCRIPTION

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I. INTRODUCTION

On June 25, 2009, Michael Jackson died in his sleep from cardiac arrest, sending shockwaves throughout the public sphere.[1] Popular response to his untimely demise was staggering.[2] In the days following initial reports of his death, fans flooded the Internet with an unprecedented number of searches, comments, and messages.[3] Grieving admirers held memorial services across the globe, and even the President of the United States sent his condolences.[4] News about Jackson dominated the airwaves for weeks, erasing any doubt that the "King of Pop" had been one of the most entertaining and controversial cultural icons in modern history.[5]

Over a legendary music career spanning four decades, Jackson treated audiences to electrifying stage performances and multi-platinum albums, including *Thriller*, the top-selling album of all time.[6] However, in later years he achieved equal infamy for his ever-changing physical appearance, ostentatious personal life, and eccentric habits.[7] One of Jackson's most notorious vices was an addiction to prescription medication.[8] The latter half of his career featured lurid accounts of his

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1. Linnie Rawlinson & Nick Hunt, *Jackson Dies, Almost Takes Internet with Him*, CNN (June 26, 2009, 3:02 PM), http://www.cnn.com/2009/TECH/06/26/michael.jackson./index.html.

2. *Id.*

3. *Id.*

4. Andrew Gumbel, *Michael Jackson Doctor Hires Lawyer as Family Hires Pathologist*, GUARDIAN (June 28, 2009, 3:48 PM), http://www.guardian.co.uk/music/2009/jun/28/michael-jackson-doctor-lawyer.

5. *See* Jeff Poor, *Jacko Telethon: Primetime Broadcast Network Coverage Devotes One Third of All News to Pop Star's Death*, NEWSBUSTERS (July 10, 2009, 11:23 AM), http://newsbusters.org/blogs/jeff-poor/2009/07/10/jacko-telethon-primetime-broadcast-network-coverage-devotes-one-third-all.

6. *See* Paul Grein, *Chart Watch Extra: Where "Thriller" Ranks*, YAHOO! MUSIC (Nov. 20, 2012, 2:38 PM), http://music.yahoo.com/blogs/chart-watch/chart-watch-extra-where-thriller-ranks-193809485.html ("No album comes close to *Thriller* as the all-time international best-seller . . . ."); Todd Leopold, *Michael Jackson, Pop Music Legend, Dead at 50*, CNN (June 25, 2009, 3:01 PM), http://edition.cnn.com/2009//Music/06/25/jackson/index.html (describing *Thriller* as "the best-selling album in history, with 50 million copies sold worldwide").

7. *See* Leopold, *supra* note 6.

8. *See* Susan Donaldson James, *Friend Says Michael Jackson Battled Demerol Addiction*, ABC NEWS (June 26, 2009), http://abcnews.go.com/Health/MichaelJackson/story?id=7938918.

growing dependence on painkillers, antidepressants, and sleeping pills.[9] His tragic passing contributed to a recent and disturbing trend of celebrity deaths linked to prescription drug abuse.[10]

As the public continued to mourn, California state authorities began to examine the peculiar circumstances surrounding Jackson's death.[11] The autopsy report confirmed that his cardiac arrest was the direct result of acute intoxication from prescription drugs, most notably the anesthetic propofol.[12] This information led the coroner to officially classify the death as a homicide.[13] Eventually, a joint Los Angeles Police Department and Drug Enforcement Agency investigation led to the indictment of Dr. Conrad Murray, Jackson's personal physician.[14]

In the month leading up to Jackson's death, Murray had supplied his celebrity client with several powerful medications, including the dose of propofol which eventually claimed his life.[15] State prosecutors believed that Murray's over-prescription and administration of various drugs rose to the level of criminal medical negligence.[16]

Murray's trial began on September 27, 2011 in Los Angeles County Superior Court.[17] From the very first day, *People of the State of California v. Conrad Robert Murray* was the subject of intense and relentless media scrutiny.[18]

On November 11, 2011, the jury found Murray guilty of involuntary manslaughter, eliciting cheers from crowds gathered around the courthouse.[19] Murray was sentenced to four years in prison, the maximum penalty under the applicable

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9. *See, e.g.*, *Doctor: Michael Jackson Was an Addict*, CBSNEWS.COM (July 9, 2009, 12:05 AM), http://www.cbsnews.com/8301-207_162-5145776.html.

10. *See* Danielle M. Nunziato, Note, *Preventing Prescription Drug Overdose in the Twenty-First Century: Is the Controlled Substances Act Enough?*, 38 HOFSTRA L. REV. 1261, 1262–63 (2010) ("In the past three years, actor Heath Ledger, celebrity deejay Adam 'DJ AM' Goldstein, and former Playboy model Anna Nicole Smith, among others, have all lost their lives to prescription drug overdose.") (citations omitted).

11. Richard Esposito, *Police Say Michael Jackson 'Heavily Addicted' to Oxycontin*, ABC NEWS (June 26, 2009), http://abcnews.go.com/Blotter/MichaelJackson/story?id=7938599.

12. *Jackson's Death Officially Ruled a Homicide*, TODAY.COM (Aug. 28, 2009, 6:11 PM), http://www.today.com/id/32598793#.UsCT8_QSiSo.

13. *Id.*

14. Natalie Finn, *Jackson Doc on the Move Again as Investigation Continues with State Attorney, DEA's Help*, E! ONLINE (July 2, 2009, 5:46 PM), http://www.eonline.com/news/132593/jackson-doc-on-the-move-again-as-investigation-continues-with-state-attorney-dea-s-help; Russell Goldman, *Prosecutors to Indict Michael Jackson's Doctor, Conrad Murray*, ABC NEWS (Jan. 8, 2010), http://abcnews.go.com/Entertainment/prosecutors-indict-michael-jacksons-doctor-conrad-murray/story?id=9515389.

15. *Coroner's Preliminary Finding: Jackson Overdosed on Propofol*, CNN (Aug. 25, 2009, 9:29 AM), http://www.cnn.com/2009/SHOWBIZ/Music/08/24/michael.jackson.propofol/index.html.

16. *Dr. Conrad Murray Trial Primer: Charged with Involuntary Manslaughter of Michael Jackson*, ABC 7, http://abclocal.go.com/kabc/feature?section=news/entertainment&id=8368852 (last visited Jan. 27, 2014).

17. *Id.*

18. *See* James Rainey, *On the Media: HLN Turns Up Histrionics for Conrad Murray Trial*, L.A. TIMES (Oct. 1, 2011), http://articles.latimes.com/2011/oct/01/entertainment/la-et-onthemedia-20111001.

19. *Jackson Fans Cheer Verdict: "Oh My God, Guilty!,"* CNN (Nov. 8, 2011, 8:21 AM), http://www.cnn.com/2011/11/07/justice/california-conrad-murray-reaction/index.html.

statute.[20] His sensational trial and uncompromising conviction sent a strong message to the medical community—when a doctor over-prescribes medication, he exposes himself to the danger of criminal liability.[21]

The criminalization of negligent over-prescription is a contentious legal issue among physicians, particularly because such prosecutions have been on the rise in recent years.[22] Medical professionals and their advocates have voiced concerns that the legal contours of this crime are ill-defined, drawing attention to an apparent lack of predictability relative to the serious consequences.[23] Much of the debate centers on the difficulty of establishing a theory of mens rea for involuntary manslaughter that comports with the unique doctor-patient relationship.[24] The nebulous quality of this element has been exacerbated by the scarcity of precedent prior to the last twenty years, especially when compared to the massive waves of civil medical malpractice litigation.[25] Some have openly questioned the fundamental logic of holding physicians criminally liable for good faith (albeit misguided or poorly-executed) attempts to improve patient health through unconventional prescriptions.[26]

This Note will explore the various theories surrounding criminally negligent over-prescription, using the recent and highly-publicized outcome in the trial of Dr. Conrad Murray as a framing device. Through this discussion, it will argue that involuntary manslaughter prosecution is a necessary social mechanism to deter criminally negligent over-prescription, due to the absence of effective professional

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20. Jennifer Medina, *Jackson's Doctor Is Sentenced to Four Years*, N.Y. TIMES, Nov. 30, 2011, at A16.

21. *See* Alan Duke, *Conrad Murray Sentenced to Four Years Behind Bars*, CNN (Nov. 30, 2011, 5:46 AM), http://www.cnn.com/2011/11/29/justice/california-conrad-murray-sentencing/index.html (quoting Judge Michael Pastor's statement at sentencing that Murray "stands convicted of the death of another human being" after a "cycle of horrible medicine").

22. *See* Edward Monico et. al., *The Criminal Prosecution of Medical Negligence*, 5 INTERNET J.L. HEALTHCARE & ETHICS, no. 1, 2006, http://ispub.com/IJLHE/5/1/5237 (discussing the increase in the number of criminal prosecutions for medical malpractice over the past twenty years).

