HOW DRAMATIC SHIFTS IN PERCEPTIONS OF PARENTING HAVE EXPOSED FAMILIES, FREE-RANGE OR OTHERWISE, TO STATE INTERVENTION: A COMMON LAW TORT APPROACH TO REDEFINING CHILD NEGLECT

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Parenting norms have shifted dramatically in recent years, favoring overprotection over traditional notions of childhood independence. This shift has permeated vague and overbroad legal standards governing child neglect, allowing parents to be held civilly and criminally liable despite the absence of harm to their children. Indeed, parents who allow their children to remain unsupervised, whether as a lesson in independence or not, are at risk of removal based on subjective decision making processes that largely favor overprotection. Because this shift conflates neglect with non-conformity, those who favor traditional notions of child-rearing are unlikely to implement their own parenting style out of fear of intervention.

Despite the increased risk of removal, the Fourteenth Amendment presumes parents fit and protects their interest in raising their children. With this constitutional precept in mind, legislatures should incorporate a more objective framework into child neglect statutes. Adopting a hybrid economic and foreseeability tort structure to balance against contextual aggravating or

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mitigating factors will help elucidate a fairer framework that will limit discretion and promote uniform enforcement of child neglect laws.

TABLE OF CONTENTS

INTRODUCTION

A fundamental right guaranteed by our Constitution is the right for parents to raise their children as they see fit without state intervention.[1] However, parenting standards in the United States have shifted dramatically in recent years, favoring overprotection and constant supervision over the imagination, exploration, and independence parents have sought to instill in their children for generations.[2] Indeed, "free-range" parenting, which aims, in part, to promote independence and self-sufficiency in children, defined the parent-child relationship for generations.[3] Recently, however, "helicopter parenting" has gained prominence and has become the most widely practiced parenting method over the past fifteen years.[4] Helicopter parents are described as overprotective parents that watch their child's every move, "hover[ing] over [him or her] like a helicopter."[5] There is no consensus as to what sparked the shift to overprotection; however, the advent of wireless communication and the internet,[6] competition,[7] and parents' own childhood experiences[8] have

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1. *See* Troxel v. Granville, 530 U.S. 57, 65–67 (2000) (declaring a Washington state statute unconstitutional because it infringed on the fundamental parental right "to make decisions concerning the care, custody, and control of their children").

2. *See* Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533, 574 (2013) (noting that, while "hovering parents" are not a new phenomenon, until the nineteenth century, most American children were left unattended or expected to work, which fostered self-reliance in children that carried through the generations).

3. *See, e.g.*, *What Kind of Parent Are You? The Debate Over 'Free Range' Parenting*, NPR (Apr. 26, 2015, 9:21 AM), http://www.npr.org/2015/04/26/402226053/what-kind-of-parent-are-you-the-debate-over-free-range-parenting (describing the Meitivs as parents that "want to instill self-reliance and independence in their children").

4. For an analysis of the social and technological trends surrounding helicopter parenting, see generally Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1223–31 (2011) (discussing the shift in attitudes that resulted in "Intensive Parenting" (helicopter parenting) becoming the predominant standard of care in the United States).

5. HAIM G. GINOTT, BETWEEN PARENT & TEENAGER 18 (1969).

6. *See* Bernstein & Triger, *supra* note 4, at 1238–39 (discussing how cellular technology has contributed to the emergence of helicopter parenting); *see also* Sarah Briggs, *Confessions of a "Helicopter Parent"*, EXPERIENCE, https://www.experience.com/alumnus/channel?channel_id=parents_survival_guide&page_id=helicopter_parents (last visited Mar. 27, 2016) (referring to cell phones as "the world's longest umbilical cord").

7. *See* Josh Levs, *Whatever Happened to 'Go Outside and Play'?*, CNN (Mar. 22, 2013, 12:16 PM), http://www.cnn.com/2013/03/22/living/let-children-play-outside (emphasizing that "parental competition" has caused parents to constantly supervise and schedule activities for their children, and that children today are deprived of

likely contributed to the helicopter parenting trend. Because many believe that helicopter parenting is the only proper parenting style, the trend has effectively become "mandatory in many communities."[9]

This Comment argues that current parenting standards in the United States emphasize overprotecting children instead of traditional notions of parenting that allowed children more freedom and independence. The shift to overprotection has permeated legal standards governing child abuse and neglect and has led to discrimination against parents of wide-ranging backgrounds. Indeed, Lenore Skenazy in New York and Danielle and Alexander Meitiv in Maryland are at risk of having their children removed by the state because they allow their children to remain unsupervised in public as a lesson in independence and self-sufficiency.[10] The Meitiv case exemplifies that "free-range" parents may be guilty of child neglect, even if their parenting philosophy does not expose their children to any risk of harm. Moreover, child neglect statutes and the best interest of the child standard, which govern all custody determinations, discriminate against the economically disadvantaged,[11] those with disabilities,[12] and, historically, same-sex

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opportunities for "freedom and character-building," to which many children of past generations were accustomed).

8. *See* Elisabeth Fairfield Stokes, *I Am a Helicopter Parent—And I Don't Apologize*, TIME (Oct. 21, 2014), http://time.com/3528619/in-defense-of-helicopter-parents (discussing the ways modern helicopter parenting attitudes may be influenced by baby boomers' own childhood experiences); *see also* Briggs, *supra* note 6 (same).

9. Bernstein & Triger, *supra* note 4, at 1262–63; *see* Briggs, *supra* note 6 (expressing skepticism about a child's long term prospects if parents do not adhere to the helicopter standard).

10. *See infra* Section I.A.5 (describing the effect of helicopter parenting attitudes on parents who decide to adopt a more hands off approach to parenting).

11. *See* Allyson B. Levine, Comment, *Failing to Speak for Itself: The Res Ipsa Loquitur Presumption of Parental Culpability and Its Greater Consequences*, 57 BUFF. L. REV. 587, 606 (2009) (arguing that parents with greater financial assets have an advantage in rebutting a finding of neglect because they have access to qualified lawyers and medical care, while less affluent families, particularly those without health insurance, simply do not have the resources to effectively represent their case).

12. *See* Rodriguez v. Dumpson, 52 A.D.2d 299, 300–01 (N.Y. App. Div. 1976) (concerning a blind mother who vehemently fought to regain custody of her son when a family court dismissed her appeal because the court stated her blindness affected her ability to care for her son); *see also* Emily A. Benfer, *Health Justice: A Framework (and Call to Action) for the Elimination of Health Inequity and Social Injustice*, 65 AM. U. L. REV. 275, 320 (2015) (describing the story of Erika Johnson and Blake Sinnett, who lost custody of their newborn baby for two months because they were blind).

couples.[13] Consequently, parents that do not adhere to the new standard of care are now at greater risk of having their children removed by the state. Child neglect statutes should incorporate more objective criteria to better recognize and evaluate risk perception, risk assessment, and parenting decisions.

Part I of this Comment examines the evolution of child neglect laws in the United States, focusing on modern child neglect laws and the best interest of the child standard. Part I also introduces the negligence standard of care in tort law, which provides a more objective standard for child abuse and neglect law enforcement.

Part II argues that child neglect statutes and the best interest of the child standard are vague, overbroad, and subjective and have led to an increase in cases involving child abuse and neglect, despite the absence of harm to children.

Part III recommends that child neglect statutes be reevaluated through the lens of the negligence and causation standard of care in tort law, which would provide a more objective assessment of suspected cases of child neglect, resulting in uniform law enforcement.

Finally, this Comment concludes that redrafting child neglect statutes to recognize risk perception, the social utility of diverging parenting philosophies, and parents' deference in child-rearing decisions will allow for a fairer and more balanced approach than the current standard.

I. A DEVOLVING STANDARD OF CARE

Despite constitutional protections to parents' interest in raising their children, the convergence of shifting parenting philosophies that emphasize overprotection with insufficient statutory definitions of child neglect—which results in wholly subjective assessments of parenting—has led to increased neglect determinations notwithstanding the absence of harm to children. The negligence standard of care in

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13. *Cf.* Danielle Epstein & Lena Mukherjee, *Constitutional Analysis of the Barriers Same-Sex Couples Face in Their Quest to Become a Family Unit*, 12 ST. JOHN'S J. LEGAL COMMENT. 782, 811 (1997) (stating that the denial of "financial and societal benefits . . . linked [to] the right to marry . . . undermines the policy of promoting the best interests of the children"). *But see* Obergefell v. Hodges, 135 S. Ct. 2584, 2604–05 (2015) (extending the fundamental right to marry to same-sex couples); *In re* Adoption of a Child by J.M.G., 632 A.2d 550, 551, 553 (N.J. Super. Ct. Ch. Div. 1993) (stating that adoption can provide "protections for [a child's] safety[,] . . . physical and emotional well being[, and] economic security," and that "the rights of parents cannot be denied, limited, or abridged on the basis of sexual orientation").

tort law can provide guidance on how to more effectively evaluate parenting decisions that do not place children at risk of harm.

