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Criminal Child Neglect and the Free Range Kid: Is Overprotective Parenting the New Standard of Care?

David Pimentel
University of Idaho College of Law, dpimentel@uidaho.edu

CRIMINAL CHILD NEGLECT AND THE "FREE RANGE KID": IS OVERPROTECTIVE PARENTING THE NEW STANDARD OF CARE?

David Pimentel*

INTRODUCTION

Parenting in American society is a far more demanding enterprise than it once was, and the changes over a single generation are startling.[1] Intensive Parenting is becoming the norm in the dominant American subcultures,[2] which are embracing safety-conscious parenting approaches that might once have been viewed disapprovingly as "overprotective" parenting.[3] Most of the change is motivated by a well-intentioned desire to protect and promote children's safety and welfare—more specifically to (1) insulate them from risks of physical harm and victimization,[4] and (2) increase their access to educational and cultural advantage.[5] De facto legal standards appear to be evolving right along with these attitudes about proper parenting,[6] with individual parental choices increasingly second-guessed by a society now willing to pass judgment on them.[7]

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* © 2012 David Pimentel. Visiting Associate Professor, Ohio Northern University; B.A., Brigham Young University; M.A., University of California, Berkeley; J.D., Boalt Hall School of Law, University of California, Berkeley. Thanks to Lenore Skenazy for inspiration, and to Lydia Sturgis and Lance Davies for research assistance.

[1] Over-parenting likely emerged by the 1990s. Nancy Gibbs, *The Growing Backlash Against Overparenting*, TIME (Nov. 20, 2009), http://www.time.com/time/magazine/article/0,9171,1940697,00.html ("From peace and prosperity, there arose fear and anxiety; crime went down, yet parents stopped letting kids out of their sight; the percentage of kids walking or biking to school dropped from 41% in 1969 to 13% in 2001. Death by injury has dropped more than 50% since 1980, yet parents lobbied to take the jungle gyms out of playgrounds . . . .").

[2] *See* Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1268, 1270–71 (2011) (stating that Intensive Parenting is culture specific, which is troubling because there can be discrimination against non-white, lower socio-economic class parents who may think of parenting differently).

[3] *Id.* at 1265. As early as the 1930s, a parenting expert counseled against the dangers of over-parenting. *Id.*

[4] *See* Gibbs, *supra* note 1 (describing extreme measures parents have taken in attempts make the world "safer" for their children; for example, a Connecticut mayor agreed to cut down three hickory trees on one block because a grandmother was afraid a stray nut might fly into her pool where her nut-allergic grandson occasionally swam).

[5] Wendy S. Grolnick & Richard M. Ryan, *Parent Styles Associated with Children's Self-Regulation and Competence in School*, 81 J. EDUC. PSYCHOL. 143, 151–52 (1989) (claiming that mothers who were extremely involved produced children with better grades).

[6] *See* Bernstein & Triger, *supra* note 2, at 1244–48 (explaining that family-law governing custody disputes essentially forces Intensive Parenting norms on parents

On the one hand, this is healthy, as child abuse has decreased along with virtually every other threat to children's health and safety. Indeed, children have never been safer than they are now.[8] On the other hand, part of the focus on child protection is based on unfounded fears and hysteria, fed by distorted and sensationalized media reports of risks faced by children in today's world.[9] The result has been a disturbing shift in favor of "over-parenting," which, despite the best of intentions, may be harming America's children in unanticipated ways.[10]

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attempting to gain or retain custody, even when these parents are unwilling or unable to follow such norms).

[7] For example, the public outcry over Lenore Skenazy allowing her nine-year-old son to ride the New York City subway alone. LENORE SKENAZY, FREE-RANGE KIDS: GIVING OUR CHILDREN THE FREEDOM WE HAD WITHOUT GOING NUTS WITH WORRY 50–57 (2009) (describing the harsh judgments parents impose on differing parenting standards, and the pressure this puts on parents to subscribe to the parenting standards held by their peers); *see* Gibbs, *supra* note 1; *see infra* text accompanying notes 53–56. Parents can no longer trust their own judgment about leaving a child alone, which has resulted in government websites providing guidelines on when it is appropriate to leave a child alone. Child Welfare Info. Gateway, *Leaving Your Child Home Alone*, U.S. DEP'T OF HEALTH & HUM. SERVS., http://www.childwelfare.gov/pubs/factsheets/homealone.cfm (last visited June 12, 2012).

[8] BRYAN CAPLAN, SELFISH REASONS TO HAVE MORE KIDS: WHY BEING A GREAT PARENT IS LESS WORK AND MORE FUN THAN YOU THINK 102 (2011) ("Conditions today aren't merely better [than they were in the 1950s]. They improved so much that government statisticians changed their denominator [for youth mortality] from deaths per 1,000 to deaths per *100,000*.").

[9] *See infra* Part I.D (discussing media distortions).

[10] Professors Bernstein and Triger have outlined numerous psychological effects that Intensive Parenting has on the first generation of intensively parented children. Bernstein & Triger, *supra* note 2, at 1274–78. These negative effects include dependency and inability to cope with life's challenges; inability "to manage their time, strategize, and negotiate open conflict during play"; decreased "creativity, spontaneity, [and] enjoyment . . . than children raised under different child rearing practices"; decreased empathy; and immaturity. *Id.* at 1275. If the law forces parents to subscribe to Intensive Parenting norms, it may undermine the critical role of parents to instill in their children a sense of independence and the ability to successfully separate from their parents. *Id.* at 1274; Hara Estroff Marano, *A Nation of Wimps*, 37 PSYCHOL. TODAY, Nov. 1, 2004, at 64–68, *available at* http://www.psychologytoday.com/articles/pto-20041112-000010.html. The severity of mental health problems on college campuses has been rising since 1988. Marano, *supra* at 62. It is estimated that 15% of college students nationwide are suffering from depression. *Id.* Depression is increasing fastest among children. *Id.* at 66. "Harvard psychologist Jerome Kagan has shown unequivocally that what creates anxious children is parents hovering and protecting them from stressful experiences." *Id.* Arguably, the demise of play with other children is linked to children losing leadership skills. *Id.* at 64.

> There's a terrible irony here . . . [b]y trying so hard to eliminate risk from our children's lives, we end up making them more anxious. We can also make them

This potential for harm is behind a growing movement toward "Free Range" parenting, rooted in the philosophy that children can and should be given greater responsibility and autonomy at young ages and that the perceived risks that prompt overprotective parenting are overblown.[11]

Despite the sensibilities of Free Range parents, the trend toward overprotective parenting—defined as those aspects of over-parenting that address issues of safety—may be reinforced and exacerbated by the fear of criminal liability. If criminal child neglect standards are sufficiently vague, and are applied in the discretion of prosecutors, and in the judgment of juries, steeped in the media's fear-mongering, parents will have little choice but to stifle their children's independence and initiative and buy into the Intensive Parenting culture.[12]

The problem is not an easy one to resolve. The vagueness of child neglect statutes is a problem, of course; bringing more specificity to the statutes may help. Juries are part of the problem, particularly if they have media-distorted perceptions of risk.[13] Accordingly, even if the statutes cannot be made more specific and more sensitive to the legitimate objectives of Free Range parents, perhaps jury instructions can.[14]

Finally, courts considering these issues should consider allowing expert testimony on related issues: (1) the actual risks children face when they are given a long leash, and (2) the harms that come from oversheltering children. Jurors need perspective on these issues if they are going to give a fair hearing to a Free Range

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> less safe and less successful in the long run because they don't get all the benefits that come from taking risks.

CARL HONORÉ, UNDER PRESSURE: RESCUING OUR CHILDREN FROM THE CULTURE OF HYPER-PARENTING 247 (2009) (quoting MICHAEL UNGAR, TOO SAFE FOR THEIR OWN GOOD: HOW RISK AND RESPONSIBILITY HELP TEENS THRIVE (2009)) (internal quotation marks omitted).

[11] *See generally* SKENAZY, *supra* note 7 (using the term "Free Range" to refer to parenting styles that provide children with more autonomy). Indeed, accidental death rates have sharply declined for every age group of children, and children under fifteen are almost four times as safe now as they were in the 1950s. CAPLAN, *supra* note 8, at 102.

[12] Bernstein & Triger, *supra* note 2, at 1248 (stating that Intensive Parenting norms can be forced on those who neither want to nor can afford to subscribe to them).

[13] *See* DANIEL GARDNER, THE SCIENCE OF FEAR: WHY WE FEAR THE THINGS WE SHOULDN'T—AND PUT OURSELVES IN GREATER DANGER 155–81 (2008) (discussing in a chapter titled "All the Fear That's Fit to Print" the role of the media in inflaming unjustified fears); Bruce Schneier, *Perceived Risk vs. Actual Risk*, SCHNEIER ON SECURITY (Nov. 3, 2006, 7:18 AM), http://www.schneier.com/blog/archives/2006/11/perceived_risk_2.html (discussing misperception of risks).

[14] "[U]nconstitutional vagueness may be cured by . . . an appropriate narrowing instruction to the jury . . . ." *Capital Punishment*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 783, 792 (2009).

parent, or any parent who is charged with child neglect or endangerment—particularly parents from outside the mainstream American middle-class culture.[15]

The legal system should be sensitive and responsive to these issues in the ongoing debate about how best to parent children in today's society. Prosecutors and jurors are likely to share misperceptions that overvalue the actual risks children face in the world and that undervalue the harms children suffer from being raised in an overly protective environment.[16] Those misperceptions can result in the prosecution and conviction of good parents, and in the process, suppress in society the less intensive parenting practices that are arguably best suited to teaching children responsibility and self-sufficiency.

I. SHIFTS IN SOCIETAL ATTITUDES ABOUT PARENTING

A. The Prevailing Trend Toward Overprotective Parenting

In their recent article in the U.C. Davis Law Review, Professors Bernstein and Triger document the emerging trend toward what they call "Intensive Parenting," defining its three primary components as (1) the parents' acquiring sophisticated knowledge regarding child development needs, (2) "concerted cultivation" of a child's talents, orchestrating child leisure activities and intervening with schools and other institutions on a child's behalf, and (3) closely monitoring many aspects of the child's life.[17] Consistent with this is an obsession with safety and investment

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[15] This is especially important because people have been found to estimate the riskiness of an activity based on the useful qualities they associate with it. GARDNER, *supra* note 13, at 65. In a reaction labeled the "dread factor," people link risks and benefits; if people think the risk of an activity is high, then they will list the benefit as low and vice versa. *Id.* at 69–70.

[16] Many jurors are parents themselves, and their outlook on parenting may impact the way they perceive risk.

> Some argue that . . . the world has become—or appears to be—a more dangerous place. Consequently, parents are "simply" responding to that new danger—or to a perception of danger. Many point to a new "culture of fear" and especially to widely publicized stories of kidnapping, Internet pornography, and sexual predators. Some note that more parents are having just one child, and therefore a larger proportion of parents are "new" parents who are more anxious than those who are more experienced. In a similar vein, it is argued that as parents have fewer children, each child becomes ever more precious.

MARGARET K. NELSON, PARENTING OUT OF CONTROL: ANXIOUS PARENTS IN UNCERTAIN TIMES 17 (2010).

[17] Bernstein & Triger, *supra* note 2, at 1232. An interesting view on Intensive Parenting is articulated by Yale law professor Amy Chua who has condemned American parenting practices as overly concerned about coddling children to protect their self-esteem. Maureen Corrigan, *Tiger Mothers: Raising Children the Chinese Way*, NPR (Jan.

of energies to ensure that a child is thoroughly and adequately supervised at all times.[18]

1. The Assumptions Underlying Overprotective Parenting

It is impossible to protect one's children from all risk, however, and insulating them from one set of risks only exposes them to different risks.[19] Psychologists

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11, 2011), http://www.npr.org/2011/01/11/132833376/tiger-mothers-raising-children-the-chinese-way/ (excerpting AMY CHUA, BATTLE HYMN OF THE TIGER MOTHER (2011)). Professor Chua advocates pushing children through intensive and highly demanding parenting to produce highly accomplished and successful children:

> When Chua married her husband, fellow Yale law professor and novelist Jed Rubenfeld, they agreed that their children would be raised Jewish and reared "the Chinese way," in which punishingly hard work—enforced by parents—yields excellence; excellence, in turn, yields satisfaction in what Chua calls a "virtuous circle." The success of this strategy is hard to dispute. Older daughter Sophia is a piano prodigy who played Carnegie Hall when she was 14 or so.

Id.

[18] *See* Bernstein & Triger, *supra* note 2, at 1233.

> [S]afety and monitoring are paramount. Parents can use baby monitors that alert them if the baby cries or, more importantly, if the baby ceases to breathe. Some parents who hire a nanny equip their home with "Nanny Cams." These cameras secretly monitor the nanny's behavior and alert the parents in case of any misconduct. In addition, unlike previous generations, parents assure that their children play in rubber-cushioned playgrounds, use sanitizing gel, sit in car seats, and wear helmets and knee pads while riding their bicycles.

Id. (citations omitted). An example of this obsession with safety is James Hirtenstein, an expert in "baby-proofing." *See About Us*, BABY-SAFE, INC., http://www.babysafe america.com/BSA_About.html (last visited June 13, 2012).

> As a father to an adorable 6 year old boy, James is very serious about safety. He also knows that there is no substitute for parental supervision and all it takes is *one second for a child to get into a life threatening problem* when proper safety features aren't in place.

Id. (emphasis added).

[19] *See, e.g.*, WARWICK CAIRNS, HOW TO LIVE DANGEROUSLY: THE HAZARDS OF HELMETS, THE BENEFITS OF BACTERIA, AND THE RISKS OF LIVING TOO SAFE 46 (2008) (explaining that by keeping children "safe at home" a child is exposed to the risk of dying from flames or smoke inhalation; this kills a child once every ten days, compared to the 0.00007% or "1-in-1.4 million-years chance of being abducted and murdered" by a stranger that any particular child faces).

have identified a natural tendency to focus on the low probability horrific scenario (e.g., stranger abduction), and to take extraordinary measures to minimize or eliminate that risk.[20] At the same time, parents are likely to overlook far more probable, but less catastrophic, risks their children may face.[21]

The assumption behind this modern trend toward overprotective parenting is one that discounts children's ability to care for themselves, exercise judgment, or bear responsibility.[22] History demonstrates, however, that young children are capable of much more than is expected of them today.[23] The agrarian economy that prevailed in the United States 150 years ago typically involved putting the youngest members of the family to work.[24] It was widely accepted at that time that children, even very young children, were capable of caring not only for themselves, but also for cows, sheep, chickens, and even younger siblings.[25]

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[20] Daniel Gilbert, *If Only Gay Sex Caused Global Warming*, L.A. TIMES (July 2, 2006), http://articles.latimes.com/2006/jul/02/opinion/op-gilbert2/; *see also* GARDNER, *supra* note 13, at 16 (defining the "availability heuristic" as the standard assumption that something is common if examples can be easily recalled).

[21] *See* GARDNER, *supra* note 13, at 16.

[22] SKENAZY, *supra* note 7, at 68–76. "Stay-at-home moms used to just tell their kids to go outside and play. Now mom *and* dads tag along with their kids as supervisors, or servants." CAPLAN, *supra* note 8, at 11.

[23] *See generally* Marano, *supra* note 10 (arguing that as the nature of childhood moved away from children working, parents began to assume that kids could not handle difficult situations; parents feel the need to save their child from any difficulty, when in reality the child could cope with the situation if the parent had properly equipped her for it). "Children are a lot more resilient and robust than we give them credit for. . . . [A] few knocks along the way are unlikely to scar anyone for life; they might even make them stronger." HONORÉ, *supra* note 10, at 248.

[24] *See* Jennifer Senior, *All Work and No Fun: Why Parents Hate Parenting,* N.Y. MAG. (July 4, 2010), http://nymag.com/news/features/67024 (describing how before urbanization, children were considered economic assets of their parents, and they toiled along with their parents at the family business).

[25] There is nothing laudatory about child labor, of course. This ugly practice of exploiting children for economic gain nonetheless recognized that children were capable of bearing responsibility. Modern perceptions go far beyond the sense that children should be protected from economic exploitation, and fail to give them credit for what they *are* capable of, in terms of responsibility and self-sufficiency. Parenting that assumes child incompetence is unlikely to cultivate the virtues of independence and self-reliance in children as they grow older. The failure to give genuine responsibility to children—and especially adolescents—by increasing both responsibility and independence over time has been linked directly to the high incidence of destructive behaviors in young people. Alison Gopnik, *What's Wrong with the Teenage Mind?* WALL ST. J. (Jan. 28, 2012), http://online.wsj.com/article/SB10001424052970203806504577181351486558984.html ("There is strong evidence that IQ has increased dramatically as more children spend more time in school. [What today's teenagers lack is practical experience.] . . . For most of our history, children have started their internships when they were seven, not 27.").

