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Eric C. Shedlosky

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COMMENTS

PROTECTING CHILDREN FROM THE HARMFUL BEHAVIOR OF ADULTS

ERIC C. SHEDLOSKY*

The Supreme Court has repeatedly recognized family integrity to be a fundamental liberty interest protected by the U.S. Constitution. The Court has recognized that implicit to the family integrity interest is the right to self-determine one's own family life, and in the case of parents, to manage the upbringing of children. However, as child protection has become a more prominent public concern, the state's escalating interest in ensuring the wellbeing of children has permitted it to intervene in areas historically addressed exclusively within the walls of the family home. This Comment argues that the state's interest in the wellbeing of children extends both to protecting a child's physical health and to protecting the less tangible considerations of a child's wellbeing, such as emotional welfare, psychological development, and ability to flourish as a member of society. This Comment further argues that by imposing criminal liability, rather than civil remedies, in situations where an adult places a child's physical, psychological, or emotional wellbeing at risk, the state will further two important initiatives. First, it will encourage a shift in the public's perception of the state's role in protecting children, and second, it will permit the state to better protect children from the harmful behavior of adults.

I. INTRODUCTION

From the outside, Detective Gary Brandl concluded that Judith Scruggs's home was well cared for, well kept, and cute for the area of

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town.¹ However, upon opening the front door, he was faced with the timeless grade school lesson: you can't judge a book by its cover.²

The police were called to the Scruggs's home after Judith's twelve-year-old son, Joseph Daniel, was found hanging by a necktie in his bedroom closet.³ Despite the pleasant exterior of the Scruggs's home, the conditions in which the family lived shocked investigators.⁴ Surprisingly, from the outside, there were none of the usual indicators of disarray: the home's structure was in good repair, the utilities were working, there was no evidence of drug or alcohol abuse, and the neighbors even appeared friendly. Instead, the shocking conditions were caused by Judith Scruggs's failure to implement basic housekeeping practices.⁵

In investigating Joseph Daniel's suicide, state officials generalized the Scruggs's home as disturbingly dirty, cluttered, and unsafe.⁶ They reported that the house was besieged by a foul and offensive odor, a stench that Detective Brandl colorfully related to a mixture of "fermented garbage" and "as if you stuck your head in a dirty clothes hamper."⁷ The piles of clutter, junk, and debris that permeated the entire house stunned officials.⁸ In making their way through the apartment, investigators could not help but step on mirrors, glass, and other breakables hidden beneath the mess that completely hid the floor.⁹ They observed that the furniture, counters, and tables were unusable because they were all covered with dirty clothing, old food, disposable food containers, trash, unwashed kitchenware, and other clutter.¹⁰ They reported that they saw no clear space in the kitchen where food could be prepared or consumed because all the flat surfaces, including

¹ *Suicide of a 12-Year-Old*, CBS NEWS, Oct. 29, 2003, <http://www.cbsnews.com/stories/2003/10/28/60II/main580507.shtml>.

² *See id.* (reporting Detective Brandl's opinion of the Scruggs's home "changed 180 degrees" upon seeing the inside for the first time).

³ *Id.*

⁴ *Id.*

⁵ *See id.*

⁶ STATE OF CONN. OFFICE OF THE CHILD ADVOCATE & THE CHILD FATALITY REVIEW PANEL, INVESTIGATION OF THE DEATH OF JOSEPH DANIEL S. ii, 15-16 (Jan. 2003) [hereinafter CHILD FATALITY REVIEW REPORT].

⁷ *Suicide of a 12-Year-Old*, *supra* note 1.

⁸ CHILD FATALITY REVIEW REPORT, *supra* note 6, at 15-16.

⁹ *Id.*

¹⁰ *Id.*

the ironing board, were covered with junk.¹¹ In short, the Scruggs's home was "disgusting," "filthy," and generally "a safety hazard."¹²

Four months after Joseph Daniel's death, Judith was arrested and charged with two counts of risk of injury to a child¹³ and one count of cruelty to persons.¹⁴ In bringing these charges, the State attempted to make it clear that it was not prosecuting Judith for causing her son's suicide.¹⁵ Instead, the prosecution was attempting to hold her responsible for creating and maintaining a dangerous home environment and for negligently depriving her son of proper physical care.¹⁶ Despite the State's efforts to separate these charges from Joseph Daniel's death, the media and the public often failed to recognize any distinction.¹⁷

Judith was convicted of one count of risk-of-injury-to-a-minor for providing a home environment that was likely to injure her son's mental and emotional health.¹⁸ The court explained that Judith's conviction was about more than merely a messy home¹⁹—it was rooted in her having placed Joseph Daniel in a situation that was likely to injure his mental health.²⁰ In response to the continuing inaccuracies as to the foundation of the charges, the court noted that Judith's conviction was not based on an assertion that the law "regulates the frequency of vacuuming or prescribes specific housekeeping practices," but rather that the law "requires a parent

¹¹ *Id.*

¹² *Id.* (quoting Police Aff., State of Conn. Super. Ct., Application for Arrest Warrant (Apr. 22, 2002)); see also Marc Santora, *Case Tries to Link a Mother to Her Boy's Suicide*, N.Y. TIMES, Sept. 27, 2003, at B1; *Suicide of a 12-Year-Old*, *supra* note 1.

¹³ See CONN. GEN. STAT. § 53-21 (2007).

¹⁴ See *id.* § 53-20; State v. Scruggs, 905 A.2d 24, 26-28 (Conn. 2006).

¹⁵ State v. Scruggs, No. CR 020210921S, 2004 WL 1245557, at *1 n.2 (Conn. Super. Ct. Mar. 8, 2004), *rev'd*, 905 A.2d 24 (Conn. 2006).

¹⁶ *Id.*

¹⁷ See, e.g., Alaine Griffin, *State Not Likely to Seek Prison Term for Scruggs*, HARTFORD COURANT, May 13, 2004, at A1; Traci Neal, *Everyone Was Responsible*, HARTFORD ADVOCATE, Nov. 13, 2003, at A1; Marc Santora, *After a Son's Suicide, Mother Is Convicted over Unsafe Home*, N.Y. TIMES, Oct. 7, 2003, at B1; Santora, *supra* note 12, at B1; *Suicide of a 12-Year-Old*, *supra* note 1 ("Scruggs went on trial last month. It was one of the first times a parent has been charged in connection with a child's suicide.").

¹⁸ *Scruggs*, 2004 WL 1245557, at *7. However, Judith's conviction was ultimately overturned by the Connecticut Supreme Court, which found that Connecticut's risk-of-injury statute was unconstitutionally vague as applied to Judith's conduct. See *infra* notes 145-47 and accompanying text.

¹⁹ *Scruggs*, 2004 WL 1245557, at *1 n.2 ("The fact that the child committed suicide was relevant evidence concerning the risk to the child . . . but was not itself an element of the offense charge. . . . The same violation, creating and maintaining a situation that endangered the child's mental health, would have existed even had the child *not* committed suicide.").

²⁰ *Id.* at *7.

to provide a home that does not cause risk of harm to a child's mental health."²¹

Under Connecticut's risk-of-injury-to-a-minor statute, Judith could have been sentenced to a term of up to ten years in prison.²² However, at the request of the state prosecutor, the Connecticut Superior Court granted her a suspended sentence and five years of probation.²³ Although the prosecutor did not explain why he decided not to seek jail time after making the controversial decision to prosecute Judith,²⁴ scholars suspect it was because criminal punishment would have had little purpose.²⁵ Nonetheless, the prosecutor commented that probation was necessary because "the law requires parents and caregivers to protect their children, to keep them safe, [and] to make sure they are not subject to risks to their health."²⁶ In short, Judith had unacceptably thrown her parental responsibilities "to the wind."²⁷

Judith's trial and the public debates that ensued from her conviction raised an important question regarding the appropriate roles of parents and the state in raising and protecting children. Should parental autonomy be protected as an ultimate authority in the rearing of children? Or does the state have an interest in the nurturing and development of children that justifies an assertion of primacy over parents? Traditionally, parents were deemed to have a paramount interest in raising their children and the state's guidance was considered to be an inadequate substitute.²⁸ However, parental autonomy has since been qualified and limited through a shift in institutional policy that has directed the general focus of protection from the preservation of families to the wellbeing of children.²⁹ In escalating the state's interest in ensuring the wellbeing of children, the law has maneuvered into an awkward position of "attempting to maintain a

²¹ *Id.*

²² CONN. GEN. STAT. § 53-21 (2007).

²³ *No Jail for Mom in Son's Suicide*, CBS NEWS, May 14, 2004, http://www.cbsnews.com/stories/2004/05/14/national/main617614.shtml?source=search_story.

²⁴ See, e.g., M. Lauren Gillies, *Placing Blame After the Suicide of a Minor: Analysis of State v. Scruggs and Connecticut's Risk-of-Injury Statute*, 5 CONN. PUB. INT. L.J. 131, 151 (2005) (reporting that various advocacy groups, sympathetic parents, and disapproving critics protested Judith's prosecution and accused the state of "intentionally filing bogus charges" and wrongfully prosecuting a "grieving mother who was herself a victim").

²⁵ *Id.* at 155 ("The statute's purpose is to protect children, and it must be considered if bringing such a charge will attain this goal. The charge cannot benefit the child who has died.").

²⁶ *Id.*

²⁷ *Id.*

²⁸ Joseph W. Ozmer, II, *Who's Raising the Kids: The Exclusion of Parental Authority in Condom Distribution at Public Schools*, 30 GA. L. REV. 887, 897-900 (1991).