A. The Evolution of Child Neglect Laws and Its Effect on Families

Parenting in the United States has changed dramatically over the past fifteen years. While the courts have traditionally afforded parents deference regarding child-rearing decisions,[14] modern parenting trends have alienated some families,[15] while others enjoy the benefits of the protection of the law. Indeed, this shift in the perception of what constitutes adequate parenting, along with poorly drafted statutes, has led to discrimination against certain families, with law enforcement officials determining custody based on their own views instead of whether a parenting practice is lawful.[16]

1. The constitutional liberty afforded to parents

Although shifting parenting standards and Congress's difficulty in properly defining child abuse and neglect have recently dictated how parents should raise their children, the Due Process Clause of the Fourteenth Amendment protects parents' interest in raising their children without unjustified interference.[17] The U.S. Supreme Court has historically recognized that, in the absence of a familial dispute, parents should enjoy the "freedom of personal choice in matters of family life [as] a fundamental liberty interest protected by the Fourteenth Amendment."[18] It has equally been recognized that the courts should not interfere with parental responsibilities as parents are compelled to shape their child's world view and prepare him or her for the future,[19] which is an important lesson in maturity that many parents hope to impart on their children.

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14. *See infra* Section I.A.1 (describing the constitutional foundation of parents' interest in raising their children without undue interference).

15. *See infra* notes 74–93 and accompanying text (providing introductions to the Skenazy, Meitiv, and Harrell cases).

16. *See infra* Sections I.A.5, II.B (discussing the Meitiv and Harrell cases, and the Maryland statutes and procedures used in Meitiv investigation).

17. *See* Troxel v. Granville, 530 U.S. 57, 66 (2000) ("[T]he Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (extending due process constitutional guarantees to protect natural families that the state attempts to break up without a showing of parental unfitness).

18. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

19. Pierce v. Soc'y of Sisters, 268 U.S. 510, 535 (1925).

Supreme Court jurisprudence established fundamental protections for parents. The Court, in *Meyer v. Nebraska*,[20] affirmed parents' fundamental right to make child-rearing decisions. The Court overturned the conviction of a schoolteacher who taught German to a student who had not passed the eighth grade in violation of a state statute.[21] The Court found that the statute was arbitrarily applied and did not relate to any purpose that a state may permissibly regulate.[22] Most importantly, the Court noted that because the parents had consented and education was a fundamental liberty warranting protection, the conviction could not stand.[23] The Court determined that the parents had the fundamental right to allow their daughter to pursue an education as they saw fit and concluded that the Due Process Clause of the Fourteenth Amendment "denotes not merely freedom from bodily restraint but also the right of the individual to . . . acquire useful knowledge, to . . . establish a home and bring up children, . . . and generally to enjoy those privileges long recognized at common law as essential . . . ."[24]

Two years later, in *Pierce v. Society of Sisters*,[25] the Court reaffirmed its decision in *Meyer* by invalidating a statute that made it a criminal offense to prevent children between the ages of eight and sixteen from attending public school.[26] The Court held that parents' fundamental right to raise their children extended to education because parents who have the right to "direct [their child's] destiny [also] have the right . . . to . . . prepare him for additional obligations."[27] In *Wisconsin v. Yoder*,[28] the Court found that Wisconsin's compulsory school attendance statute was unconstitutional as applied to the Amish community, which rejects high school education because the school programs sharply conflict with Amish values.[29] Chief Justice Burger, in affirming the value of parental discretion in raising their children, held that there was "no basis for assuming that . . . reasonable standards cannot be

20. 262 U.S. 390 (1923).
21. *Id.* at 396, 402–03.
22. *Id.* at 403.
23. *Id.* at 400, 403.
24. *Id.* at 399.
25. 268 U.S. 510 (1925).
26. *Id.* at 530, 534–35.
27. *Id.* at 535.
28. 406 U.S. 205 (1972).
29. *Id.* at 217.

established concerning the content of the continuing vocational education of Amish children under parental guidance . . . ."[30]

Finally, in *Troxel v. Granville*,[31] the Supreme Court denied visitation rights to a child's grandparents—rights that the custodial parent had objected to in lower courts—because the fundamental right to raise a child belongs solely to the child's parents.[32] The Court found that the state visitation statute[33] allowed any person to petition the court for visitation of a child at any time, which could be granted if it served the best interest of the child.[34] The Court ruled that the visitation order imposed by the lower court[35] failed to afford the mother any deference and unconstitutionally infringed on her right to make child-rearing decisions.[36]

2. The erosion of the parental immunity doctrine

The erosion of the parental immunity doctrine has quickened as a result of the shift in parenting standards. Initially expressed in the late nineteenth century decision *Hewellete v. George*,[37] parental immunity is a common law doctrine that refers to the axiom that children cannot sue their parents, and vice versa, for tort claims.[38] The courts believed that state criminal laws offered sufficient protection from parental violence and that the courts would not address civil sanctions.[39] The parental immunity doctrine

30. *Id.* at 236.

31. 530 U.S. 57 (2000).

32. *Id.* at 72, 75.

33. WASH. REV. CODE ANN. § 26.10.160(3) (West 2005 & Supp. 2014).

34. *Troxel*, 530 U.S. at 67.

35. *See In re* Smith, 969 P.2d 21, 31 (Wash. 1998) (en banc) (discussing the temporary order from the lower court that allowed the mother's former boyfriend, who was not related to the child, visitation every other weekend).

36. *See Troxel*, 530 U.S. at 72–73 ("[T]he Due Process Clause does not permit a State to infringe on the fundamental right of parents to make child-rearing decisions simply because a state judge believes a 'better' decision could be made.").

37. 9 So. 885 (Miss. 1891). In *Hewellette*, the Supreme Court of Mississippi introduced the first parental immunity rule, which forbade a child from asserting "a claim to civil redress for personal injuries suffered at the hands of the parent." *Id.* at 887.

38. *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 905–06 (1941) ("American courts have refused to allow actions between parent and minor child for personal torts, whether they are intentional or negligent in character." (footnotes omitted)).

39. *See id.* at 906 (explaining that the parental immunity doctrine was based on the belief that civil litigation would disrupt "domestic tranquility and parental discipline"); *see also* Wagner v. Smith, 340 N.W.2d 255, 255–56 (Iowa 1983) (immunizing a father from tort liability for negligent supervision when his son was injured by a grain auger); Sanford v. Sanford, 290 A.2d 812, 813–14, 816 (Md. Ct. Spec. App. 1972) (preventing a child from suing his father for injuries sustained

traditionally defined the parent-child relationship,[40] but challenges to and consequent exceptions from the doctrine for civil redress claims have eroded its viability.[41] Currently, there is confusion among jurisdictions over when it is appropriate for courts to intervene in the parent-child relationship. For example, parents have been immune under the parental immunity doctrine for failing to teach a child how to cross streets safely and use seat belts, while others who have taken measures to protect their child from danger have been held liable.[42] In such cases, courts have had difficulty defining the scope of the parent-child relationship with regard to negligent supervision.[43] Some jurisdictions have upheld the common law,[44] while others have

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during a car accident "because if there was a need for [the parental immunity doctrine to change,] it was better accomplished by legislative enactment"); Cook v. Cook, 124 S.W.2d 675, 676–77 (Mo. Ct. App. 1939) (preventing a child from suing her mother for assault because "a person may be punished criminally for such malicious assaults"), *abrogated by* Hartman v. Hartman, 821 S.W.2d 852 (Mo. 1991); Small v. Morrison, 118 S.E. 12, 12–13 (N.C. 1923) (preventing a child from suing her father for injuries sustained during a car accident because "[t]he state, through criminal laws, will give the minor child protection from parental violence and wrongdoing"). *But see* Roller v. Roller, 79 P. 788, 788–89 (Wash. 1905) (extending the parental immunity doctrine to civil causes of action for rape).

40. *See* Porter, *supra* note 2, at 539 (noting that the parental immunity doctrine developed from traditional concepts of a hierarchical family, which continues to be idealized both socially and judicially).

41. *See* Gail D. Hollister, *Parent-Child Immunity: A Doctrine in Search of Justification*, 50 FORDHAM L. REV. 489, 496–98, 508–09 (1982) (arguing that social changes and failed policy rationales have either narrowed or abrogated the parental immunity doctrine). *See generally* Sandra L. Haley, *The Parental Tort Immunity Doctrine: Is It a Defensible Defense?*, 30 U. RICH. L. REV. 575, 581–91 (1996) (detailing the history of the parental immunity doctrine and tracking the exceptions to the doctrine, such as personal injury resulting from automobile or common carrier accidents, negligent child-rearing, negligent supervision, parental abandonment, reckless and intentional acts, and prenatal injuries).

42. *See* Haley, *supra* note 41, at 590 (explaining that, while parents have been immune from liability in cases where a child wandered away and was bitten by a dog, a parent could be held liable if he notices a danger but is negligent in protecting against it).