Even one generation ago, the norms were different for determining the age at which a child no longer needed a babysitter.[26] The expected minimum age for babysitters has gone up as well, although in the few states that have legislated specific ages the thresholds vary widely.[27] In Illinois, it is illegal to leave a child under fourteen unsupervised for an "unreasonable period of time";[28] in Maryland, in contrast, a thirteen-year-old is considered old enough not only to care for himself, but also to babysit infants.[29] The days when eleven- and twelve-year-old neighborhood kids were considered competent babysitters appear to be long gone. This development is all the more marked considering that mobile phones have created a virtually instant line of communication between the sitter and the parents, something unheard of in earlier eras when younger sitters were considered acceptable.

2. The Decline of Confidence in and Deference to Parents

Historically, state and federal courts have recognized and safeguarded parents' right to decide how best to raise their children. As recently as 2000, the United States Supreme Court has reaffirmed that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions regarding the "care, custody, and control of their children."[30] Accordingly, state courts have subjected infringements of that right to strict

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[26] *See Legal Age Restrictions for Latchkey Kids*, LATCHKEY-KIDS.COM, http://www.latchkey-kids.com/latchkey-kids-age-limits.htm (last visited June 13, 2012) (giving a listing of state-by-state age limits of when kids are old enough to be left without a sitter).

[27] *See id.*

[28] Illinois law defines a neglected minor, in part, as "any minor under the age of 14 years whose parent or other person responsible for the minor's welfare leaves the minor without supervision for an unreasonable period of time without regard for the mental or physical health, safety, or welfare of that minor." 705 ILL. COMP. STAT. 405/2-3(1)(d) (2011 & Supp. 2012).

[29] MD. CODE ANN., FAM. LAW § 5-801(a) (LexisNexis 2011) ("A person who is charged with the care of a child under the age of 8 years may not allow the child to be locked or confined in a dwelling, building, enclosure, or motor vehicle while the person charged is absent and the dwelling, building, enclosure, or motor vehicle is out of the sight of the person charged unless the person charged provides a reliable person at least 13 years old to remain with the child to protect the child."). The statute prescribes misdemeanor criminal sanctions for failure to comply. *Id.* § 5-801(b).

[30] Troxel v. Granville, 530 U.S. 57, 66 (2000); *see also* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) ("In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the 'liberty' specially protected by the Due Process Clause includes the right to . . . direct the education and upbringing of one's children . . . .").

scrutiny.[31] This has been held to prohibit state authorities from second-guessing parenting decisions, simply because a state judge believes a better decision could have been made.[32]

This deference to parents' discretion was the foundation for the common law doctrine of parental immunity, as articulated by the Maryland Supreme Court in *Frye v. Frye*[33]:

> Our primary concern with regard to matters involving the parent-child relationship was the protection of family integrity and harmony and the protection of parental discretion in the discipline and care of the child. We have steadfastly recognized the authority of parents and their need to fulfill the functions devolved upon them by that position.[34]

The doctrine held that a child could not, out of respect for the sanctity of family unity, sue her own parent(s) in tort.[35] In recent years, the parental immunity doctrine has broken down,[36] and in many jurisdictions has been fully abrogated—at

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[31] Dutkiewicz v. Dutkiewicz, 957 A.2d 821, 830 (Conn. 2008) ("[A] parent's interest in the care, custody and control over his or her child is a fundamental right."); *see also* Punsly v. Ho, 105 Cal. Rptr. 2d 139, 144–45 (Ct. App. 2001) (describing parents fundamental right to raise their children by stating "the custody, care and nurture of the child reside first in the parents"); Cent. Tex. Nudists v. Cnty. of Travis, No. 03-00-00024, 2000 WL 1784344, at *3 (Tex. Ct. App. Dec. 7, 2000) (recognizing that parents have a general right, under the Fourteenth Amendment, to direct the upbringing of their children).

[32] *Troxel*, 530 U.S. at 71.

[33] 505 A.2d 826 (Md. 1986).

[34] *Id.* at 831 ("It is clear that for over a half a century this Court has recorded its belief in the importance of keeping the family relationship free and unfettered. . . . The parental status should be held inviolate so that there be no undue interference with the dependence of the minor unemancipated child on the parents for such judgment and care needed during the child's minority or with the dependence of the law on the parent for fulfillment of the necessary legal and social functions associated with the office of parent.").

[35] *See* Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors' Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503, 518 (2011) ("[P]arental immunity . . . [was] justified as furthering individual and broader social goals. . . . As a public policy matter, courts deemed it in society's interest that households reside in harmonious companionship unimpaired by the tensions that could arise from litigation.").

[36] Benjamin Shmueli, *Love and the Law, Children Against Mothers and Fathers: Or, What's Love Got to Do with It?*, 17 DUKE J. GENDER L. & POL'Y 131, 147–54 (2010) (stating that the present model in a majority of the U.S. jurisdictions is: (1) a qualified doctrine of parental immunity, meaning it is abrogated except if the parent is exercising *acceptable* parental authority or discretion (leading to increased claims of child abuse); (2) complete abrogation of the doctrine and the adoption of the "reasonable and prudent parent standard"; or (3) reliance on a standard similar to that found in the Restatement of Torts ((a) a parent or child is not immune from tort liability to the other solely by reason of that relationship; (b) repudiation of general tort immunity does not establish liability for an act

least in part due to growing recognition of the problem of child abuse.[37] Today, child protection has become a key policy priority, with parents often depicted as the ones children need protection from, necessarily and fundamentally devaluing any perceived interest in protecting parental autonomy regarding how to raise their children.[38]

In previous generations, parents who "let their kids run wild" were viewed with some disdain by neighbors, perhaps, but subjected to no greater sanction than head wagging and disapproving gossip in the community.[39] Today, such situations are far more likely to result in a call to Child Protective Services, with subsequent legal intervention.[40]

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or omission that, because of a parent-child relationship, is otherwise privileged or is not tortious)). Although there were several policy justifications for the parental immunity doctrine, one was "the prevention of interference with parental care and discipline." Amy L. Nilsen, Comment, *Speaking Out Against Passive Parent Child Abuse: The Time Has Come to Hold Parents Liable for Failing to Protect Their Children*, 37 HOUS. L. REV. 253, 270 (2000).

[37] *See* Nilsen, *supra* note 36, at 275–77.

[38] *See* Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773 (2008) (highlighting the potential conflict between parental autonomy and child protection).

[39] This attitude is depicted in Barbara Robinson's classic stories about the Herdman family, which reflect prevailing norms in American society in the early 1970s. *See e.g.*, BARBARA ROBINSON, THE BEST CHRISTMAS PAGEANT EVER 19 (rev. Harper Trophy ed. 2005). The single mother—who worked two shifts at the shoe factory—let her six children run amok in the neighborhood: "So the [Herdman kids] pretty much looked after themselves." *Id.* at 19. While the situation was lamentable (and lamented), it did not occur to anyone in the story that the mother should be held liable for child neglect. Even the social-service worker observed, speaking of the mother, "I can't say I blame her." *Id.*

[40] *See* NELSON, *supra* note 16, at 68 (describing how households now believe themselves to be "island[s] of sanity" and the need to be attentive to the threat outside their own doors, which includes stranger danger that could even extend to their neighbors). An example of legal intervention is *Gross v. State*, 817 N.E.2d 306 (Ind. Ct. App. 2004), where two parents were convicted in Indiana for felony neglect of a dependent because they loosely taped their children's wrists and ankles in a "hostage" game. *Id.* at 307. The appellate court reversed, reasoning:

> There is admittedly a fine line between properly exercising the police power to protect dependents and improperly subjecting every mistake a parent may make in raising his or her child to prosecutorial scrutiny. In this particular case, whether [defendants'] playing the "hostage" game with children requires the involvement of a child welfare office is something we need not decide, but we are confident that this does not support a criminal conviction for neglect of a dependent.

Id. at 311.

Tennessee is one state that still recognizes, in the context of parental immunity, the importance of protecting parental discretion and autonomy. In the 1994 case of *Broadwell v. Holmes*,[41] the Tennessee Supreme Court declined to abrogate the parental immunity doctrine completely, instead deciding to limit its application to "conduct that constitutes the exercise of parental authority, the performance of parental supervision, and the provision of parental care and custody."[42] The *Broadwell* court interpreted Tennessee's policy of protecting parents' discretion in raising their children as inherently within the privacy and liberty interests guaranteed by the Tennessee Constitution.[43] The *Broadwell* court went so far as to define *protected conduct* as "the skills, knowledge, intuition, affection, wisdom, faith, humor, perspective, background, experience, and culture which only a parent and his or her child can bring to the situation."[44] The *Broadwell* court's rejection of the reasonable parent standard appeared to be predicated on the court's refusal to determine judicially what is reasonable within the sphere of family life.[45] The *Broadwell* court expressed concern that, absent immunity, "juries would feel free to express their disapproval of what they consider to be unusual or inappropriate child rearing practices" in any situation where the parent's conduct was unconventional.[46]

The Tennessee Supreme Court's analysis stands out as an exception to the prevailing trend against parental autonomy in the pursuit of child protection.[47] The *Broadwell* case is now eighteen years old, and has been subjected to serious criticism.[48] It may prove to be the last gasp of the policy of protecting the erstwhile sacred right of parents to decide how to raise their own children. In most of America, notwithstanding *Broadwell,* it is no longer "nobody else's business" how a parent raises his or her children.

B. The "Free Range Kids" Movement and Related Trends

A growing parental movement is resisting the societal pressure to engage in overprotective parenting. These parents happily embrace the risks of a child falling from a tree, for example, and even breaking a bone in the process, in the belief that

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[41] 871 S.W.2d 471 (Tenn. 1994).

[42] *Id.* at 476–77; Irene Hansen Saba, *Parental Immunity from Liability in Tort: Evolution of a Doctrine in Tennessee*, 36 U. MEM. L. REV. 829, 830, 868 (2006).

[43] *Broadwell*, 871 S.W.2d at 475; Saba, *supra* note 42, at 868.

[44] *Broadwell*, 871 S.W.2d at 476.

[45] *Id.* at 475.

[46] *Id.* at 476; Saba, *supra* note 42, at 873.

[47] *See* Bernstein & Triger, *supra* note 2, at 1249–50 (discussing the trend of jurisdictions to abolish or constrict the parental immunity doctrine).

[48] *See* Saba, *supra* note 42, at 871 ("Commentators have criticized the *Broadwell* standard as vague, overbroad, and subject to inconsistent, arbitrary application. *Broadwell* also has been criticized as being conservatively pro-parent, serving the interests of parents rather than children, and leaving children with less than adequate judicial recourse.").

the freedom, creativity, physical exercise, and sense of empowerment that a child gets from learning to climb trees far outweighs the attendant risk of injury.[49] Even more important is the idea of giving children autonomy, allowing them to play outdoors unsupervised, to walk or ride a bicycle to school or a friend's house. These parents believe that this autonomy is important in helping children develop a sense of responsibility and self-sufficiency.[50] These are not negligent, reckless, or uncaring parents, but rather quite the opposite; these are parents, some of whom are highly educated and highly informed, consciously exercising their best judgment of what is ideal child-rearing.[51] The movement has been dubbed the "Free Range Kids" movement—a term coined by writer and columnist Lenore Skenazy, whose manifesto on the subject has attracted considerable attention.[52]

Ms. Skenazy's notoriety began when she allowed her nine-year-old to ride the New York City subway home alone, in a carefully planned, thoroughly discussed

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[49] Arguably the small risk encountered in this activity is dwarfed by the potential future ramifications for children who are not physically active and who are therefore prone to obesity. Lindsey Tanner, *Should Parents Lose Custody of Super Obese Kids?*, USA TODAY (July 12, 2011, 7:57 PM), http://www.usatoday.com/news/health/wellness/story/2011/07/Should-parents-lose-custody-of-super-obese-kids/49320358/1 (discussing the possibility of charging parents for child abuse for overnourishing their children).

[50] *Cf.* Bernstein & Triger, *supra* note 2, at 1275 (stating that the heavy monitoring involved in Intensive Parenting has been shown to prevent children from developing independence, self-sufficiency, and the coping skills needed to handle the hardships of life).

[51] The many comments on Lenore Skenazy's blog do not convey a lack of concern for children's health and safety, but rather the well-considered concerns of thoughtful people about how unhealthy overprotection can be for children. *See e.g.*, Jet, Comment to *Outrage of the Week: Mom JAILED for Letting Kids Play at Park*, FREE-RANGE KIDS (June 10, 2012), http://freerangekids.wordpress.com/2012/06/10/outrage-of-the-week-mom-jailed-for-letting-kids-play-at-park; BMS, Comment to *Ugh! Now 5th Graders "Can" Go Play—Once a Month, If Chaperoned*, FREE-RANGE KIDS (March 9, 2012), http://freerangekids.wordpress.com/2012/03/09/ugh-now-5th-graders-can-go-play-once-a-month-if-chaperoned. It is worth noting that two of the leading evangelists in this movement, Lenore Skenazy and Warwick Cairns, have graduate degrees from Ivy League institutions (Columbia and Yale), but they are not substantive experts on safety; indeed, their degrees are in Journalism and English Literature, respectively. *Lenore Skenazy*, LINKEDIN.COM, http://www.linkedin.com/in/lenoreskenazy (last visited June 9, 2012); *About Me*, WARWICKCAIRNS.COM, http://www.warwickcairns.com/Site/About_Me.html (last visited July 12, 2012). Rather, they and their readers—judging from the comments posted to Ms. Skenazy's blog at least—are merely concerned parents and citizens. *E.g.*, SKENAZY, *supra* note 7; CAIRNS, *supra* note 19.

[52] *See* L.J. Jackson, *Smothering Mothering: 'Helicopter Parents' Are Landing Big in Child Care Cases*, 96 A.B.A. J. Nov. 2010, at 18, 19. Skenazy, a newspaper columnist, "stirred up controversy after she wrote about letting her then-9-year-old son ride the New York subway by himself. The resulting ruckus earned her the moniker 'America's worst mom' and compelled her to write *Free-Range Kids* . . . , an anti-intensive-parenting manifesto encouraging the liberation of children from parental control." *Id.*

adventure designed to encourage and reward the child's growing sense of independence.[53] The controversy that ensued after she wrote about it in a column resulted in a series of television appearances, where Ms. Skenazy was labeled "America's Worst Mom."[54] It sparked a general societal debate over what constitutes appropriate parenting given the dangers children face in society, including considerable debate over whether those dangers are real, illusory, or somewhere in between.[55] The debate has received plenty of media attention; in addition to the television appearances, TIME MAGAZINE featured the topic in a 2009 cover story entitled "The Growing Backlash Against Overparenting."[56]

The academic community has weighed in as well. There is a growing body of research to support the concerns of Free Range parents, documenting the harmful impact of overprotective parenting.[57] Close control of children's environments and the insistence on constant supervision has been shown to impair the child's ability to develop independence, responsibility, and self-reliance.[58] Unwillingness to allow children to engage in vigorous physical play out of doors—such as riding bikes, climbing trees, and playing ball in the neighborhood—has resulted in children spending most of their time in sedentary activity, exacerbating the public health problem of child obesity.[59] Keeping children in sanitized environments has

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[53] Because Intensive Parenting has become the norm, anything that goes against it seems to receive harsh criticism. *See* Gibbs, *supra* note 1.

[54] *Id.* (stating that if you search on Google for "America's Worst Mom" the results will be for Lenore Skenazy). When Ms. Skenazy appeared on the Today show to discuss the subway incident, Ann Curry asked, "Is she an enlightened mom or a really bad one?" *Id.*

[55] *See* NELSON *supra* note 16, at 56 ("[M]any parents believe that because dangers outside the home have become closer and more immediate, children can no longer be left free to roam as they did in the past."); Gibbs, *supra* note 1 (noting that although backlash against over-parenting may have already been building, another stimulus for it was the downfall of the economy; "Since the onset of the Great Recession, according to a CBS News poll, a third of parents have cut their kids' extracurricular activities. They downsized, downshifted and simplified because they had to—and often found, much to their surprise, that they liked it.").

[56] *See* Gibbs, *supra* note 1. The media attention is illustrative of the pressure put on parents who raise their children according to "unconventional" norms. *See, e.g.*, HONORÉ, *supra* note 10, at 254 ("[T]he pressure from other parents can be hard to take. Many people complain that fellow moms and dads raise an eyebrow if they allow their children to walk home from school.").

[57] "Some psychologists say such parenting has crossed the line from involved to overzealous, often leaving the child without an independent outlet." Jackson, *supra* note 52, at 18.

[58] Bernstein & Triger, *supra* note 2, at 1275.