23. *See id.* ("Despite this explanation, what medical acts transform tort negligence into criminal negligence remains anybody's guess. Courts and common law have not been helpful in clarifying how criminal negligence applies to the practice of medicine.").

24. *See* James A. Filkins, *"With No Evil Intent": The Criminal Prosecution of Physicians for Medical Negligence*, 22 J. LEGAL MED. 467, 492 (2001) (discussing the potentially disproportionate importance of mens rea in criminal cases involving medical negligence); *see also* Alexander McCall Smith, *Criminal or Merely Human? The Prosecution of Negligent Doctors*, 12 J. CONTEMP. HEALTH L. & POL'Y 131, 133 (1995) (examining the different types of mens rea which contribute to a finding of criminal liability in medical malpractice cases).

25. *See* Monico et al., *supra* note 22 ("To describe the criminal prosecution of health care providers in the United States as a trend might be asking too much from the term when you compare the flurry of criminal cases to the blizzard of civil litigation providers face when they are accused of medical malpractice."); *see also* Ronald L. Eisenberg & Leonard Berlin, *Malpractice Issues in Radiology: When Does Malpractice Become Manslaughter?* 179 AM. J. ROENTGENOLOGY 331, 332 (2002) ("Criminal prosecution of negligent physicians has historically been uncommon.").

26. *See* Monico et al., *supra* note 22 (considering theoretical arguments against criminal liability for medical negligence, including the objection that negligent physicians have not voluntarily committed any wrong); *see also* Smith, *supra* note 24, at 135–37 (arguing that the complexity and special exigency of medical practice should preclude a finding of criminal liability for negligence).

self-discipline by state medical boards. Part II will give a more detailed account of the circumstances leading to Michael Jackson's death and Murray's subsequent conviction. Part III will give a brief historical overview of the prosecution of physicians for involuntary manslaughter. Part IV will analyze the various legal bases for establishing criminal negligence in this type of situation. Finally, Part V will examine the policy questions which fuel the debate about imposing criminal liability for negligent over-prescription.

II. MICHAEL JACKSON'S DEATH AND *PEOPLE V. MURRAY*

Murray first entered Jackson's service in May 2009 as part of an arrangement brokered by AEG Live, the promoter for Jackson's most recent (and, unbeknownst to them, final) tour.[27] Jackson remembered that Murray had successfully treated one of his children in the past, and insisted on hiring Murray as a personal physician to provide specialized day-to-day care at his home.[28] In exchange for his undivided medical attention, Murray received a handsome six-figure monthly salary.[29] For six weeks, Murray treated Jackson with a variety of prescription drugs, mainly to assuage the artist's famously intractable insomnia.[30]

Jackson's favorite sleep medication was propofol, a powerful anesthetic typically applied during surgical procedures in a hospital environment.[31] Propofol is not commonly recommended for treating insomnia, and government regulations advise that it should only be used by trained anesthetists equipped with the appropriate monitoring tools.[32] Its exceptional strength makes it ill-suited for regular household administration.[33] Nonetheless, Jackson preferred propofol over all other sleep treatments, affectionately referring to the drug as his "milk."[34] Prior to hiring Murray, he reportedly consulted three other doctors in search of a propofol prescription, all of whom refused on safety-related grounds.[35]

At first, Murray was willing to provide Jackson with an intravenous solution of

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27. *See Dream Job Turns to Tragedy for Jackson Doctor*, TODAY.COM (July 10, 2009, 6:14 PM), http://www.today.com/id/31855763/site/todayshow/ns/today-entertainment/t/dream-job-turns-tragedy-jackson-doctor/#.UQ9h62ckSSo.

28. *See id.*

29. *See id.*

30. *See Coroner's Preliminary Finding*, *supra* note 15.

31. *See* Alan Duke & Saeed Ahmed, *Diprivan Risk Well-Known to Doctors*, CNN (July 3, 2009, 9:08 PM), http://www.cnn.com/2009/SHOWBIZ/Music/07/03/jackson.diprivan/; *see also Michael Jackson Referred to Drug Propofol as 'Milk,'* TELEGRAPH (Aug. 27, 2009, 7:06 AM), http://www.telegraph.co.uk/culture/music/michael-jackson/6097472/Michael-Jackson-referred-to-drug-propofol-as-milk.html.

32. *See* FOOD & DRUG ADMIN., DIPRIVAN 32–33 (2008), *available at* http://www.accessdata.fda.gov/drugsatfda_docs/label/2008/019627s046lbl.pdf. Propofol is the generic name for Diprivan, and the two names are used interchangeably in medical literature. *See id.* at 1; *see also* Duke & Ahmed, *supra* note 31.

33. *See* Elizabeth Landau, *Diprivan Not Approved for Sleep Disorders*, CNN (July 2, 2009, 2:53 PM), http://www.cnn.com/2009/HEALTH/07/02/diprivan.propofol.jackson/index.html.

34. *See Michael Jackson Referred to Drug Propofol as 'Milk,' supra* note 31.

35. *See Jackson's Death Officially Ruled a Homicide*, *supra* note 12.

propofol on demand.[36] He was at Jackson's bedside in this capacity almost every night.[37] However, as time passed, Murray began to fear that Jackson was developing a serious addiction to the drug.[38] Murray then attempted to wean his patient off of propofol by administering combinations of other pharmaceuticals, which appeared to be equally effective in putting Jackson to sleep.[39]

During the night of June 24, Jackson experienced a particularly acute case of insomnia after practicing dance choreography for an upcoming concert.[40] All through the night and into the morning of June 25, Murray gave Jackson three different drugs—valium, lorazepam, and midazolam—in an attempt to induce sleep without resorting to propofol.[41] None of them succeeded in putting Jackson to sleep.[42] Throughout the failed treatments, Jackson complained that he could not function without sleep, and intimated that he would have to cancel concerts if he could not get his rest.[43] Jackson pleaded with Murray for hours, trying to convince him to switch to the propofol.[44]

Finally, at approximately 10:40 AM, Murray gave in to Jackson's repeated requests and administered a propofol injection.[45] Jackson quickly fell asleep, and Murray left the bedroom.[46] But when Murray returned some time later, he discovered that Jackson had stopped breathing.[47] Murray first attempted to resuscitate Jackson by performing CPR and injecting flumazenil, a drug intended to reverse the effects of an overdose.[48] When these efforts failed, he summoned an ambulance to take Jackson to the UCLA Medical Center.[49] There, the King of Pop was pronounced dead at 2:26 PM.[50]

After a full autopsy, the coroner reported that Jackson had experienced a fatal cardiac arrest caused by "acute propofol intoxication."[51] Experts observed that while Murray had injected a relatively small dose of propofol, there was a high likelihood that it would react negatively to the other drugs already present in

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36. *See Michael Jackson Referred to Drug Propofol as 'Milk,' supra* note 31.
37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See* Howard Breuer, *Michael Jackson's Plea to Doctor: 'Please, Please' Give Me Propofol*, PEOPLE.COM (Oct. 7, 2011, 6:00 PM), http://www.people.com/people/article/0,,20535487,00.html.
44. *See id.*
45. *See Coroner's Preliminary Finding*, *supra* note 15.
46. *See id.*
47. *See id.*
48. *See id.*
49. *See Michael Jackson Dead at 50 After Cardiac Arrest*, CNN (June 25, 2009), http://www.cnn.com/2009/SHOWBIZ/Music/06/25/michael.jackson/.
50. *See id.*
51. *See Jackson's Death Officially Ruled a Homicide*, *supra* note 12.

Jackson's system.[52] Contrary to the directions of the Food and Drug Administration, Murray did not keep any of the recommended equipment for patient monitoring, precision dosing, and resuscitation at Jackson's home.[53]

During Murray's trial in Los Angeles County Superior Court, the prosecution endeavored to portray Jackson as the innocent victim of Murray's negligent conduct.[54] In their opening statement, prosecutors told the jury that "misplaced trust in the hands of [Murray] cost Michael Jackson his life," claiming that Murray had abandoned "all principles of medical care" throughout the course of treatment.[55] The defense countered with the theory that Jackson had actually administered the fatal dose of propofol to himself after Murray left the room.[56] However, the prosecution won a major victory when Judge Michael Pastor instructed the jury, over the defense's objection, that they could convict Murray of involuntary manslaughter even if they believed the defense's alternative account.[57] According to Judge Pastor, Murray could still be found guilty if he "should have foreseen the possibility of harm that could result from his act."[58]

Judge Pastor further instructed the jury on the legal standard: in order to find Murray guilty, they had to determine either that he had committed a lawful act with criminal negligence or that he had failed to perform a legal duty due to criminal negligence.[59] After hearing testimony from forty-nine witnesses and examining a wide body of evidence—including a tape of Jackson speaking in a severely drug-addled state—the jury returned a guilty verdict.[60] The prosecution had successfully convinced them that Murray's actions demonstrated a lack of care tantamount to criminal negligence.[61]

Although Murray did not testify at trial, he exhibited a noted lack of remorse in interviews prior to his conviction.[62] He was quoted as saying, "I don't feel guilty because I did not do anything wrong."[63] At sentencing, Judge Pastor issued a lengthy statement castigating Murray for "blaming the victim," expressing aston-

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52. *See id*.