43. *See id.* at 591–92 (discussing the differing results of cases concerning negligent supervision—where parent defendants are often not held liable—and negligent entrustment—where parents are responsible on the theory that the parent has knowledge of the child's ability to cause harm with the entrusted item).

44. *See* Squeglia v. Squeglia, 661 A.2d 1007, 1009, 1013 (Conn. 1995) (affirming a father's motion for summary judgment based on parental immunity against his four-year-old son's strict liability suit for injuries sustained after being bitten by the family dog); Zellmer v. Zellmer, 188 P.3d 497, 502 (Wash. 2008) (en banc) (invoking the parental immunity doctrine because its primary objective is to avoid any undue state interference in exercising parental supervision and discretion, and expressly rejecting a "reasonable parent" standard).

narrowed or entirely abrogated the parental immunity doctrine.[45] Commentators argue that the doctrine has broken down in the wake of helicopter parenting, increasing the potential liability for parents and discouraging other child-rearing practices[46] despite the liberty interest parents have in raising their children without undue interference.[47]

3. Federal standards

While state agencies are the primary authority governing family law, Congress passed the Child Abuse Prevention and Treatment Act[48] (CAPTA) in 1974 to provide federal funding to support the operation of state agencies responsible for investigating allegations of child abuse and neglect, such as Child Protective Services (CPS),[49] and created a federal definition of child abuse and neglect.[50] CAPTA defined child abuse and neglect as the "physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen by a person who is responsible for the child's welfare under circumstances which indicate that the child's health or welfare is harmed or threatened . . . ."[51] The definition has been amended several times, exemplifying the difficulty in defining child abuse and neglect.[52] Furthermore, CAPTA created incentives for

45. *See* Bernstein & Triger, *supra* note 4, at 1250 nn.124–25 (listing various jurisdictions that have abrogated the parental immunity doctrine).

46. *See id.* at 1244, 1250–51 (arguing that the constriction of the parental immunity doctrine "is an important enabling structure" for incorporating helicopter parenting practices and "creates potential for judgments discriminating against parents whose conduct does not conform to prevailing community standards," which discourages "novel child-rearing practices").

47. *See* Troxel v. Granville, 530 U.S. 57, 67–68 (2000) (extending due process protections to parents' child-rearing philosophies); Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (recalling the instances in which the Supreme Court has recognized the constitutional protections afforded to parents and children); Stanley v. Illinois, 405 U.S. 645, 651 (1972) (declaring parents' right to conceive and raise children an "essential" right).

48. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106 (2012)).

49. *See* Howard Davidson, *Federal Law and State Intervention When Parents Fail: Has National Guidance of Our Child Welfare System Been Successful?*, 42 FAM. L.Q. 481, 485 (2008) ("[The Child Abuse Prevention and Treatment Act (CAPTA)] established a state grant program for 'developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.'" (quoting Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101 (2012)))).

50. Pub. L. No. 93-247, 88 Stat. 4 (1974).

51. *Id.*

52. *See* David Pimentel, *Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children*, 42 PEPP. L. REV. 235, 243–45 (2015) (describing the legislative history of the definition of child abuse and critiquing the

states to conform to the standard and continue to report cases because it provided state funding only if a state amended its child abuse and neglect laws to meet the minimum federal standard.[53]

Prior to 2010, the statute defined child abuse and neglect as "any recent act or failure to act on the part of a parent or caretaker, which results in death, *serious physical or emotional harm*, sexual abuse or exploitation, or an act or failure to act which presents an *imminent risk of serious harm*."[54] The purpose of revising the definition of child abuse and neglect was to limit state and federal intervention to legitimate instances of abuse.[55] However, using the terms "serious" and "imminent" without any guidance as to what constitutes such harm allows the law to apply in a variety of contexts, whether or not intervention is appropriate or warranted.[56]

Although the 2010 amendment to CAPTA removed the definitions of child abuse and neglect,[57] the former federal definitions have been incorporated into many state parental termination statutes.[58] CAPTA

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definition that existed until 2010, which led to an increase in reports of unsubstantiated child neglect because it vaguely defined abuse and neglect using terms such as "negligent treatment" or "maltreatment").

53. *Id.* at 243.

54. 42 U.S.C. § 5106g (2006) (emphasis added) (this definition was removed in 2010).

55. *See* Pimentel, *supra* note 52, at 245 (stating that the vague definitions of child abuse and neglect prompted the Senate Committee on Labor and Human Resources to revise the language "to limit abuse and neglect definitions to serious harm to a child" (quoting S. REP. NO. 104–17, at 15 (1995))).

56. *See id.* at 245–46 ("Although the Committee's report shows that the change in definition was meant to curtail [Child Protective Services (CPS)] intervention by limiting it to situations involving 'serious harm,' the latter phrase that refers to 'imminent risk' of such harm reopens the door to apply the standard to a wide range of circumstances.").

57. 42 U.S.C. § 5106g (2012).

58. *See, e.g.*, 705 ILL. COMP. STAT. ANN. 405/2-3(2)(ii) (West 2007) (defining an abused minor as an individual who is under eighteen whose parent "creates a substantial risk of physical injury"); ME. REV. STAT. ANN. tit. 22, § 4002(1) (Supp. 2014) (defining both abuse and neglect as "a threat to a child's health or welfare"); MD. CODE ANN. FAM. LAW § 5-701(b) (LexisNexis 2012 & Supp. 2015) (defining child abuse in terms of whether the child is placed at "substantial risk of being harmed"); MICH. COMP. LAWS ANN. § 722.622(j)(ii) (West Supp. 2015) (defining child neglect as parental conduct that places a child "at an unreasonable risk to the child's health or welfare"); N.H. REV. STAT. ANN. § 169-C:3(XIX)(b) (Supp. 2014) (defining a neglected child as one "[w]ho is without proper parental care or control . . . when it is established that his health has suffered or is very likely to suffer serious impairment"); VA. CODE ANN. § 18.2-371.1(A) (Supp. 2015) (defining child abuse and neglect as conduct that subjects a child to "serious injury to the life or health of [the] child"); WASH. REV. CODE ANN. § 26.44.020(16) (West 2015) (defining negligent treatment as an act or failure to act that manifests "a serious disregard of

requires that all individuals who report suspected child abuse or neglect in good faith are immune from liability,[59] which most states now follow.[60]

A number of states have also imposed criminal penalties for failure to report suspected child abuse by imposing fines or threatening incarceration.[61] When mandatory reporting laws were first adopted, lawmakers believed that instances of child abuse "numbered in the hundreds and therefore the governmental services in place could adequately deal with the reports being filed."[62] With recent victim rates in the hundreds of thousands,[63] however, this belief in the adequacy of governmental services is misplaced as CPS agencies generally lack the resources to handle so many reports.[64]

4. State standards—the best interest of the child

In all child custody determinations, including termination of parental rights in instances of abuse or neglect, the governing standard is the child's best interest, which serves as the guiding principle in placement decisions.[65] Since the late-nineteenth century, state courts have adopted "universal laws regarding the family . . . one of those being the best interests of the child standard,"[66] which courts use to balance "(1) the parent's interest for family integrity; (2) the state's interest to protect the minor; and (3) the child's interest in

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consequences of such magnitude as to constitute a clear and present danger to a child's health, welfare, or safety").

59. 42 U.S.C. § 5106a(b)(2)(B)(vii).

60. *See* Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 860 (2010) (noting that, as of 2010, all but two states grant immunity from civil or criminal sanctions to good faith reporters, even if the report proves to be unfounded). The immunity from liability even applied to reports made in bad faith until CAPTA was amended in 1996 to protect only reports made in good faith. Pimentel, *supra* note 52, at 267 n.178.

61. *See* Hafemeister, *supra* note 60, at 863–64 (emphasizing the fact that many states drafted statutes that encouraged apprehensive individuals to report suspected child abuse or neglect by providing penalties such as a fine or jail sentence for failure to report).

62. *Id.* at 841.

63. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT ii, 20–21 (2013) [hereinafter CHILD MALTREATMENT] (reporting child abuse victim rates of 702,000 in 2009 and 679,000 in 2013).

64. *See* Hafemeister, *supra* note 60, at 829–30 (explaining that CPS receives approximately 50,000 reports of child abuse or neglect every day, with each investigative worker handling on average twenty-four cases, and up to as many as forty or fifty cases, at one time).

65. *See* Joyce Koo Dalrymple, Note, *Seeking Asylum Alone: Using The Best Interest of the Child Principle to Protect Unaccompanied Minors*, 26 B.C. THIRD WORLD L.J. 131, 143 (2006).

66. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAM. STUD. 337, 338 (2008).

safety and a stable family environment."[67] The courts determine which interests prevail by examining the circumstances of each case under the traditional presumption that, absent a finding of abuse or neglect, parents act in their child's best interest.[68] But investigations for suspected abuse or neglect under state parental termination statutes, particularly those involving children who were not harmed, can undermine and intrude on the parent-child relationship.[69]

Since the development of the best interests of the child standard,[70] children's rights have received more attention, culminating in the "children's rights movement" of the 1960s, which ushered in a new wave of judicial discretion in which judges largely ignored precedent and sought to "probe tangled fact situations to discover the best interests of an individual child."[71] Generally, the statutes simply provided judges with a list of nondescript factors,[72] giving them broad discretion to enforce the best interest of the child standard in cases of neglect.[73] Because child custody determinations focus on the child's best interest without clear measures for such determinations, state standards allow parents to be subjected to criminal punishment without evidence of abuse or neglect.

5. The effect of child neglect standards on parents, free-range or otherwise

In 2008, Lenore Skenazy sparked national attention after she wrote a short column in the *New York Sun* describing her decision to allow her nine-year-old son to ride the New York City subway system

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67. Dalrympie, *supra* note 65, at 143.

68. *See id.* at 143–44 (stating that "[o]nly when parents abuse their authority can the state intervene to protect the child's welfare"); *see also* Parham v. J.R., 442 U.S. 584, 602 (1979) (recognizing the presumption that parents act in their child's best interests).

69. *See* Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1001–02 (1975) (suggesting that intervention due to vague child neglect laws results in harm by erroneously removing children from homes in which they were thriving).

70. *See* Kohm, *supra* note 66, at 339 n.6 (stating that the best interest of the child standard originated in *Lincoln v. Lincoln*, 247 N.E.2d 659 (N.Y. 1969)).

71. *Id.*

72. *See id.* at 372, 372–73 n.234 (stating that the core set of factors courts consider in determining the child's best interests are "first, the opinion of the child and the members of [his or her] family; second, the child's sense of time; third, the child's need for continuity; and finally, the risk of harm to the child").

73. *See id.* at 373 (declaring that the "greatest concern with the best interests [of the child] analysis lies with the judge who makes it" which allows for judicial discretion that is difficult to harmonize with statutory law).

alone.[74] The media labeled her "America's Worst Mom," while many parents accused her of child neglect.[75] Ms. Skenazy subsequently founded the movement "Free Range Kids," which aims to fight "the belief that our children are in constant danger from creeps, kidnapping, germs, grades, flashers, frustration, failure, baby snatchers, bugs, bullies, men, sleepovers and/or the perils of a non-organic grape."[76]

Although Ms. Skenazy endured harsh criticism, other supporters of the free-range movement have faced police intervention and possible criminal charges. In late 2014, Maryland CPS visited the home of Danielle and Alexander Meitiv after receiving a call that their two children were unsupervised outdoors.[77] The Meitiv children, ages ten and six, were walking home after playing in a nearby park.[78] Despite there being no evidence of neglect or any risk of harm to their children, CPS threatened to remove the children if the Meitivs did not sign a form promising to supervise their children at all times until a follow-up appointment.[79] After an investigation, Maryland CPS found the Meitivs guilty of unsubstantiated child neglect.[80]

In a second incident on April 12, 2015, the Meitiv children were detained by police only three blocks from their home while walking home from a playground and transported to CPS offices

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74. *See* Lenore Skenazy, *Why I Let My 9-Year-Old Ride the Subway Alone*, N.Y. SUN (Apr. 1, 2008), http://www.nysun.com/opinion/why-i-let-my-9-year-old-ride-subway-alone/73976 (describing the careful planning and consideration that went into Skenazy's decision).

75. Jane E. Brody, *Parenting Advice From "America's Worst Mom"*, N.Y. TIMES (Jan. 19, 2015), http://well.blogs.nytimes.com/2015/01/19/advice-from-americas-worst-mom (noting that Skenazy endured "damning criticism" and the threat of arrest for child endangerment as a result of her column).

76. FREE-RANGE KIDS, http://www.freerangekids.com (last visited Mar. 27, 2016).

77. *See* Andrew Metcalf, *A Timeline of the Incidents Involving the Free-Range Meitiv Kids in Montgomery County*, BETHESDA MAG. (Apr. 15, 2015, 10:16 AM), http://www.bethesdamagazine.com/Bethesda-Beat/2015/A-Timeline-of-the-Incidents-Involving-the-Free-Range-Meitiv-Kids-in-Montgomery-County (providing a timeline of the events surrounding the Meitiv case).

78. *Id.*

79. *See* Kelly Wallace, *Maryland Family Under Investigation for Letting Their Kids Walk Home Alone*, CNN (Jan. 21, 2015, 2:08 PM), http://www.cnn.com/2015/01/20/living/feat-md-free-range-parents-under-attack (stating that the CPS officer who arrived at the Meitiv home claimed she had the right to take the children into custody immediately if the Meitivs did not sign the form).

80. *See* Metcalf, *supra* note 77 (reporting that the Meitivs were found guilty of unsubstantiated child neglect in February 2015, a charge which means that in their case there was evidence of some child neglect but not enough evidence to substantiate a definitive conclusion).

approximately fifteen miles away.[81] The case generated substantial media attention and controversy because the Meitiv parents were again found guilty of neglect despite the absence of clear evidence that they violated state law and were not acting in the best interests of their children.[82] The Meitivs were under investigation for several months, but were ultimately cleared of the first charge in May 2015, and the second charge in June 2015.[83]

Although the Meitivs allowed their children to remain in public unsupervised as a lesson in independence, parents who have no choice but to allow their child to remain unsupervised in public have been held liable for neglect notwithstanding the absence of harm to the child. Such was the case for Debra Harrell, a working-class, single mother, who was arrested and fired from her job after letting her nine-year-old daughter play in a park unattended.[84] At the time, Ms. Harrell was an employee at McDonald's making minimum wage.[85]

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81. *See id.* The children were observed by police in the area of Fenton and Easley streets in Silver Spring, Maryland and were transported to CPS offices at 1301 Piccard Drive, Rockville, Maryland. Driving Directions from Fenton and Easley Streets, Silver Spring, Md. to 1301 Piccard Drive, Rockville, Md., GOOGLE MAPS, http://maps.google.com (follow "Directions" hyperlink; then search starting point field for "818 Easley Street, Silver Spring, Maryland" and search destination field for "1301 Piccard Drive, Rockville, Maryland").

82. *E.g.*, Bonnie Fuller, *Free Range Parents Danielle and Alexander Meitiv Need to Stop Fighting and Put Kids' Safety First*, HUFFINGTON POST (Apr. 15, 2015, 11:34 AM), http://www.huffingtonpost.com/bonnie-fuller/free-range-parents-danielle-and-alexander-meitiv-need-to-stop-fighting-and-put-kids-safety-first_b_7058238.html (stating that "CPS should be concerned with parents who truly are neglectful or abusive," unlike the Meitivs); Donna St. George, *Montgomery Seeks Clarity Stemming from 'Free-Range' Parenting Debate*, WASH. POST (Apr. 22, 2015), http://www.washingtonpost.com/local/education/montgomery-council-seeks-clarity-stemming-from-free-range-debate/2015/04/22/a74fd086-e82e-11e4-9767-6276fc9b0ada_story.html (observing that Maryland law requires that children under eight years old be accompanied by a reliable person over the age of thirteen in buildings, vehicles, and enclosed spaces, but does not mention children playing outdoors).

83. Jessica Chasmar, *Free-Range Meitiv Family Cleared of All Child-Neglect Allegations*, WASH. TIMES (June 22, 2015), http://www.washingtontimes.com/news/2015/jun/22/free-range-meitiv-family-cleared-of-all-child-negl; *Maryland 'Free-Range' Family: 2nd Neglect Case Cleared*, NBC WASH. (June 22, 2015, 8:37 AM), http://www.nbcwashington.com/news/local/Maryland-Free-Range-Family-2nd-Neglect-Case-Cleared-309004351.html ("Officials [have not] commented but recently clarified their policy, noting that the state [should not] investigate unless kids are harmed or face substantial risk of harm.").

84. Bryce Covert, *McDonald's Fires Mom Who Was Arrested for Letting 9-Year-Old Play in Park Alone*, THINKPROGRESS (July 22, 2014, 11:23 AM), http://thinkprogress.org/economy/2014/07/22/3462704/debra-harrell-fired.