²⁹ See *infra* notes 101-03 and accompanying text.

commitment to strong parental rights”³⁰ while simultaneously providing the state the authority to “undermine or trump” decisions made by parents.³¹

This Comment argues that the state has an interest both in protecting the physical health of children and in protecting the less tangible considerations of a child’s wellbeing, such as emotional welfare, psychological development, and ability to flourish as a member of society. For the state to intervene successfully in areas historically addressed exclusively within the walls of the family home, it must overcome the cultural sanctity of parental autonomy and further society’s transition towards an interventionist culture. While this cultural shift could be encouraged by a variety of methods, this Comment suggests that one strategy available to the state is the imposition of criminal liability, rather than civil remedies, in situations where an adult places a child’s physical, psychological, or emotional wellbeing at risk. This Comment further argues that imposing criminal liability through such risk-of-injury statutes will permit the state to better protect children from the harmful behavior of adults in addition to altering the public’s perception of the state’s role in protecting children.

II. THE PARENTAL RIGHTS DOCTRINE AND THE INTERESTS OF THE STATE

A. ESTABLISHING PARENTAL AUTONOMY

The Supreme Court has repeatedly recognized family integrity to be a fundamental liberty interest protected by the U.S. Constitution.³² The Court has recognized that implicit to the family integrity interest is the right to self-determine one’s own family life, and in the case of parents, to manage the upbringing of their children.³³ The Court first articulated the concept of parental liberty interests in *Meyer v. Nebraska*.³⁴ In *Meyer*, the Court held that the Due Process Clause of the Fourteenth Amendment protected parents’ liberty interests in having their children taught in a foreign language.³⁵ *Meyer* thus struck down a state statute that prohibited instructing students who had not yet passed the eighth grade in any language other than English in any school.³⁶ A few years later, the Court

³⁰ Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 279 (2000).

³¹ Ozmer, *supra* note 28, at 889-91.

³² Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. REV. L. & SOC. CHANGE 255, 269-70 (2006).

³³ *Id.* at 269.

³⁴ 262 U.S. 390, 400-02 (1923).

³⁵ *Id.* at 399-402.

³⁶ *Id.* at 400-03.

reaffirmed the developing concept of parental autonomy in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*.³⁷ In *Pierce*, the Court restated the parental rights doctrine of *Meyer* and held unconstitutional a state statute that prohibited parents from sending their children to private schools in place of the government provided public schools.³⁸ The Court reasoned that the State's interest in the upbringing of children was limited as compared to that of parents, noting that because "[t]he child is not the mere creature of the State, those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare [their children] for additional obligations."³⁹ In applying the *Pierce* reasoning in subsequent cases, the Court has commented that:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interest of their children.⁴⁰

Accordingly, as long as parents adequately care for their children and their decisions continue to "prepare [them] for additional obligations,"⁴¹ there is no reason for the state to intervene in the "private realm of the family."⁴²

One of the most significant contemporary decisions concerning parental autonomy and the State's right to regulate the upbringing of children is *Wisconsin v. Yoder*.⁴³ In *Yoder*, the State of Wisconsin criminally prosecuted a group of Amish parents under the State's compulsory schooling law for failing to send their children to high school.⁴⁴ The Amish parents argued that application of the State's compulsory schooling law "violated their free exercise of religion rights under the First Amendment and their Fourteenth Amendment right to raise and educate their children in accordance with their own beliefs"⁴⁵ because they considered the high school education to involve "an impermissible exposure of their children to a 'worldly' influence in conflict with their beliefs."⁴⁶ Relying on the parents' First Amendment argument, the Court held that the

³⁷ 268 U.S. 510, 518-19 (1925).

³⁸ *Id.* at 534-35 (finding that "[u]nder the doctrine of *Meyer v. Nebraska* . . . [there is a] liberty of parents and guardians to direct the upbringing and education of [their] children").

³⁹ *Id.* at 535.

⁴⁰ *Parham v. J.R.*, 442 U.S. 584, 602 (1979).

⁴¹ *Wisconsin v. Yoder*, 406 U.S. 205, 214 (1972) (restating the holding in *Pierce*, 268 U.S. at 534-35).

⁴² *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (plurality opinion).

⁴³ *Yoder*, 406 U.S. at 229-34; see also *Ozmer*, *supra* note 28, at 897-98.

⁴⁴ *Yoder*, 406 U.S. at 207-09.

⁴⁵ *Ozmer*, *supra* note 28, at 897-98.

⁴⁶ *Yoder*, 406 U.S. at 211.

application of the State's compulsory schooling law to this particular set of parents was unconstitutional because it violated their rights to raise their children in accordance with their religious beliefs.⁴⁷ Although the Court specified that its holding was grounded in the Free Exercise Clause and was narrowly tailored towards this particular group of Amish parents,⁴⁸ the Court emphasized the importance of parental rights under the U.S. Constitution.⁴⁹ The Court referenced its decision in *Pierce* and described *Pierce*'s restatement of the parental rights doctrine of *Meyer* as "perhaps the most significant statements of the [C]ourt" regarding the role of parents in dictating the upbringing of their children.⁵⁰ Concluding that the concept of parental autonomy was well established, the Court stated that "[t]he history and culture of Western Civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate."⁵¹

B. QUALIFYING PARENTAL AUTONOMY

Meyer, *Pierce*, and *Yoder* demonstrate the traditional view that parental autonomy is a "fundamental liberty interest protected by the U.S. Constitution."⁵² While the parental rights doctrine permits parents to claim "primacy in rearing, educating, and inculcating moral standards and religious beliefs in their children,"⁵³ parental autonomy has not been interpreted as an unchecked defense to any instance of state action. In all three cases, while deferring to parents' decisions in the upbringing of their children, the Court noted that the disputed decisions of the parents posed no risk to the wellbeing of the children and had little potential of creating significant social burdens.⁵⁴ In *Yoder*, the Court explicitly stated that it

⁴⁷ James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1385-86 (1994) ("Thus, the Court in *Yoder* established that the right guaranteed by the Free Exercise Clause is more than just the religious individual's right to control his own beliefs and self-determining behaviors, and a freedom from state imposed duties to take actions inconsistent with his beliefs . . . [but] also includes a liberty to control the lives and minds of one's children, to keep them to oneself, isolated from outside influences, and to make them the type of persons one wants them to be in light of one's own religious beliefs.").

⁴⁸ *Yoder*, 406 U.S. at 233-34.

⁴⁹ *Id.* at 233.

⁵⁰ *Id.* at 232.

⁵¹ *Id.*

⁵² Marcus, *supra* note 32, at 269.

⁵³ Ozmer, *supra* note 28, at 898.

⁵⁴ See, e.g., *Yoder*, 406 U.S. at 233-34 ("[T]he power of the parent, even when linked to a free exercise claim, may be subject to limitation under *Prince* if it appears that parental

would be justified in limiting the power of the parent if the decision in question had the potential to injure either the wellbeing of the child, or the wellbeing of society.⁵⁵

In addition to reaffirming that the power of a parent may be subject to limitations if a decision imposed certain risks, the *Yoder* Court established a “balancing test . . . [that] weigh[ed] parental interests in fulfilling their religious aspirations through their children against the State’s interest in protecting the welfare of children and in promoting other societal values.”⁵⁶ In evaluating the facts at issue in *Yoder* against this test, the Court looked beyond the individual impact that an insufficient education could have on the children themselves, and determined that the State’s interest in requiring school attendance was “principally a societal interest in children one day ‘meeting the duties of citizenship’ and not becoming ‘burdens on society because of educational shortcomings.’”⁵⁷ The Court subsequently found that even when “justifying the imposition of constraints on parental control over [their] children’s lives” with such a legitimate societal concern, “more than merely a ‘reasonable relation to some purpose within the competency of the State’ is required” to overcome the parental rights doctrine.⁵⁸ Scholars and courts have subsequently interpreted *Yoder* to suggest that laws that infringe on the power of parents “must be narrowly tailored to serve a compelling state interest . . . without unnecessarily restricting the right of parents to manage their children’s upbringing.”⁵⁹ Therefore, although parents have a right to direct lives of their children, the parental right is not always controlling and can be superseded by a compelling state interest.

Although the Supreme Court in *Yoder* held that a state’s broad societal interest in the education of its children was not sufficiently “compelling” to justify superseding the decisions of parents, lower courts have been more

decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.”); see also *Meyer v. Nebraska*, 262 U.S. 390, 403 (1923) (“[E]xperience shows that . . . [learning a foreign language] is not injurious to the health, morals or understanding of the ordinary child.”).

⁵⁵ *Yoder*, 406 U.S. at 233-34; see also Michael Loatman, *Protecting the Best Interest of the Child and Free Exercise Rights of the Family*, 13 VA. J. SOC. POL’Y & L. 89, 100 (2005) (“[T]he Court in *Yoder* did not grant the Amish an exception regardless of the impact that [it] would have on Amish children, but instead granted the exemption after a showing that the exemption would not harm the schoolchildren.”).

⁵⁶ Dwyer, *supra* note 47, at 1383.

⁵⁷ *Id.* at 1386 (quoting *Yoder*, 406 U.S. at 224, 227).

⁵⁸ *Id.* (quoting *Yoder*, 406 U.S. at 233).

⁵⁹ Marcus, *supra* note 32, at 269; see, e.g., *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 569-73 (1993) (interpreting the balancing test implemented in *Yoder* to require strict scrutiny under a “compelling state interest” standard).

deferential in reviewing states' interests and allowing state intrusion into family decisions. Courts have repeatedly held the state's interest in "protecting the welfare of children"⁶⁰ and "educating children"⁶¹ to be adequate justifications for limiting parental autonomy, even though these interests seem to address broad policy choices rather than narrowly defined situations such as that presented in *Yoder*. In accepting these broadening state interests as sufficient justification, courts have demonstrated a continually evolving understanding of the parental rights doctrine.