[59] *See* CYNTHIA OGDEN & MARGARET CARROLL, DIV. OF HEALTH & NUTRITION EXAMINATION SURVEYS, PREVALENCE OF OBESITY AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, TRENDS 1963–1965 THROUGH 2007–2008 (2010), *available at* http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf

been tied to a startling spike in child allergies and has impaired the children's ability to develop natural immunities.[60] Unwillingness to let children walk to school or even ride their bikes in response to a virtually nonexistent risk of stranger abduction has not only deprived children of the benefits of physical exercise, but has exposed them to the far greater risks of injury in automobile accidents.[61] Indeed, the American Academy of Pediatrics has published statistics suggesting that "being driven to school in a passenger vehicle is by far the most dangerous way to get there."[62]

Whatever disrepute overprotective parenting once suffered, the pendulum has swung, and many parents are afraid to allow their children the kind of independence they enjoyed as a child.[63] Many of these parental fears can be shown to be unfounded, however.[64] For example, the general fear of adulterated

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(stating 16.9% of children and adolescents aged two through nineteen years are obese); Julie Steenhuysen, *Why are U.S. Kids Obese? Just Look Around Them*, REUTERS (Sep. 25, 2007 6:13 PM), http://www.reuters.com/article/2007/09/25/us-obesity-children-usa-idUSN243 0531820070925. Obesity among American children from six to nineteen years of age tripled between 1980 and 2004. Bernstein & Triger, *supra* note 2, at 1260. Obesity carries significant health risks including high blood pressure, high cholesterol, type 2 diabetes, cancer, heart disease, obsessive compulsive disorder, anxiety, and depression. Coyla J. O'Connor, Student Work, *Childhood Obesity and State Intervention: A Call to Order!*, 38 STETSON L. REV. 131, 137 (2008).

[60] *See* HONORÉ, *supra* note 10, at 252; Juliana Keeping, *University of Michigan Research: Too Much Sanitizing Might Make Allergies More Likely for Kids*, ANN ARBOR.COM (Nov. 29, 2010, 11:17 AM), http://www.annarbor.com/news/university-of-michigan-research-too-much-sanitizing-might-make-allergies-more-likely-for-kids (outlining University of Michigan hypothesis which suggests "living in an overly hygienic environment could actually hurt us, since exposure to certain microorganisms is beneficial for immune development"). Allergy rates soared in East Germany after unification, when the society got cleaned up. *See* HONORÉ, *supra* note 10, at 252. Diabetes rates increased too. *Id.* "This brings us back to the same old irony of modern childhood: by striving to create for children an ideal environment, in this case a scrupulously hygienic one, we may actually be making them weaker." *Id.*

[61] Christie Barnes contrasts the top ten concerns of parents (kidnapping, snipers, terrorism, etc.) with "the real causes of death and injury for most children," which places car accidents as number one on the list. CHRISTIE BARNES, THE PARANOID PARENTS GUIDE: WORRY LESS, PARENT BETTER, AND RAISE A RESILIENT CHILD 38–39 (2010).

[62] Jane E. Brody, *Turning the Ride to School into a Walk*, N.Y. TIMES Sep. 11, 2007, at F7, *available at* http://www.nytimes.com/2007/09/11/health/11brod.html. "Driving your third-grader to the store is vastly more dangerous than leaving him at home without a bodyguard." CAPLAN, *supra* note 8, at 37.

[63] *See generally* SKENAZY, *supra* note 7, at 135–41 (describing a middle school class where the teacher encouraged kids to try an independent activity; some parents, however, forbade their children from participating).

[64] *See* GARDNER, *supra* note 13, at 290–304 (describing how the world is safer now than it ever has been before). However, surveys show that people in the United States believe it is more dangerous now than in the past. CAIRNS, *supra* note 19, at 6. And this

Halloween treats has prompted strict vigilance and caution on the part of parents across America. But while most can cite a rumor they may have heard about this, research has failed to document even a single incident when a child was harmed by nefarious tampering with Halloween treats.[65] While child abductions by strangers *have* been documented, they are so exceedingly rare that the statistical probability of their happening to any particular child is, for all practical purposes, zero.[66] People are struck by lightning more than three times as often as children are abducted by strangers.[67] According to the statistics cited by the National Center for Missing and Exploited Children, only about 1 in 1.5 million children will be abducted and killed this year.[68] In an effort to put these odds in perspective, one commentator has observed that, statistically, someone who *wanted* a child to be abducted would have to leave the child outside, unattended, for 500,000 years before he could expect it to happen.[69] Nonetheless, many parents obsess about this

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fear causes anxiety; seven out of ten adults state they experience stress or anxiety on a daily basis, often interfering with their lives. *Id.* at 7–8. In 2005, approximately 7% of adult Americans were diagnosed with clinical anxiety, this number jumped to nearly 18% by 2007. *Id.* at 8.

[65] CAPLAN, *supra* note 8, at 212 n.103 (citing JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS 132–38 (1993)); SKENAZY, *supra* note 7, at 59–67.

[66] *See* GARDNER, *supra* note 13, at 187 (2008) ("Risk regulators use a term called *de minimis* to describe a risk so small it can be treated as if it were zero. What qualifies as a *de minimis* risk varies, with the threshold sometimes as big as one in 10,000, but a one-in-a-million risk [such as that associated with child abduction and murder] is definitely *de minimis*. . . . [T]he number of stereotypical kidnappings is so small that the chance of that happening to a child is almost indescribably tiny. And . . . in the incredibly unlikely event that a child is snatched by a lurking pedophile, there is a good chance the child will survive and return home in less than a day.").

[67] Based on reported cases from 2001 to 2010, the National Weather Service estimates that four hundred people will be killed or injured in lightning strikes in a given year. *Lightning Safety*, NAT'L WEATHER SERV., http://www.weather.gov/om/lightning/medical.htm (last visited June 12, 2012). In contrast, a particularly thorough study by the U.S. Department of Justice concluded that 115 children were victims of *stereotypical kidnappings* in 1999. DAVID FINKELHOR ET AL., U.S. DEP'T OF JUSTICE, NONFAMILY ABDUCTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS, NATIONAL INCIDENCE STUDIES OF MISSING, ABDUCTED, RUNAWAY AND THROWNAWAY CHILDREN 1, *available at* https://www.ncjrs.gov/pdffiles1/ojjdp/196467.pdf. Stereotypical kidnappings are defined as "abductions perpetrated by a stranger or slight acquaintance and involving a child who was transported fifty or more miles, detained overnight, held for ransom or with the intent to keep the child permanently, or killed." *Id.*

[68] SKENAZY, *supra* note 7, at 16.

[69] CAIRNS, *supra* note 19, at 45 ("[I]t would take your child, left outside, 500,000 years to be abducted by a stranger, and 1.4 million years for a stranger to murder them."). *See also* CAPLAN, *supra* note 8, at 96 ("Conditions today [compared to the past] aren't merely better. They improved so much that government statisticians changed their denominator from deaths per 1,000 to deaths per *100,000*."). Despite these statistics,

risk, and go to great lengths—even exposing their children to other, far more credible and probable risks[70]—in a misguided effort to protect their children from "stranger danger."

Skenazy and others urge parents to take a breath and put these fears in perspective, particularly in light of the harms children have been shown to suffer from overprotective parenting.[71] As explained below, however, legal liability issues may prevent that.

C. Risk Management in Parenting

Almost every choice, including parenting choices, involves a balancing of risks.[72] Risks can be avoided only at certain cost, including new risks generated by the act of minimizing the initial risk.[73] Safety and security expert Bruce Schneier explains it this way:

> There is no single correct level of security; how much security you have depends on what you're willing to give up in order to get it. This trade-off is, by its very nature, subjective—security decisions are based on personal judgments. Different people have different senses of what constitutes a threat, or what level of risk is acceptable.[74]

Protecting a child from the risks associated with playing on climbing equipment (from which they could fall) exposes them to the risks associated with a

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"[a]ccording to one study, more than 90 percent of parents named safety as their biggest concern when making decisions about whether to allow their kids to play outside." KIM JOHN PAYNE, SIMPLICITY PARENTING 179–80 (2009).

[70] For example, parents will drive their children to school and take their children with them on driving errands rather than subject them to the risks of walking to school or staying home alone. As noted above, the number-one killer of children is car accidents. *See* Brody, *supra* note 62 and accompanying text.

[71] *See* Gibbs, *supra* note 1 (noting that the new revolution in parenting has been labeled many things: "slow parenting, simplicity parenting, free-range parenting—but the message is the same: Less is more; hovering is dangerous; failure is fruitful. You really want your children to succeed? Learn when to leave them alone. When you lighten up, they'll fly higher. We're often the ones who hold them down.").

[72] *See, e.g.*, CAIRNS, *supra* note 19, at 60–61 (giving the example of the different risks involved in riding a bicycle versus driving a car).

[73] *Id.* at 101 (stating that when people seek to manage risks outside their control by implementing official precautions and procedures, these often have the deleterious effect of taking the power and responsibility away from individual people to deal with the dangers that face them).

[74] BRUCE SCHNEIER, BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD 17 (2003).

lack of physical exercise.[75] Protecting them from the risks associated with playing freely in the neighborhood by ensuring that they are continually under adult supervision exposes them to the risk of growing up with a sense of dependency and helplessness.[76] Even vaccines, which are supposed to protect children from serious disease, carry a measurable risk of death.[77]

Routine parenting decisions, far removed from threats to the child's life, involve issues of risk management. Refusing a child's request to play high school football may lower risk of injury, but it increases (1) health risks associated with lack of physical exercise, (2) risks of delinquency if the youth is bored and available to get into trouble in the afternoons, and (3) the risk of social alienation—which may be significant with respect to his emotional health—because he is not part of the team and is denied the social status that high school communities bestow upon student athletes. Encouraging or allowing a child to engage in high school sports, on the other hand, will certainly expose the child to a different, and no less real, set of risks, including but not limited to concussions or other physical injuries.[78]

A problem arises, therefore, where statutes define criminal child neglect or child endangerment in terms of putting a child "at risk."[79] The Michigan statute,

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[75] It is estimated that the obsession with keeping kids safe has led to nearly 40% of schools eliminating recess altogether. SKENAZY, *supra* note 7, at 44; *see* Marano, *supra* note 10. The disappearance of recess is compounded by the fact that children who are kept indoors do not get as much exercise as they need. *See* CAIRNS, *supra* note 19, at 144 (according to a study published in 2007 by English researchers, by the age of eleven only one in twenty boys and one in two hundred girls gets the amount of exercise they need to stay fit). According to the Centers for Disease Control (CDC), one-third of all American children over five are overweight, obese, or at serious risk of becoming so. *Id.* at 145. In addition to health problems, the sedentary lifestyle of children inhibits their ability to learn. Studies show that children who engage in physical activity experience improved concentration, memory, learning, creativity, and problem solving for up to two hours after exercise. Brody, *supra* note 62.

[76] *See* Marano, *supra* note 10 (describing the problem of dependency).

[77] *See Possible Side-effects from Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 27, 2012), http://cdc.gov/vaccines/vac-gen/side-effects.htm (acknowledging that all vaccines carry risks, including an "extremely small" risk of serious injury or death for the overwhelming majority of them).

[78] Gary Mihoces, *Parents Weigh Risks of Youth Football Amid Concussion Debate,* USA TODAY (May 23, 2012, 3:11 PM), http://www.usatoday.com/sports/football/story/2012-05-16/Parents-weigh-youth-football-risks/55150850/1.

[79] Some courts have recognized the almost unlimited conduct that vague child neglect or endangerment statutes can encompass. For example, the New Mexico Supreme Court explained:

> Child abuse by endangerment, as opposed to physical abuse of a child, is a special classification designed to address situations where an accused's conduct exposes a child to a significant *risk* of harm, "even though the child does not

for example, criminalizes "[p]lacing a child at an unreasonable risk . . . by failure . . . to intervene to eliminate that risk when that person is able to do so and has, or should have, knowledge of the risk."[80] Because everything a parent does exposes a child to some risks, the entire question in Michigan comes down to which of those risks are "reasonable."[81] But who can be trusted to make the determination of what is reasonable? If society does not trust parents to make such determinations anymore, it must necessarily entrust that judgment call to prosecutors, in their charging decisions, and to juries, in their determinations of guilt in child neglect and endangerment cases. The concern that juries cannot necessarily be trusted to evaluate the reasonableness of risks is developed below. That problem is exacerbated by vagueness in the statutes and cultural biases about what constitutes appropriate parenting. These issues are also discussed below.[82]

D. Media Distortions

The modern media has gone a long way toward inflaming fears of dubious or at least marginal risks.[83] Some of the reporting is truthful but misleading; other

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> suffer a physical injury." . . . Taken literally, our endangerment statute could be read broadly to permit prosecution for any conduct, however remote the risk, that "*may* endanger [a] child's life or health." However, by classifying child endangerment as a third-degree felony, our Legislature anticipated that criminal prosecution would be reserved for the most serious occurrences, and not for minor or theoretical dangers. Therefore, we have taken a more restrictive view of the endangerment statute, and have interpreted the phrase "*may* endanger" to require a "reasonable probability or possibility that the child will be endangered."

State v. Chavez, 211 P.3d 891, 896 (N.M. 2009) (citations omitted).

[80] MICH. COMP. LAWS SERV. § 722.622 (LexisNexis 2005).

[81] Broadwell v. Holmes, 871 S.W.2d 471 (Tenn. 1994); Saba, *supra* note 42; *see supra* text accompanying notes 41–48 (showing the reasonable parent standard is problematic, as outlined in the analysis in *Broadwell*).

[82] *See* discussion *infra* Part II.C–D.

[83] *See* Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DEPAUL L. REV. 741, 744 (2009). Lyon explains:

> [T]he need for "good numbers"—that is, high viewership—influences every channel, newspaper, and advertiser to aggressively compete for advertising and viewership within the ever-fragmented media marketplace. This can result in a willingness to show more "low-brow" images, and to "hawk" violence with redoubled vigor. . . . In television and print news, far from merely reporting objectively on crime, media companies are now major stakeholders that profit from our carefully cultivated *fear of crime.*

reports are simply false. For example, between 1996 and 1999 there were sixteen reported deaths of children under five drowning in toilets, averaging four per year.[84] The CBS Early Show, however, hosted a professional baby-proofer, James Hirtenstein, who claimed, perhaps self-servingly, that there are two such drownings a week.[85] The venerable National Public Radio recently ran a story on safety in packing children's lunches for school, observing that 97% of the 235 lunches studied were kept at a temperature dangerous for the growing of bacteria.[86] The inflammatory statistic was tempered somewhat by an acknowledgment, later in the story, that because it takes a long time for the bacteria to grow, *none* of the 235 children who ate those lunches actually got sick.[87]

The media has learned quickly that stories about harm to children captivate audiences.[88] The perfect teaser for a news story is "could your child be next?" Such a come-on virtually guarantees that the parent will watch. The story will be compelling only if the risk to children in general, and the risk to the viewer's own children, appears to be immediate and serious.[89] The result is that public opinion

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Id. (emphasis added). Warrick Cairns makes a related observation:

> If you experience the world through the [media] . . . you will see a very different world than the one that you actually live in, and you will experience, every single day, all sorts of emotions brought about by dangers that you are never likely to come across in your daily life.

CAIRNS, *supra* note 19, at 96. The media personalizes victims to the viewers, which affects the viewers' emotions and causes them to be afraid of risks that statistically are so minute they will almost surely never affect the viewers. *Id.* at 97–99.

[84] Press Release, U.S. Consumer Prod. Safety Comm'n, *CPSC Warns: Pools Are Not the Only Drowning Danger at Home for Kids*, (May 23, 2002), *available at* http://www.cpsc.gov/cpscpub/prerel/prhtml02/02169.html.

[85] SKENAZY, *supra* note 7, at 31–32. "Fear is a great marketing prod to parents; it engages their laudable instinct for protection. Manufacturers of all the safety devices sense parental concerns—and then whip them up to a fever pitch in their marketing strategies." HARA ESTROFF MARANO, A NATION OF WIMPS: THE HIGH COST OF INVASIVE PARENTING 77 (2008).

[86] *Morning Edition: Simple Things to Do to Lessen Back-to-School Stomach Bugs* (NPR radio broadcast Aug. 29, 2011), *available at* http://www.npr.org/blogs/health/2011/08/29/139943466/simple-things-to-do-to-lessen-back-to-school-stomach-bugs.

[87] *Id.*

[88] *See, e.g.*, *Casey Anthony Is the Most Hated Person in America: Poll*, REUTERS (Aug. 10, 2011, 10:08 AM), http://www.reuters.com/article/2011/08/10/us-caseyanthony-idUSTRE77934O20110810. Additionally, HLN and Nancy Grace had record ratings while covering the trial. Rodney Ho, *HLN Rides Casey Anthony Trial to Best Ratings Month Ever in June*, BLOGS.AJC.COM (July 5, 2011, 2:36 PM), http://blogs.ajc.com/radio-tv-talk/2011/07/05/hln-rides-casey-anthony-trial-to-best-ratings-month-ever-in-june.

[89] *See* GARDNER, *supra* note 13, at 158–59 (noting that the way people estimate risk is directly related to how images, such as those seen on the news, make them feel). Further,

on these topics is being shaped by profoundly misleading media reports, consistently calculated to overstate risks to children.[90] Even legislation is no longer prompted by the prevalence of a problem in society, but instead by the hysteria created by news coverage of a single tragedy. Legislation is even named for the single victim whose tragedy prompted the legislation. "Megan's Law" was prompted by a horrific sex crime against a girl bearing that name.[91] The recent media circus surrounding the trial of Casey Anthony has prompted the Oregon legislature to pass new legislation called "Caylee's Law," after the victim of the crime Casey Anthony was charged with (and acquitted of).[92]

Of greater concern than legislative overreaction to inflammatory media reports is the problem of parental overreaction.[93] After all, it is parents who are daily, even hourly, making judgment calls in managing the risks to which their children will be exposed. Unjustified parental fears may be responsible, therefore,

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unusual events such as floods or riots are made to appear common because that is what is shown on the media. *Id.* at 159–61.