53. *See* Corky Siemaszko, *Michael Jackson Autopsy Report Confirms Singer Suffered from Vitiligo, Wore Wig, Had Tattooed Makeup*, N.Y. DAILY NEWS (Feb. 10, 2010, 11:00 AM), http://www.nydailynews.com/entertainment/gossip/michael-jackson-autopsy-report-confirms-singer-suffered-vitiligo-wore-wig-tattooed-makeup-article-1.170898.

54. *See* Luchina Fisher & Bryan Lavietes, *Key Moments from Michael Jackson Death Trial*, ABC NEWS (Nov. 4, 2011), http://abcnews.go.com/Entertainment/key-moments-michael-jackson-death-conrad-murray-manslaugter/story?id=14873219.

55. *First Witnesses Testify in Trial of Michael Jackson's Doctor*, CNN (Sep. 27, 2011, 10:15 PM), http://www.cnn.com/2011/09/27/justice/california-conrad-murray-trial/.

56. Fisher & Lavietes, *supra* note 54.

57. *Id.*

58. *Id.*

59. *Id.*

60. Duke, *supra* note 21.

61. *See id.*

62. *Id.*

63. *Id.*

ishment at the "umbrage and outrage on the part of Dr. Murray against the decedent, without any, any indication of the slightest involvement in this case."[64] Judge Pastor sentenced him to four years' imprisonment, the maximum available penalty, even though Murray was technically eligible for probation.[65] Members of Jackson's family issued a statement promoting this sentence as a reminder to physicians that "they cannot sell their services to the highest bidder and cast aside their Hippocratic Oath to do no harm."[66]

III. HISTORICAL BACKGROUND

A. Past Reluctance to Convict: From Thompson *to the 1980's*

Members of the medical profession have long revered the physician's duty to exercise proper care when prescribing drugs.[67] Hippocrates, the "father of modern medicine," included this statement in the famed Hippocratic Oath: "I will apply dietetic measures for the benefit of the sick according to my ability and judgment; I will keep them from harm and injustice. I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect."[68] These principles remain relevant to physicians today—in fact, many modern medical schools administer an updated version of the Hippocratic Oath to their graduating students.[69] In light of this deeply-rooted sentiment, American courts have examined the legal consequences of negligent prescription since the earliest years of the Republic.[70] However, until very recently, judges have expressed considerable reticence regarding criminal prosecution for such acts.[71]

The characterization of negligent prescription as involuntary manslaughter first entered American jurisprudence in *Commonwealth v. Thompson*, an 1809 case from the Supreme Judicial Court of Massachusetts.[72] The defendant Thompson, an itinerant doctor of questionable pedigree, advertised his ability to "cure all fevers" with a colorful assortment of exotic medicines and folk remedies.[73] A prospective patient invited Thompson into his home, hoping to cure a cold which had left him

64. *Id.*
65. *Id.*
66. *Id.*
67. *See* Alex Sakula, *In Search of Hippocrates: A Visit to Kos*, 77 J. ROYAL SOC'Y MED. 682, 682 (1984).
68. *Id.* (describing Hippocrates as the "father of modern medicine"); Ludwig Edelstein, THE HIPPOCRATIC OATH: TEXT, TRANSLATION AND INTERPRETATION 3 (1943).
69. *See* Sakula, *supra* note 67, at 687.
70. *See* Monico et al., *supra* note 22 (examining criminal medical malpractice cases, including one dating back to 1809).
71. *See* Filkins, *supra* note 24, at 469–70 (describing the scarcity of successful criminal prosecutions for medical negligence prior to the 1990s).
72. 6 Mass. (5 Tyng) 134 (1809); *see also* Monico et al., *supra* note 22 (describing *Thompson* as the first published case of criminal prosecution for an act of medical negligence in the United States).
73. *Thompson*, 6 Mass. (5 Tyng) at 134.

bedridden for several days.[74] For hours, Thompson subjected the patient to a variety of unconventional treatments, which had the collective effect of causing extreme perspiration and exhaustion.[75] Most notably, he administered a powder of *lobelia inflata* (then commonly known as "Indian tobacco"), which caused the patient to vomit uncontrollably.[76] Throughout the latter half of this treatment, the patient experienced terrible convulsions, and at one point protested that he was "dying."[77] By evening of the next day, he was dead.[78] Evidence showed that the patient's death resulted from damage to his digestive system, incurred from continuous exposure to Thompson's dubious practices.[79]

The prosecution pushed for a murder conviction, but the court quickly rejected this charge because there was no evidence that Thompson intended any harm to his patient.[80] On the contrary, the court felt that his actions and statements demonstrated a good faith effort to cure the cold.[81] Alternatively, the Solicitor General advanced a manslaughter theory, on grounds that Thompson "rashly and presumptuously administered to the deceased a deleterious medicine, which, in his hands, by reason of his gross ignorance, became a deadly poison."[82] The court was more receptive to this position, but ultimately felt that Thompson's conduct did not even rise to the level of manslaughter.[83] Having determined that the prosecution's evidence was insufficient to support the indictment, the court acquitted Thompson of all charges.[84]

In dispensing with the manslaughter charge, the court remarked that Thompson's extraordinary ignorance was readily apparent.[85] He could not have reasonably expected his medication to work after observing its ill effects over the first few hours of treatment.[86] The opinion candidly described Thompson as a "quack" wholly lacking in knowledge, training, and experience.[87]

Yet for all its stated disdain, the court unanimously decided that Thompson was innocent—he did not understand the danger of his prescriptions, and thus could not be criminally culpable for their mortal effects.[88] The court concluded:

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74. *Id.*
75. *Id.* at 135.
76. *Id.* at 136.
77. *Id.* at 135.
78. *Id.* at 135–36.
79. *Id.* at 138.
80. *Id.* at 139.
81. *Id.*
82. *Id.*
83. *Id.* at 140.
84. *Id.* at 141–42.
85. *Id.* at 139.
86. *Id.*
87. *Id.* at 142.
88. *Id.*

> If one, assuming to be a physician, however ignorant of the medical art, administers to his patient remedies which result in his death, he is not guilty of manslaughter, unless he had so much knowledge or probable information of the fatal tendency of his prescriptions as to raise a presumption of obstinate, willful rashness.[89]

Interestingly, the court felt this ruling would apply even when the supposed "physician" was unlicensed or otherwise untrained.[90]

While it is doubtful that identical facts would produce the same result in any U.S. court today, *Thompson* set the stage for almost two hundred years of judicial reluctance to convict physicians of manslaughter for fatal prescriptions.[91] Up until the late twentieth century, criminal prosecution of negligent physicians was exceedingly uncommon, especially when compared to civil tort litigation in the medical field.[92] Prosecution for criminally negligent over-prescription was especially rare.[93] Between 1809 (when *Thompson* was decided) and 1981, only fifteen cases of manslaughter for medical negligence ever reached the published appellate level.[94] Even the most significant historical periods of advancement in civil medical malpractice, such as the massive surge of such litigation between 1835 and 1865, did not produce concurrent increases in criminal prosecution.[95] In 1990, the American Medical Association ("AMA") described successful prosecution for clinical mistakes as "almost unknown."[96]

One of the rare involuntary manslaughter convictions during this period appeared in *Commonwealth of Pennsylvania v. Youngkin*.[97] Dr. Youngkin had prescribed several medications to his patient, seventeen-year-old Barbara Fedder, including seven prescriptions for the barbiturate Tuinal.[98] While attending a party, Fedder lost consciousness and ultimately suffocated to death when the contents of her stomach flooded into her lungs.[99] The coroner and expert testimony verified that the cause of asphyxiation was the suppression of Fedder's gag reflex due to

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89. *Id.*

90. *Id.*

91. *See* Filkins, *supra* note 24, at 472 (discussing the rarity of reported cases involving criminal prosecution of medical negligence between 1809 and 1981).

92. *See* Monico et al., *supra* note 22 ("To describe the criminal prosecution of health care providers in the United States as a trend might be asking too much from the term when you compare the flurry of criminal cases to the blizzard of civil litigation providers face when they are accused of medical malpractice.").