In *Troxel v. Granville*, the plurality stated that a fit parent's due process rights to control her children's upbringing were violated by a court order, issued without deference to the parent's determination of her children's best interests, compelling visitation rights between her children and their grandparents.⁶² Although *Troxel* upheld the traditional view that parents have a constitutionally protected "fundamental right . . . to make decisions concerning the care, custody and control of their children,"⁶³ the case's plurality opinion reflects the changing view of the "child-state-parent relationship."⁶⁴ In response to *Troxel*'s six-way split, one scholar observed that "the division among members of the Court mirrors the American public's conflicting views on the definition and scope of parenting."⁶⁵ Although the Court was unable to reach a majority holding, *Troxel* indicates two important changes to the parental rights doctrine. First, the plurality decision indicates that although parents' liberty interests are derived from

⁶⁰ Dwyer, *supra* note 47, at 1403; *see, e.g.*, *Jehovah's Witnesses v. King County Hosp.*, 278 F. Supp. 488, 500-01, 505 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (upholding a statute granting authority to declare children wards of the State for purposes of authorizing medical care over the objections of the parents); *Brown v. Stone*, 378 So. 2d 218, 221-23 (Miss. 1979), *cert. denied*, 449 U.S. 887 (1980) (overruling a religious exemption to a state law requiring vaccination of all school children because protecting the basic welfare of children is a compelling state interest).

⁶¹ *See* *People v. Bennett*, 501 N.W.2d 106, 116 (Mich. 1993) (upholding compulsory education law because, "in general, it can be assumed the state has an interest in seeing that all children within its borders are properly educated"); *see also* *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1209 (9th Cir. 2005) (holding that "protecting the mental health of children falls well within the state's broad interest in education").

⁶² 530 U.S. 57, 67-74 (2000) (plurality opinion).

⁶³ *Id.* at 66.

⁶⁴ *See* Alessia Bell, *Public and Private Child: Troxel v. Granville and the Constitutional Rights of Family Members*, 36 HARV. C.R.-C.L. L. REV. 225, 226-27 (2001); *see also* Buss, *supra* note 30, at 279 ("Eight Justices recognized some constitutionally protected right of parents to control their children's private associations, but seven did so haltingly, reflecting their readiness to qualify that right in the face of . . . claims more compelling than those asserted . . . in this case.").

⁶⁵ Bell, *supra* note 64, at 226-27 (noting that forty-three special interest groups filed "passionate" amicus curiae briefs on both sides of the *Troxel* case).

the Due Process Clause, not all parental interests are “fundamental.”⁶⁶ Therefore, absent involvement of a suspect classification, the rights of a fit parent should be balanced against the intervening State interest through an intermediate scrutiny test, rather than through a strict scrutiny review as was implemented in *Yoder*.⁶⁷ Second, the plurality decision suggests (and the dissent explicitly concludes) that the Due Process Clause does not require a finding of harm to justify unwelcome State intervention.⁶⁸ These two changes suggest that the State is not required to demonstrate, as a prerequisite for intervention, either that it has a compelling interest to limit parental autonomy or that the welfare of a child or society would be harmed by deferring to the parent’s decision.

C. THE INTEREST OF THE STATE

In developing the doctrine of parental rights, the Court repeatedly noted a caveat to parents’ autonomy in directing the upbringing of their children. In an attempt to balance parental liberty interests against the State’s interest in intervention, the Court suggested that if the parents’ interests were likely to harm either the wellbeing of their children or the wellbeing of society, that the State’s interest in preventing that harm would be sufficiently compelling to give rise to a right on the part of the State to intercede.⁶⁹ Through a variety of statutory mechanisms, every state has recognized the existence of this compelling interest to intervene in situations where the potential harm to children involves a physical injury.⁷⁰ However, in considering the role and scope of parental authority in raising children, the Court has not limited its discussions to mere concerns for a child’s physical wellbeing.⁷¹

In *Pierce*, the Court referred to other notions relevant to raising a child as an interest in preparing them for “additional obligations,” and held that a

⁶⁶ *Troxel*, 530 U.S. at 67-74 (plurality opinion).

⁶⁷ See *id.*; Bell, *supra* note 64, at 277-78 (noting that “accurately reading precedent and promoting sound public policy, the Court applied intermediate scrutiny”); see also *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1208 (9th Cir. 2005) (holding that the State’s intervention in parental decisions relating to the education of their children did not involve suspect classifications, and therefore should be decided under a rational basis review); *People v. Bennett*, 501 N.W.2d 106, 111-12 (Mich. 1993) (holding that the state may reasonably regulate education).

⁶⁸ *Troxel*, 530 U.S. at 58, 73, 77, 81 (plurality opinion); see also Buss, *supra* note 30, at 303-04.

⁶⁹ See *supra* notes 54-55 and accompanying text.

⁷⁰ See, e.g., Mary Margaret Oliver & Willie Levi Crossley, *New Challenges for the Georgia General Assembly: Survey of Child Endangerment Statutes*, 7 GA. B.J. 8, 8-11 (Dec. 2001).

⁷¹ See *supra* note 47 and accompanying text.

parent not only had the right to “nurture,” “direct,” and “prepare” their children for these additional obligations, but that it was their “high duty” to do so.⁷² In *Yoder*, the Court elaborated on the *Pierce* understanding of parental rights and duties and suggested that parents had the liberty to direct their children’s upbringing in such a way as to make them the type of people their parents want them to be.⁷³ Similarly, in *Troxel*, one of the few ideas on which the Court could agree was that a parent’s interest in the companionship, care, nurturing, and management of his or her child deserved some amount of protection from interference.⁷⁴ In each of these cases, the Court was concerned with protecting parents’ interests in these “intangible considerations” for the same reason: because these matters have an enormous potential to influence a child’s development.⁷⁵ However, just as the state has a compelling interest to intervene where a parent’s decision threatens a child’s physical wellbeing (for instance, refusing to allow a child to receive necessary medical care),⁷⁶ the state should likewise have a compelling interest to intervene where a parent’s decision threatens to inflict non-physical harm upon a child.

In arguing that the state has an obligation to endow its citizens with the capabilities required to function as members of society, Professor Martha Nussbaum reasons that the state is not only required to ensure that children receive nutritious food and an education,⁷⁷ but that it has a duty to promote and protect children’s less tangible “fundamental capabilities” to ensure that they have the opportunity to “flourish as a functioning citizen.”⁷⁸ Nussbaum defines an individual’s “fundamental capabilities” as the characteristics and the basic abilities required to participate as a productive member of society.⁷⁹ Nussbaum reasons that because these basic abilities and characteristics are required to function in society, if the development of

⁷² See *supra* note 39 and accompanying text.

⁷³ See *supra* note 47.

⁷⁴ *Troxel v. Granville*, 530 U.S. 57, 65-66, 77, 79, 96 (2000) (plurality opinion).

⁷⁵ See, e.g., Diana J. English, *The Extent and Consequences of Child Maltreatment*, 8 FUTURE CHILD. 39, 41, 47 (1998) (noting that maltreatment—which includes a lack of attention or affection—can adversely affect children’s physical, cognitive, emotional, and social development).

⁷⁶ See *supra* note 60.

⁷⁷ MARTHA NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 78-86 (2000).

⁷⁸ *Id.* at 78-80.

⁷⁹ *Id.*; see also Robin West, *Human Capabilities and Human Authorities: A Comment on Martha Nussbaum’s Women and Human Development*, 15 ST. THOMAS L. REV. 757, 758-59 (2003) (noting that Nussbaum’s fundamental capabilities range from the bare necessities of possessing food and shelter to more abstract conceptions of maintaining bodily integrity and possessing the ability to play and form meaningful affiliations with others).

an individual's fundamental capabilities is neglected, the state will be inhibited in any later attempt to promote the general welfare of society.⁸⁰ Just as the *Pierce* and *Yoder* Courts suggested that considerations outside the bare necessities of life were important in a child's development, Nussbaum suggests that the state has an obligation to protect these considerations so that its citizens may flourish as members of society.⁸¹ This does not suggest that the state's interest in fostering these fundamental capabilities should generally preempt parental autonomy, but instead, that the state has a compelling interest to intervene when a parent's decision is likely to harm the wellbeing of a child or the wellbeing of society.

D. PROVOKING A CULTURAL SHIFT THROUGH CRIMINAL LIABILITY

When Judith Scruggs was convicted of creating and maintaining a dangerous home environment, her case was brought into the national spotlight.⁸² She appeared on nationally broadcast television programs such as *The Oprah Winfrey Show*⁸³ and *60 Minutes II*⁸⁴ to describe her son's life and death and to tell the story of her trial. As one would expect, the story of a grieving mother being criminally prosecuted after her child's suicide elicited incredible amounts of public sympathy. However, this sympathy was not universal.⁸⁵ The public was generally divided into three broad groups. The first group lamented the State's intrusion into the private realm of family life, calling it "appalling" and "embarrassing" that the judicial system would convict a mother who had already been through so much.⁸⁶ The second group praised Connecticut's efforts to hold a parent accountable for the harm (or the risk of harm) inflicted on a child.⁸⁷ The third group was stuck in an awkward position in the middle: they supported the State for holding Judith accountable, but feared a general policy allowing the State to intrude into their family lives.⁸⁸

⁸⁰ See West, *supra* note 79, at 757.

⁸¹ See *supra* text accompanying notes 38-40 and 45-46; see also NUSSBAUM, *supra* note 77.

⁸² See *supra* notes 17-18 and accompanying text.

⁸³ See Gillies, *supra* note 24, at 132 (citing *The Oprah Winfrey Show* (CBS television broadcast June 1, 2004)).