85. *Id.*

Because of financial constraints, Ms. Harrell could not afford summer school or childcare during her daughter's summer break.[86] Instead, her daughter spent the summer sitting in a booth at McDonald's playing on Ms. Harrell's laptop.[87] After her daughter asked to play in a nearby park, Ms. Harrell allowed her to do so, requiring her to carry a cell phone for emergencies.[88] While at the park, Ms. Harrell's daughter played with other children and could walk to her home or to the McDonald's where Ms. Harrell worked in only a few minutes.[89] Furthermore, the park had a program that provided "free supervised breakfast and lunches for children playing there."[90]

Ms. Harrell had no choice but to allow her daughter to be unsupervised. Ms. Harrell was arrested, fired from her job, and initially spent the night in jail.[91] Even after she was released on bond, the state maintained custody of her daughter for more than two weeks.[92] Ms. Harrell was only allowed back to work after her story sparked national attention, and a crowd-funding site offered support for her expenses and legal fees.[93]

B. The Negligence Standard of Care in Torts

In tort law, negligence is based on the caution a reasonable person of ordinary prudence would take,[94] and there is only a duty to guard against reasonably foreseeable risks.[95] A person is negligent if he or

86. *Id.*

87. *Id.*

88. *Id.*

89. Corey Adwar, *Attorney: McDonald's Mom Who Let Her Child Play in Park Did Not Put Her in Harm's Way*, BUS. INSIDER (July 17, 2014, 1:31 PM), http://www.businessinsider.com/attorney-defends-debra-harrell-after-daughter-played-alone-at-park-2014-7.

90. *Id.*

91. *Id.*

92. *Support Debra Harrell*, YOUCARING, http://www.youcaring.com/help-a-neighbor/support-debra-harrell/204837 (last visited Mar. 27, 2016).

93. *See* Covert, *supra* note 84; *Support Debra Harrell*, *supra* note 92 (showing that more than two thousand individuals supported Ms. Harrell, raising over $45,000).

94. Vaughan v. Menlove [1937] 132 Eng. Rep. 490 (PC) 492.

95. *See, e.g.*, Lubitz v. Wells, 113 A.2d 147, 147 (Conn. Super. Ct. 1955) (holding that the risk of a significant injury after leaving a golf club lying in a backyard is not reasonably foreseeable); Blyth v. Birmingham Waterworks Co. [1856] 156 Eng. Rep. 1047 (Ex.) 1049 (holding that there is no duty to guard against an unforeseeable or remotely foreseeable risk or injury, and an individual cannot be negligent for unforeseeable harm).

she fails to "exercise reasonable care under all the circumstances."[96] In evaluating whether conduct lacks reasonable care, the courts consider several factors, including the "foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm."[97]

1. Economic analyses of negligence

One way courts determine whether an act is negligent is through applying an economic analysis test, which weighs the probability and magnitude of harm, the cost of prevention, and the social utility of the act as it stands. For example, in *Chicago, Burlington & Quincy Railroad Co. v. Krayenbuhl*,[98] a four-year-old boy's foot was severed in an unlocked railroad turntable.[99] The railroad required its employees to keep the turntable locked to prevent serious injury, but employees regularly disregarded the rule.[100] In a suit for negligent maintenance of the turntable, the court employed an economic analysis to determine what constitutes a negligent act and ruled that the danger from using the turntable would be significantly lessened by properly enforcing the rule to keep it locked.[101] In other words, applying an economic analysis, the probability and magnitude of harm to bystanders was high, the cost of prevention by locking the turntable was low, and the social utility of an unlocked turntable was low, but significantly higher if locked.[102]

2. Judge Cardozo's foreseeability analysis in Palsgraf v. Long Island Railroad Co.

A second way courts determine whether an act was negligent is through a foreseeability analysis, which determines negligence based on whether a risk is reasonably perceivable. In the seminal ruling in *Palsgraf v. Long Island Railroad Co.*,[103] Chief Justice Benjamin Cardozo

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96. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. LAW INST. 2010).

97. *Id.*

98. 91 N.W. 880 (Neb. 1902).

99. *Id.* at 881.

100. *Id.*

101. *Id.* at 882–83.

102. *Id.*

103. 162 N.E. 99 (N.Y. 1928). In *Palsgraf*, the plaintiff was waiting on a train station platform when a package of fireworks exploded. *Id.* at 99. Two guards were simultaneously trying to help a passenger onto a moving train, and in the process, the package in the passenger's hands fell onto the rails. *Id.* Unbeknownst to the

stated that there was nothing that gave notice to railroad employees that a nondescript package, which contained fireworks, was capable of injuring someone at the other end of the platform, and that "[i]t was not necessary that the defendant should have had notice of the particular method in which an accident would occur, if the possibility of an accident was clear to the ordinarily prudent eye."[104] While some acts, such as shooting a gun, are so imminently dangerous as to impose a heightened duty, a negligent act is "defined in terms of the natural or probable" consequences.[105] Ultimately, "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation."[106] In other words, because the act of knocking the package out of the passenger's arms did not create any reasonably foreseeable harm, the railroad company could not be liable for negligence.[107]

II. INADEQUATE STATUTES LEAD TO IMBALANCED LAW ENFORCEMENT

Child neglect statutes of many states and the best interest of the child standard do not provide guidance on enforcement,[108] allowing law enforcement officials to abuse their discretion.[109] Although child abuse and neglect laws aim to protect children, there may be an increase in investigations—and criminal charges—of situations where parents do not actually harm their children if child neglect statutes are not revised to treat all parenting philosophies equally.

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railroad employees, the package contained fireworks, which exploded, causing a concussive blast throughout the station that injured the plaintiff when tiles at the other end of the platform dislodged. *Id.*

104. *Id.* at 99–100 (quoting Munsey v. Webb, 231 U.S. 150, 156 (1913)).

105. *Id.* at 101.

106. *Id.* at 100.

107. *Id.* at 101.

108. *See infra* notes 258–29 and accompanying text (describing the poorly drafted child neglect statutes of California, Delaware, and Indiana, and the more objectively based statute in effect in Illinois, to emphasize the vague language of the Delaware and Indiana statutes).

109. *See* Kohm, *supra* note 66, at 353 ("The greatest concern with the use of [the best interest of the child standard] today is that application of the doctrine rests on the judge's personal observations and values."); Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-the-Child-Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule"*, 41 U. BALT. L. REV. 83, 106 (2011) (stating that the criticisms of the best interest of the child standard mainly involve the lack of objective rules to help guide discretion); *see also supra* Section I.A.5 and *infra* Section II.A (examining the Meitiv and Harrell cases where the Meitivs allowed their children to remain unsupervised in public as a lesson in independence and autonomy, while Ms. Harrell had no choice because her employment and financial resources prevented her from securing child care).

A. The Problem with Current Standards

State and federal child neglect statutes and the best interest of the child standard are vague, overbroad, and subjective.[110] The current system reinforces helicopter parenting and has discriminated against families who, whether by choice or not, employ a more hands-off approach to parenting.[111] As a result, children who are not actually being mistreated are more likely now than ever to be victims of removal.[112] The Meitiv and Harrell cases illustrate that parenting practices that do not conform to the overprotective standard—whether the parent disagrees with it or cannot adhere to it—will be condemned, fined, and criminalized. The result, removing a parent or child from the home, will inevitably threaten the parent-child bond.[113] If the law is not changed in a way that promotes flexibility in parenting styles, the Meitivs (and other free-range parents) and the Harrells (and other economically disadvantaged families) will likely have to adjust their parenting styles out of fear of intervention, thereby preserving the shift to both child overprotection and the legal system's response to non-conformity.

As previously discussed, children's rights and best interests have received more attention in recent years, resulting in a turn "toward new pure judicial discretion in contemporary judging, causing litigators and advocates to have no rule of law to rely upon."[114]

The permeation of helicopter parenting is unlikely to improve the best interest of the child standard[115] because the standard neither

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110. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 45 n.13 (1981) (Blackmun, J., dissenting) (noting that the Supreme Court has acknowledged that the "best interests of the child standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values" and that several other courts have "invalidate[d] parental termination statutes on vagueness grounds"). *See generally* Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family and Criminal Law*, 83 CORNELL L. REV. 688, 705–06 (1998) (arguing that child neglect statutes do not explicitly impose particular standards of behavior and fail to assist courts in making custody determinations).

111. *See, e.g.*, *supra* notes 77–83 and accompanying text (outlining the controversy surrounding the Meitiv case where the Meitivs were subjected to police intervention after allowing their children the freedom to walk to a nearby park alone).

112. *See supra* notes 77–83 and accompanying text.

113. *See* Wald, *supra* note 69, at 1001–02 (positing that erroneously removing a child from a home in which he or she was thriving can cause harm to the child).

114. Kohm, *supra* note 66, at 339.

115. *See* Dalrympie, *supra* note 65, at 143–45 (discussing how the arbitrary nature of the standard leaves judges to make custody decisions based on intuition under the guise of the child's best interests); Warshak, *supra* note 109, at 104–05 (suggesting

focuses on any particular factor nor identifies any characteristics to help balance judicial enforcement, which perpetuates overprotective norms. Indeed, the lack of guidance in applying the best interest of the child standard may encourage parents to overprotect their children because the standard influences law enforcement officials to view parents not adhering to overprotective norms in a negative light, thereby "undermin[ing] . . . effective []parenting."[116] The best interest of the child standard will continue to depend on pure judicial discretion unless additional key factors and elements are provided for judges to consider.[117]

B. Intervention Based on Parental Conduct

Many parents have difficulty disputing a charge of child neglect as statutory vagueness permits the state to intervene on the basis of the parents' conduct, rather than harm to the child.[118] While current standards offer little to no guidance on the level of culpability required to support a finding of neglect, leading to varied application of law,[119] some courts are aware of the risks associated with the problematic standard and have either repealed parental termination statutes entirely[120] or adopted tests to more accurately evaluate cases under the relevant state statute to make custody determinations.[121] Still, child neglect statutes in other jurisdictions continue to

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the subjective nature of the standard leaves judges susceptible to awarding custody based on personal bias).