> One of the hardest parts of parenthood is worrying that something terrible will happen to your child. The news is full of stories about parents who failed to shield their child from the dangers of the world—enough to make anyone sick. Fortunately, news is one thing and real life is another. On the news, the world is going to hell in a handbasket. Even . . . innocent children aren't safe. In real life, however, things are looking up. Children under five years old are almost five times as safe today as they were in the Idyllic Fifties.

CAPLAN, *supra* note 8, at 6.

[90] Risks can be described as "relative" and "absolute". GARDNER, *supra* note 13, at 164. Relative is how much bigger or smaller a risk is compared to something else (e.g., women who use a birth control patch have twice the risk of clotting as women who do not). *Id.* Absolute risk is just the probability of something happening (e.g., 6 in 10,000). *Id.* The media often uses relative risks alone, which can be misleading. *Id.* The media does this because fear sells and the more the viewer personalizes the risk, the bigger the story. *See id.* at 165.

[91] Office of Att'y Gen., *California Megan's Law*, CAL. DEP'T OF JUSTICE, http://www.meganslaw.ca.gov/homepage.aspx?lang=ENGLISH (last visited June 11, 2012) ("Megan's Law provides the public with certain information on the whereabouts of sex offenders so that members of our local communities may protect themselves and their children. Megan's Law is named after . . . a New Jersey girl who was raped and killed by a known child molester who had moved across the street from the family without their knowledge. ").

[92] Donal Lynch, *Caylee Trial Leaves Shocked and Angry Nation in Search of Answers*, SUNDAY INDEP., July 31, 2011, *available at* 2011 WLNR 15087749. Many states, including Florida, are considering "Caylee" laws. *States Weigh 'Caylee's Law' in Verdict Aftermath*, USA TODAY, (July 9, 2011, 1:07 AM), http://www.usatoday.com/news/nation/2011-07-09-caylee-anthony-law_n.htm. The potential for media coverage to prejudice a jury will be discussed further *infra*, Part II.F.

[93] *See* CAPLAN, *supra* note 8, at 13–14; SKENAZY, *supra* note 7, at 50–57.

for the disappearance of children's ability to play.[94] Media distortions cloud the judgment of parents attempting to do the right thing, to trust their instincts, and to do reasonable risk management for their children's safety. The inflamed fears of child abduction will prompt parents to weigh that risk far too heavily, and accordingly expose their children to other, far more genuine risks.[95] It will also cause them to unfairly judge the parenting of others, as they overvalue certain risks and undervalue others.[96] As discussed below, this poses a serious problem in juries' evaluations of parents' behavior in child neglect cases.

II. LEGAL ISSUES ARISING IN THE DEBATE

Of particular concern is how the trend toward overprotective parenting is reinforced by legal standards. Professors Bernstein and Triger caution that standards applied in divorce and child custody proceedings provide strong incentives in a wide range of civil contexts, incentives that backfire by reinforcing harmful over-parenting norms.[97] What have not been discussed, until now, are the

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[94] *See* David Elkind, *Playtime is Over*, N.Y.TIMES, Mar. 27, 2010, at A19, *available at* http://www.nytimes.com/2010/03/27/opinion/27elkind.htm ("[C]hildren aged 6 to 11 spent more than 28 hours a week using computers, cellphones, televisions and other electronic devices. . . . [F]rom 1979 to 1999, children on the whole lost 12 hours of free time a week, including eight hours of unstructured play and outdoor activities."). In 1990, Mayer Hillman, a social scientist, published a report about modern childhood commissioned by the Policy Studies Institute. CAIRNS, *supra* note 19, at 31. The report examined the lives of children aged eight to eleven and compared them to children who attended the same schools in 1970, just one generation before. *Id.* The area in which a typical eight-year-old was allowed to travel on his or her own had shrunk to one-ninth its former size. *Id.* The majority of parents knew they were taking away their children's freedom, but decided this was best because the world was more dangerous. *Id.* By 2007, according to a study by the Children's Society, a typical nine-year-old girl could not wander farther than her front yard. *Id.* at 32.

[95] Children are far more likely to be the victim of an assault by another child or an unintentional injury through an accident such as a car accident than be abducted by a stranger. Roni Caryn Rabin, *Dangers Lurk Closer to Home*, N.Y. TIMES, Sept. 15, 2008, at H7, *available at* http://www.nytimes.com/2008/09/15/health/healthspecial2/15risks.html.

[96] Children are 2.5 times more likely to drown in a swimming pool and 26 times more likely to die in a car crash than to be abducted by a stranger. GARDNER, *supra* note 13, at 186.

[97] Bernstein & Triger, *supra* note 2, at 1245 ("[P]arents eager to gain custody become overly dominating in their interaction with their children. For example, some may take over sport practices and leave their children with no independent outlet. Others may overwhelm their children by constant phone calls and text messages."). Bernstein and Triger summarize the harm to children: "Intensive Parenting carries . . . adverse ramifications for children . . . thwarting one of the most important roles of parents, namely, nurturing a sense of independence and separation from the parent." *Id.* at 1274.

implications of criminal law in this area, particularly with respect to the enforcement of criminal child neglect and endangerment statutes.

Historically, parents have had little reason to consider the threat of criminal prosecution when deciding how to parent their children; presumably, the prevailing concern behind parenting choices has been what is best for the child and for the family. But the ability of a parent to trust her own instincts and values in raising her children may be at risk.[98] Vague statutes do not provide sufficient guidance to parents to know what matters remain within their discretion, nor do they provide sufficient guidance to prosecutors and jurors to know when a parental lapse rises to the level of criminal conduct.[99] For parents, the vagueness problem may prompt paranoia. For the legal system, the vagueness problem results in overreliance on the discretion of the prosecutor,[100] on the judge's attempt to give meaning to the statute via jury instructions, and on the judgment of a jury venire already tainted by media hysteria over child protection.

A. Criminal Prosecutions for Child Neglect and Endangerment

As noted above, the legal standards that gave great deference to parental discretion are in flux.[101] The doctrine of parental immunity in tort has eroded in most states and disappeared completely in several,[102] reflecting "changes in the social legitimacy of parental autonomy and state intervention within the family."[103] At the same time, legislation has emerged not only restricting parents' discretion in

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[98] Chiu, *supra* note 38, at 1784–86 (discussing the importance of parental autonomy).

[99] *See* United States v. Williams, 553 U.S. 285, 286 (2008) ("What renders a statute vague, however, is not the possibility that it will sometimes be difficult to determine whether the incriminating fact it establishes has been proved; but rather the indeterminacy of what that fact is.").

[100] In the American criminal justice system, jurors are intended to act as a check on prosecutorial discretion to protect defendants from overzealous prosecutors. J. Kevin Wright, Comment, *Misplaced Treasure: Rediscovering the Heart of the Criminal Justice System Through the Use of the Special Verdict*, 19 T.M. COOLEY L. REV. 409, 410 (2002). However, this is only an effective protection if the jury is capable of making the right decision. *Id.* It appears that while jurors are competent at making factual determinations, they struggle with applying the law to the facts. *Id.* This is compounded by the fact that prosecutors often have absolute immunity from liability for potential civil rights violations. *See, e.g.*, Gray v. Poole, 243 F.3d 572, 577–78 (D.C. Cir. 2001) (holding that prosecutors in the District of Columbia are absolutely immune from damages under 42 U.S.C. § 1983 for their conduct in initiating and prosecuting child neglect actions).

[101] *See supra* notes 35–38 and accompanying text.

[102] *See* Carla Maria Marcolin, Rousey v. Rousey*: The District of Columbia Joins the National Trend Towards Abolition of Parental Immunity*, 37 CATH. U. L. REV. 767, 767 (1988); Edward Sylvester, Note, Chenault v. Huie*: Denying the Existence of a Legal Duty Between a Mother and Her Unborn Child*, 33 AKRON L. REV. 107, 114 n.37 (1999) (listing cases summarizing the status of the parental immunity doctrine in all fifty states).

[103] Bernstein & Triger, *supra* note 2, at 1250 n.123.

methods of child discipline, but also criminalizing some time-honored approaches that many parents still swear by.[104] There is no question that child abuse is a serious problem calling for serious solutions, but once parental authority and wisdom are cast in doubt, the slope gets slippery.

The concern here is that parents who resist the trend toward overprotective parenting, including Free Range parents who consciously choose to give their children a long leash, may expose themselves to criminal liability.[105] A compelling example comes from Bozeman, Montana, where a university professor was charged with child endangerment for dropping her kids (three kids, ages ranging from twelve to three) and a couple of similarly-aged neighbor kids, off for a couple of hours at the local mall.[106] The two twelve-year-olds had taken babysitting classes sponsored by a local hospital, and received specific instructions on what to do.[107] After the twelve-year-olds stepped into dressing rooms, leaving the younger children unattended for about five minutes, store employees alerted the police, and the mother was ultimately arrested for child endangerment.[108] Despite pleas for leniency—first offense, lesson learned, etc.—the prosecutor seemed intent on securing a guilty plea, insisting that she too was a mother and would never leave her child alone at the mall.[109] The prosecutor's inflexibility also appeared motivated by town-and-gown tensions, as she insisted that highly educated professors should not get special treatment.[110] Initially pleading not guilty and anticipating her trial, this mother submitted to a mock trial, with a mock jury, empaneled by her own lawyers.[111] The reactions of the bitterly divided mock jury persuaded her to abandon her defenses and enter a plea agreement involving community service.[112]

The reactions of those mock jurors, selected to represent a cross-section of the community, were telling. One older rancher scoffed at the charges, noting that he

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[104] *See generally* Jason M. Fuller, *The Science and Statistics Behind Spanking Suggest That Laws Allowing Corporal Punishment Are in the Best Interests of the Child*, 42 AKRON L. REV. 243, 245–49 (2009) (summarizing the trend toward banning spanking, both in the United States and internationally, and noting that restricting parental discretion in this way can be harmful both to the children and to society).

[105] *See* Paul W. Schmidt, *Dangerous Children and the Regulated Family: The Shifting Focus on Parental Responsibility Laws*, 73 N.Y.U. L. REV. 667, 676–77 (1998) ("'Endangering the welfare' statutes hold adults culpable for either contributing to the delinquency of a minor or endangering the welfare of a minor .... The statutes have received favorable treatment when challenged, with courts often overlooking arguable defects in the statutes in light of their important public policy role.").

[106] Bridget Kevane, *Guilty as Charged*, BRAIN, CHILD, http://www.brainchildmag.com/essays/summer2009_kevane.asp (last visited June 12, 2012).

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] *Id.*

was cutting wheat and driving a tractor at age twelve.[113] A child therapist was "appalled yet forgiving."[114] A father of one was "unforgiving."[115] An older homemaker objected to the defendant's characterization of Bozeman, Montana as a "safe community" exclaiming that a murder had occurred there the previous year.[116] The advice of the jurors was that if she wanted an acquittal she would need to "cry and show remorse."[117] She could not, of course, show remorse because she did not feel remorse; she felt that she "was being reprimanded for allowing [her] daughter to develop that sense of responsibility."[118] She still insists she did nothing wrong: "I . . . had trusted my own instincts and trusted the way I had been brought up when I made my decision on that fateful day: It was fine to drop the kids off at the mall."[119] Instead of going to trial, she took the prosecutor's deal, learning "a different, sadder lesson: that self-sufficiency is shrinking in today's culture."[120] She expressed this lesson as follows:

> Did I learn from this? Absolutely. I learned it's not okay to drop the kids off at the mall, not in Bozeman, Montana, anyway. But I also learned that I am more fiercely attached than I realized to my way of parenting. My temperament, my juggling, my choices: I would not let someone tell me how to raise my children.[121]

The lesson learned is a sobering one. Not only is it considered inappropriate to leave children in the care of their twelve-year-old siblings today, but it may also be a criminal offense to do so.

The real loss here is parents' ability to trust their instincts in caring for their own children. Parents will need to decide not "what is right for me and my child," but "how will this look to others?" It cuts to the core of the Free Range parenting movement, whose parenting philosophy may never get a fair hearing in the marketplace of ideas if parents who subscribe to those values face potential criminal liability for their parenting choices.

Other prosecutions have been sustained for a wide variety of instances of leaving children unsupervised or inadequately supervised. There are several examples from Ohio in which courts of appeals have overturned child-endangerment convictions, suggesting that finders of fact in today's society may be

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[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*

too quick to find a parent criminally liable. In *State v. Hughes*,[122] a father was convicted in a bench trial for leaving his five-year-old daughter in the air-conditioned cab of his pickup truck, watching a cartoon on a DVD player, equipped with a cell phone she knew how to use, while he ran in to a store.[123] The court of appeals reversed, over a vehement dissent, noting that the Ohio statute required that the father's neglect create a "substantial risk" or a "significant possibility" of harm to the child.[124] The prevailing opinion (not joined by the concurring judge) detailed the various sequences of events that would be necessary for this child to be harmed during the twenty-seven minutes she was alone, and found them to be speculative.[125] The majority was careful not to endorse the father's conduct, however, only concluding that the facts did not justify criminal conviction:

> Finally, we do not, in any way, condone Hughes' imprudent and irresponsible parenting decision to leave his daughter unattended in his vehicle for around thirty minutes. However, simply because Hughes made an irresponsible parenting decision does not mean that his conduct rises to the level of a criminal offense, deserving of fines and possible imprisonment. It is not the function of the criminal justice system to invade the sacred right of parents to raise their children as they deem suitable and proper, and police officers and prosecutors should exercise the appropriate discretion in deciding whether a parent's conduct crosses that thin line between bad parenting and criminal culpability.[126]

The dissent would have upheld the conviction, emphasizing that the store was less than a mile from the interstate and concluding that "[t]hese facts created a substantial risk to the child's safety, because she could have left the car seat and attempted to operate the truck (running with the keys in the ignition) or left the vehicle and been injured or kidnapped, or both."[127] The dissent also relied on the fact that a member of the local populace reported the incident, suggesting that at least that person thought the defendant had put his daughter at risk.[128]

But as already discussed, the media has sensationalized risk to children to such a degree that the view of a "member of the populace" is unlikely to reflect

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[122] No. 17-09-02, 2009 WL 2488102 (Ohio Ct. App. Aug. 17, 2009). Unpublished opinions are not cited here for precedential value, but merely as examples of modern prosecutions.

[123] *Id.* at *1–3.

[124] *Id.* at *4.

[125] *Id.* at *5–6.

[126] *Id.* at *7.

[127] *Id.* at *9.

[128] *Id.*

actual dangers or risks.[129] The gut reaction of people on the street is inherently unreliable in today's media-saturated society.[130] The Ohio courts have also reversed convictions of parents who left their children in the care of young caregivers: one case involving a four-year-old entrusted to thirteen- and twelve-year-old babysitters,[131] and another case involving an eight-year-old and a four-year-old left in the care of their eleven- and nine-year-old siblings.[132] While these last three convictions were ultimately reversed, that does not change the fact that the parents were charged, tried, and convicted of neglect or endangerment in all these cases. That alone sends a very strong message to parents that their parenting decisions will be second-guessed by others, with nothing less than criminal punishment and a criminal record at stake.[133]

B. The Problem of Mens Rea

Given the sensitivity of this particular subject area, one might be tempted to advocate a high mens rea requirement for these crimes. But despite the high stakes and the potential to undermine parental discretion, particularly the discretion of those attempting to do Free Range parenting, high mens rea requirements are not particularly helpful.

In the Montana example, the statute required that the prosecution prove, beyond a reasonable doubt, that the parent acted "knowingly."[134] This did not help

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[129] *See* MARANO, *supra* note 85, at 77 ("With the generous help of tabloid newspapers and graphic television news broadcasts, the net effect is that adults misread the vague dangers around them.").

[130] *See, e.g.*, CAPLAN, *supra* note 8, at 101 (listing a table showing that in every age group—infants to twenty-four years of age—children are safer now than they were in the 1950s); PAYNE, *supra* note 69, at 179–80 (citing a study where 90% of polled parents stated safety was their biggest concern when making decisions about whether to let their kids play outside).

[131] State v. Perrine, No. 2001CA00338, 2002 WL 1289866 (Ohio Ct. App. June 10, 2002).

[132] Village of Utica v. Billman, No. 01 CA 24, 2001 WL 1032975 (Ohio Ct. App. Sept. 7, 2001).

[133] Arguably, this message is being heard loud and clear by worried parents who now must ask the government for help in making parenting decisions. *See, e.g.*, *Frequently Asked Questions*, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., http://www.ocfs.state.ny.us/main/prevention/faqs.asp#supervision (last visited June 13, 2012) (acknowledging that parents often ask when it is appropriate to leave a child alone; in response, parents are informed there is no clear answer, but the state gave recommendations for things to consider when a parent makes this assessment); Child Welfare Info. Gateway, *supra* note 7 (outlining factors to consider regarding individual children's characteristics before making a decision to leave them home alone).