⁸⁴ See *id.* (citing *60 Minutes II* (CBS television broadcast Oct. 29, 2003)).

⁸⁵ *Mailbag: Judith Scruggs Guilty?* (CBS television broadcast Oct. 30, 2003) [hereinafter *Mailbag*].

⁸⁶ See, e.g., *id.* ("Judith Scruggs has already been punished. . . . It is appalling to me that this mother should be facing up to 10 years in prison. If she was charged and found guilty, everyone else who did not help this child should also be charged and found guilty.").

⁸⁷ See, e.g., *id.* ("This mother should serve prison time, without a doubt. . . . Parents should be held responsible—or [they shouldn't] have the kids.").

⁸⁸ See *id.*

The public debate that erupted out of *State v. Scruggs* is only a small indication of the controversy that surrounds the concept of the state imposing its own interests in the child-parent relationship.⁸⁹ As mentioned above, commentators observed that while the *Troxel* plurality opinion reflects the public's views on the definition and scope of parenting, there is no majority opinion.⁹⁰ In order for the state to intervene successfully in areas historically addressed exclusively within the confines of the family home, it must overcome opponents who are appalled by such state action.⁹¹ One method by which the state could prompt a transition towards an interventionist culture is to "moralize" the conduct giving rise to situations where the state has an interest to intervene.

Professor Paul Rozin described moralization as "the process through which preferences are converted into values," at both the individual and cultural levels.⁹² Rozin has tracked the moralization of cigarette smoking, vegetarianism, drugs, and obesity in America, and suggests that as a behavior or entity acquires moral status, it gains influence over individuals and society.⁹³ As an example of this influence, Rozin points out that the moralization process can cause governments to take action "through taxation or establishment of prohibitions" on the moralized behavior (e.g., consider the various regulations that have been enacted in the last fifty years in relation to cigarette smoking and drinking).⁹⁴

Although Rozin identifies government action as a result of moralization, it could also function as an instigating factor to the process.⁹⁵ In criminalizing some undesirable behavior, society expresses its condemnation of the proscribed act.⁹⁶ Since, among other things, a social stigma is attached to breaking the law, the government could use society's disgust of violators as a "moral amplifier"⁹⁷ to influence an individual's

⁸⁹ Compare J. Besharov, "Doing Something" About Child Abuse: The Need to Narrow the Grounds for State Intervention, 8 HARV. J.L. & PUB. POL'Y 539, 540, 554-72 (1985) (arguing that the laws governing the state's ability to intervene in private family matters are often overly ambitious and counterproductive), with Marcus, *supra* note 32, at 260-61 (acknowledging the need for state intervention).

⁹⁰ See *supra* note 65 and accompanying text.

⁹¹ See *Mailbag*, *supra* note 85.

⁹² Paul Rozin, *The Process of Moralization*, 10 PSYCHOL. SCIENCES 218 (1999).

⁹³ *Id.* at 218-20; Paul Rozin, Maureen Markwith & Caryn Stoess, *Moralization and Becoming a Vegetarian: The Transformation of Preference into Values and the Recruitment of Disgust*, 8 PSYCHOL. SCI. 67, 67-68 (1997); Paul Rozin & Leher Singh, *The Moralization of Cigarette Smoking in the United States*, 8 J. CONSUMER PSYCHOL. 321, 334 (1999).

⁹⁴ Rozin, *supra* note 92, at 218; Rozin & Singh, *supra* note 93, at 323.

⁹⁵ See Rozin & Singh, *supra* note 93, at 322-23.

⁹⁶ See *infra* notes 172-79 and accompanying text.

⁹⁷ Rozin, *supra* note 92, at 218.

internalized preferences.⁹⁸ By linking society's disgust of criminal behavior to conduct that places a child's physical, psychological, or emotional wellbeing at risk, the state could use the moralization process to alter the public's perception of the state's role in protecting children.

III. PROTECTING CHILDREN THROUGH THE CRIMINAL JUSTICE SYSTEM

A. A SHIFT FROM FAMILY PRESERVATION TO CHILD PROTECTION

There have been laws against harmful conduct directed towards minors since the colonial period.⁹⁹ However the individuals, agencies, and systems involved, and the roles of each, have changed with every new policy and institution implemented to better safeguard the wellbeing of children.¹⁰⁰ In the last ten years, the change has been marked by a general shift in institutional policy from "family preservation"¹⁰¹ to "child protection."¹⁰² Prior to this transition, the prevailing philosophy was that, except in extreme cases, matters involving harmful conduct towards children were handled by the civil child welfare system, which dealt "specifically and in detail with these problems."¹⁰³ However, this recent policy shift has

⁹⁸ Rozin & Singh, *supra* note 93, at 322 (suggesting that "the most effective way to enforce a social prohibition is to . . . [link] it to disgust").

⁹⁹ Besharov, *supra* note 89, at 540 (noting that "[m]any of the original thirteen colonies . . . had laws against certain forms of child maltreatment").

¹⁰⁰ See, e.g., Keeping Children and Families Safe Act, 42 U.S.C. § 5101 (2003); Child Abuse Prevention and Treatment Act, 42 U.S.C. § 5101 (1974); J. Besharov, *The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect*, 23 VILL. L. REV. 458 (1978) (discussing the effect of state reporting laws); Julian W. Mack, *The Juvenile Court*, 23 HARV. L. REV. 104 (1909) (discussing the creation of juvenile courts).

¹⁰¹ See Lara Jakes, *Saving Kids by Splitting Families*, ALBANY TIMES UNION, Aug. 23, 1998, at A1 ("Since the early 1980s, judges and social workers . . . placed a priority on keeping families together, even when they [were] seriously troubled.").

¹⁰² See The Adoption and Safe Families Act, PUB. L. NO. 105-89, 111 STAT. 2115 (1997) (including provisions directing the state to terminate a parent's legal guardianship upon the occurrence of certain events); Jakes, *supra* note 101, at A1 ("Experts say the new policy will help abused and neglected kids get to stable homes faster" and "[s]upporters hope it will also guard against returning children to dangerous homes."); see also Rachel L. Swarns, *In a Policy Shift, More Parents Are Arrested for Child Neglect*, N.Y. TIMES, Oct. 25, 1997, at A1 ("The shift . . . comes as many cities and states are beginning to favor child protection over family preservation.").

¹⁰³ Martin G. Karopkin, *Child Abuse and Neglect: New Role for Criminal Courts*, 215 N.Y.L.J. 1, 1 (1996) ("Although some . . . cases make their way into the criminal courts, those are extreme matters, involving serious physical injury, death or more commonly, sexual assaults."); Alison B. Vreeland, *The Criminalization of Child Welfare in New York City: Sparing the Child or Spoiling the Family?*, 27 FORDHAM URB. L.J. 1053, 1053-54 (2000) ("Historically, the police have arrested and prosecuted parents and custodians for child abuse, including sexual abuse. But in cases of suspected neglect, the Administration

resulted in an increase in the number of parents who have been arrested and criminally prosecuted for acts that previously would have been addressed by the civil child welfare system.¹⁰⁴ Since the civil and criminal systems serve different functions and employ drastically different mechanisms, this policy change raises the question of “whether or not arrest and criminal prosecution are the most appropriate responses” to instances of harmful conduct directed towards children.¹⁰⁵

This change in institutional policy was, in part, a response to two events: the enactment of the federal Adoption and Safe Families Act¹⁰⁶ and a series of highly publicized, tragic child abuse cases where children, who had been reported to the child welfare system, were subsequently killed by abusive parents.¹⁰⁷ The Adoption and Safe Families Act changed the focus of the child welfare system from family reunification to child protection by requiring that the state initiate proceedings to terminate parental rights upon the occurrence of certain events.¹⁰⁸ In expediting the termination of parental rights, the federal directive openly opposed the child welfare system’s previous goal of keeping families together.¹⁰⁹ The tragic child abuse cases brought heavy criticism to the child welfare system for its failure to prevent the deaths of the reportedly abused children.¹¹⁰ As a result, states took steps to avoid a repeat of the tragic events by enacting policies of “overreaction” to reports of child abuse, neglect, and maltreatment.¹¹¹ In New York City, this overreaction policy took the form of a directive from both the mayor and police commissioner to the police, instructing officers to “take action . . . when they [observed] children in dangerous situations.”¹¹² The combination of the Adoption and Safe Families Act and states’ responses to the publicized child abuse cases led to an increase in the number of child welfare cases that were directed to the

for Children’s Services (‘ACS’) would respond The police . . . [now] take action . . . when they see children in dangerous situations.”).

¹⁰⁴ Karopkin, *supra* note 103, at 1.

¹⁰⁵ Vreeland, *supra* note 103, at 1054.

¹⁰⁶ PUB. L. NO. 105-89, 111 STAT. 2115.

¹⁰⁷ Karopkin, *supra* note 103, at 1 (noting that “a few highly publicized events have worked to change” the approach towards child abuse and child neglect cases); Vreeland, *supra* note 103, at 1054.

¹⁰⁸ Vreeland, *supra* note 103, at 1069.

¹⁰⁹ See Jakes, *supra* note 101; Vreeland, *supra* note 103, at 1070.

¹¹⁰ See Swarns, *supra* note 102.

¹¹¹ Joanne Wasserman, *More Kids Left Alone, State Says*, DAILY NEWS (N.Y.), July 27, 1997, at 4 (preferring to be accused of overreacting than underreacting).