116. Warshak, *supra* note 109, at 104.

117. *See* Kohm, *supra* note 66, at 373 (arguing that unless the legislature or case law provides additional factors to consider, judges' "decision making process[es will be] relatively unbridled, and therefore thoroughly subjective").

118. *See* Wald, *supra* note 69, at 1000–02 (stating that child neglect statutes "almost always define neglect primarily in terms of parental conduct or home conditions . . . [and neither] . . . require any showing of actual harm to a child . . . [nor] specify the types of harm that are of concern. . . . This encourages [law enforcement officials] to focus on the parents rather than on the child['s best interests]" (footnotes omitted)).

119. *See infra* Sections II.A–C, E (discussing problems with the current standards that allow for significant law enforcement and judicial discretion).

120. *See, e.g.*, Alsager v. Dist. Court of Polk Cty., 406 F. Supp. 10, 16, 21 (S.D. Iowa 1975) (holding that the Iowa parental termination rights statutes are unconstitutionally vague because they inhibited a parent's constitutional right to child-rearing).

121. Davis v. Smith, 583 S.W.2d 37, 42 (Ark. 1979) (adopting a test to evaluate the efficacy of vague parental termination statutes, which should allow for more flexibility than criminal law statutes and less flexibility than statutes that regulate businesses).

discriminate[122] because of the shift to overprotection and its affirmation by the courts.[123]

Parents, such as the Meitivs in Maryland, are at greater risk of losing their children even where there is no clear evidence of abuse or neglect. The Maryland statute states that a child is any individual under eighteen years of age,[124] and defines neglect as:

> the leaving of a child unattended or other failure to give proper care and attention to a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of the child under circumstances that indicate: (1) the child's health or welfare is harmed or placed at *substantial risk of harm*; or (2) mental injury to the child or a substantial risk of mental injury.[125]

The statute is at odds with the practices of free-range parents and others who leave their child unattended in public. Although the statute states that a parent may be guilty of neglect if a child is left unattended, it does not define any criteria as to what creates a substantial risk of harm. More specifically, Maryland Statewide CPS Screening Procedures, which have not been revised since 1996, employ a broad, sweeping definition of an unattended child that is unsuitable in a more modern, technologically advanced society that helicopter parents openly endorse.[126] The procedure defines an unattended child as:

> [a child] who has been abandoned; a child less than [eight] years old left alone in the care of either an unreliable person or

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122. *See supra* notes 80–83 and accompanying text (providing articles detailing the Meitiv case and results from an investigation by Maryland CPS); *see also supra* notes 54–55 (indicating that vague terms have been incorporated into many state child neglect statutes due to CAPTA incentives); *infra* notes 124–29 and accompanying text (describing the Maryland child neglect statute); *infra* note 259 (describing child neglect statutes that do not provide criteria to guide law enforcement officials as to what constitutes neglect). *But see* 705 ILL. COMP. STAT. 405/2-3(1)(d) (West 2007) (incorporating a list of factors to help law enforcement officials exercise their discretion more effectively when making negligent supervision determinations).

123. *See* David Pimentel, *Criminal Child Neglect and the "Free Range Kid": Is Overprotective Parenting the New Standard of Care?*, 2012 UTAH L. REV. 947, 967 (arguing that the trend toward overprotective parenting is reinforced by vague child abuse and neglect statutes, resulting in overreliance on judicial discretion and inconsistent application of law).

124. MD. CODE ANN. FAM. LAW § 5-701(e) (LexisNexis 2012 & Supp. 2015).

125. *Id.* § 5-701(s)(1)–(2) (emphasis added); *see also id.* § 5-203(b)(1) (indicating that parents "are jointly and severally responsible for the child's support, care, nurture, welfare, and education").

126. *See* Bernstein & Triger, *supra* note 4, at 1236–41 (emphasizing that modern technology allows parents to closely monitor their children).

> someone less than [thirteen] years old; a child between [eight] and [twelve] left alone longer than briefly without sufficient contact or safety information (phone numbers of parents, neighbors, etc.); a child [twelve] years or older who is left alone for long periods or overnight with responsibilities beyond his or her capacity or if the child has a special mental or physical disability that creates a greater risk.[127]

Although the procedure seemingly provides guidance for state officials to follow, simply listing ages at which children can be legally left alone is not enough to limit discretion because it does not account for the varying maturity levels of children. Parents, not law enforcement officials, are in the best position to evaluate their child's capabilities.[128] Using the term "reliable" and the phrase "responsibilities beyond his or her capacity" is a step toward applying the law consistently, but finding parents guilty of neglect without any knowledge of what support system is in place is insufficient because it undermines parental discretion, the child's capabilities, or whether the child seeks removal. Indeed, the procedure should focus more sharply on factors indicating abandonment. Similar regulations may perpetuate overprotective norms by continuing to criminalize parents who adhere to more traditional or novel notions of parenting. More nuanced guidelines that help state officials make a comprehensive assessment of a child's circumstances could go a long way towards curtailing the relatively unbridled discretion permitted under the current system.

Furthermore, the procedure does not account for any type of harm that is reasonably likely to occur to an unattended child. Additional guidelines providing a more comprehensive assessment of parenting and its interaction with child neglect statutes will help promote a uniform application of the law and decrease the number of erroneous findings of neglect.[129]

Unless there is clear evidence of abuse, neglect, or a foreseeable injury,[130] the state should initially presume parents as fit.[131] In tort

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127. *Frequently Discussed Topics, Office of the County Attorney*, MONTGOMERY COUNTY, MD., http://www.montgomerycountymd.gov/cat/services/fdt.html (last visited Mar. 27, 2016).

128. *See* Pimentel, *supra* note 52, at 256 n.118 ("An outsider looking in may say that a twelve-year-old is too young to babysit a younger sibling, but a fifteen-year-old is mature enough. The . . . parents, however, understand the child's true maturity level the best; certainly some twelve-year-olds are up to the task, just as some fifteen-year-olds are surely unfit for such responsibility.").

129. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-3(1)(d) (West 2007) (providing fifteen factors officials in Illinois are required to consider when making a determination of negligent supervision).

130. Trimarco v. Klein, 436 N.E.2d 502, 505 (N.Y. 1982) (holding that liability via proximate causation may follow when an injury results from ignoring a standard of care).

law, for example, an injured individual who seeks redress via a statute must (1) be within the class of injuries the statute was designed to protect; (2) be in the class of persons the statute was designed to protect; and (3) have a causal connection to the injury.[132] But "[b]ecause [child neglect] statutes do not reflect a considered analysis of what types of harm justify the risks of intervention, [decision making] is left to the ad hoc analysis of social workers and judges" without considering the decision's potentially broad effects.[133]

To curtail the number of erroneous findings of neglect, child abuse and neglect statutes should employ a more objective framework, and consider "whether the parent is, or within a reasonable time will be, able to care for the child in a way that does not endanger the child's welfare."[134] Additionally, parental decisions should be assessed based on the facts and circumstances of each case to appropriately serve the child's best interests.[135] Neither poor judgment nor hands-off parenting should give rise to liability, or worse, warrant the loss of a child if no injury is actual or apparent.

C. The Degeneration of Presumptive Fitness

The history of the presumption that parents are fit to raise their children without undue interference can be traced back to the Fourteenth Amendment.[136] This constitutional liberty affords parents the freedom of choice in raising their children.[137] Indeed, many state courts have established that, to protect parental rights, the trier of fact must consider the best interests of the child and be mindful of the presumption favoring a continuation of the parent-child relationship.[138]

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131. *See* Parham v. J.R., 442 U.S. 584, 602–03 (1979) (stating that even parental conduct that "creates a basis for caution" should not overcome the presumption that parents act in their child's best interest).

132. *Trimarco*, 436 N.E.2d at 505–06.

133. Wald, *supra* note 69, at 1001.

134. *In re* Adoption/Guardianship of Rashawn H., 937 A.2d 177, 191 (Md. 2007).

135. *See, e.g.*, MD. CODE ANN. FAM. LAW § 5-323(d) (LexisNexis 2012) ("[P]rimary consideration [should be given] to the health and safety of the child and consider[] . . . all other factors [to] determine whether terminating a parent's rights is in the child's best interests.").

136. *See supra* Section I.A.1 (describing several cases spanning nearly 100 years where the Supreme Court has affirmed parents' fundamental right to raise their children without undue interference).