93. *See* Filkins, *supra* note 24, at 472 (discussing the uncommonness of criminal medical negligence cases generally, including the limited number of cases involving negligent over-prescription).

94. *Id.*

95. *Cf.* Allen D. Spiegel & Florence Kavaler, *America's First Medical Malpractice Crisis, 1835–1865*, 4 J. COMMUNITY HEALTH 283, 283–308 (1997) (examining the first major historical wave of civil medical malpractice litigation in the mid-19th century).

96. Filkins, *supra* note 24, at 469–70 (quoting *Pennsylvania Prosecutor Finds No Grounds for Charges Against Surgeon*, AM. MED. NEWS, June 1, 1990, at 5).

97. 427 A.2d 1356, 1369–70 (Pa. Super. Ct. 1981).

98. *Id.* at 1359.

99. *Id.*

excess levels of Tuinal in her system.[100] Experts further testified that the amount of Tuinal prescribed to Fedder far exceeded the ordinary dosage.[101] The last time Fedder visited the pharmacy to refill her Tuinal prescription, her pharmacist phoned Youngkin out of concern for Fedder's visibly unstable condition.[102] Youngkin brusquely dismissed the objections and authorized the refill.[103]

The Pennsylvania Superior Court affirmed the conviction for involuntary manslaughter, finding that Youngkin had "consciously disregarded a substantial and unjustifiable risk" which led to "a gross deviation from the standard of conduct."[104] Youngkin's over-prescription was not the sole or immediate cause of Fedder's death.[105] However, his negligent treatment was "a direct and substantial factor in producing the death."[106] As such, his conduct fell within the confines of Pennsylvania's involuntary manslaughter statute.[107]

B. Modern Rise of Prosecution: From the 1990's to the Present

While *Youngkin* and its few companions in other jurisdictions illustrated some willingness to convict physicians for their mistakes, the sheer scarcity of relevant precedent made it difficult to ascertain what kind of negligent prescription qualified as involuntary manslaughter.[108] Due to a relative lack of interest in pursuing prosecution, the legal bases for the crime suffered from a seeming lack of predictability and consistency.[109] Throughout the state courts, the standard for involuntary manslaughter in over-prescription cases had not evolved much from *Thompson*'s "obstinate, willful rashness."[110]

At first, the medical community did not seem overly concerned about this ambiguity, if only because the threat of criminal prosecution was so slim.[111] However, the 1990s and 2000s heralded an unprecedented increase in criminal prosecution for medical negligence, placing doctors on high alert.[112] Physicians were subjected to charges of criminal negligence at a rate which seemed unthink-

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100. *Id.* at 1360.
101. *Id.* at 1361.
102. *Id.*
103. *Id.*
104. *Id.*
105. *See id.* at 1359–60.
106. *Id.* at 1362.
107. *Id.* at 1361; *see also* 18 PA. CONS. STAT. § 2504 (2008).
108. *See* Monico et al., *supra* note 22 ("Courts and common law have not been helpful in clarifying how criminal negligence applies to the practice of medicine.").
109. *See* Eisenberg & Berlin, *supra* note 25, at 333 ("The circumstances under which a physician's error of medical judgment triggers criminal prosecution are not totally clear.").
110. *See* Monico et al., *supra* note 22 ("Despite this explanation, what medical acts transform tort negligence into criminal negligence remains anybody's guess.").
111. *See* Filkins, *supra* note 24, at 469–70 (describing the general lack of concern among medical professionals regarding criminal prosecution for negligence prior to the 1990s).
112. *See id.* at 470 (describing a subsequent increase in prosecution which triggered a corresponding increase in concern within the medical community); *see also* Deborah Hellman, *Prosecuting Doctors for Trusting Patients*,

able only a decade ago.[113] Although the number of criminal cases still paled in comparison to the amount of civil malpractice litigation, the healthcare industry found this upward trend highly troubling.[114] By 1995, the AMA had shifted its commentary on the issue to an attitude of stern resistance against "the attempted criminalization of health care decision-making, especially as represented by the current trend toward criminalization of malpractice."[115]

One high-profile case from this new era was *United States v. Wood*, decided in 2000.[116] Dr. C. Douglas Wood was a surgeon who performed an abdominal operation on his patient, Virgil Dykes.[117] In the days following the surgery, a resident overseeing Dykes' condition noticed that his blood potassium level was dangerously low.[118] Attempts to introduce potassium into Dykes' body through the gastrointestinal system failed, because his recovering stomach was unable to absorb it.[119] When Wood arrived on the scene, he injected Dykes with a highly concentrated solution of potassium chloride and other drugs in hopes of raising his potassium level.[120] Unfortunately, heavy doses of potassium chloride in the bloodstream can have lethal effects on the human heart.[121] Surely enough, Dykes suffered a fatal cardiopulmonary arrest.[122] He died shortly after the injection, despite Wood's attempts to resuscitate him.[123]

After nearly four years of investigation, the federal government indicted Wood for first-degree murder.[124] At trial, the court also instructed the jury on lesser counts of second-degree murder and manslaughter.[125] The jury eventually convicted Wood of involuntary manslaughter, and the court sentenced him to five

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16 GEO. MASON L. REV. 701 (2009) ("Prosecutions of physicians under drug trafficking laws in connection with their prescribing controlled substances are on the rise.").

113. *See* Edward Richards, *Public Health Law Map*, LSU LAW (Apr. 19, 2009), http://biotech.law.lsu.edu/map/CriminalLaw.html ("Suggestions that physicians might face criminal prosecution for what were considered routine business practices were dismissed by most medical care attorneys. Now, prominent hospitals and medical schools have paid hundreds of millions of dollars in administrative and criminal fines, health care practitioners and administrators have gone to jail, and all hospitals are working on plans to demonstrate compliance with federal law so that they can claim mitigation under the Federal Sentencing Guidelines if they are accused of criminal behavior.") (citation omitted); *see also Criminal-Negligence Charge Rarely Filed Against Doctors*, SEATTLE TIMES (Jan. 15, 1998, 12:00 AM), http://community.seattletimes.nwsource.com/archive/?date=19980115&slug=2728863 ("A decade ago, the AMA said, it was unheard of to press criminal negligence charges.").

114. *See* Filkins, *supra* note 24, at 470 (stating that by 1995, medical professional organizations "feared a trend was beginning to emerge that would lead to increasing numbers of physician prosecutions.").

115. *Resolution No. 202, Criminalization of Health Care Decision-Making*, 1995 PROC. AM. MED. ASS'N 343.

116. 207 F.3d 1222 (10th Cir. 2000).

117. *Id.* at 1226.

118. *Id.*

119. *Id.* at 1227.

120. *Id.*

121. *Id.* at 1230.

122. *Id.* at 1227.

123. *Id.*

124. *Id.*

125. *Id.*

months imprisonment with a $25,000 fine.[126] On appeal, the Tenth Circuit agreed that the evidence was sufficient to support a charge of involuntary manslaughter, such that a jury could find Wood guilty beyond a reasonable doubt.[127] Expert testimony confirmed that the quantity and speed of the potassium chloride injection far exceeded the maximum beneficial dosage, making the injection "reckless enough to constitute a lack of due caution and circumspection."[128] This was properly construed as criminal negligence reflecting a "wanton or reckless disregard for human life," the requisite mens rea for involuntary manslaughter under federal statute.[129] Although the Tenth Circuit eventually remanded on other grounds, the *Wood* case demonstrated a new, more vigorous government interest in prosecuting doctors for involuntary manslaughter.[130]

Both legal and medical commentators have advanced several theories to explain the spike in prosecution throughout the past two decades.[131] Some suggest that, with the modern emergence of white collar crime, state prosecutors have become more willing to delve into the hybridized civil and criminal thicket of medical malpractice.[132] Others posit a growing suspicion among the government and the general populace that the medical profession has been lax in policing itself.[133] More broadly, this trend could reflect a deepening societal disillusionment with the prestige and goodwill of the medical profession.[134]

Increased prosecution may also find its roots in heightened executive awareness.[135] For example, in 1999 the Clinton Administration gave great publicity to a report by the Institute of Medicine of the National Academy of Sciences, which

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126. *Id.*

127. *Id.* at 1234.

128. *Id.* (internal quotation marks omitted).

129. *Id.* at 1228.

130. *See id.* at 1238 (remanding the case for new trial on charge of involuntary manslaughter due to prejudicial statements made to the jury); *see also* Monico et al., *supra* note 22 (discussing the increase in the number of criminal prosecutions for medical malpractice over the past twenty years).

131. *See* Monico et al., *supra* note 22 (examining several theories which attempt to explain the rise in criminal prosecutions of medical professionals for negligence).

132. *See generally* Pamela H. Bucy, *Fraud by Fright: White Collar Crime by Health Care Providers*, 67 N.C. L. REV. 855 (1989) (comparing crimes by health care providers to other types of white collar crime, analyzing the theories historically used to prosecute medical professionals).