¹¹² Vreeland, *supra* note 103, at 1053.

criminal courts and changed the way that the cases were handled by both the police and the prosecutors.¹¹³

B. THE DEBATE OVER CRIMINALIZING CHILD WELFARE

New York City's involvement of the criminal justice system in minor neglect and endangerment cases was intended to help prevent and uncover instances of more serious abuse and to send the message that neglect and abuse would not be tolerated.¹¹⁴ Although New York City's strong stance was intended to better protect children from the harmful conduct of adults, the so-called "criminalization of child welfare" received a mixed greeting.¹¹⁵ This policy shift threatened the traditionally distinct, non-overlapping involvement of the civil child welfare and criminal justice systems.¹¹⁶ Prior to this change, the civil child protection system was used, almost exclusively, to protect children from offenses perpetrated by the victim's caregiver and most other nonviolent offenses, such as neglect and emotional maltreatment.¹¹⁷ The civil system focused on the condition of the child and of the family.¹¹⁸ If, for some reason, the condition of either was

¹¹³ Karopkin, *supra* note 103, at 2 ("These changes . . . brought a steady stream of criminal cases where the injuries [were] less severe or where there [was] no injury and the charges involve[d] allegations of neglect," all offenses that previously would not have been addressed in criminal courts.); Vreeland, *supra* note 103, at 1054 ("Mayor Rudolph Giuliani has reinstated the long-abandoned practice of using police power to arrest and prosecute parents where there is probable cause to believe a parent has endangered the welfare of a child.").

¹¹⁴ See Swarns, *supra* note 102; see also Mona Charen, *With Kids, the Cautious Seldom Err*, DENV. ROCKY MTN. NEWS, May 22, 1997, at 67A (noting that the commissioner of the Administration for Children's Services "has vowed to make child safety, not family preservation, the watchword of his tenure"); Wasserman, *supra* note 111 ("You start enforcing the law, a lot of people will get the message.").

¹¹⁵ Compare Charen, *supra* note 114, at 67A ("[T]he authorities appear to be on a hair trigger now. . . . [I]f this is the price we must pay for more aggressive enforcement of child welfare laws, it is well worth it."), with Megan E. McLaughlin & Roger L. Green, *Child Welfare Doesn't Belong in Police Hands; Harmful Interventions*, N.Y. TIMES, Oct. 30, 1997, at A30 (noting "[u]nnecessary police interventions . . . damage both the mother and the child, often with lasting consequences"), and Virginia Ravenscroft-Scott, *Child Welfare Doesn't Belong in Police Hands; Harmful Interventions*, N.Y. TIMES, Oct. 30, 1997, at A30 (voicing a reader's "horror" that a woman was arrested for living with a child in an apartment that did not have adequate utilities).

¹¹⁶ David Finkelhor, Theodore P. Cross & Elise N. Cantor, U.S. Dep't of Justice, *How the Justice System Responds to Juvenile Victims: A Comprehensive Model*, JUV. JUST. BULL., Dec. 2005, at 2-4.

¹¹⁷ See *id.* at 2.

¹¹⁸ See *id.* at 2, 4-6; see also Karopkin, *supra* note 103, at 5 ("[T]he [civil system] services a function very different from that of the Criminal Court. A child protective proceeding is civil in nature . . . [i]ts purpose is to protect children from injury and

not suitable, the system would attempt to protect the child by "treating the family" through counseling and supervision.¹¹⁹ In the event that the civil system determined that a child was at-risk, or that the treatment ordered by the civil proceedings needed to be enforced, the child welfare agencies had the authority to remove the child from his or her home.¹²⁰ On the other hand, the criminal justice system was used to protect children from offenses that were considered to be violent in nature, such as homicide, physical assault, and sexual abuse.¹²¹ Because the goals of the criminal system include the "punishment of perpetrators" and the "deterrence of potential perpetrators," its proceedings focused on the defendant's guilt or innocence, and little, if any, consideration was given to treating the family.¹²²

The debate over the role of criminal courts in child welfare cases has largely focused on these basic foundations of the civil and criminal systems.¹²³ Despite considerable and increasing interaction between the two systems,¹²⁴ opponents to the criminalization trend emphasize the two different roles filled by the civil and criminal systems.¹²⁵ The civil child welfare system was "designed . . . to deal with the unique and complex problems facing families."¹²⁶ Its goals and the methods it uses to protect at-risk children are indisputably distinct from the penal focus of the criminal system.¹²⁷ While the criminal court generally assesses blame for a wrongful act and imposes punishment on the offender, the civil system attempts to address the problem without relying on the threat of sanctions.¹²⁸

C. THE NEED TO IMPLEMENT THE CRIMINAL JUSTICE SYSTEM

Unfortunately, the dispositional nature of the child welfare system does not adequately protect children from the harmful conduct of adults. Of the children removed from their families by child welfare services, roughly two-thirds are reunited with their families after the family unit is "treated"

mistreatment, safeguard their physical, mental and emotional well-being, and insure the parent's right to due process of law.").

¹¹⁹ See Finkelhor et al., *supra* note 116, at 2, 4-6.

¹²⁰ See *id.* at 4-6.

¹²¹ See *id.* at 2, 6-7.

¹²² See *id.*; see also Karopkin, *supra* note 103, at 5 ("[T]he function of the criminal justice system is not just protection, but deterrence, rehabilitation and retribution. It provides an appropriate public response to the particular offense committed.").

¹²³ See Vreeland, *supra* note 103, at 1077-78.

¹²⁴ See Finkelhor et al., *supra* note 116, at 2.

¹²⁵ See Vreeland, *supra* note 103, at 1075, 1077-78.

¹²⁶ *Id.* at 1077.

¹²⁷ See Swarns, *supra* note 102.

¹²⁸ See *id.*

by the civil system.¹²⁹ On average, over one-third of the children who are reunited with their families have to again be removed by child welfare services within eighteen months of going home.¹³⁰ In these failed reunifications, each subsequent attempt to reunite the family is not particularly permanent and usually must be tried repeatedly.¹³¹ This reunification process ultimately fails for about one in four children.¹³² This means that if nine children are removed from their families by child welfare services, six children could expect to be reunited with their families, but two of those six would probably be removed again within the next eighteen months. In this example, four of the original nine children who were removed would be able to return and remain with their families. However, this suggests that the rehabilitation rate of the civil system is less than forty-five percent at eighteen months.¹³³ While the civil system ultimately reunites seventy-five percent of the children removed, this terminal success rate is determined after repeated cycles of removal and reunification.¹³⁴

Furthermore, some scholars question whether the child welfare system should place such a prioritization on returning children to their biological families after placement in foster care.¹³⁵ In a study examining the behavior health outcomes for youth who were reunified after placement in foster care, researchers found that youth who were reunified with their biological

¹²⁹ See Ill. Dep't of Child & Family Servs., *Family Reunification*, in CHILD WELFARE RESEARCH REVIEW, VOL. II 226 (Richard Barth et al. eds., 1997) ("In the not-so-short term of four years [in foster care], two-thirds of children will return home."); Finkelhor et al., *supra* note 116, at 6 ("In 1999, 66 percent of children exiting foster care returned to their families Some [of those children], however, need[ed] to re-enter foster care after reunification because of recurring maltreatment or a renewed risk of maltreatment.").

¹³⁰ Jakes, *supra* note 101, at A1 ("In 1995 and 1996, 34 percent of kids who were put under Social Services' care because they were abused, neglected or labeled a person in need of supervision were back in the social care system within 18 months of going home. In Albany County, that number was even higher: 49.5 percent."); Ill. Dep't of Child & Family Servs., *supra* note 129, at 221 ("30% of the children who entered foster care in 1988 and had been reunified since then, reentered foster care by the end of 1993.").

¹³¹ Ill. Dep't of Child & Family Servs., *supra* note 129, at 219.

¹³² *Id.*

¹³³ This is not intended to suggest that the rehabilitation rate of the criminal justice system is any better, but instead, that the deterrent effects of each system should be emphasized in evaluating society's approach to protecting children. See ANDREW VON HIRSCH ET AL., CRIMINAL DETERRENCE AND SENTENCE SEVERITY: AN ANALYSIS OF RECENT RESEARCH 1 (1999); DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 47 (A. Blumstein, J. Cohen & D. Nagin eds., 1978).

¹³⁴ See *supra* text accompanying notes 130-32.

¹³⁵ See Heather N. Taussig, Robert B. Clyman & John Landsverk, *Children Who Return Home from Foster Care: A 6-Year Prospective Study of Behavioral Health Outcomes in Adolescence*, 108 PEDIATRICS 10, 10 (July 2001).

families had more “negative outcomes” than youth who did not reunify.¹³⁶ Researchers were careful to note that this study should not be “misconstrued as an argument against reunification,” but rather that it should caution observers against presuming that reunification results in positive outcomes.¹³⁷ This study also stresses the need to examine child welfare policy not only on rates of reunification, but also on the long term impact and deterrent potential of such policy.¹³⁸

In researching the deterrent effects of criminal sanctions, Professors Paul Robinson and John Darley suggested that the most effective deterrence comes from having a criminal justice system that imposes punishment, not from the substantive rules that impose liability and punishment.¹³⁹ Robinson and Darley observe that because “potential offenders often do not know . . . the legal rules,” changes to the criminal law and the punishment imposed on violators often have no deterrent effect.¹⁴⁰ This observation implies that society can deter undesired behavior merely by calling it “criminal”—the actual penalties that attach do not matter.

The codification of acts of endangerment, neglect, abuse, and maltreatment into criminal statutes reflects society’s “disapproving sentiment toward violence in the home, which, in turn, enforces the value society places on safe homes.”¹⁴¹ To reflect the value placed on a safe home accurately, the state must use the most effective means available to protect individuals from harmful home environments. The positive correlation between the criminal justice system’s involvement and safety within the home was demonstrated when police increased their involvement in cases of domestic violence.¹⁴² In that instance, police involvement is credited with increasing public awareness about domestic violence and providing help to victims.¹⁴³ Because children are less likely to be able to

¹³⁶ *Id.* (Researchers analyzed adolescent risk behaviors, life-course outcomes, and current symptomatology and concluded that “[r]eunification status was a significant predictor of negative outcomes” after controlling for length of time in foster care, age, and gender.).