137. Santosky v. Kramer, 455 U.S. 745, 753 (1982).

138. *See In re Adoption/Guardianship of Rashawn H.*, 937 A.2d at 192 (asserting that the court's role is to carefully consider and make findings based on the relevant statutory factors as to what constitutes the best interest of the child along with a presumption favoring the parent-child relationship and articulate whether those

But this presumption has broken down in the wake of overprotective norms. For example, in the Meitiv case, unless the children were placed in substantial risk of harm or the children were incapable of walking home alone, there should be no presumption of neglect.[139] However, the parents were initially found liable for unsubstantiated child neglect,[140] and were given the option to either sign a form promising to supervise their children at all times until a follow-up appointment, or have their children removed immediately.[141] A presumption of guilt might be justifiable in some instances of clear abuse or neglect because such behavior is universally condemned, but it is unjustifiable in the case of parenting practices that do not expose children to either foreseeable or unreasonable harm.[142] Without the presumption of parental fitness, parents will have difficulty making reasonable judgments based on personal values out of fear of intervention,[143] thereby reinforcing overprotective norms. Because overprotective norms have imbued legal standards governing child abuse and neglect,[144] revising statutes in terms of specific or reasonably foreseeable harm to the child will

findings clearly show parental unfitness or an "exceptional circumstance" that may result in removal). *But see In re* Nathaniel A., 864 A.2d 1066, 1074 (Md. Ct. Spec. App. 2005) ("[A] parent's right to direct his or her child's upbringing is not absolute.").

139. *See* MD. CODE ANN. FAM. LAW § 5-701(s)(1)–(2) (LexisNexis 2012 & Supp. 2015) (defining neglect); *supra* notes 77–83 and accompanying text (explaining that the Meitiv children were ten and six years old when walking one mile from a local park to their home).

140. *See supra* note 80 and accompanying text.

141. Wallace, *supra* note 79. *Contra In re* Yve S., 819 A.2d 1030, 1040–42 (Md. 2003) (stating that the protections guaranteed to parents in raising children are contingent on satisfying the best interest of the child standard, which "embraces a strong presumption that the child's best interests are served by maintaining parental rights"); Pimentel, *supra* note 52, at 256 n.118 (noting that parents are the individuals best fit to make determinations about their children's capabilities).

142. *See* Pimentel, *supra* note 52, at 276 ("[W]hen the problem is not actual harm to a child but the mere possibility of harm—usually harm from some unknown, easy-to-imagine, but most likely non-existent predator who *might be out there*—[a presumption of guilt] is difficult to justify.").

143. *See id.* at 284–85 (stating that free-range parents will abandon their personal parenting style and adopt an overprotective approach to parenting to avoid CPS intervention).

144. Wald, *supra* note 69, at 1000–01 (commenting on the current standards for intervention, which "allow virtually unlimited intervention").

limit erroneous intervention and removal,[145] and preserve parents' interest in raising their children without undue interference.[146]

D. Mandatory Reporting Negatively Affects Parents

In contrast to many jurisdictions,[147] only health care workers, law enforcement, educators, and social service workers acting in a professional capacity are required to report suspected cases of abuse or neglect in South Carolina,[148] while Maryland extends its similar law to all state citizens.[149] In light of differing opinions as to what constitutes proper parenting in a continually-evolving society, law enforcement officials should investigate reports from bystanders with skepticism and operate under a presumption that favors the continuation of the parent-child relationship. While limiting mandatory reporting only to professionals could help reduce the number of investigations, as CAPTA intended but failed to do,[150] statutes need to provide more guidance to help control discretion. As parenting practices have shifted to become increasingly protective, courts and social service agencies have also become more assertive about enforcing child abuse and neglect laws. This trend leaves the courts with broad discretion in deciding whether to seek and enforce legal action against parents.[151] As a consequence, referrals to child welfare agencies are more likely to be investigated than they were in the past despite CAPTA's attempt to curtail over-reporting cases of

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145. *Id.*

146. *See* Troxel v. Granville, 530 U.S. 57, 65 (2000) (holding that the Fourteenth Amendment substantively provides heightened protection against government interference with parents' fundamental right and liberty interest in raising children, which is "perhaps [one of] the oldest of [such] interests recognized by [the Supreme Court]").

147. *See* Hafemeister, *supra* note 60, at 853, 864 ("By 1977, twenty states had passed legislation that mandated that 'any person' who suspects child abuse file a report," and, as of 2010, "forty-six states and the District of Columbia have established penalties for mandated reporters failing to report child abuse.").

148. S.C. CODE ANN. § 63-7-310(A) (2010 & Supp. 2014) (listing a wide range of occupations required to report due to professional duty).

149. MD. CODE ANN. FAM. LAW § 5-705(a)(1) (LexisNexis 2012 & Supp. 2015).

150. *See infra* note 152 (detailing CAPTA provisions on reporting and the continued challenges of excessive reporting and investigation).

151. *See* Hafemeister, *supra* note 60, at 823–24, 842, 878, 881 (detailing the history and statistics of child abuse reporting in the United States and the vagueness as to how child abuse and neglect are defined in U.S. law, allowing broad discretion in determining whether a parent may retain custody); *supra* note 125 and accompanying text (employing language that does not provide clear guidance on how to properly exercise discretionary enforcement).

suspected child abuse and neglect,[152] inevitably harming children who do not require intervention,[153] as in the Meitiv and Harrell cases.

Parents who employ free-range parenting techniques are more likely to be the targets of child abuse and neglect enforcement than traditional child abusers (e.g., parents who abuse their children in private) because their children are often seen in public and, as previously discussed, state and federal law encourage over-reporting instances of suspected child neglect.[154] Because typical "indicators [of neglect] are not as clear as in direct abuse cases,"[155] it is likely that there will be many more cases involving parents that either (1) allow their children to remain unsupervised in public as a lesson in independence, or (2) are forced to leave their children unsupervised in public because of a lack of resources to secure child care.[156]

E. The Wide-Reaching Effects of Child Neglect Statutes and the Best Interest of the Child Standard

Child neglect statutes and the best interest of the child standard have discriminated against disadvantaged families.[157] Race, class, and

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152. CAPTA was amended in 1996. Child Abuse Prevention and Treatment Act Amendments of 1996, Pub. L. No. 104-235, 110 Stat. 3063. In the amendment, Congress sought, in part, to address the growing number of reports of unsubstantiated child neglect by modifying federal and state programs that aimed to single out clear instances of child abuse and neglect. *Id.* §§ 102(f), 104(3)(D)–(F), 105(a)(1)(E). However, the problem of over-reporting and unsubstantiated investigations remains many years later. *See* CHILD MALTREATMENT, *supra* note 63, at x–xii, 20 (noting that approximately two-thirds of referrals to child welfare services are investigated, four-fifths result in a finding of no maltreatment, and almost sixty percent are unsubstantiated or intentionally false); *see also* Hafemeister, *supra* note 60, at 883 (showing the increase in removals from 206,000 in 2003 to 267,000 in 2008); *supra* notes 74–93 and accompanying text (highlighting the Skenazy, Meitiv, and Harrell cases as examples of unsubstantiated investigations).

153. *Cf.* Wald, *supra* note 69, at 1001 (suggesting that vague child neglect laws increase intervention decisions that result in harm to the child).

154. *See* Pimentel, *supra* note 52, at 266–67 (arguing that the confluence of state law, which either encourages or requires mandatory reporting of child endangerment, and federal law, which provides financial incentives to states providing immunity to reporters of child abuse, will allow more free-range parents to be criminalized because their children are visible within the community, "[w]hile stereotypical child abuse takes place behind closed doors and often goes undetected").

155. *Id.* at 247.

156. *See id.* at 266–67 (suggesting that laws incentivizing over-reporting coupled with the public nature of free-range parenting will result in more investigations); *see also supra* Section I.A.5 (describing the Meitiv and Harrell cases and the legal system's response).

157. *See* Wald, *supra* note 69, at 998 ("[S]ocial work agencies apply middle-class standards to poor and minority parents and attempt to change their lifestyles to meet

gender biases influence intervention decisions[158] where parents either do not have a choice in supervising their child[159] or make a conscious moral decision with the child's best interests in mind.[160] Judges are, at times, reluctant to award custody in cases that do not reflect their personal values.[161] Furthermore, if judges ultimately make determinations about the moral fitness of a custodian based on the judge's own biases, judges could reach varying determinations, further exacerbating inconsistent removal determinations. Judges ultimately are "not particularly well-equipped to decide moral issues."[162] As a result, the best interest of the child standard harms disadvantaged families.

Arguably, the vagueness of the best interest of the child standard and removal statutes encourages discrimination against lower income families and those with disabilities because the focus tends to be on the parents[163] and not the best interest of the child.[164] Child neglect statutes "[r]arely . . . require any showing of actual harm to the child; in fact, [they] do not even specify the types of harm that are of concern."[165] To illustrate, *Rodriguez v. Dumpson*[166] involved a blind

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middle-class norms . . . [and] threaten to remove children or withhold desired services, such as day-care, in order to force parental compliance with the worker's concepts of proper childrearing.").