133. *See* Filkins, *supra* note 24, at 471 ("Many commentators agree with the AMA that an increasing number of physicians are being prosecuted for clinical mistakes, but explain the trend by pointing to the medical profession's failure to police itself by, for example, failing to revoke the licenses of incompetent physicians."); *see also* Robert S. Adler, *Stalking the Rogue Physician: An Analysis of the Health Care Quality Improvement Act*, 28 AM. BUS. L.J. 683, 689 (1991) (discussing the infrequency of effective professional self-discipline among state medical boards); Monico et al., *supra* note 22 (examining criticism regarding the perceived failure of alternative safeguards for medical negligence, particularly the inefficacy of state licensing boards).

134. *See* Filkins, *supra* note 24, at 471 ("Still others note that, along with the loss of public respect for physicians, there is also less reluctance to demand severe penalties when a bad outcome does occur.").

135. *See* Opinion, *Moving Fast on Patient Safety*, N.Y. TIMES, Dec. 8, 1999, http://www.nytimes.com/1999/12/08/opinion/moving-fast-on-patient-safety.html (reporting President Bill Clinton's renewed interest in addressing the problem of medical negligence).

listed medical error as the eighth highest cause of death in America—responsible for up to 98,000 deaths each year.[136]

The Controlled Substances Act ("CSA") has also emerged as an important platform for the criminal prosecution of over-prescription specifically.[137] The CSA came into effect in 1970 as a means to regulate the manufacturing and distribution of drugs.[138] Among other provisions, the CSA requires physicians to register with the federal government and adhere to various prescription guidelines.[139] While the statute was not initially viewed as a primary vehicle for prosecuting doctors, government attorneys began using the CSA and its state law equivalents to go after physicians prescribing medicine in violation of its tenets.[140] Such cases did not necessarily include involuntary manslaughter in their deliberations, but they did raise the legal profile of criminal over-prescription.[141] This has led some theorists to suggest that state prosecutors should bring involuntary manslaughter charges hand-in-hand with CSA charges for cases involving fatal patient overdose.[142] In the time leading up to the Conrad Murray trial, legal experts speculated that the prosecution would utilize the CSA in addition to California manslaughter law.[143]

Another contributor to the increased scrutiny of over-prescription is the growing development of "concierge medicine" within the healthcare industry.[144] Concierge medicine is a personalized form of healthcare where an individual pays the physician directly for increased one-on-one access.[145] This phenomenon emerged in response to heightened patient demand for greater doctor-patient familiarity and

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136. *See id.*; INST. OF MED., TO ERR IS HUMAN: BUILDING A SAFER HEALTH SYSTEM 1 (Linda T. Kohn et al. eds., 2000).

137. *See* 21 U.S.C. § 811 (2012); Hellman, *supra* note 112, at 705–07 (examining physicians' potential liability for illegal prescription under the Controlled Substances Act).

138. Nunziato, *supra* note 10, at 1280–81.

139. 21 U.S.C. § 822(a) (2012).

140. *See* Hellman, *supra* note 112, at 705–07 (discussing the use of the CSA as a means to prosecute physicians); Nunziato, *supra* note 10, at 1284–87 (describing the federal government's increased use of the CSA after successful prosecution in *United States v. Moore*, 423 U.S. 122 (1975), and discussing California's use, specifically).

141. *See* Nunziato, *supra* note 10, at 1289–93 (comparing the effect of CSA prosecutions to the effect of state homicide prosecutions in deterring medical negligence).

142. *See id.* at 1294 (stating that successful prosecution under the CSA for illegal prescription often satisfies factual requirements for involuntary manslaughter under state law, and proposing that prosecutors should bring simultaneous manslaughter charges to magnify the deterrent effect on medical negligence).

143. *See id.* at 1295 (arguing that Murray should be charged under various provisions of the California Uniform Controlled Substances Act in addition to manslaughter charges). *But see* Terry Baynes, *More U.S. Doctors Facing Charges Over Drug Abuse*, REUTERS (Sept. 14, 2011, 11:54 AM), http://www.reuters.com/article/2011/09/14/us-jackson-malpractice-idUSTRE78D3P620110914 (reporting that government prosecutors declined to pursue CSA charges against Murray, under the conclusion that propofol did not qualify as a controlled substance under the statutory definition).

144. *See* Nunziato, *supra* note 10, at 1274–77 (discussing the rise of concierge medicine, particularly for celebrities, and the associated implications for medical malpractice law).

145. STEVEN D. KNOPE, CONCIERGE MEDICINE 10 (2008).

sensitivity to specialized needs.[146] Today, over 5,000 doctors either partially or solely engage in concierge services.[147] Concierge doctors often cater to an exclusive clientele, tailoring their practice to suit their patients' particular lifestyles, schedules, and medical histories.[148] Unsurprisingly, this form of medicine has become highly popular among actors, musicians, and other wealthy celebrities.[149] To those who can afford to pay a personal physician, concierge medicine provides unrivaled availability, convenience, preventative care, and professional discretion.[150]

However, the format has been subject to criticism due to perceived ethical issues.[151] Concierge doctors may have their professional judgment compromised by a heightened desire to please their sole client, on whom they depend for the majority of their income.[152] In terms of prescribing drugs, this imbalance of power in the doctor-patient relationship may lead to the stereotypical situation of a physician acting as the wealthy patient's "personal pharmacy."[153] Dr. Conrad Murray's arrangement with Michael Jackson was a textbook example of celebrity concierge medicine, and his conviction suggests that their professional relationship was distorted by the aforementioned concerns.[154]

Academic musings aside, the rise in prosecutions may simply be the product of hard statistical realities. According to the Centers for Disease Control and Prevention, fatal overdoses from prescription drugs in the United States increased from approximately 4,000 deaths in 1999 to 13,800 deaths in 2006.[155] In other words, the annual number of fatal prescription drug overdoses more than tripled over a seven-year period.[156]

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146. Anthony J. Linz et al., *Impact of Concierge Care on Healthcare and Clinical Practice*, 105 J. AM. OSTEOPATHIC ASS'N 515, 515 (2005).

147. JoNel Aleccia, *Patients Face Bitter Choice: Pay Up or Lose Care*, NBCNEWS.COM (Nov. 23, 2009 8:23 AM), http://www.nbcnews.com/id/34019606/ns/health-health_care/t/patients-face-bitter-choice-pay-or-lose-care/.

148. *See* Nunziato, *supra* note 10, at 1275–76 (describing concierge medicine as "a concept that has deep roots in the lifestyles of the rich and famous").

149. *See id.* at 1268 (describing a special preference for concierge medicine among many celebrities).

150. *See id.* at 1275 ("Celebrity patients use concierge medical services primarily for the availability, personalized attention, convenience, and discretion of the physician.").

151. *See* Aleccia, *supra* note 147.

152. *Doctors and Celebrities—Money Over Ethics?*, CNN (June 30, 2009, 6:37 AM), http://am.blogs.cnn.com/2009/06/30/doctors-and-celebrities-money-over-ethics/.

153. *See id.* ("Medical ethicists, while not commenting specifically about Murray, take a very cautionary view towards any doctor who devotes all or most of his time to a single patient . . . . In other words, it's hard to say no to that kind of patient.").

154. *See Dream Job Turns to Tragedy for Jackson Doctor*, *supra* note 27 (reporting the circumstances of Murray's employment, including the high pay and high pressure which contributed to Murray's prescribing potentially dangerous drugs in response to Jackson's repeated demands).

155. CTRS. FOR DISEASE CONTROL & PREVENTION, INCREASE IN FATAL POISONINGS INVOLVING OPIOID ANALGESICS IN THE UNITED STATES, 1999–2006, at 1 (2009), *available at* http://www.cdc.gov/nchs/data/databriefs/db22.htm.

156. *Id.*

IV. LEGAL CONCEPTS: INVOLUNTARY MANSLAUGHTER AND CRIMINAL NEGLIGENCE

Dr. Conrad Murray was indicted under § 192(b) of the California Penal Code, which defines involuntary manslaughter as manslaughter "in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection."[157] Murray was convicted under this statutory definition because his over-prescription of propofol and other drugs qualified as an act "without due caution and circumspection."[158]

In *People v. Klvana*, the California Court of Appeals stated that the "essential distinction between second degree murder based on applied malice and involuntary manslaughter based on criminal negligence is that in the former, the defendant subjectively realized the risk to human life created by his conduct, whereas in the latter the defendant's conduct objectively endangered life, but he did not subjectively realize the risk."[159] Thus a defendant need not fully understand the dangers of his conduct to be held liable for involuntary manslaughter, provided the conduct was objectively egregious.[160] This characterization of involuntary manslaughter places heavy emphasis on the mental state of the defendant, which represents a prime concern for cases involving over-prescription.[161]

The requisite mens rea most frequently associated with common law involuntary manslaughter in the United States is "criminal negligence."[162] The Supreme Court of California has held that acting "without due caution and circumspection" is equivalent to criminal negligence,[163] so this standard was relevant to *Murray*. Unfortunately, the term "criminal negligence" has frequently eluded comprehensive definition, and its application tends to be highly fact-specific.[164] Statutes which include this phrase do not always go into detail about how it differs from the type of negligence found in civil tort law.[165] Likewise, courts have not been especially consistent or helpful when describing criminal negligence, particularly

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157. CAL. PENAL CODE § 192(b) (West 2007).

