

Berman: Hasn't Kesen Hu suffered enough?

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Last August, Kesen Hu inadvertently caused the death of his 18-month-old son, Daniel, having forgotten him in a locked car. Hu usually delivered Daniel to child care on his way to work. That morning, however, distracted by a call to his cell phone, he bypassed Daniel's child care and drove straight to his office.

Only later that afternoon did it suddenly occur to Hu that he had never dropped Daniel off and that the boy had been trapped in the family's minivan for hours.

Daniel's death was a horrifying tragedy. It is agonizing even to reflect on the suffering that Daniel experienced as he succumbed in that sweltering car — or on the torment that his father must undergo every day as he relives what he caused his child.

One might think that the nightmare in which Kesen Hu and his wife, Jing, are enveloped could get no darker. It can.

A Williamson County grand jury recently indicted Hu on a charge of criminally negligent homicide and endangering a child, felonies punishable by up to two years in prison each.

Austin officials were not eager to pursue this case. But the Austin parking lot in which Daniel died lies in Williamson County. And Williamson County District Attorney John Bradley pressed on. By all published accounts, Hu was a loving father. Nonetheless, Bradley insisted, "the facts are the facts."

Take one of the offenses for which Hu was indicted — criminally negligent homicide. One commits that felony if he causes the death of an individual and ought to have been aware of a substantial and unjustifiable risk that death would result from his conduct.

Though nobody maintains that Hu apprehended any risk that leaving his minivan that morning would cause anyone's death — he had forgotten that Daniel remained in back — there is a clear enough sense in which he should have. If so, Hu committed criminally negligent homicide.

But the real question isn't what the facts are or whether the facts make out an offense under Texas law. It's whether justice, or any other good end, is served by this prosecution.

The district attorney cannot responsibly sidestep that question.

Prosecutorial discretion — the nearly absolute and unreviewable power to choose whether to bring criminal charges even when the evidence would unquestionably support them — is among the oldest and most entrenched ideas in American criminal justice.

And with good reason. Rules are blunt instruments. Because they can never be perfectly tailored to individual circumstance, law enforcers are entrusted with some discretion so our system of broad, and often severe, criminal rules can more often achieve justice.

So Bradley was not obligated to prosecute. He rightfully enjoyed discretion to make the call. And because every prosecution is in our name, we all should ask whether he has exercised that discretion wisely or foolishly.

There are several possible reasons to impose criminal punishment. The principal rationales, in Texas as elsewhere, are: to deter future offenses; to incapacitate offenders who are likely to recidivate; to reform wrongdoers; to condemn wrongdoing or send other messages; and to inflict just deserts.

Several of those rationales offer no reason to proceed here. The threat of punishment will not affect the behavior of a parent who has forgotten his child, and is unnecessary otherwise. And Hu is not a risk to reoffend. He needn't be deterred, incapacitated or reformed.

Perhaps, having caused the death of his child, Hu deserves to suffer. People disagree regarding whether anyone ever deserves to suffer and, if so, whether one can deserve to suffer for negligence. But even assuming that Hu does deserve to suffer for his carelessness, surely he has suffered more than enough already. No decent society would aim to add to his woes.

That leaves the justifications often described as expressive, communicative or condemnatory. Indeed, articles have reported that prosecutors pursued the case to raise public awareness of the dangers of leaving children in cars. That's a message worth sending but not this way, by exacerbating the Hus' agony.

Bradley should never have brought the case to the grand jury. But it's not too late to see reason. Texas law allows a prosecutor to move to dismiss a criminal action at any time. The district attorney has sent his message. The time to dismiss is now.

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