[134] Kevane, *supra* note 106; MONT. CODE ANN. § 45-5-622(1) (2011) ("A parent . . . of a child less than 18 years old commits the offense of endangering the welfare of children

the defendant in that case, who consciously and purposefully left her kids at the mall, choosing to trust her oldest daughter.[135]

In the process of active and responsible parental risk management, the parents are acting knowingly and intentionally, choosing which risks to expose their children to and which to shield their children from. When a parent straps his ten-year-old into the car and drives out on the freeway, he is certainly knowingly exposing his child to the risk of death or serious injury in an automobile accident.[136] But he is protecting that same child from the perceived risks of injury or death the child would face if left home alone.[137] This is a conscious choice the parent makes, based on the parent's own instincts and judgment.

Indeed, the high mens rea requirements will ironically offer greater protection to those parents who are not conscientious enough to weigh and consider risks: negligent, careless, and reckless parents who take no note of the risks to which they are exposing their children. The Free Range parent, who consciously chooses to allow her child some freedom and autonomy, carefully weighing those risks, will easily meet the "knowing" or "intentional" mens rea requirement in terms of exposing her children to the attendant risks. Either letting the child stay at home alone or forcing the child to submit to the dangers of the highway by taking the child with him, the parent easily satisfies the mens rea requirement of, for example, the Kansas statute which defines the crime as "intentionally and unreasonably causing or permitting a child under the age of 18 years to be placed in a situation in which the child's life, body or health may be injured or endangered."[138] The sole question, under the Kansas statute, is whether placing the child in a situation where "the child's life, body or health may be injured"—be it strapped into a car on the highways, or home alone in the family abode, or just about anywhere else, for that matter—is unreasonable.

In fact, the statutes covering criminal child neglect and endangerment in the various states reflect an extremely wide range of mens rea requirements, ranging from acting merely negligently in Nebraska,[139] to recklessly in Maine,[140] to knowingly in Arizona,[141] to willfully in Mississippi,[142] to intentionally in Kansas.[143] Most state statutes, however, do not specify *any* mens rea, merely prescribing criminal liability for actions like "failure" to provide necessary or

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if the parent . . . knowingly endangers the child's welfare by violating a duty of care, protection, or support.").

[135] *See supra* notes 91–96 and accompanying text.

[136] *See supra* text accompanying note 70 (concerning the risks of driving children in automobiles).

[137] Brody, *supra* note 62 and accompanying text.

[138] KAN. STAT. ANN. § 21-3608(a) (2008).

[139] NEB. REV. STAT. ANN. § 28-707 (LexisNexis 2009).

[140] ME. REV. STAT. tit. 17-A, § 554 (2011).

[141] ARIZ. REV. STAT. ANN. § 13-3619 (2006).

[142] MISS. CODE ANN. § 97-5-39 (2011).

[143] KAN. STAT. ANN. § 21-3608 (2008).

proper care.[144] Whether the lack of a mens rea requirement translates to strict liability for parents or to some higher level of scienter will be a matter of statutory interpretation for the various state courts.[145]

C. Vagueness in Child Neglect and Child Endangerment Statutes

The statutory definition of child neglect for purposes of criminal prosecution is, in many states, startlingly vague.[146] The child neglect and endangerment statutes in the various states demonstrate a remarkable range of standards, many of which have been upheld and applied despite their vagueness.[147]

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[144] *See, e.g.*, N.J. REV. STAT. § 9:6-1 (2002); N.C. GEN. STAT. ANN. § 14-318.2 (West 2011); S.C. CODE ANN. § 63-5-70 (2010); W. VA. CODE ANN. § 61-8D-4 (LexisNexis 2002).

[145] *See generally* Ann Hopkins, Comment, *Mens Rea and the Right to Trial by Jury*, 76 CAL. L. REV. 391, 402–06 (1988) (discussing the mens rea requirement and the development of strict criminal liability).

[146] *See, e.g.*, Kenneth D. Dwyer, *Indiana's Neglect of a Dependent Statute: Uses and Abuses*, 28 IND. L. REV. 447, 449–50 (1995). Dwyer summarizes the courts' treatment of vagueness in the Indiana statute:

> In the 1985 case of *State v. Downey*, [476 N.E.2d 121 (Ind. 1985),] the Indiana Supreme Court held in a unanimous decision that, construed literally, the Neglect of a Dependent Statute is unconstitutionally broad and vague. The "major part" of the vagueness in the statute is caused by the "double contingency factored into the definition of the crime by the phrase may endanger." The court saved the statute from nullification by giving it a narrowing construction. "[T]he statute is to be regarded as applying to situations that endanger the life or health of a dependent. The placement must itself expose the dependent to a danger which is actual and appreciable." Failure to instruct the jury that the danger to the dependent must be actual and appreciable will result in the reversal of a conviction and a remand for retrial. However, instructions containing the statute's original "may endanger" language do not erroneously provide a jury with a lower standard of harm than is required by the Downey decision as long as other instructions include the Downey mandate that the State must prove that the defendant placed the dependent in a situation that actually and appreciably endangered the life of the dependent.

Id.

[147] Milton Roberts, Annotation, *Validity and Construction of Penal Statute Prohibiting Child Abuse*, 1 A.L.R. 4th 38 (1980). In contrast, there have been several states that have found statutes unconstitutional or implied their unconstitutionality. *Id.* For example,

> It was implied by the court, in *People v. Hoehl*, 568 P.2d 484 (Colo. 1977) that if the word "may" in the clause "may endanger the child's life or health," in the provision of a child abuse statute defining the proscribed conduct, were

The problem is not a new one, and it has been identified as problematic in the related context of dependency and termination (of parental rights) cases for decades:

> [T]ermination criteria relating to neglect, substance abuse, and parental failure are ambiguous and poorly defined in state law. Statutes include undefined terms and phrases like "token efforts" (Nevada), "being an unfit parent" (Arkansas), and "without excuse" (Massachusetts). For some time, legal and social work scholars have described how child welfare laws pertaining to neglect, in particular, are ambiguous and overly inclusive. In fact, more than thirty years ago Michael Wald (1975) called for a standardized statutory definition of neglect that might limit subjective or disproportionate judgments about it in child welfare practice. At the time, Wald . . . wrote: "Most state statutes define neglect in broad, vague language, which would seem to allow virtually unlimited intervention" in the family. The content analysis suggests that there has been little progress in changing how the states define neglect in the intervening years.[148]

While state proceedings terminating parental rights are not, as a rule, decided by juries, the same problems with the vagueness of statutes plague the courts in criminal child neglect and endangerment cases. Criminal liability and the termination of parental rights are both nightmare scenarios for any loving and law-

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> construed in the dictionary sense as meaning "be in some degree likely," the statute would be unconstitutional, since, the court said, virtually any conduct directed toward a child had the possibility, however slim, of endangering the child's life or health. The court accordingly construed the word "may" as conveying the meaning that there was a "reasonable probability" that the child's life or health would be endangered from the situation in which the child was placed.

Id. §4[b].

> In *State v. Gallegos*[,] . . . 384 P2d 967[(Wyo. 1963)], . . . [t]he statute in question made it a crime for anyone knowingly "to cause, encourage, aid or contribute to the endangering of the health, welfare, or morals" of a child under the age of 19 years. The court held that the statute furnished no standard as to what the endangering of a child's health, welfare, or morals was, and, hence, left it to arbitrary judgment, whim, and caprice; that since men necessarily had to guess at its meaning and differ as to its application, the statute violated an essential of due process.

Id. (quoting State v. Gallegos, 384 P.2d 967, 968–69 (Wyo. 1963)).

[148] William Vesneski, *State Law and the Termination of Parental Rights*, 49 FAM. CT. REV. 364, 374 (2011) (citations omitted).

abiding parent. Leaving such determinations to the discretion of strangers without clear statutory guidance is problematic.

The statute in West Virginia is a good example of the vagueness problem.[149] It specifies no mens rea and applies whenever there is an "unreasonable failure by a parent . . . to exercise a minimum degree of care to assure said minor child's physical safety or health."[150] Such a standard leaves open not only the question of what is unreasonable, but also the question of defining a "minimum degree of care." Neither does the statute indicate who determines what is unreasonable or what constitutes minimum care.

Connecticut's statute has been held unconstitutional as applied in the case of a parent convicted of felony child endangerment for keeping a messy house.[151] The single mother worked two jobs—a total of sixty hours a week—to support her seventeen-year-old daughter and twelve-year-old son.[152] The son was bullied at school and suffered from a variety of emotional problems.[153] Ultimately, the boy committed suicide by hanging himself in his closet.[154] When authorities arrived to investigate the death, they found an extremely cluttered house, with a bad odor.[155] On that basis alone, the grieving mother was charged with felony child endangerment, defined as:

> willfully or unlawfully caus[ing] or permit[ting] any child under the age of sixteen years to be placed in such a situation that the life or limb of such child is endangered, the health of such child is likely to be injured or the morals of such child are likely to be impaired.[156]

After a conviction in the trial court, the court of appeals reversed, holding that the statute was unconstitutionally vague as applied to the defendant's conduct in this case:

> We recognize that there may be generally accepted housekeeping norms and that it may be common knowledge that, all things being equal, a clean and orderly home is preferable to a dirty and cluttered home. The same could be said of any number of conditions and actions that affect a child's well-being. It may be common knowledge, for example, that drinking milk is healthier than a constant diet of soft drinks, reading books is preferable to constant exposure to television programs, large cars are safer than small cars, playing computer games is safer than

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[149] W. VA. CODE § 61-8D-1(6) (2005).
[150] *Id.*
[151] State v. Scruggs, 905 A.2d 24, 40 (Conn. 2006).
[152] *Id.* at 26.
[153] *Id.*
[154] *Id.*
[155] *Id.* at 27.
[156] *Id.*; CONN. GEN. STAT. § 53-21(a) (2011).

> riding a bicycle, and so on. All of these comparisons, however, involve virtually infinite gradations of conduct, making it extremely difficult, if not impossible, for an ordinary person to know where the line between potentially harmful but lawful conduct and unlawful conduct lies or, indeed, whether that line exists at all. Not *all* conduct that poses a risk to the mental or physical health of a child is unlawful. Rather, there is an acceptable range of risk.[157]

Since any parenting decision involves some risk, and there is "an acceptable range" of such risks, the problem becomes one of line-drawing, a task generally allocated to prosecutors in their charging decisions and to jurors in their verdicts. Consistent with the experiences in the Montana and Ohio cases discussed above, the jurors appeared willing to convict a parent whose level of care did not conform to the jurors' own standards of good parenting.[158] In those cases, the appellate court stepped in to reverse the conviction, insisting that criminal liability requires something more than substandard parenting.[159] Drawing the line is difficult, and the statutes do not do it very effectively—many of them giving little or no guidance to the ultimate decision maker or, for that matter, to parents who are trying to comply with the law.[160] The resulting vagueness puts any less-than-perfect or unconventional parent at risk of prosecution.

D. Cultural Differences and Child Neglect Standards

In the absence of clearer statutory directives, the interpretation and enforcement of vague standards will almost inevitably be driven by culture-specific norms of parenting.[161] One example is the issue of teaching a child to

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[157] *Scruggs*, 905 A.2d at 26, 36–37.

[158] An additional danger is the tendency of individuals to conform to group standards. In an experiment conducted by Richard Crutchfield in 1953, people conformed to an obviously false group consensus one-third of the time. GARDNER, *supra* note 13, at 103.

[159] *Scruggs*, 905 A.2d at 27.

[160] *See, e.g.*, ALASKA STAT. § 11.51.100 (2010) ("A person commits the crime of endangering the welfare of a child . . . if, being a parent . . . of a child under 16 years of age, . . . the person intentionally deserts the child in a place under circumstances creating a substantial risk of physical injury to the child . . . ."); HAW. REV. STAT. § 709-904 (2008) ("A person commits the offense of endangering the welfare of a minor in the second degree if, being a parent . . . the person knowingly endangers the minor's physical or mental welfare by violating or interfering with any legal duty of care or protection owed such minor.").

[161] This is dangerous because of something psychologists have labeled confirmation bias. When individuals form a belief, no matter how trivially reached, they will embrace information that supports the view, while rejecting information that contradicts it. GARDNER, *supra* note 13, at 110–11. For example, in 1979 when capital punishment was a top issue in the United States, researchers brought together equal numbers of supporters and opponents. *Id.* at 112. The strength of each side's views was tested by having each side

work. Some cultures, including nineteenth century American agrarian society, would insist that a child's development requires that the child learn to discipline herself to work hard, including, perhaps, to share in the responsibility for supporting the family. Other cultures would condemn those very same conditions as child labor, a violation of the fundamental rights of the child.[162]

The fact that child neglect standards are necessarily culture specific[163] should raise two concerns. The first is that ethnic and socio-economic minorities in the United States are likely to come out losers in child neglect proceedings, as they may be parenting according to a different set of cultural values.[164] Indeed, the

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read a carefully balanced essay that presented both evidence that capital punishment deters crime and evidence that it does not deter crime. *Id.* The researchers then retested the people's views and found they had grown *stronger*. *Id.* Each group had absorbed the information that confirmed its views and ignored the rest. *Id. See also* Simon Stern, *Constructive Knowledge, Probable Cause, and Administrative Decisionmaking*, 82 NOTRE DAME L. REV. 1085, 1121 (2007) ("Confirmation bias leads people to accentuate the positive thrust of evidence that accords with their expectations or desires, and to minimize the thrust of evidence to the contrary.").

[162] Differing cultural approaches to the work of children required some compromise in drafting international instruments governing the rights of children. There are examples of such delicately crafted standards. *See, e.g.*, Convention on the Rights of the Child, art. 32, para. 1, Nov. 20, 1989, 1577 U.N.T.S. 3, *available at* http://treaties.un.org/doc/Treaties/1990/09/19900902%2003-14%20AM/Ch_IV_11p.pdf ("States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development."); *see also* GARDNER, *supra* note 13, at 116 (noting that different cultures fixate on different risks; Europe fears genetically engineered food while the United States, as a whole, does not).

[163] *See* Bernstein & Triger, *supra* note 2, at 1266 (arguing that Intensive Parenting "is a culture, race, ethnicity, and class specific practice of parenting"). Intensive Parenting has been identified as essentially a middle-class parenting trend. *Id.*

[164] Native American tribes, for example, may view the relationship between parents and children differently than the norms of Anglo-American law and culture. Barbara Ann Atwood, *Tribal Jurisprudence and Cultural Meanings of the Family*, 79 NEB. L. REV. 577, 609–10 (2000). "When the laws of a community reflect a dominant culture and yet many of its members are from other minority cultures, there is often conflict. When this conflict occurs in the legal regulation of the parent-child relationship, the consequences are tremendous for the children, the parents, and the State." Chiu, *supra* note 38, at 1773. "Culture dictates what are optimal, appropriate, and acceptable parenting practices. What one group accepts may be considered unacceptable or even abusive and neglectful by another group." *Id.* at 1775–76. In her book, *Child Abuse and Culture: Working With Diverse Families*, Dr. Lisa Aronson Fontes further explains how the dominance of certain cultural norms leads to bias and unfairness. She notes that "[r]egardless of their own cultural background, most professionals in North America have been schooled to see people from the dominant group as the norm and people from other groups as deviant," and

woman in Montana who left her kids at the mall grew up in Puerto Rico as one of eight children.[165] Large families in the Latino community are far more likely to expect older children to take responsibility for younger children.[166] This may go a long way toward explaining why she saw nothing irresponsible about trusting her twelve-year-old to care for younger siblings and why both the prosecutor (who apparently had one daughter)[167] and the mock juror with one child were the least sympathetic and least forgiving of her actions that day. Professors Bernstein and Triger provide a sampling of other cultural differences:

> Childrearing practices vary considerably across cultures. Many alternative formats of childcare exist where it is not necessarily the mother, the parents, or even a particular adult providing the care. In many societies across the world, siblings play a central role in providing care and instruction. While European-American families rarely use a babysitter under the age of twelve, in many societies five to ten year olds care for toddlers. In some cultures, grandparents play a central role in child rearing. In other societies, the children of several mothers mingle, and whoever is free takes care of them, regardless of whether they are her children or not. In many cultures, the assumption is that "the mother is often too busy to tend to the child." In some cultures, "a mother is chastised by peers if she is overly fond of her child."[168]

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these "[c]ultural norms shape how we evaluate abuse and risk." LISA ARONSON FONTES, CHILD ABUSE AND CULTURE: WORKING WITH DIVERSE FAMILIES 59, 63 (2005).

[165] Kevane, *supra* note 106.

[166] WASH. RISK ASSESSMENT PROJECT, MULTI-CULTURAL GUIDELINES FOR ASSESSING FAMILY STRENGTHS AND RISK FACTORS IN CHILD PROTECTIVE SERVICES 35 (Diana J. English & Peter J. Pecora eds., 1993).