158. *See* Duke, *supra* note 21 (describing Murray's conviction for involuntary manslaughter under California law).

159. 15 Cal. Rptr. 2d 512, 526–27 (Ct. App. 1992).

160. *See* Filkins, *supra* note 24, at 491 (stating that a failure to recognize the dangers of criminally negligent conduct may be immaterial to a finding of criminal negligence).

161. *See id.* at 471 ("Mens rea, that is, a defendant's criminally culpable state of mind, becomes a significant element of the case.").

162. *Id.* ("The mens rea ordinarily at issue in the prosecution of physicians for medical negligence is criminal negligence or recklessness.").

163. People v. Stuart, 302 P.2d 5, 9 (Cal. 1956).

164. *See* Monico et al., *supra* note 22 ("Despite this explanation, what medical acts transform tort negligence into criminal negligence remains anybody's guess."); Eisenberg & Berlin, *supra* note 25, at 333 ("The circumstances under which a physician's error of medical judgment triggers criminal prosecution are not totally clear.").

165. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 235–37 (2d ed. 1986).

as applied to medical malpractice.[166] Black's Law Dictionary only defines criminal negligence as "gross negligence so extreme that it is punishable as a crime."[167]

At the very least, a defendant's actions must go far beyond the pale of ordinary negligence to qualify as criminally negligent in most jurisdictions.[168] A finding of unreasonable carelessness sufficient to establish negligence (or even gross negligence) in tort does not necessarily satisfy the requirements of criminal negligence.[169] Criminally negligent activity represents a severe deviation from reasonable behavior, such that the defendant should have been able to appreciate the serious risk involved, even though he failed to do so.[170] Criminal negligence is thus conceptually distinct from recklessness, in which the defendant knowingly exposes another to an understood risk of injury.[171] However, the theoretical divide between criminal negligence and recklessness is often undercut by a tendency among journalists and commentators to use the terms interchangeably, particularly when describing one by use of the other.[172]

Certain sections of the Model Penal Code attempt to alleviate this uncertainty by establishing clearer boundaries between the different forms of mens rea for homicide.[173] The Code provides firm definitions of the terms "purposely," "knowingly," "recklessly," and "negligently" within the criminal context.[174] Section 210 of the Code describes the distinct offenses of murder, manslaughter, and negligent homicide, which are collectively grouped under the umbrella term "criminal homicide."[175] Notably, § 210.3 treats manslaughter as a crime arising primarily from recklessness, not criminal negligence.[176] This means that acts of medical malpractice amounting to "involuntary manslaughter" in some jurisdictions would be classified as the lesser offense of negligent homicide under the Code.[177]

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166. *See* Monico et al., *supra* note 22 ("Courts and common law have not been helpful in clarifying how criminal negligence applies to the practice of medicine.").

167. BLACK'S LAW DICTIONARY 1134 (9th ed. 2009).

168. *See* Eisenberg & Berlin, *supra* note 25, at 333 ("Most jurisdictions hold that something more than ordinary negligence must be proven before the defendant can be found guilty of involuntary manslaughter.").

169. *See* Filkins, *supra* note 24, at 471 (stating that civil tort law is not necessarily instructive or relevant in determinations of criminal negligence).

170. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04[D][2][b] (2d ed. 1995).

171. *See* Smith, *supra* note 24, at 139–40 (distinguishing negligence from recklessness, which is action "with indifference to the consequences for others").

172. *See, e.g.*, Fisher & Lavietes, *supra* note 54 ("Criminal negligence involved acting in a reckless way that creates a high risk of death or serious injury or acting in a way that a reasonable person would not."); *see also* Smith, *supra* note 24, at 140 ("This tendency to talk of recklessness in the same breath as gross negligence—perhaps a consequence of the general failure of common law systems to identify and clarify theoretical distinctions—was bound to lead to confusion.").

173. *See* MODEL PENAL CODE § 2.02 (2009).

174. *Id.*

175. *Id.* §§ 210.1–210.4.

176. *Id.* § 210.3.

177. *See id.* § 210.4.

However, many states have not adopted this definitional scheme.[178] California has never enacted this portion of the Model Penal Code, so Conrad Murray could not have appealed to its characterization of mens rea and negligent homicide.[179]

As it stands, the working legal definition of "criminal negligence" for involuntary manslaughter depends heavily on the facts of the case and the relevant common law precedent within each jurisdiction.[180] This poses a problem for cases of criminal over-prescription, due to the historical scarcity of such prosecutions.[181] The imprecise nature of criminal negligence adds an extra layer of subtlety to over-prescription cases, which are already complicated by the scientific particularities of medical malpractice.[182]

Dr. James A. Filkins suggests that mens rea is actually the single most important element influencing the decision to prosecute or convict a defendant physician.[183] Causation and standard of care may be difficult to explain in medical negligence cases, because a doctor's work often involves complex biochemical reactions occurring within an emergency context.[184] In lieu of wrestling with these complications, a jury may prefer to focus on the more expedient, accessible question of whether the defendant physician appeared to be inattentive or incautious.[185] Because the average juror does not have any medical training, he may give extra attention to actions which intuitively appear to be careless or unreasonable, as opposed to medical decisions which require specialized knowledge to evaluate.[186] Thus prosecutors often place particular evidentiary emphasis on conduct which exhibits broad personal carelessness.[187]

Certain statements by the jurors regarding the verdict in *Murray* suggest that Dr. Filkins's assessment may have been true for Murray's conviction.[188] In an interview following the *Murray* verdict, juror Debbie Franklin said, "We had decided the three issues we were going to focus on were the not calling 911, not

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178. *See* Charles L. Hobson, *Reforming California's Homicide Law*, 23 PEPP. L. REV. 495, 509–10 (1996) (discussing the stark differences between the Model Penal Code and California's state homicide statutes).

179. *See id.*

180. *See* Filkins, *supra* note 24, at 471–72 (discussing the lack of uniformity among determinations of criminal negligence in medical malpractice cases).

181. *See supra* Part III.A; *see also* Filkins, *supra* note 24, at 471 (discussing the uncommonness of criminal medical negligence cases generally, including the limited number of cases involving negligent over-prescription).

182. Filkins, *supra* note 24, at 471–72.

183. *Id.* at 491.

184. *See id.* ("Although the evaluation of complex issues of causation and standard of care may be more relevant to the defendant's guilt or innocence, causation and standard of care are more difficult for the lay trier of fact to comprehend, particularly when disputed by opposing experts."); *see also* Smith, *supra* note 24, at 135 ("Doctors are required daily to make delicate judgments and to exercise a high degree of skill.").

185. *See* Filkins, *supra* note 24, at 491 ("It is often simpler for the trier of fact in a criminal prosecution for medical negligence to conclude that the negligence in question actually amounted to a criminal act when the trier of fact has first decided that the defendant physician possessed a guilty state of mind.").

186. *Id.*

187. *Id.*

188. *See* Duke, *supra* note 21 (quoting juror Debbie Franklin).

having the medical equipment and him leaving the room. That was the bottom line for this case."[189] Two of these stated factors—"not calling 911" and "leaving the room"—reflect activities which do not require any technical medical knowledge to view negatively. It does not take a trained physician to know that one should immediately call an ambulance when a sleeping person has stopped breathing.[190]

Dr. Filkins also highlights two patterns of physician behavior strongly associated with findings of a physician's criminal negligence—"disregarding past experience in failing to avoid a dangerous situation" and "disregarding the facts of the patient's condition to limit harm in a timely fashion."[191] According to Dr. Filkins, "[t]he trier of fact will sometimes take a broad view of any other acts or omissions relevant to the defendant physician's medical practice to establish a pattern of conduct from which a culpable state of mind may be inferred."[192] In other words, juries may be persuaded by a history of derelict professional behavior distinct in time and place from the actions which directly caused harm to the patient.[193] This is particularly true in cases of criminally negligent over-prescription, which tend to feature long-term treatment errors culminating in a single deadly mistake.[194] Such a description applies neatly to the actions for which Conrad Murray was found criminally negligent—six weeks of regular propofol injections leading to the final, lethal dose administered on June 25, 2009.[195]

For over-prescription cases, the perceived nature of the medication itself may also play an important part in determining criminal negligence. In *Wood*, the Tenth Circuit found that the trial court's verdict was heavily influenced by expert testimony regarding the deadly effects of potassium chloride, particularly the fact that high doses of potassium chloride have occasionally been used for lethal injection.[196] Similarly, the prosecution in *Murray* took great pains to demonstrate the vast strength and specialized usage of propofol, in order to suggest that Murray's prescription of propofol to Jackson was excessive and dangerous.[197] Medical experts agreed that propofol was far too powerful to use as an everyday sleeping aid—one noted anesthesiologist said that treating insomnia with propofol

189. *Id.*

190. *See, e.g.*, *Standard First Aid w/AED Review Sheet: ECC Guidelines 2010*, DEP'T OF MED. HEALTH & ADDICTION SERVS. (2010), http://www.ct.gov/dmhas/lib/dmhas/publications/SFAAEDreviewsheet.pdf (detailing, in the form of a public information resource, the importance of calling an ambulance in the event of medical emergency).