¹³⁷ *Id.* at 16.

¹³⁸ *Id.*

¹³⁹ Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioral Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 173-74, 204-05 (2004); see, e.g., VON HIRSCH, *supra* note 133, at 45-49 (concluding that having a criminal justice system that imposes liability and punishment for violations deters).

¹⁴⁰ Robinson & Darley, *supra* note 139, at 173.

¹⁴¹ Vreeland, *supra* note 103, at 1076-77.

¹⁴² *Id.*

¹⁴³ *Id.* at 1076 n.201 (citing Donald Bertrand, *Domestic Violence Up*, N.Y. DAILY NEWS, Jan. 5, 1998, at 1).

protect themselves, they may receive an even greater benefit from intervention by the criminal justice system.¹⁴⁴

IV. PROTECTING CHILDREN THROUGH RISK-OF-INJURY STATUTES

A. CONNECTICUT'S RISK-OF-INJURY STATUTE

In September 2006, the Connecticut Supreme Court unanimously overturned Judith Scruggs's conviction for creating a home environment that posed a risk of injury to her son.¹⁴⁵ It held that Connecticut's risk-of-injury statute was unconstitutionally vague as applied to Judith's conduct because she was not on notice that the home's unkempt conditions "were so squalid that they posed a risk of injury to the mental health" of her son.¹⁴⁶ The court reasoned that although Judith may have known that her home's condition was not optimal, she reasonably could have believed that the conditions "were within the acceptable range . . . [of] generally accepted housekeeping norms."¹⁴⁷ Therefore, absent proof that Judith "knew or should have known that the conditions would constitute a risk of injury to the mental health of *any* child," her conviction would comprise a due process violation for the lack of necessary notice.¹⁴⁸

Despite the various shortcomings of *State v. Scruggs*, Judith's prosecution illustrates an attempt by the State to act upon and further its interest in protecting children from the potential harmful conduct of adults.¹⁴⁹ In applying Connecticut's risk-of-injury statute to Judith's case, both the trial court and the state supreme court acknowledged that it was

¹⁴⁴ *Id.* at 1076.

¹⁴⁵ *State v. Scruggs*, 905 A.2d 24, 40-41 (Conn. 2006).

¹⁴⁶ *Id.* at 36-37, 40.

¹⁴⁷ *Id.* at 36-37.

¹⁴⁸ *See id.* at 36-40. The court noted that if any of a number of situations were present, Judith would have been provided the requisite notice to preclude the court from reversing her conviction. *Id.* at 37-40.

¹⁴⁹ *See generally* CHILD FATALITY REVIEW REPORT, *supra* note 6, at ii-iii, 19-23. In investigating Joseph Daniel's death, the Child Fatality Review Panel evaluated the State's "web of formal and informal systems of protection" designed to ensure the safety and care of children. *Id.* at 19. In this web, the "primary safe keepers of children are parents." *Id.* However, because some parents either do not or cannot properly care for their children, the state imposes laws, regulations, and a child welfare system to make "extrafamilial protections available." *Id.* The Review Panel concluded that this web of safeguards failed to ensure Joseph Daniel's care and safety because the safeguards never came together to adequately respond to the problems he faced. *Id.* at ii, 41. In response to this failure, it made a series of recommendations to augment the State's ability to safeguard children; however, this review was limited to the civil involvement of state agencies because the review of the criminal justice system and instances of individual culpabilities would play out in the courts. *Id.* at 41-43.

enacted to protect children from a broad range of situations that could cause them harm.¹⁵⁰ In analyzing the risk-of-injury statute's application to Judith's case, the *Scruggs* courts explained that it was intended to protect children from any variety of harmful situations, regardless of the legality of the conduct giving rise to the situation, and without consideration as to whether the legislature had predicted that a particular conduct could create a situation that would be potentially harmful to a minor.¹⁵¹ Although Judith's conviction was the first case in Connecticut where a parent was convicted under the risk-of-injury statute after her child's suicide, it was not unprecedented for the State to charge a parent under the risk-of-injury statute for exposing a child to some sort of harmful environment.¹⁵²

Even without a substantive legislative history surrounding Connecticut's risk-of-injury statute, the state judiciary has time and again interpreted the statute's purpose consistent with that which was described by the *Scruggs* courts.¹⁵³ These courts have applied a liberal interpretation to the statute's already broadly drafted text to permit the statute's implication in various harmful situations.¹⁵⁴ This combination of a vague

¹⁵⁰ *State v. Scruggs*, No. CR 020210921S, 2004 WL 1245557, at *7 (Conn. Super. Ct. Mar. 8, 2004) (reasoning that Connecticut's risk-of-injury statute seeks to protect children by broadly mandating "that adults not place a child 'in such a situation that . . . [its] health . . . [is] likely to be injured'" (citing CONN. GEN. STATUTES § 53-21(a)(1)), *rev'd*, 905 A.2d 24, 39-40 (Conn. 2006) ("We are mindful that § 53-21(a)(1) is broadly drafted and was intended to apply to any conduct, illegal or not, that foreseeably could result in injury to the health of a child.")).

¹⁵¹ See cases cited *supra* note 150.

¹⁵² See Noreen Gillespie, *No Jail for Mom in Son's Suicide*, CBS NEWS, May 14, 2004, <http://www.cbsnews.com/stories/2004/05/14/national/printable617614.shtml> ("Legal experts said they believed it was the first time a parent had ever been convicted in connection with her child's suicide."); see also *State v. Ritrovato*, 905 A.2d 1079, 1085, 1100-01 (Conn. 2006) (convicting defendant for creating a risk-of-injury to a minor by providing lysergic acid diethylamide ("LSD") to a fifteen-year-old as payment for babysitting the defendant's own children); *State v. Padua*, 869 A.2d 192, 199-201 (Conn. 2005) (convicting defendants under the first part of Connecticut's risk-of-injury statute for packaging marijuana in the presence of children); *State v. Smith*, 869 A.2d 171, 178-79 (Conn. 2005) (convicting defendant under the first part of Connecticut's risk-of-injury statute for placing a toddler on a bed that also held a rock of crack cocaine); *State v. Payne*, 695 A.2d 525, 527-28 (Conn. 1997) (convicting defendant under the second part of Connecticut's risk-of-injury statute for forcing children to urinate in a cup under the threat of death); *State v. Smalls*, 827 A.2d 784, 792-93 (Conn. App. Ct. 2003) (convicting defendant for creating a risk of injury to a minor by killing a child's father in the presence of the child).

¹⁵³ See, e.g., *State v. Payne*, 695 A.2d 525, 528 (Conn. 1997) (stating that "[t]he general purpose of [the risk-of-injury statute] is to protect the physical and psychological well-being of children from the potentially harmful conduct of adults").

¹⁵⁴ See, e.g., *State v. Eastwood*, 850 A.2d 234, 250 (Conn. App. Ct. 2004) (holding that the "[l]ack of an actual injury to . . . the victim is irrelevant . . . [because] actual injury is not an element of the offense. . . . [T]he creation of a prohibited situation is sufficient.") (citing

statute and a broad judicial interpretation has the potential to present significant problems relating to notice and consistent application.¹⁵⁵ However, a broad, yet constitutional, application enables the state to intervene in a potentially harmful situation by filing criminal charges before the at-risk child is actually injured.¹⁵⁶ This is not intended to suggest that the state does not have options outside the criminal justice system that could address such situations,¹⁵⁷ but rather, that criminal risk-of-injury charges are unique tools that may be implemented to shift societal norms and provide an increased level of protection for children.¹⁵⁸

B. OTHER CRIMINAL RISK-OF-INJURY STATUTES

Although the facts surrounding Judith's prosecution were considered fairly extraordinary,¹⁵⁹ Connecticut's risk-of-injury statute should not be considered anything more than a representative example of a legislative

State v. Davila, 816 A.2d 673, 677 (Conn. App. Ct. 2003)); State v. Cutro, 657 A.2d 239, 243 (Conn. App. Ct. 1995) (holding that a violation of Connecticut's risk-of-injury statute does not require the victim to be aware of defendant's prohibited conduct).

¹⁵⁵ Gillies, *supra* note 24, at 144-45. Gillies points out that a number of significant problems may arise from a statute that is broadly drafted and broadly interpreted. *Id.* Specifically, she reasons that because a broadly drafted statute (such as Connecticut's risk-of-injury statute) relies on the prosecutor's discretion in deciding whom to prosecute, the statute may result in due process violations if a defendant does not have notice as to what acts are criminal. *Id.* at 145. This would especially be true if the statute can be applied to acts that the public would not normally consider criminal. *See id.* Additionally, Gillies suggests that a statute that is too broadly drafted and interpreted may result in disparate treatment of equally culpable individuals and "erroneous verdicts due to juror confusion or juror bias." *Id.*

¹⁵⁶ Gillies suggests that notwithstanding the potential problems of a broadly drafted and broadly interpreted statute, the judiciary interprets the risk-of-injury statute broadly to "allow . . . a jury, or . . . public opinion, to determine which [potentially harmful] actions should be punished rather than require the legislature to foresee and articulate any possible action that might harm a child." *Id.* at 144-45.