> Issues of lack of supervision of young children surface most frequently in referrals for Native American and Hispanic families. Older, but still young children are expected to care for their younger siblings. In Native American families, being responsible for one's siblings is an indication of maturity and ability. In Hispanic families, especially migrant families, caring for younger siblings may be [a] role associated with younger children's contribution to family survival.

Id. (citations omitted) Additionally, it has been argued that the surge in fear for children's safety may stem in part from the trend toward smaller families. HONORÉ, *supra* note 10, at 243. "The fewer kids you have, the more precious they become, and the more risk-averse you get." *Id.*; *see also* NELSON, *supra* note 16, at 23 (referencing the "preciousness" effect).

[167] Kevane, *supra* note 106 ("She told my lawyer in their first meeting that she also had a daughter and would never have left her at the mall.").

[168] Bernstein & Triger, *supra* note 2, at 1267; *see also id.* at 1266–69 (section entitled "Intensive Parenting and Cultural and Ethnic Differences").

The second concern is that culture is a moving target because culture shifts with time, and a system that enforces cultural expectations with criminal sanctions must be cautious about fairness and justice to those either ahead of or behind the curve of recent cultural shifts.[169] Forty years ago, the typical American parent may have allowed a child to climb trees, ride her bike in the neighborhood, stay home alone for an hour or two, and walk herself to school.[170] The Free Range Kids movement hopes giving kids this much freedom will become the norm again.[171] But for now, many if not most parents in America's dominant white, middle-class culture consider these activities unreasonably risky for the youngest of schoolchildren.[172]

As already noted, despite the newness of the Intensive Parenting norm, there is already a backlash against it.[173] It is highly problematic, therefore, for the legal system to embrace and enforce such cultural expectations. It will be inherently unfair to those who may be slightly behind (or ahead of) the times and to those who are not part of the dominant ethnic and socio-economic culture in American society.[174] And if the new research on the substantial downside of Intensive Parenting holds up, enforcing such standards with criminal law could interfere with the pendulum's natural swing back, taking a serious toll on the next generation.

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[169] *See, e.g.*, *id.* at 1263–64 (describing how within a few years the correct way to lay a sleeping baby to prevent SIDS changed).

[170] *Id.* at 1225 (Intensive Parenting norms did not emerge until the mid-1980s).

[171] *See generally* SKENAZY, *supra* note 7 (describing the goals of the Free-Range Kids movement).

[172] *See id.*

[173] Gibbs, *supra* note 1. Over-parenting and the backlash against it are not confined to America. In Britain, a preschool called the Secret Garden uses nature as its classroom for children. HONORÉ, *supra* note 10, at 240. "[I]t also challenges the very modern belief that children need to be handled with extreme care, that the way to rear them is indoors, in places that are rigorously hygienic, accident-proof, climate-controlled, and under constant supervision." *Id.* Of course, there are dangers associated with teaching small children to appreciate nature. However, a mother whose little boy was burned when he put his finger in the campfire opined that the benefits of this form of education outweighed the risks: "The truth is that there are risks in the world and that children benefit from being exposed to them within reason." *Id.* (internal quotation marks omitted). A teacher at an outdoor preschool explained the rationale behind exposing children to some risk: "Dangerous things happen in life, so there is no point trying to eliminate all risks from childhood. . . . We explore the danger of certain objects, and the children learn very quickly how to handle them." *Id.* at 249 (internal quotation marks omitted).

[174] For instance, "[l]ess privileged adults cannot always move their children to environments with adequate police protection and lower crime rates." NELSON, *supra* note 16, at 82. In these more dangerous neighborhoods, some parents choose to expose their children to risk in order to enable them to deal with such risks properly. As one working-class African-American mother put it: "Among those who are less privileged, too much protection can carry as many risks as too little." *Id.* at 86.

E. Prosecutorial Discretion

Given the vagueness of child neglect statutes, prosecutors wield significant power in deciding which cases to prosecute. The story from Montana suggests that the prosecutor was motivated by her own parenting standards, that she "would never have left her [daughter] at the mall."[175] The prosecutor, at least according to the story as told by the defendant, also appeared to be motivated to prosecute based on a separate agenda:

> As the pretrial procedures dragged on, I began to feel I was caught in a culture war, or perhaps several wars—town vs. gown, native Montanan vs. outsider, and working mother vs. working mother. . . . [The prosecutor] also said she believed professors are incapable of seeing the real world around them because their "heads are always in a book." Her first letter to my lawyer ended on a similar theme: "I just think that even individuals with major educations can commit this offense, and they should not be treated differently because they have more money or education." Despite the fact that Montana professors are among the lowest paid in the nation, and that undoubtedly the prosecutor has a law degree herself, she nevertheless categorized me as someone trying to receive special treatment. . . .
>
> I now realize that her pressure—her near obsession with having me plead guilty—had less to do with what I had done and more to do with her perception of me as an outsider who thought she was above the law, who had money to pay her way out of a mistake, who thought she was smarter than the Bozeman attorney because of her "major education." . . . I was visible but silent, and thus unable to shake the image that the prosecutor had created of me: a rich, reckless, highly educated outsider mother who probably left her children all the time in order to read her books.[176]

This may or may not be a fair characterization of the prosecutor in that particular case, but it suggests the role prosecutorial discretion can play in these cases. No doubt, the prosecutor was outraged by the conduct of the defendant in this case, and some of the mock jurors, faced with the same evidence, agreed with her.

The case may seem easier if the child does in fact come into harm as a result of the parent's choice to pursue a more laissez-faire parenting style. In that case, a prosecutor may feel the need to vindicate the wrong. However, there is a flaw in this reasoning as well. If a parent exposes a child to a one-in-twenty risk of serious harm, the parent might be deemed to have breached the standard of care; in other words, the 5% probability of harm might be considered by the jury to be an

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[175] Kevane, *supra* note 106.

[176] *Id.*

unreasonable risk.[177] The wrongfulness of the parent's act is the same whether or not the child comes to harm, but to a jury the fact of actual harm may be taken as proof that the parent's choice was unreasonable. If the risk of harm is literally one in a million—in the category of "freak accident"—it would be patently unreasonable to expect any significant investment in precaution against that harm.[178] And yet, every time that freak accident occurs, the parent may face liability for endangerment, as jurors are likely to take the fact of the harm itself as conclusive evidence of its likelihood: "[h]ere's the problem—what might seem prudent precaution *before* an accident occurs might appear, in hindsight, to have been imprudent. That is, if an accident has occurred, the hindsight bias may tell us that the accident was more inevitable than we would have thought before."[179]

When the child is not harmed, the situation is far more compelling for the parent to be let off with a warning, and with a lesson learned. This is one reason the Montana prosecution is so striking; the children were not harmed, and there was no immediate evidence of a threat to them. Yet the mother was prosecuted anyway.

But the issue of actual harm to the child (as opposed to merely exposing the child to a risk that never materialized) can cut the other way. If the parents' neglect or poor judgment has resulted in the child's death, the prosecutor may determine that the parents are suffering enough already. There may be little point in terms of deterrence or even retribution in heaping a prison sentence on top of that. An example comes from the problem of leaving children in parked cars where the heat inside the vehicle threatens the child's safety and health. In 2001 it was estimated that 178 children had died from heat-related causes in automobiles.[180] Charges were filed in only sixty-five (37%) of these cases, despite the fact that a child

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[177] The reasonableness of the risk would also depend, of course, on the options the parent had for avoiding such risks, how easily or inexpensively such risks could have been avoided, as well as the new risks created by the measures taken to minimize this particular risk.

[178] The trend to blur the line between a "danger" and a "risk" could also contribute to the danger of determining that the parent should have prevented the "freak accident." *See* NELSON, *supra* note 16, at 17.

> When dangers are redefined as risks and thus "viewed as the product of human action and decision-making rather than fate," individuals might hold themselves even more responsible for ensuring the safety of themselves and of those who are dependent on them. In conjunction with this approach, a growing body of empirical research notes that as the dangers facing children are interpreted as risks to be managed, parents come to limit the mobility of their children, leading ultimately to a more circumscribed existence.

Id.

[179] ROBERT COOTER & THOMAS ULEN, LAW & ECONOMICS 51 (6th ed. 2012).

[180] Stephanie Armagost, *An Innocent Mistake or Criminal Conduct: Children Dying of Hyperthermia in Hot Vehicles*, 23 HAMLINE J. PUB. L. & POL'Y 109, 111 (2001).

died.[181] There may be a lot of explanations for this statistic, but a likely one is that the prosecutor determined that those responsible for the children's deaths did not need to be taught a lesson, that they were already suffering severely for their lapse of judgment. In the case in Montana, in contrast, the mother was unrepentant. The prosecutor may have been prompted by a strong public policy objective to teach a lesson and send a message: that it is simply never acceptable to entrust one's children in a public place to caregivers that young.

F. The Role of the Jury

1. A Check on Prosecutorial Discretion

The criminal justice system places reliance on the jury of one's peers as a check on the overzealous prosecutor.[182] Grand juries are there to check the prosecutors even at the charging stage.[183] Petit juries are there to ensure that citizens are treated fairly and reasonably.[184] And who better to judge what is reasonable than a body of one's peers, ordinary citizens in the same community?

By relying on juries to apply legal standards, the legal system has historically trusted the defendant's neighbors and fellow citizens far more than the state to determine what is *reasonable* behavior. But if the public is misinformed about the risks children face in the world and is driven by irrational fears inflamed by sensationalistic media reports, the jury may be in a poor position to judge the actions of a parent who, based on personal convictions as to the best interest of his child, defies the overprotective parenting norm.[185]

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[181] *Id.*

[182] *See* Juan Casteñeda, *The Jury's Dilemma: Playing God in the Search for Justice*, 72 DEF. COUNS. J. 387, 396–97 (2005) (recognizing the jury's role as a safeguard to protect against an overzealous prosecutor).

[183] *See* United States v. Cotton, 535 U.S. 625, 634 (2002).

[184] The U.S. Supreme Court offered this pithy explanation of the petit jury's role:

> Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it.

Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

[185] *See* THOMAS A. MAUET, TRIALS: STRATEGY, SKILLS, AND THE NEW POWERS OF PERSUASION 2 (6th ed. 2009). Jurors often use rules of thumb and stereotyping to create their image of what happened in a case. *Id.* Most jurors use emotional, not logical reasoning. *Id.* Most people use their beliefs and attitudes to process information—to accept, distort, or reject it based on whether the information is consistent with their beliefs and attitudes about how life works. *Id.* at 5–6. The most important predictors of likely juror beliefs and attitudes are the experiences that the jurors, their families, and close friends

2. Jurors' Assessment of Risk—Why They Are Likely to Get It Wrong

Psychologists who study fear have determined a number of reasons that people misperceive risks. Indeed, they note that "perceived risks rarely match the actual risks."[186] What follows is a discussion of five factors that contribute to this distortion between actual and perceived risks.

(a) The Availability Heuristic

One cause of risk misperception, known as the "availability heuristic," describes how, on a gut level, people assess the likelihood of an occurrence according to how easily they can recall an example of it.[187] Horrific stories about child abductions, however rare those instances may be, are burned into people's memories—mostly because the stories themselves are so horrible—and are therefore easily recalled.[188] Because jurors can quickly and easily recall examples of child abductions, they will assume that such events are common. Accordingly they will predictably overrate the likelihood and risk of such abduction and will be quick to condemn parenting choices that fail to guard against such "common" and well-known risks.

(b) Exotic Risks v. Mundane Risk

It is human nature to "exaggerate spectacular but rare risks and downplay common risks."[189] People "worry more about earthquakes than they do about slipping on the bathroom floor, even though the latter kills far more people than

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have had that are similar to the facts in the case before them. *Id.* To jurors, their experiences in life are just as much evidence as the testimony they hear at trial. *Id.* This could be a problem if jurors are programmed to believe that Intensive Parenting norms are the proper parenting standard. "[T]he movement of Intensive Parenting carries significant social force. Many already believe that Intensive Parenting is the preferred, if not the only legitimate parenting style. Therefore, Intensive Parenting is effectively mandatory in many communities." Bernstein & Triger, *supra* note 2, at 1262.

[186] SCHNEIER, *supra* note 74, at 26.

[187] GARDNER, *supra* note 13, at 46–48.

[188] *See* DANIEL SCHACTER, THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS 178–79 (2001) (explaining that when people are shown a series of pictures that include ordinary scenes, such as a mother walking her child to school, as well as dreadful scenes, such as a child being hit by a car, they will recall the negative scenes far more readily than the others); *see also* GARDNER, *supra* note 13, at 49 (discussing the same study).

[189] SCHNEIER, *supra* note 74, at 26.

the former."[190] It is not surprising, therefore, that surveys and focus groups conducted by a "paranoid parents" support group revealed that the top four concerns parents have for their children are (1) kidnapping,[191] (2) school snipers, (3) terrorism, and (4) stranger danger.[192] Less exotic risks, such as disease or car accidents, are actually far more likely to harm or even kill a child.[193] A fortiori, people tend to ignore the higher-probability risks that impose less catastrophic and less visible harms, such as risks to children's health and independence from being kept "safe" indoors, where they can get little physical exercise or freedom to explore.[194]

(c) Human Risks v. Anonymous Risks

If people can put a human face on the risk and tell the story of the harm to a child or a family, they will systematically exaggerate that risk. Josef Stalin understood this principle, noting, "A single death is a tragedy, a million deaths is a statistic."[195] This tendency explains why "[p]eople gloss over statistics of automobile deaths, but when the press writes page after page about nine people trapped in a mine—complete with human-interest stories about their lives and families—suddenly everyone starts paying attention to the dangers with which miners have contended for centuries."[196]

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[190] *Id.* ("Similarly, terrorism causes more anxiety than common street crime, even though the latter claims many more lives. Many people believe that their children are at risk of being given poisoned candy by strangers at Halloween, even though there has been no documented case of this ever happening.").

[191] Another poll found that 50% of polled parents stated they worried "a lot" about someone kidnapping their child. PAYNE, *supra* note 69, at 179.

[192] CHRISTIE BARNES, THE PARANOID PARENTS GUIDE: WORRY LESS, PARENT BETTER, AND RAISE A RESILIENT CHILD 38 (2010). The top ten are rounded out with "(5) Drugs, (6) Vaccinations, (7) Playing in the front yard or walking to school, (8) Bullying, (9) School buses, and (10) Natural disasters." *Id.* It would appear that numbers 1 (kidnapping), 4 (stranger danger), and 7 (playing in the front yard or walking to school) overlap to a significant degree, as all three involve the risk of abduction. *Id.*

[193] Disease and accidents are the top two causes of death in children up through age fourteen, with disease claiming 681.1 children per 100,000 in 2005, and accidents claiming 45.8 children per 100,000 that same year. CAPLAN, *supra* note 8, at 104–05. Homicide was third at 10.6, meaning that children are more than fifty times more likely to die from disease than from violent crime. *Id.*

[194] *See supra* text accompanying note 19.

[195] JOHN BARTLETT, BARTLETT'S FAMILIAR QUOTATIONS 686 (Justin Kaplan ed., 17th ed. 2002).

[196] SCHNEIER, *supra* note 74, at 27.

(d) Media Sensationalism Distorting Juror Evaluations of Risks to Children

The impact of the availability heuristic is strongly exacerbated by media coverage. Those events that get heavy media coverage will be easily recalled, assumed to be common, and deemed to be a serious risk. Jurors exposed to such media reports and images will, therefore, overestimate such risks and be too quick to find child endangerment.[197]

The exhaustive and inflammatory coverage of Casey Anthony's trial in Florida in 2011 is a case in point. Although it did not involve child neglect *per se,* it commanded tremendous national attention, which focused on the vulnerability of defenseless children. The intensive coverage it received and the overwhelmingly pro-prosecution perspective of that coverage has prompted concern about the degree to which such broadcasts can prejudice the entire country.[198] Lawyers are now raising concerns about getting fair trials in other cases, citing the "Nancy Grace Effect," which references a television commentator whose highly charged commentary was broadcast on television throughout the *Anthony* case.[199] Of course, this is nothing new. Fear of media influence has prompted expensive and highly burdensome procedures (burdensome to both the state and the jurors) of jury sequestration in a variety of cases, including the notorious trial of O.J. Simpson.[200] But the concern here is not the prejudicing of a single case by case-specific media coverage, but the prejudicing of all child neglect and endangerment

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[197] *See id.* ("[P]eople overestimate risks that are being talked about and remain an object of public scrutiny. . . . The West Nile virus outbreak in 2002 killed very few people, but it worried many more because it was in the news day after day. AIDS kills about 3 million people per year worldwide—about three times as many people each day as died in the terrorist attacks of 9/11.").

[198] *See* Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DEPAUL L. REV 741 (2009) (discussing jurors' susceptibility to media exposure, which can shape their views of a defendant).