191. Filkins, *supra* note 24, at 495.

192. *Id.* at 492.

193. *Id.*

194. *See* Nunziato, *supra* note 10, at 1277 (describing the potential for physicians to over-prescribe to patients throughout an extended period of time due to a deleterious doctor-patient relationship).

195. *Coroner's Preliminary Finding*, *supra* note 15.

196. United States v. Wood, 207 F.3d 1222, 1237 (10th Cir. 2000).

197. Fisher & Lavietes, *supra* note 54.

was "like using a shotgun to kill an ant."[198] As previously mentioned, Murray's failure to maintain the recommended safety equipment for an anesthetic of propofol's strength played a key role in convincing the jury of his guilt.[199] In this way, a finding of criminal negligence may depend in part on the potency and notoriety of the drugs prescribed.[200]

V. ARGUMENTS AND ALTERNATIVES

Predictably, members of the medical community have expressed vigorous opposition to the criminal prosecution of physicians for negligent over-prescription.[201] The intensity of this resistance has increased as the number of criminal malpractice prosecutions steadily rises.[202] For example, the AMA has repeatedly voiced its trepidation and disapproval regarding modern trends of heightened prosecution.[203]

One common objection to prosecution is that the serious social and professional stigma of criminal conviction is fundamentally disproportionate to the nature of a negligent physician's wrongdoing.[204] According to this line of thinking, doctors who act negligently do not possess the requisite malicious intent to justify a criminal prosecution.[205] The practice of medicine demands a high degree of skill and concentration, often conducted in a high-stress environment where lives are constantly on the line.[206] In such a heightened context, it may seem unjust to expose a physician to criminal liability simply because he made a well-intentioned

198. *Source: Powerful Sedative Propofol Found at Michael Jackson's Mansion,* FOXNEWS.COM (July 3, 2009), http://www.foxnews.com/entertainment/2009/07/03/source-powerful-sedative-propofol-michael-jacksons-mansion/ (quoting Dr. Howard Nearman, department chairman of anesthesia at University Hospitals Case Medical Center in Ohio).

199. *See supra* note 188 and accompanying text.

200. *See also* Joe Cantlupe & David Hasemyer, *Pills at Will: Deception, Incompetence and Greed Can Lead to Over-Prescribing,* SAN DIEGO UNION-TRIBUNE (Sept. 27, 2004), http://legacy.utsandiego.com/news/health/20040927-9999-lz1n27report.html (linking recent criminal prosecutions of physicians to increased government attention on the over-prescription of specific drugs, particularly OxyContin).

201. *See* Hellman, *supra* note 112, at 704 (criticizing the prosecution of physicians for prescription-related offenses as "forc[ing] doctors to choose between professional duty and fear of criminal sanction").

202. *See* Filkins, *supra* note 24, at 470 (tracking the AMA's gradually increasing resistance against criminal prosecution for medical negligence throughout the past several years).

203. *Id.*

204. *See* Hellman, *supra* note 112, at 704 ("The problem with criminalizing physicians' willful blindness is that in doing so we impinge on the professional obligations of physicians and criminalize morally justified conduct."); *see also* Monico et al., *supra* note 22 (discussing the argument that doctors should not be subject to criminal stigma for wrongs that they did not voluntarily commit).

205. Monico et al., *supra* note 22; *see also* Theodore G. Chiricos et al., *Inequality in the Imposition of a Criminal Label*, 19 SOC. PROBS. 553, 562–64 (1972) (noting the severity of social stigma associated with homicide convictions).

206. *See* Smith, *supra* note 24, at 135 ("Doctors are required daily to make delicate judgments and to exercise a high degree of skill.").

mistake that looks egregious in retrospect.[207] This problem is aggravated by the nebulous quality of the "criminal negligence" standard that applies to involuntary manslaughter.[208]

Professor Alexander McCall Smith offers a nuanced theoretical version of this argument that focuses on mens rea.[209] While Professor McCall Smith readily concedes that prosecution for reckless medical behavior is justified, he argues that prosecution of truly negligent (i.e. unknowing) physicians "conflicts with the principle that the morally innocent should not be convicted of serious crimes."[210] In his view, criminal prosecution of medically negligent conduct represents an inappropriate use of criminal sanction to police professional standards of competence.[211] Instead, Professor McCall Smith proposes abandoning the criminal negligence language in favor of a test for recklessness—whether the defendant deliberately exposed others to a risk of harm.[212]

A second, more policy-driven argument is that increased prosecution could make doctors reluctant to take on difficult cases or pursue experimental treatments, due to the ever-present threat of criminal liability.[213] According to this theory, doctors working under a criminal malpractice regime would routinely settle for the most conventional, predictable, and uncontroversial methods in order to shield themselves from the catastrophic professional consequences of a criminal prosecution.[214] This could stifle the advancement of medical science, and harm patients who might have benefited from riskier but potentially more effective medicines.[215] A related economic argument is that increased criminal prosecution promotes a culture of low-risk defensive medicine that could drive up the cost of healthcare

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207. *See id.* at 131 ("One view holds that it is inappropriate to criminally prosecute those who act with anything less than subjective recklessness. In the alternative, negligent behavior, in terms of a doctor's failure to meet an objectively determined standard of care, should have purely civil consequences.").

208. *See supra* Part IV.

209. *See* Smith, *supra* note 24, at 137–41 (arguing that mere negligence is not as morally culpable as recklessness, and that the misplaced concept of "criminal negligence" actually reflects societal opprobrium against recklessness).

210. *Id.* at 145.

211. *See id.* ("Reform of the law to prevent the inappropriate use of criminal sanctions as a means of regulating medical practice should ideally be achieved by a more wide-ranging reform of the law relating to involuntary homicide.").

212. *Id.* at 146.

213. Monico et al., *supra* note 22. It is important to note that these kinds of objections do not apply to the *Murray* case. However, they may be relevant in other criminal negligence situations involving unusual treatments in times of emergency. For example, the defendant in *Wood* made the fatal injection in a last-ditch effort to prevent the patient from drowning from excess fluid in his lungs. United States v. Wood, 207 F.3d 1222, 1237 (10th Cir. 2000).

214. *See* Monico et al., *supra* note 22 (examining the argument that criminal prosecution "will drive physicians away from taking hard cases or experimenting in new areas").

215. *Id.* ("There may come a day when only the bravest or most foolhardy clinician will opt for anything but the least controversial option.").

for all patients.[216]

All of these criticisms rely upon the presence of acceptable alternatives, as even the most stalwart opponent of criminal prosecution would agree that society requires some mechanism to police negligent over-prescription.[217] Many industry theorists point to the interaction between professional disciplinary measures and the civil torts system as a substitute for criminal sanction.[218] These critics argue that state medical boards and professional associations, as opposed to government prosecutors, are best situated to deal with medical negligence in general.[219] Board investigators have access to specialized medical knowledge, which makes them more qualified to judge the extent of a physician's negligence.[220] When investigators determine that a doctor has acted with an impermissible lack of care in issuing prescriptions, the board can quickly suspend or revoke his license to practice medicine.[221] Such a decision may be informed by a conspicuous history of civil medical malpractice suits.[222] Under this scheme, the combined fears of professional termination and disastrous financial loss would suffice to deter physicians from grossly negligent prescription.[223] Thus doctors would have due incentive to avoid severely negligent behavior, without bearing the excessive and unjustified stigma of criminal punishment.[224]

Unfortunately, current practice demonstrates that physician self-governance has not risen to the occasion in this way.[225] Statistics on the regulatory methods of state medical boards suggest that suspensions and revocations for incompetence are generally quite rare, even in the presence of repeated civil penalties.[226] According

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216. *See id.* ("Others argue that such a precedent will encourage the practice of defensive medicine and further drive up the cost of health care.").