¹⁵⁷ *See supra* note 149. "In addition to criminal law . . . there is also a child welfare system administered by the Department of Children and Families (DCF)." CHILD FATALITY REVIEW REPORT, *supra* note 6, at 19. Established under Conn. Gen. Statutes 17(a)(3), "DCF is a 'comprehensive, consolidated agency serving children and families. Its mandates include child protective and family services, juvenile justice services, mental health services, substance abuse related services, prevention and educational services.'" *Id.* (quoting Department of Children and Families website, <http://www.state.ct.us/def/>). The purpose of DCF is to "'protect children, strengthen families and help young people reach their fullest potential.'" *Id.* (quoting Department of Children and Families, About the Department, <http://www.dcf.state.ct.us/mission.htm>).

¹⁵⁸ *See Swarns, supra* note 102, at B2 (quoting Lisa Smith, a special assistant to District Attorney Charles J. Hynes of Brooklyn, as saying, "Sometimes you need the threat of prosecution to get people to seek the help they need Prosecution is thinking about prevention of future incidents.").

¹⁵⁹ *See supra* note 152 and accompanying text.

attempt to protect children from the harmful conduct of adults. Most states have enacted some form of a broad child endangerment statute that establishes criminal liability for subjecting a minor to conduct, or an omission of conduct, that creates a substantial risk of injury to the minor.¹⁶⁰ Just as other laws addressing commonly legislated issues often vary from state to state, different states have taken different approaches to criminalizing conduct that could potentially harm a child. Some states have enacted specific statutes that criminalize the act of subjecting a minor to conduct that could injure the child's wellbeing (thereby distinguishing between child endangerment and child abuse).¹⁶¹ Other states have adopted a broad interpretation of child abuse so that it includes acts of child endangerment.¹⁶² Most of these risk-of-injury statutes limit liability to parents, guardians, or other persons that provide care for, or have custody or control of, a child.¹⁶³ However, a few statutes extend liability to any

¹⁶⁰ See, e.g., ARK. CODE ANN. §§ 5-27-206-07 (2006) ("A person commits the offense of endangering the welfare of a minor . . . if [the person] . . . engages in conduct creating a substantial risk of serious harm to the physical or mental welfare of . . . a minor."); CAL. PENAL CODE § 273a (West 2006) ("Any person who . . . willfully causes or permits [a] child to be placed in a situation where his or her person or health is endangered, shall be punished by imprisonment."); HAW. REV. STAT. § 709-904 (2005), *amended by* 2006 HAW. SESS. LAWS 249 ("A person commits the offense of endangering the welfare of a minor . . . if . . . 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."); KY. REV. STAT. ANN. § 530.060 (West 2006) ("A . . . person legally charged with the care or custody of a minor is guilty of endangering the welfare of a minor when he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming a neglected . . . child."); N.H. REV. STAT. ANN. § 639:3 (2006) ("A person is guilty of endangering the welfare of a child . . . if he knowingly endangers the welfare of a child . . . by purposely violating a duty of care, protection or support he owes to such child."); N.Y. PENAL LAW § 260.10-15 (McKinney 2006) ("A person is guilty of endangering the welfare of a child when . . . he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child"); 18 PA. CONS. STAT. § 4304 (2006) ("A . . . person supervising the welfare of a child . . . commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support."). Cf. Endangering Welfare of Children, MODEL PENAL CODE § 230.4 (2007).

¹⁶¹ See, e.g., ARK. CODE ANN. §§ 5-27-205-07; CAL. PENAL CODE § 273a; CONN. GEN. STAT. ANN. § 53-21 (West 2007); HAW. REV. STAT. §§ 709-903.5-09, *amended by* 2006 HAW. SESS. LAWS 249; KY. REV. STAT. ANN. § 530.060; N.H. REV. STAT. ANN. § 639.3; N.Y. PENAL LAW § 260.10-15; 18 PA. CONS. STAT. § 4304.

¹⁶² See, e.g., ARIZ. REV. STAT. ANN. § 13-3623 (2006); *State v. Mahaney*, 975 P.2d 156 (Ariz. Ct. App. 1999) (holding endangerment to be within Arizona's criminal child abuse statute). Cf. UTAH CODE ANN. § 76-5-109 (2006); *Provo City v. Cannon*, 994 P.2d 206, 209-10 (Utah Ct. App. 1999) (holding that "physical injury," as used in Utah's child abuse statute, includes conduct that "imperil[s] or threaten[s] a child's health or welfare").

¹⁶³ See also, e.g., *State v. Yates*, 876 A.2d 176, 185-86 (N.H. 2005) (scope of term "duty of care" as applied to endangering the welfare of a child statute refers "only to those who have a parental or supervisory relationship with a child."). Compare HAW. REV. STAT.

individual whose conduct could endanger a minor's wellbeing.¹⁶⁴ The various statutory approaches also differ according to the potential harm to a minor required to establish a violation¹⁶⁵ and the degree of punishment dispensed to offenders.¹⁶⁶ Despite variations in the approaches employed by different states, the multitudes of formulations all contain two fundamental commonalities: first, they are designed to safeguard minors from the deleterious activities of adults;¹⁶⁷ and second, they create outer boundaries to a parent's autonomy in directing the upbringing of his or her child.¹⁶⁸

C. THE DEBATE OVER CRIMINAL RISK-OF-INJURY STATUTES

Opponents to risk-of-injury statutes suggest that the same safeguards could be achieved by vigorously prosecuting criminal acts directed against children without relying on criminal risk-of-injury statutes.¹⁶⁹ Georgia provides a good example of a state that has attempted to follow this principle.¹⁷⁰ Rather than rely on a broad risk-of-injury statute, Georgia maintains a series of laws that provide for the prosecution of criminal acts directed against children.¹⁷¹ Some laws are specifically tailored to address the protection of minors.¹⁷² Other laws, however, recognize the reality that "behavior that is harmful to children . . . is often the same behavior that is harmful to adults."¹⁷³ Thus, the laws proscribe undesirable conduct regardless of whom it is directed toward.¹⁷⁴

By contrast, proponents of risk-of-injury statutes point out that Georgia's current lack of a child endangerment law results in a variety of

§ 709-904, amended by 2006 HAW. SESS. LAWS 249 (allowing the prosecution of a person "whether or not charged with the care or custody of a minor"), with 18 PA. CONS. STAT. § 4304 (2007) (requiring that the defendant be "[a] parent, guardian or other person supervising the welfare of a child").

¹⁶⁴ See *supra* note 163.

¹⁶⁵ *Id.*

¹⁶⁶ See, e.g., 18 PA. CONS. STAT. § 4304(b) (2007) (providing that when an offense involves "a course of conduct" rather than a discrete violation, the offense is upgraded from a first-degree misdemeanor to a third-degree felony).

¹⁶⁷ *Leheny v. State*, 818 S.W.2d 236, 237-38 (Ark. 1991).

¹⁶⁸ See *supra* text accompanying notes 53-68.

¹⁶⁹ See Gillies, *supra* note 24, at 161-62.

¹⁷⁰ *Oliver & Crossley*, *supra* note 70, at 10.

¹⁷¹ *Id.* at 11 (citing GA. CODE ANN. § 16-5-60(b) (2007) (reckless conduct); GA. CODE ANN. § 16-5-3(a) (2007) (involuntary manslaughter); GA. CODE ANN. § 16-12-1(b)(3) (2007) (contributing to the deprivation of a minor); GA. CODE ANN. § 16-5-70(b) (2007) (cruelty to children)).

¹⁷² See, e.g., GA. CODE ANN. § 16-12-1(b)(3).

¹⁷³ Gillies, *supra* note 24, at 162.

¹⁷⁴ See, e.g., GA. CODE ANN. § 16-5-3(a).

shortcomings.¹⁷⁵ For example, the system does not create liability for harmful conduct that is specifically directed towards a child, unless the conduct is independently criminal.¹⁷⁶ Additionally, statutes currently relied upon require “proof of malice,” a hurdle that is insurmountable in many cases relating to the failure to fulfill a custodial duty.¹⁷⁷ Finally, many of the current statutes extend criminal liability only to a child’s parent or guardian, and not to other individuals who maintain custody or control of the child.¹⁷⁸ Regardless of whether these shortcomings hamper the effectiveness of Georgia’s system, attempts by Georgia legislators to supplement the current statutes with a child endangerment statute have been unsuccessful.¹⁷⁹

Following a line of reasoning similar to that of the Georgia legislature, Lauren Gillies proposed the removal of Connecticut’s risk-of-injury statute under the argument that its benefits were readily ascertainable through other criminal charges.¹⁸⁰ Gillies reasoned that in instances where a defendant’s conduct gives rise to multiple charges, the benefits associated with bringing risk-of-injury charges could be obtained by prosecuting the defendant for his unsavory conduct under only the related criminal charge.¹⁸¹ In support of this proposal, Gillies points out that “[i]n the sixty years that the [risk-of-injury] statute has existed and in the six hundred times it has been used, it was only used four times without a concomitant [criminal] charge.”¹⁸² However, such an argument presumes that the risk-of-injury statute provides only the same benefits as those achieved through prosecution under the other criminal statutes. While the risk-of-injury charges and the other, more narrowly legislated, criminal charges are rooted in similar underlying philosophies, the mere fact that they were brought concurrently

¹⁷⁵ Oliver & Crossley, *supra* note 70, at 11.

¹⁷⁶ *Id.* at 11-12. For examples of conduct that is independently criminal regardless of whether it is specifically directed towards a child, see GA. CODE ANN. § 16-5-60-3(a) (involuntary manslaughter), GA. CODE ANN. § 16-5-60 (reckless conduct), GA. CODE ANN. § 16-5-70(b) (cruelty to children), and GA. CODE ANN. § 16-12-1(b)(3) (contributing to the deprivation of a minor).