[199] Tim Rutten, Op-Ed, *Rutten: The Threat of Nancy Grace,* L.A. TIMES (July 23, 2011), http://articles.latimes.com/2011/jul/23/opinion/la-oe-rutten-nancy-grace-20110723. Rutten noted that the attorney for the doctor accused of killing Michael Jackson asked that the jury be sequestered to shield it not from the media in general, but from the influence of Nancy Grace in particular:

> Anyone who had occasion to watch her relentless coverage of the recently completed Casey Anthony murder trial witnessed . . . a nightly . . . campaign for the conviction of a criminal defendant. It was a campaign that continued after Anthony's acquittal with virtually nonstop on-air abuse of the jurors and defense attorneys. The impact of that torrent of contempt on jurors in future cases that come under Grace's gaze is yours to gauge.

Id.

[200] *See generally* Mary Strauss, *Sequestration*, 24 AM. J. CRIM. L. 63, 65–70 (1996) (describing jury sequestration in O.J. Simpson case).

cases because of ongoing, widespread, and systematic media exaggerations about risks to unsupervised children.[201]

The impact of the media is not limited to news coverage and commentary. The availability heuristic works just as well if the jurors can think of examples from fictional accounts of child abductions, which may be all the more vivid in their impact as they are filmed for maximum effect.[202] Television shows and movies, entirely fictional ones, such as *CSI* or *Law and Order: Special Victims Unit* regularly depict horrific crimes against children.[203] The psychological effect, via the availability heuristic, is the same as if these were news shows depicting true crimes: the viewer can easily recall examples of grisly victimizations of children, which are both exotic and highly personalized risks,[204] and therefore assumes that they are common.[205] This explanation of basic psychological principles makes it far easier to understand why someone would think that unsupervised children in a shopping mall were at risk of serious harm.

(e) The Problem of Defining "Reasonableness"

As already noted, child neglect statutes are vague, and because everything a parent does exposes the child to some risk,[206] the only thing that stands between parents and jail is the prosecutor's determination in the charging phase and the jury's determination in the guilt phase that the parents' actions or risks were "unreasonable."[207] Accordingly, if jurors overestimate the risks to children, they are likely to find parental conduct that fails to take precautions against these exaggerated risks to be unreasonable.

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[201] *See* GARDNER, *supra* note 13, at 192–93 (noting that the media highlights crimes against children, despite the fact that adults are much more likely to be the victims of violence).

[202] "[A]bout twenty percent of all films are crime movies and around half of all films have significant crime content." *Id.*

[203] Research has linked skewed perception of risk to skewed coverage of traumatic events in the news. *Id.* at 57. However, this skewed coverage of risk is also perpetrated by movies and television drama. *Id.*

[204] *See* SCHNEIER, *supra* note 74, at 26–27.

[205] This belief would be dangerous because, for example, a content analysis of American television shows in the 1950s showed that the homicide rate on the shows was approximately 1,400 times higher than the actual homicide rate at the time. GARDNER, *supra* note 13, at 193.

[206] This may include the risk of the psychological harms to the child that come from overprotective parenting, if nothing else. *See supra* notes 56–57 and accompanying text.

[207] *See, e.g.*, MICH. COMP. LAWS § 722.622(j)(ii) (2005) ("Placing a child at an *unreasonable* risk to the child's health or welfare by failure of the parent.") (emphasis added); FLA. STAT. § 827.03(3)(a)(2) (2006) ("failure to make a *reasonable* effort to protect a child") (emphasis added); W. VA. CODE § 61-8D-1(6) (2005) ("'Neglect' means the *unreasonable* failure by a parent . . . to exercise a minimum degree of care to assure said minor child's physical safety or health.") (emphasis added).

Additionally, many of the statutes permit a parent to be criminally prosecuted for what may have been a lapse in judgment, but which should not rise to the level of criminal conduct.[208] The statutes do not, as a rule, give good guidance regarding where to draw the line between criminal conduct and merely poor parenting. Rather, the statutes in many states turn on the reasonableness of the parent's actions or the reasonableness of the risk to which the parent's behavior subjected the child.[209]

These reasonableness standards shift the determination of what is legal conduct from the legislature to the finder of fact, typically the jury.[210] The jury then writes on a virtually clean slate, based on the jury members' own visceral sense of what is good parenting or what risks are unreasonable, often without any evidence of what constitutes a statistically-significant probability of feared or anticipated harm. As already demonstrated, however, juries are ill-equipped to assess risk, much less to determine when a parent's poor judgment is sufficiently bad to warrant criminal punishment.

When a parent drives a child to school, this unquestionably endangers the child, exposing him to risk of injury or death in an automobile accident. A jury may consider this to be a reasonable risk, as it is certainly a common one, even in this age of overprotective parenting. A parent's choice to have the child walk home from school unaccompanied, however, may not be viewed so deferentially by a jury, despite the fact that children ages 0 to 14 are about 56 times more likely to die in a moving vehicle accident (2,566 deaths in 1998)[211] as in a stranger

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[208] *See* Emily Friedman, *When Moms Are Pushed Too Far,* ABC NEWS (Apr. 24, 2009), http://abcnews.go.com/Health/story?id=7414322&page=1 (describing a mother charged with child endangerment in White Plains, New York for kicking her ten- and twelve-year-old daughters out of the car three miles from home when they would not stop arguing).

[209] *See, e.g.*, COLO. REV. STAT. § 18-6-401(1)(a) (2011) ("A person commits child abuse if such person . . . permits a child to be unreasonably placed in a situation that poses a threat of injury . . . ."); FLA. STAT. § 827.03(a)(2) (2011) ("A caregiver's failure to make a reasonable effort to protect a child . . . ."); KAN. STAT. ANN § 21-3608(a) (West 2008) ("Endangering a child is . . . unreasonably causing or permitting a child . . . to be placed in a situation in which the child's life, body or health may be injured or endangered."); MICH. COMP. LAWS § 750.136b(5)(b) (2011) ("The person . . . commits an act that under the circumstances poses an unreasonable risk of harm or injury to a child."); MO. REV. STAT. § 560.050 (2000) ("Being a parent, guardian or other person legally charged with the care or custody of a child . . . fails or refuses to exercise reasonable diligence in the care or control of such child."); *see also* State v. Scruggs, 905 A.2d 24, 36–37 (Conn. 2006) ("Although the defendant reasonably could have been aware that the conditions were not optimal, we are not persuaded that the nature and severity of the risk were such that the defendant reasonably could not have believed that they were within the acceptable range.").

[210] Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1460 (2010).

[211] Nat'l Ctr. for Injury Prevention & Control, *WISQARS Leading Causes of Death Reports, 1981–1998*, CTRS. FOR DISEASE CONTROL & PREVENTION,

abduction (46 deaths in 1999).[212] While these statistics may be subject to closer analysis and criticism, they are robust enough to challenge assumptions that may have previously appeared obvious: that it is not a reasonable risk to allow a child to walk or bicycle to school and that a safety-minded parent will choose to drive the child instead.[213] Indeed, they support the consensus of pediatricians, cited above, that "being driven to school in a passenger vehicle is by far the most dangerous way to get there."[214]

The problem, of course, is that a jury may have a grossly distorted view of the risks of allowing children some freedom and autonomy, based on inflammatory media reports. They are likely to overestimate the risks of child abduction in particular, and underestimate the harms of overprotective parenting. The end result is that finders of fact in child neglect cases may punish parents who resist the trend toward overprotective parenting, and by so doing, force all parents into overprotective practices.[215]

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http://webappa.cdc.gov/sasweb/ncipc/leadcaus9.html (last visited June 10, 2012) (select "Top 5" for "Number of Causes"; select "Custom Age Range" for "Age Group Formatting" then select age range of "<1" to "14"; select "All Injuries" for "Categories of Causes"; then tally the total deaths listed under "Unintentional MV Traffic").

[212] *See* FINKELHOR ET AL., *supra* note 67, at 10 (40% of the 115 stereotypical kidnappings ended in the death of the child—ages 0 to 14—which calculates to 46 overall in the study year).

[213] Certain public policies will be defeated if parents face criminal liability for allowing their kids to walk to school. For example, International Walk to School actively promotes walking for a variety of sound public policy reasons. See Nat'l Ctr. for Safe Routes to School, INT'L WALK TO SCHOOL, http://www.iwalktoschool.org (last visited June 23, 2011).

[214] *See* Brody, *supra* note 62, at F7 and accompanying text. However, current parenting trends overwhelmingly ignore these statistics. *See id.* ("Forty years ago, half of all students walked or bicycled to school. Today, fewer than 15 percent travel on their own steam. One-quarter take buses, and about 60 percent are transported in private automobiles."). This change was primarily motivated by safety concerns, but it has resulted in the unintended consequence of sedentary, obese children at a greater risk of developing hypertension, diabetes, and heart disease. *Id.*

[215] Perhaps defense lawyers do not trust juries on these things either, as it appears that many of the reported cases involve bench trials. *See, e.g.*, State v. Perrine, No. 2001CA00338, 2002 WL 1289866 (Ohio Ct. App. June 10, 2002) (case involving a four-year-old entrusted to thirteen- and twelve-year-old babysitters); Village of Utica v. Billman, No. 01 CA 24, 2001 WL 1032975, at *1 (Ohio Ct. App. Sept. 7, 2001) (involving an eight-year-old and a four-year-old left in the care of their eleven- and nine-year-old siblings); State v. Voland, 716 N.E.2d 299, 302 (Ct. Com. Pl. Ohio 1999) (giving car keys to a twelve-year-old who ran the car for air conditioning, but put it in gear, hit a fence, and killed someone).

3. Tendency Toward Harsh Judgment of Other Parents, Especially Other Mothers

Jurors may also be motivated to be particularly harsh with parents whose children have come to harm.[216] Most people like to think that these tragedies should not happen at all, and that when they do, someone must be blamed for it and held accountable. But this is not just retribution; it is driven by a deep human need for reassurance that such tragedies are preventable, and more specifically, that they will not happen to one's own children.[217] If a child drowns at a local beach while the parent dozes on the sand, it is natural to insist that the parent should have been with the child the whole time. By assuring ourselves that we would never have made that mistake and by condemning the parent for his neglect, we reassure ourselves that it couldn't happen to us.[218]

There is also evidence that mothers can be particularly harsh in adjudging the parenting decisions of other mothers.[219] One study of jurors in neglect cases found that female jurors found neglect or mistreatment more often than male jurors.[220] And while the idea that women are harder on other women may be dismissed as a stereotype, it has been independently confirmed that women who are mothers are harder on other mothers who "have failed to protect their children."[221]

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[216] The belief that emotions undercut rational decision making is widely shared today; a specialist in criminal procedure argues that a prosecutor should not make statements to deliberately appeal to jurors' emotions. Todd E. Pettys, *The Emotional Juror*, 76 FORDHAM L. REV. 1609, 1611 (2007). The connection between certain jurors' emotions and their decision making is highlighted by litigators' attempts to set the "ideal" jury. *Id.* at 1631. Further, jurors' personal experiences will impact how salient they find the evidence presented. *Id.* at 1638–39.

[217] *See* GARDNER, *supra* note 13, at 116–19 (describing how exaggerated perceived risks can create deep hostility toward the action believed to be far more dangerous than it actually is).

[218] For example, several prosecutors have stated they "believed that women jurors are good for male defendants in rape cases, because they are critical of the victims." Marvin Zalman & Olga Tsoudis, *Plucking Weeds from the Garden: Lawyers Speak About Voir Dire*, 51 WAYNE L. REV. 163, 306 (2005). "They are much more judgmental about the victim, for placing herself in a vulnerable position. . . . Women will say, if that was me he would have had to kill me because I would have fought and fought." *Id.* The importance of educating the jury is key. One prosecutor stated he must educate jurors about domestic violence, because women jurors often "seem to judge women [victims] more harshly, asking, 'why didn't you act to keep yourself and your children safe[?]'" *Id.* at 307.

[219] This would be especially true if the mother adhered to parenting norms different from those held by the offender. *See* GARDNER, *supra* note 13, at 119 (describing how one's cultural norms are strengthened by the fact that people tend to surround themselves with other people who share their viewpoints).

[220] *See* Ann T. Greeley, *Women on the Jury: Stereotypes and Reality*, 2 ATLA ANN. CONVENTION REFERENCE MATERIALS 2689 (2003).

[221] *Id.*; *see also* Sandra Benlevy, *Venus and Mars in the Jury Deliberation Room: Exploring the Differences That Exist Among Male and Female Jurors During the*

"Stereotypical gender roles, particularly the female role of mother, are ingrained in the criminal law" just as in the rest of society.[222] "Mothers are rarely associated with resentment, erotic pleasure, or, especially, violence. . . . Society finds [mothers that allegedly commit crimes the] most repulsive."[223] What is more, "[t]oday's social perception of bad mothers is not the evil stepmother, but the single, urban, minority woman. Society . . . stigmatizes unwed mothers, unfit mothers, and women who do not become mothers for violating the dominant norm. These women are perceived as deviant or criminal."[224] The legal system rewards conduct that matches a woman's maternal role and punishes conduct that conflicts with society's idea of mothering.[225] Punishing mothers for non-maternal conduct is just as much about enforcing gender roles as protecting children.[226] Although the black letter law treats men and women the same, mothers typically have more responsibility in raising children, consequently resulting in increased liability.[227] "While feminist scholars debate whether this is a by-product of biology or society, the fact remains that women are treated differently by the law because of their role as mothers. Nowhere is this more evident than in child abuse and neglect cases that are inherently female."[228]

III. SOLUTIONS AND RECOMMENDATIONS

The marketplace of ideas may ultimately vindicate advocates of Free Range parenting and like-minded parents who are eager to foster their children's sense of adventure, self-direction, and independence.[229] But overprotection appears to be

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Deliberation Process, 9 S. CAL. REV. L. & WOMEN'S STUD. 445, 450 (2000) ("In cases involving children, there are also differences among jurors' opinions based on gender. According to empirical studies, female jurors are more sympathetic toward children defendants and are more likely than their male counterparts to convict defendants who are accused of harming children.").

[222] Suzanne D'Amico, *Inherently Female Cases of Child Abuse and Neglect: A Gender-Neutral Analysis*, 28 FORDHAM URB. L.J. 855, 879 (2001).

[223] *Id.* at 880–81.

[224] *Id.* (quoting Dorothy E. Roberts, *Motherhood and Crime*, 79 IOWA L. REV. 94, 137 (1993)).

[225] *Id.*

[226] *Id.*

[227] *Id.* at 881–82.

[228] *Id.* at 882.

[229] *E.g.*, CONN IGGULDEN & HAL IGGULDEN, THE DANGEROUS BOOK FOR BOYS (2006) (a bestseller in Britain). Co-author Conn described the phenomenon behind the incredible success of his book:

> I think we've become aware that the whole "health and safety" overprotective culture isn't doing our sons any favors. Boys need to learn about risk. They need to fall off things occasionally, or—and this is the important bit—they'll take worse risks on their own. If we do away with challenging playgrounds and

the norm today; parents who dare "trust" their kids with this type of independence face serious criminal liability for child neglect if something goes wrong, and possibly even if nothing does.[230] Fear of prosecution may well reinforce the overprotective parenting norms, coercing parents to conform their parenting to the overprotective parenting that has, for a variety of dubious reasons, emerged as the new minimum standard of care in mainstream American culture. The result is not merely a loss of parental and family autonomy, but even more serious risks and harm for the children themselves.

A. Addressing the Problem of Vague Statutes

As is so often the case, diagnosing the problem is easier than solving it. Some heightened degree of statutory specificity may help, but it is difficult to draw up specific statutes that will apply to the infinite variations of how a child might be neglected. In the *Hughes* case in Ohio, where the five-year-old was left in the cab of the pickup truck, the court was careful to say, "the outcome of this case is intensely fact-specific."[231] Indeed, it is difficult to imagine any child neglect case that is not intensely fact-specific, since a wide range of factors would have to be considered to evaluate the reasonableness of parental conduct overall.[232]

> cancel school trips for fear of being sued, we don't end up with safer boys—we end up with them walking on train tracks. In the long run, it's not safe at all to keep our boys in the house with a Playstation. It's not good for their health or their safety.
>
> You only have to push a boy on a swing to see how much he enjoys the thrill of danger. It's hard-wired. Remove any opportunity to test his courage and they'll find ways to test themselves that will be seriously dangerous for everyone around them.

Roger Ferrell, *The Real Dangerous Book for Boys . . . and Girls*, SBC IMPACT!, http://sbcimpact.org/2008/02/01/the-real-dangerous-book-for-boys-and-girls (last visited June 23, 2012).

[230] Most of the statutes do not require that any harm come to the child. A parent may be found liable merely for exposing the child to a risk of harm. *E.g.*, FLA. STAT. § 827.03(3)(b)–(c) (2011) (making child neglect a second-degree felony if the child suffers great bodily harm, and a third-degree felony if the child does not).

[231] State v. Hughes, No. 17-09-02, 2009 WL 2488102, at *7 (Ohio Ct. App. Aug. 17, 2009).