217. *See* Hellman, *supra* note 112, at 743–45 (acknowledging the need for physicians to balance their right to professional discretion with their societal obligation to provide competent care).

218. *See, e.g.*, Kathleen L. Blaner, Comment, *Physician, Heal Thyself: Because the Cure, the Health Care Quality Improvement Act, May Be Worse than the Disease*, 37 CATH. U. L. REV. 1073, 1111–12 (1988) (urging state medical boards and professional associations to improve self-policing measures, in view of encroaching federal legislation); *cf.* Jacob B. Nist, *Liability for Overprescription of Controlled Substances: Can It Be Justified in Light of the Current Practice of Undertreating Pain?*, 23 J. LEGAL MED. 85, 94 (2002) ("A breach of these customs also may lead to professional discipline. A fear of sanction by regulatory agencies is the primary reason that physicians cite for not treating chronic pain adequately.").

219. *See* Monico et al., *supra* note 22 ("In theory, peer review provides oversight of the care rendered by medical professionals and should be well situated to monitor the quality of health care.").

220. *Id.*

221. *Id.* ("These boards may revoke a physician's license to practice medicine for gross negligence, professional incompetence, or similar acts.").

222. *See id.*

223. *Id.*

224. *Id.*

225. *See id.* ("Despite this power, state licensing boards rarely revoke a health care provider's license for incompetence.").

226. *See* AM. ASS'N FOR JUSTICE, MEDICAL NEGLIGENCE: THE ROLE OF AMERICA'S CIVIL JUSTICE SYSTEM IN PROTECTING PATIENTS' RIGHTS 27–28 (2011), *available at* http://www.justice.org/resources/Medical_Negligence_Primer.pdf.

to data collected by the National Practitioner Databank in 2007, less than nine percent of doctors who make multiple malpractice payments are ever subjected to discipline from the medical board.[227] Two-thirds of those who make ten or more malpractice payments never receive any discipline at all.[228]

By contrast, medical boards tend to react more strongly to criminal convictions, particularly those involving involuntary manslaughter—they typically revoke a physician's license outright if he is convicted under a state homicide statute.[229] However, even criminal conviction is not always enough to motivate the board, as lesser offenses often result in no license penalty at all.[230] Occasionally, medical boards have withheld disciplinary action in exchange for the negligent physician's promise to never practice within the board's jurisdiction again.[231] In the past, this has allowed incompetent doctors to continue their questionable practices simply by moving to a different state.[232]

This troubling state of affairs could be the product of difficult practical realities among medical boards, which are often under-staffed and under-funded.[233] Well-qualified investigators and administrators tend to suffer from inadequate compensation and a perceived taboo against condemning their colleagues in the medical field.[234] Faced with a gross disparity between professional risk and reward, medical board officials might feel pressured to take the path of least resistance when examining their peers.[235]

Taking these problems into account, it appears that current forms of professional discipline cannot serve as an adequate replacement for the prosecution of criminally negligent medical conduct.[236] Self-governing medical institutions lack the preventative tools to stand alone, due to logistical difficulties and accountability issues.[237] As a practical matter, criminal prosecution possesses a force of censure that its private and civil counterparts cannot match.[238]

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227. *Id.*

228. *Id.*

229. Paul Jung et al., *U.S. Physicians Disciplined for Criminal Activity*, 16 HEALTH MATRIX 335, 343–44 (2006).

230. *Id.* at 336 ("[M]edical licensing boards in thirteen states and jurisdictions do not consider a felony conviction related to the practice of medicine to be sufficient grounds in and of itself for a board review, hearing or action.").

231. *See* Blaner, *supra* note 218, at 1074 ("If the disciplined physician has privileges at another hospital or a license to practice in another state, which often is the case, the physician may continue to practice medicine with impunity. Thus, the physician can continue to harm patients in other facilities and states.").

232. *Id.*

233. Monico et al., *supra* note 22.

234. *Id.*

235. *See id.*

236. *See* Nunziato, *supra* note 10, at 1297–98 (arguing that involuntary manslaughter prosecutions similar to the one brought against Murray should become standard practice in order to deter abuse of concierge medicine).

237. *See supra* notes 226–28 and accompanying text.

238. *See* Nunziato, *supra* note 10, at 1297–98 (arguing in favor of the value and legitimacy of criminal prosecution for a physician's negligent conduct).

Although the current prosecutorial climate appears harsh when compared to previous decades, the modern increase in criminal malpractice cases could actually improve consistency in this area of the law by establishing solid precedent.[239] High-profile cases such as *Murray* serve to educate both practitioners and the public on the type of physician behavior that warrants criminal punishment, especially for newly-emergent contexts such as concierge medicine.[240] While each successful prosecution has the obvious short-term effect of deterring the convicted individual, this growing body of jurisprudence may someday decrease the overall demand for prosecution by making legal standards more concrete and predictable.[241] These developments would be particularly helpful for historically problematic concepts such as mens rea, which have long suffered from a lack of defining examples in this setting.[242]

Despite certain philosophical objections, the criminalization of medical negligence places a hard cap on irresponsibility by establishing severe consequences for unjustifiable mistakes.[243] In this way, the law of involuntary manslaughter supplies a necessary check on the worst excesses of negligent over-prescription.[244]

VI. CONCLUSION

The sensational trial of Dr. Conrad Murray provides a striking example of criminal prosecution for negligent over-prescription.[245] Against opposition from physicians and other healthcare professionals, government authorities have pursued criminal sanction for medical negligence with increased frequency and tenacity.[246] While criminal malpractice cases may never match the sheer mass of civil malpractice litigation, state prosecution has become much more than the minor historical oddity it once represented.[247] In light of these legal developments, doctors must now take greater care in measuring the consequences of their prescriptions, particularly if they provide concierge services to celebrity clients.[248]

Prosecuting doctors for involuntary manslaughter necessarily implicates diffi-

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239. *See* Filkins, *supra* note 24, at 472–94 (analyzing nine recent cases in order to derive patterns of physician misbehavior which could make prosecution more predictable and avoidable).

240. *Id.*; *see also supra* Part III-B.

241. *Id.*

242. *Id.*; *see also supra* Part IV.

243. *See* Nunziato, *supra* note 10, at 1297–98 (arguing in favor of the value and legitimacy of criminal prosecution for a physician's negligent conduct).

244. *Id.*

245. *See* Jim Avila & Christina Ng, *Michael Jackson's Doctor Guilty*, ABC NEWS (Nov. 7, 2011), http://abcnews.go.com/US/michael-jacksons-doctor-guilty/story?id=14880567 (reporting Murray's conviction for involuntary manslaughter under California law).

246. *See* Filkins, *supra* note 24, at 470 (describing an increase in criminal prosecution for medical negligence).

247. *See* Richards, *supra* note 113 (noting a responsive change within the healthcare industry in response to the higher possibility of criminal sanction in modern times).

248. *See* Nunziato, *supra* note 10, at 1274–77 (discussing the rise of concierge medicine, particularly for celebrities, and the subsequent effect on medical malpractice law).

cult questions of mens rea, owing to the perceived ambiguity surrounding criminal negligence.[249] A dearth of precedent related to over-prescription has made the factual application of "criminal negligence" a problem issue in many jurisdictions.[250] This can contribute to a lack of consistency in prosecution, causing problems for doctors who wish to safeguard their practices against criminal liability.[251] However, the modern increase in such cases may serve to deter similar activity and inform physicians of the types of errant procedures which qualify as criminally negligent.[252]

Although prosecutors must always deal with unique problems when interacting with the healthcare industry, the current professional landscape suggests that state medical board discipline and civil torts cannot fully replace the power of criminal sanction in this arena.[253] As a result, prosecution for involuntary manslaughter remains an effective—if occasionally troubled—tool for deterring negligent behavior among would-be "personal pharmacies."

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249. *See* Filkins, *supra* note 24, at 490–96 (discussing the potentially disproportionate importance of mens rea in criminal cases involving medical negligence); *see also* Smith, *supra* note 24, at 137–41 (examining the different types of mens rea which contribute to a finding of criminal liability in medical malpractice cases).

250. Eisenberg & Berlin, *supra* note 25, at 333–34 (discussing the variance and general lack of clarity different jurisdictions regarding the scope of involuntary manslaughter in the medical context).

251. *See id.*

252. *See* Filkins, *supra* note 24, at 472–94 (analyzing nine recent cases in order to derive patterns of physician misbehavior which could make prosecution more predictable and avoidable).

253. *See* Jung et al., *supra* note 229, at 336. *But see* AM. ASS'N FOR JUSTICE, *supra* note 226, at 29 (arguing for a more robust civil liability system).