¹⁷⁷ See, e.g., GA. CODE ANN. § 16-5-70 cmt. 7.

¹⁷⁸ *Id.* at cmt. 1.

¹⁷⁹ See H.B. 453, 147th Gen. Assem., Reg. Sess. (Ga. 2001) (seeking to amend Ga. Code Ann. § 16-5-73, available at http://www.legis.ga.gov/legis/2001_02/sum/hb453.htm, to create the offense of child endangerment, but currently tabled by H.V. 0631 Gen. Assem., Reg. Sess. (Ga. Mar. 7, 2001), available at http://www.legis.state.ga.us/legis/2001_02/votes/hv0361.htm).

¹⁸⁰ See Gillies, *supra* note 24, at 162-63.

¹⁸¹ See *id.*

¹⁸² *Id.* at 162; see also *State v. Schriver*, 542 A.2d 686, 687 (Conn. 1988); *State v. George*, 656 A.2d 232, 233 (Conn. App. Ct. 1995); *State v. Palangio*, 588 A.2d 644, 645 (Conn. App. Ct. 1991); *State v. Shaw*, 15 Conn. L. Rptr. 405, 405 (Conn. Super. Ct. 1995).

should suggest that there were multiple levels to the offense, not that the broad risk-of-injury statute was superfluous.¹⁸³

In evaluating the justification of criminal statutes, scholars generally invoke four normative underpinnings of the criminal justice system: deterrence,¹⁸⁴ individual desert,¹⁸⁵ expressive condemnation,¹⁸⁶ and rehabilitation.¹⁸⁷ At some level, all criminal statutes share these core goals or functions. The legislature enacts criminal statutes to prohibit certain undesirable behavior and to impose punishment on violators to deter potential wrongdoers from engaging, or repeat offenders from reengaging, in the proscribed behavior.¹⁸⁸ The infliction of punishment enables society to take retributive action against the wrongdoer,¹⁸⁹ permits the community to express its condemnation of the wrongdoer's behavior,¹⁹⁰ and provides encouragement to the wrongdoer to change his or her ways or be punished again.¹⁹¹ In evaluating a risk-of-injury-to-a-minor or child endangerment statute against these four considerations, the instances where liability may attach under a risk-of-injury-to-a-minor statute but not under an alternate criminal statute are again highlighted. The Child Endangerment Provision of the Model Penal Code states that the statute is an attempt "to prohibit a broad range of conduct in order to safeguard the welfare and security of

¹⁸³ Acknowledging that offenses against minors should be treated differently than offenses against adults, Gillies suggests replacing Connecticut's risk-of-injury statute with amendments to other criminal statutes to impose escalated penalties based on the age of the victim. Gillies, *supra* note 24, at 162-63. Therefore, in the event that someone was arrested for driving under the influence and a minor was in the car, rather than maintaining separate charges of driving under the influence and creating a risk of injury to a minor, the risk-of-injury-to-a-minor charge would be incorporated in the driving under the influence statute as an escalated penalty. *Id.* at 163; see, e.g., CONN. GEN. STAT. § 53a-70 (2007) (Connecticut's Sexual Assault Statute imposes escalated penalties based on the age of the victim).

¹⁸⁴ See JEREMY BENTHAM, *Principles of Penal Law*, in THE WORKS OF JEREMY BENTHAM, 396, 399-402 (J. Browning ed., 1843).

¹⁸⁵ See IMMANUEL KANT, THE PHILOSOPHY OF LAW 194-98, 447-48 (W. Hastie trans., 1887).

¹⁸⁶ See JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING & DESERVING 98-101 (1970).

¹⁸⁷ See Edward L. Rubin, *The Inevitability of Rehabilitation*, 19 LAW & INEQ. 343 (2001); Michael Vitiello, *Reconsidering Rehabilitation*, 65 TUL. L. REV. 1011 (1991).

¹⁸⁸ See BENTHAM, *supra* note 184.

¹⁸⁹ See KANT, *supra* note 185, at 196 ("[T]he undeserved evil which any one commits on another is to be regarded as perpetrated on himself.").

¹⁹⁰ See FEINBERG, *supra* note 186, at 98 ("Punishment, in short, has a symbolic significance largely missing from other kinds of penalties.").

¹⁹¹ It is worth noting that critics question "rehabilitation" as a sound function of punishment because of the dismal track record of penal institutions supposedly designed to reform wrongdoers. See, e.g., *Mistretta v. United States*, 488 U.S. 361, 365 (1989) ("Rehabilitation as a sound penological theory came to be questioned and, in any event, was regarded by some as an unattainable goal for most cases.").

children”¹⁹² The statute reaches this broad range of conduct by shifting the focus of prosecution for endangering the welfare of children “from the mental state of the actor . . . to the potential effect that such [wrongful] conduct may have on the . . . [wellbeing] of the child or children who are witness to the conduct.”¹⁹³ This shift permits a defendant to be convicted without requiring that the State demonstrate the defendant’s malice or intent to do harm if he or she should have been aware that the conduct posed a risk of injury to a minor.

For example, in *State v. Riggs*, the defendant was warned not to allow her children to go into a certain area in their trailer park because it contained an open basement and an unfenced duck pond.¹⁹⁴ Nonetheless, the defendant left her two children, ages four and two, outside unattended to play for about forty-five minutes.¹⁹⁵ During that time, the two children wandered into the restricted area and the two-year-old drowned in the duck pond.¹⁹⁶ The defendant was subsequently convicted of one count of involuntary manslaughter and one count of endangering the welfare of a child.¹⁹⁷ On appeal, the Missouri Court of Appeals reversed the involuntary manslaughter conviction, holding that the defendant’s “omission to watch her child was not reckless conduct to such an extreme that it r[ose] to the level required to be liable for homicide.”¹⁹⁸ However, the appellate court affirmed the child endangerment conviction because although the defendant did nothing to demonstrate an intent to harm her child, “a reasonable juror could have found that leaving a two-year-old child outside for forty-five minutes, coupled with a warning . . . about the unfenced duck pond, put that child at risk, and defendant by her inaction knowingly endangered her child.”¹⁹⁹ As *Riggs* demonstrates, in applying a child endangerment statute, the prosecution is generally not required to prove that the defendant knew that the risk could result in injury or death, but only that a reasonable person would recognize that the risk existed.²⁰⁰ Under most risk-of-injury-to-a-minor statutes, if faced with circumstances similar to those in *Riggs*, a court could convict the defendant of endangering a minor even if the child had

¹⁹² Endangering Welfare of Children, MODEL PENAL CODE § 230.4 cmt. 1 (2001).

¹⁹³ *Id.* § 230.4 cmt. 3.

¹⁹⁴ 2 S.W.3d 867, 868 (Mo. Ct. App. 1999).

¹⁹⁵ *Id.* at 868.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 869, 872.

¹⁹⁸ *Id.* at 872.

¹⁹⁹ *Id.* at 873.

²⁰⁰ *Id.*

been rescued from the pond or had been discovered playing unsupervised at the pond's edge.²⁰¹

In addition to permitting the state to prosecute a defendant for harmful conduct that would otherwise go unpunished, risk-of-injury-to-a-minor and child endangerment statutes have the capacity for their respective charges to function as bargaining chips for prosecutors.²⁰² If a defendant's conduct implicates both a risk-of-injury-to-a-minor charge and another separate criminal charge,²⁰³ the prosecutor can offer to drop one of the charges in exchange for the defendant's guilty plea to the other charge.²⁰⁴ This option not only allows prosecutors to plead out cases they would otherwise have to take to trial, but also gives prosecutors the ability to drop charges that they would likely be unsuccessful in prosecuting. If the prosecutor determines that a defendant's conduct warrants prosecution, the child endangerment charges allow the state flexibility in the prosecution of the defendant according to the circumstances specific to the case.²⁰⁵

V. CONCLUSION

The state's interest in protecting children from physical harm is well developed. Generally, there is not a question of conflicting interests when the state intervenes to prevent a parent from physically or sexually abusing a child. In cases involving a violent or sexual offense, the offending parent is deemed unfit by society, and the state's interest in protecting the child's physical wellbeing is considered paramount to any residual interest claimed by the abusing parent. However, as child protection has become a more prominent public concern, the state has developed an interest in protecting children from less tangible harms as well. To ensure that children have the capacity to develop and flourish as productive members of society, the state has recognized an interest in protecting their emotional welfare and psychological development—after all, today's children are tomorrow's adults. Although parents maintain an inherent interest in directing the upbringing of their children, they must do so within the confines required

²⁰¹ See *supra* notes 19-21 and accompanying text; see also Oliver & Crossley, *supra* note 70, at 64.

²⁰² See Gillies, *supra* note 24, at 163.

²⁰³ See, e.g., *People v. Cruz*, 152 Misc. 2d 436, 437, 440 (N.Y. Crim. Ct. 1991) (defendant's operation of a motor vehicle while intoxicated with two children as passengers in the car was held sufficient *prima facie* evidence of endangering the welfare of a child); see also *supra* note 183.

²⁰⁴ See Gillies, *supra* note 24, at 163.

²⁰⁵ See *State v. Scruggs*, No. CR 020210921S, 2004 WL 1245557 (Conn. Super. Ct. Mar. 8, 2004), *rev'd*, 905 A.2d 24 (Conn. 2006) (convicting Judith Scruggs of one count of risk of injury to a child, although she was charged with two counts of risk of injury to a child and one count of cruelty to persons).

by society. By imposing criminal liability, rather than civil remedies, in situations where an adult places a child's physical, psychological, or emotional wellbeing at risk, the state will serve the dual purposes of influencing the social expectations regarding these situations and better protecting children from the harmful behavior of adults.