[232] The Tennessee Supreme Court articulated the sensitivity and the context-specificity of the issue in *Broadwell*:

> [The law] should afford protection to conduct inherent to the parent-child relationship; such conduct constitutes an exercise of parental authority and supervision over the child or an exercise of discretion in the provision of care to the child. These limited areas of conduct require the skills, knowledge, intuition, affection, wisdom, faith, humor, perspective, background, experience, and

Some statutes attempt a few bright line rules, including specific ages at which a child may be left alone or at which a child may be left in charge of younger children.[233] This helps put parents on notice as to where liability attaches, but it fails to take into account radically different maturity levels that may be demonstrated by the individuals in each case. The oldest child in a large family may be highly practiced and skilled in caring for his younger siblings, having spent much of his life in this activity under the direct supervision of his parents. Such a child may, at the tender age of eleven or twelve, be perfectly capable of caring for those same siblings. On the other hand, it would be easy to identify fifteen-year-olds who would be woefully inadequate caregivers or babysitters.

It is difficult to see any particular pattern in the statutory provisions of the various states. However, a civil child neglect statute in Illinois[234] stands out as an alternative because it not only spells out a reasonable set of standards, but also articulates fifteen separate considerations that should be taken into account in evaluating the reasonableness of leaving a child without supervision:

> (1) the age of the minor;
> (2) the number of minors left at the location;
> (3) special needs of the minor, including whether the minor is physically or mentally handicapped, or otherwise in need of ongoing prescribed medical treatment such as periodic doses of insulin or other medications;

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culture which only a parent and his or her child can bring to the situation; our legal system is ill-equipped to decide the reasonableness of such matters.

Broadwell v. Holmes, 871 S.W.2d 471, 476 (Tenn. 1994) (quoting Cates v. Cates, 619 N.E.2d 715, 729 (Ill. 1993)).

[233] For example, Oregon specifies that child neglect for leaving a child unsupervised applies only to children under the age of ten. OR. REV. STAT. § 163.545(1) (2011); *see also* MD. CODE ANN., FAM. LAW § 5-801(a) (West 2011) (Maryland statutes set the minimum age at which a child may be left unsupervised at eight). Likewise, Texas has criminalized "leaving a child in a motor vehicle," but only if the child is younger than seven, and is not attended by an individual who is at least fourteen. TEX. PENAL CODE ANN. § 22.10(a) (West 2003).

[234] 705 ILL. COMP. STAT. 405/2-3(d) (West 2007 & Supp. 2012). Although this article is focusing on criminal child neglect statutes, it is common for criminal child neglect statutes to look to civil law for definitions and legal standards, or even to have a criminal statute located under a civil chapter. *See generally* N.Y. PENAL LAW § 260.10 (McKinney 2008 & Supp. 2012) (deferring to the civil family court laws to define neglected child); tit. 18 PA. CONS. STAT. § 4304(b) (West 1998 & Supp. 2012) (defining criminal child endangerment as "knowingly endangers the welfare of a child by violating a *duty of care*, protection or support"); MD. CODE ANN., FAM. LAW § 5-801 (located under civil family law provisions). In light of this established trend, the Illinois standards are highly persuasive as a more acceptable alternative to the vague criminal statutes currently in effect in other jurisdictions.

> (4) the duration of time in which the minor was left without supervision;
>
> (5) the condition and location of the place where the minor was left without supervision;
>
> (6) the time of day or night when the minor was left without supervision;
>
> (7) the weather conditions, including whether the minor was left in a location with adequate protection from the natural elements such as adequate heat or light;
>
> (8) the location of the parent or guardian at the time the minor was left without supervision, the physical distance the minor was from the parent or guardian at the time the minor was without supervision;
>
> (9) whether the minor's movement was restricted, or the minor was otherwise locked within a room or other structure;
>
> (10) whether the minor was given a phone number of a person or location to call in the event of an emergency and whether the minor was capable of making an emergency call;
>
> (11) whether there was food and other provision left for the minor;
>
> (12) whether any of the conduct is attributable to economic hardship or illness and the parent, guardian or other person having physical custody or control of the child made a good faith effort to provide for the health and safety of the minor;
>
> (13) the age and physical and mental capabilities of the person or persons who provided supervision for the minor;
>
> (14) whether the minor was left under the supervision of another person;
>
> (15) any other factor that would endanger the health and safety of that particular minor.[235]

This statute at least gives some guidance to prosecutors in their exercise of discretion and to juries or other finders of fact in the ultimate determination of guilt.

A number of these factors might have benefitted the woman in Montana who left her kids at the mall: that the children were left for only about two hours;[236] that the mall was a very safe and wholesome environment in which to leave them;[237] that it was in the middle of the afternoon;[238] that the children's father was available less than five minutes away;[239] the lack of restraints on the children;[240] that the

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[235] 705 ILL. COMP. STAT. 405/2-3(1)(d).

[236] *See id.* § 405/2-3(1)(d)(4).

[237] *See id.* § 405/2-3(1)(d)(5), (7).

[238] *See id.* § 405/2-3(1)(d)(6).

[239] *See id.* § 405/2-3(1)(d)(8); Kevane, *supra* note 106 ("My husband was at his office down the street from the mall, less than five minutes away.").

children had a cell phone and phone numbers of their parents, who were available to be reached by phone at any time;[241] that the children had access to food;[242] and that the twelve-year-olds in charge had done babysitter training at a local hospital and had extensive experience with the younger children left in their care.[243] The prosecutor could, of course, argue that the age of the girls left in charge (twelve) was too young, and that they obviously lacked the necessary judgment because they left the younger kids unattended for five minutes while they went into dressing rooms.[244] Applying the same statute, the prosecutor could also argue that the children left in their care included not just one, but three young children—one of whom was a mere three years of age.[245]

This list of factors could have been enormously helpful in guiding the prosecutor and the jurors in assessing the parent's conduct. Requiring that such factors be considered, either by statute or by jury instruction, could go a long way toward eliminating arbitrariness in determining "whether [the] parent's conduct crosse[d] that thin line between bad parenting and criminal culpability."[246]

1. Statutory Language Acknowledging a Role for Parental Discretion and Philosophy and for Religious and Cultural Differences

In addition to the factors already included in the Illinois statute, statutes might also clarify that parents are entitled to deference in their decisions on how to rear their children—what the Ohio Court of Appeals called "the sacred right of parents to raise their children as they deem suitable and proper."[247]

Free Range parenting may well expose children to a different set of risks than those considered acceptable by the Intensive Parenting orthodoxy, but there should be a wide range of parenting styles tolerated outside the strictures of what constitutes criminal child neglect or endangerment.[248] While one parent might find it injurious and counterproductive to prohibit teenagers from going on dates or attending dances, another might see dates and dances as inherently dangerous to a

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[240] *See* 705 ILL. COMP. STAT. 405/2-3(1)(d)(9).

[241] *See id.* § 405/2-3(1)(d)(10).

[242] *See id.* § 405/2-3(1)(d)(11); Kevane, *supra* note 106. The plan, carried out, was for the kids to have lunch at the mall. Kevane, *supra* note 106.

[243] *See* 705 ILL. COMP. STAT. 405/2-3(1)(d)(13)–(14); Kevane, *supra* note 106 ("My oldest daughter . . . and her friend, were both twelve at the time, . . . [and] had attended a babysitting class sponsored by the local hospital . . . .").

[244] *See* 705 ILL. COMP. STAT. 405/2-3(1)(d)(13).

[245] *See id.* § 405/2-3(1)(d)(1)–(2); Kevane, *supra* note 106.

[246] State v. Hughes, No. 17-09-02, 2009 WL 2488102, at *7 (Ohio Ct. App. Aug. 17, 2009).

[247] *Id.*

[248] Further, subscribing to the strict requirements of Intensive Parenting may be foolish, as parents often discover that safety advice and recommendations for child rearing practices change over the years. Bernstein & Triger, *supra* note 2, at 1263.

child's moral well being. While one parent might consider it unacceptable to allow primary-school-aged children to play in the front yard unsupervised, another would consider it unacceptable to coop a child up all day with indoor activity.[249] But for all their risks and flaws, neither Intensive Parenting nor Free Range parenting should be considered criminal, and neither prosecutors nor jurors should be encouraged to second-guess the choices made by parents who are genuinely seeking the best for their children. The factors to be considered—as provided in the Illinois statute—could be expanded to include the consideration of parenting philosophy in the overall evaluation of the reasonableness of the parents' conduct:

> (16) the parents' philosophy for teaching children responsibility and self-reliance, balancing the appropriateness of allowing children to learn from their mistakes against the need to protect children from the consequences of their mistakes or from making mistakes in the first place.

Philosophies for parenting can also be deeply rooted in religious belief, and criminal prosecutions should be deferential to such beliefs as a matter of respect, dignity, and tolerance, and as a matter of compliance with First Amendment free-exercise guarantees. The New Hampshire statute explicitly exempts parental conduct carried out "pursuant to the tenets of a recognized religion."[250] At the very least, consideration of religious tenets could be included as another factor in the overall evaluation of the reasonableness of the parents' conduct:

> (17) those religious beliefs of the parents that dictate or guide parenting decisions.

As already noted, there are serious concerns that parenting philosophies are the product of culture and socio-economic class.[251] The statutes can and should be amended to take that into consideration as well.[252] Again, it should be easy to expand the list of factors to consider cultural factors in a statute patterned after the Illinois statute.[253]

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[249] SKENAZY, *supra* note 7, at 125–33 (focusing on the importance of play).

[250] The New Hampshire statute includes a religious exemption: "A person who pursuant to the tenets of a recognized religion fails to conform to an otherwise existing duty of care or protection [to a child] is not guilty of an offense under this section." N.H. REV. STAT. ANN. § 639:3(IV) (2007).

[251] *See* Bernstein & Triger, *supra* note 2, at 1266; *supra* text accompanying note 163.

[252] This is extremely important considering the diverse cultural composition of the United States. *See* Bernstein & Triger, *supra* note 2, at 1267–68 (highlighting the cultural differences in parenting norms in different cultures on things as simple as leaving a child unsupervised, which while accepted in other cultures, may be considered *neglect* in the United States).

[253] *See supra* notes 162–168 and accompanying text.

(18) the cultural heritage and long-standing practices for parenting and caring for children in a particular family and in its cultural community.

2. Statutory Language Making Clear That Not Every Instance of Poor Parenting Need Be Treated as a Criminal Offense

The statute might also specify that criminal child neglect constitutes more than bad parenting or a lapse of good judgment. This is, perhaps, one of the more sensitive issues in child neglect prosecutions, as exhibited in the Ohio cases discussed above. Bad parenting can be addressed in other ways, including the intervention of Child Protective Services. Criminal liability should be reserved for the most egregious cases.

3. Jury Instructions to Give Guidance in Applying Vague Statutes

Even where it may be inappropriate or politically difficult to amend statutes to address the vagueness problems and to require consideration of these factors, jury instructions can and should be given to help jurors take appropriate note of them. In addition to the factors from the Illinois statute, each of the items in subsections III.A.1 and III.A.2 can and should be the subject of a separate jury instruction: (1) contrasting philosophies of parenting, (2) allowing for the impact of religious beliefs, (3) recognizing different cultural norms for parenting, and (4) cautioning that poor parenting alone is not sufficient to constitute a crime. Appropriate jury instructions will go a long way toward minimizing the potential problems inherent in vague statutes. Hopefully, prosecutors, aware that judges will allow such jury instructions if and when the cases go to trial, will also take these factors into account as they exercise their discretion on which charges to file and which cases to bring to trial.

B. The Importance of Expert Testimony on Actual Risk of Harm and the Dangers of Overprotection

Because the statutes often speak in terms of risks or what is injurious to a child's welfare, it is important that the finder of fact in a child neglect case have some basis for assessing what is a reasonable risk or what is injurious to a child's welfare.[254] It is all too likely that the finders of fact have distorted perceptions of

[254] The prosecution will sometimes call its own expert to establish the risk of an activity. *See, e.g.*, Butler v. State, No. 14-09-00067-CR, 2010 WL 547055, at *1 (Tex. Ct. App. Feb. 18, 2010). The court in *Butler* explained how the expert was used:

risk, particularly the likelihood of stranger abduction of children.[255] Accordingly, the parties to the criminal proceeding should be given an opportunity to present expert testimony, and statistical evidence, of the actual likelihood of harm.[256] This is absolutely necessary to counteract the severe prejudice that is otherwise likely to result from inflammatory media reports of tragedies involving children.

One concern is that courts may deem "reasonableness" determinations as exclusively the province of the jury and will not allow experts to testify as to the ultimate legal conclusion: whether or not the parenting choices in question were reasonable. But as already noted, jurors are likely to have a skewed perspective on these issues, and expert testimony on actual risks and actual harms may be necessary to enable the jury to fairly judge the reasonableness of the parent's action.

In addition, expert testimony can help mitigate the impact of hindsight bias, countering the temptation to take the fact that the harm actually occurred as evidence of its likelihood. Statistical evidence and expert testimony can put the actual probability of harm in appropriate perspective to help the finder of fact weigh these risks in determining whether the parental conduct is sufficiently unreasonable to warrant criminal penalties.

At the same time, expert testimony should also be available to help jurors appreciate the risks and harms of overprotective behavior by parents. Free Range parents consciously choose to expose their children to certain risks, motivated by a desire to protect them from other harms and hindrances to their development. In

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> During trial, after Sergeant Fisher finished testifying, the State called Dr. Darrel Wells as an expert witness. Dr. Wells testified about the effects of cocaine on the human body. He explained to the jury that in some instances cocaine usage could be fatal and that its effects depend on the size of the person using it and the amount used. He further testified that cocaine could also be fatal if ingested by a child. He said that the most common situation where children ingest cocaine is where they pick a rock of cocaine off the floor or a table and put it in their mouths. Dr. Wells confirmed that crack cocaine wrapped in a paper towel left alone with children in a vehicle represents a danger to the children.

Id.

[255] Analogously, the media can incite unrealistic fear in those who are statistically unlikely to be at risk. The media's coverage of breast cancer, for example, resulted in a majority of women tested in a British survey having no idea which demographic of women is the most at risk because the information provided by the media was inaccurate and exaggerated. GARDNER, *supra* note 13, at 156–57.

[256] "Intensive Parenting norms do not correlate to actual risk prevention." Bernstein & Triger, *supra* note 2, at 1269. These norms are often the result of defensive parenting practices which overestimate risks and result in overprotecting children. *Id.*; *see also* SKENAZY, *supra* note 7, at 41–48 (describing defensive parenting tactics attempting to avoid all risks, but positing that some risks are so minimal that they are worth taking to gain the benefit associated with the activity).

order to put the choices of a Free Range parent in perspective, the jury may need to be advised of the severe psychological ramifications that come from insulating children from risk during their developmental years.

Coming back to the Illinois statute, it should be easy enough to include other factors to consider:

> (19) the actual probability of harm and the severity of such harm the child faces as a result of such failure;
>
> (20) the harm that a child may face from being overprotected, and the benefit to the child from learning and exercising responsibility and self-reliance in a less-heavily-supervised environment.[257]

This may help jurors understand the trade-offs that occur in parental risk management and keep appropriate perspective on why it *may* be in the child's best interest to refuse to shield him from certain risks.

CONCLUSION

The recent trend toward Intensive Parenting raises serious concerns surrounding the welfare of children, including the concerns about child safety. But there is growing evidence that Intensive Parenting may be not only unwarranted, but also actually harmful to children in their development. Parents cannot insulate their children from every risk, and any attempt to insulate them from one risk is likely to expose them to another. In performing this difficult risk management exercise—with nothing less important than the welfare of their children at stake—parents need freedom and deference to make reasonable judgments for their children, according to their own parenting instincts and cultural values.

Free Range parenting advocates are bringing some balance and useful perspective to the debate over what constitutes good parenting. But the media find strong incentives to inflame parental fears, seriously impairing the ability of parents and others (including prosecutors and jurors) to make accurate and reasonable assessments of risks to children's safety. That, coupled with the typical vagueness of child neglect and endangerment statutes, places Free Range parents at risk of criminal prosecution.

To address these problems, child neglect and endangerment statutes should be re-examined to give stronger guidance to prosecutors and jurors regarding which parenting choices are sufficiently egregious to warrant criminal sanctions. A list of factors to consider, as provided in the Illinois statute, is a good start. Several additional factors should be included as well to ensure that cultural and religious minorities are not unfairly targeted and that rights to parental and family autonomy

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[257] This last item may be enough to invite the jury to consider the downside of overprotection, even if the statute is not amended to require consideration of differing parental philosophies, as suggested in factor 16. *See supra* Part III.A.1.

are respected. Until such statutory change can be effected, these factors should be articulated in jury instructions to guide jurors in making these critical assessments. Finally, expert testimony must be permitted to inform jurors on the issue of risk assessment because otherwise they are prone to exaggerate some risks and overlook others in their post hoc assessment of the appropriateness of parental choices.

Free Range parenting advocates bring compelling arguments to the ongoing discussion of what constitutes effective parenting, but these ideas can be meaningfully considered only if the criminal justice system respects parents' efforts to act in the best interests of children. Absent that respect, the threat of child neglect prosecutions will work to reinforce overprotective parenting norms throughout American society, forcing them on already frightened and overwhelmed parents. The losers will be parents, families, and most of all, the children themselves.