158. *Id.* (observing that social work agencies often measure poor and minority parents by middle-class standards); *see* Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 857–58, 881 (1997) (describing the prejudices courts have traditionally imposed on same-sex couples and the unfounded biases regarding the harm same-sex relationships cause young children).

159. *See supra* Section I.A.5 (describing Debra Harrell's legal battle, which began when Harrell let her nine-year-old daughter play unattended in a park near Harrell's workplace because Harrell could not afford child care).

160. *See In re* Yve S., 819 A.2d 1030, 1040, 1042 (Md. 2003) (emphasizing that the protections guaranteed to parents in raising children are contingent on satisfying the best interest of the child standard, which "embraces a strong presumption that the child's best interests are served by maintaining parental rights").

161. *Cf.* Strasser, *supra* note 158, at 857–58, 861 (suggesting that judges are reluctant to award custody in cases involving moral issues, such as in the context of parental fitness of same-sex couples, perhaps because judges are wary of making a determination of fitness based on their own conceptions of morality).

162. *Id.* at 861.

163. *See, e.g.*, Covert, *supra* note 84 (detailing how Debra Harrell's daughter was taken into protective custody and Harrell lost her job due to inability to afford childcare during the summer); Benfer, *supra* note 12, at 320–24 (describing the various ways in which parents with disabilities are treated unfairly by the court system).

164. *See supra* note 118 and accompanying text.

165. *See* Wald, *supra* note 69, at 1000–01.

166. 52 A.D.2d 299 (N.Y. App. Div. 1976).

mother who placed her newborn son in foster care because of marital difficulties.[167] The lower court dismissed the custody petition because there would be considerable risk in allowing a blind mother, who required assistance of others, to care for her son.[168] When Ms. Rodriguez sought to regain custody, a family court dismissed her appeal because, in its view, her blindness prevented her from providing adequate care for her son.[169] After attempting to regain custody for nine months, Ms. Rodriguez brought an action in state court, and the state court reversed her dismissal and remanded the case with instructions to return her son.[170]

Child neglect statutes and the best interest of the child standard are further implicated in the context of unattended children. The South Carolina child neglect statute involved in the Harrell case[171] criminalizes parents who leave a child at "unreasonable risk of harm affecting the child's life, physical health, safety, or mental well-being without removal."[172] However, the statute does not specify any circumstances as to when a child can be left alone, which allows law enforcement officials to decide whether the parent's decision was informed, criminal, or merely irresponsible.[173] Therefore, the South Carolina statute gives law enforcement officials broad discretion to determine the best interests of the child. This broad discretion can be problematic, as was seen in Ms. Rodriguez's custody battle, because it does not always invite law enforcement officials to consider the specific circumstances influencing a parent's child-rearing decisions.

The child welfare system, influenced by the permeation of overprotective norms into inadequate legal standards, presumes neglect for many parents.[174] A presumption of guilt may be

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167. *Id.* at 301.
168. *Id.*
169. *Id.* at 300–01.
170. *Id.* at 303.
171. *See supra* notes 84–92 and accompanying text.
172. S.C. CODE ANN. § 63-7-1660(A) (2010).
173. *See, e.g.*, *id.* § 63-7-1660(B)(1) (requiring that a petition for removal include a detailed description of the facts pertaining to why the child is subject to an "unreasonable risk of harm," but not delineating any guidelines as to when such harm might occur).
174. *See* Candace Smith & Lauren Effron, *'Free Range' Parents Found Responsible for Child Neglect After Allowing Kids to Walk Home Alone*, ABC NEWS (Mar. 3, 2015, 5:05 PM), http://abcnews.go.com/Lifestyle/free-range-parents-found-responsible-child-neglect-allowing/story?id=29363859 (stating that the second incident involving the Meitivs culminated in a finding of unsubstantiated child neglect despite the absence of harm to the children).

appropriate in some cases of clear abuse or neglect because society has condemned such behavior.[175] However, declaring a parenting practice neglectful simply because it does not comport with a popular standard is unjustifiable absent clear evidence of harm or imminent risk of harm to the child.[176]

III. APPLYING A TORTS STANDARD IN CHILD NEGLECT EVALUATIONS

Although child neglect statutes limit cases to where a child is at "serious"[177] or "substantial,"[178] risk of harm, the statutes fail to consider the foreseeable likelihood of such harm occurring.[179] As previously discussed, the lack of an adequate federal definition[180] and confusion among the states as to what constitutes child abuse or neglect has led to diverging interpretations among the courts[181] and has encouraged intervention on the basis of subjective judgments of parental conduct rather than actual harm or the likelihood of harm to the child.[182]

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175. *See In re* Philip M., 624 N.E.2d 168, 168, 172–73 (N.Y. 1993) (stating that New York's child neglect statute allows a finding of abuse in cases where the child sustains an injury that would not occur absent acts or omissions of the child's caretaker; in this case, two children, ages eight and five, contracted a sexually transmitted disease); *see also* Wald, *supra* note 69, at 1031 ("[W]here intervention is premised on physical abuse, sexual abuse, or parental behavior causing emotional damage, rarely can the parents' actions be accepted as an alternative means of promoting the child's best interest.").

176. *E.g.*, S.C. CODE ANN § 63-7-1660(A) (criminalizing parents who leave a child at "unreasonable risk of harm").

177. *See supra* note 58 and accompanying text.

178. MD. CODE ANN. FAM. LAW § 5-701(b)(1)–(2) (LexisNexis 2012 & Supp. 2015).

179. 42 U.S.C. § 5106g (2006); MD. CODE ANN. FAM. LAW § 5-701. *But see* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (AM. LAW INST. 2010) (noting several factors regarding conduct lacking reasonable care, including the "foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm").

180. *See supra* Sections I.A.3, II.D (arguing that federal legislation that was intended to isolate cases and clarify the definition of child abuse and neglect has in fact increased findings of neglect).

181. *See, e.g.*, MD. CODE ANN. FAM. LAW § 5-323(e)(1) (adopting a clear-and-convincing-evidence standard in child neglect determinations); Ghosh v. Ill. Dep't of Children & Family Servs., No. 1-13-1099, 2014 WL 2730725, at *10 (Ill. App. Ct. June 13, 2014) (holding that a child's age is not dispositive for a finding of neglect); Comm'r of Admin. for Children's Servs. v. Tanya W., 269 A.D.2d 394, 395 (N.Y. App. Div. 2000) (observing that a preponderance of the evidence is needed to support a finding of child neglect); *In re* Zeiser, 728 N.E.2d 10, 11, 17–18 (Ohio Ct. App. 1999) (holding parents negligent per se for leaving children ages six and eight at home alone, despite evidence that the children were very mature and responsible for their ages).

182. *See* Wald, *supra* note 69, at 1000–01 (explaining that the way in which the statutes are phrased do not adequately account for the best interests of the child).

As the law currently stands, it is difficult to separate a parental decision from an activity a child is engaging in because parental choice is being evaluated rather than the likelihood of risk of the child's activity. It could be argued that the absence of precision in defining neglect is necessary and that broad child neglect statutes recognize that neglectful behavior varies, which allows judges to examine each case more effectively.[183] But if child abuse and neglect statutes are not revised to acknowledge the principle that parents have the fundamental right to raise their children without undue interference[184] and to incorporate actual or foreseeable harm to children based on their activities, the law will continue to be applied inconsistently. Consequently, parents will be subject to state intervention when they let their children out in public unsupervised, whether by choice or not.[185]

Ultimately, child neglect statutes should be designed to protect children, not to evaluate parents' child-rearing philosophies. A more objective assessment of imminent harm to the child and its association with risk should be adopted, which will account for parenting preferences that do not conform to the current helicopter parenting standard. The negligence and causation standards of care in tort law are instructive in developing this standard to more effectively guide enforcement of child abuse and neglect laws. Negligence in tort law, for example, is an objective standard, defined as "conduct which falls below the standard established by law for the protection of others against *unreasonable risk of harm*."[186] A negligent act is one performed without the care a reasonable person in the same position "would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another,"[187] and an individual may be found liable to another for negligence if his or her "conduct is a *substantial factor* in bringing about the harm."[188] If states

183. *See id.* at 1001 (noting that the imposition of broad child neglect statutes recognizes the fact that neglectful behavior varies dramatically, but that such a broad definition is undesirable because vague laws increase the likelihood that intervention will occur in cases in which intervention may cause harm to the child).

184. *See supra* Section I.A.1 (arguing that constitutional protections have been recognized and provide the infrastructure to implement a fairer standard that evaluates each case on the merits, and not on personal opinions of proper parenting).

185. *See supra* Section I.A.5 (describing some of the different scenarios in which parents have let their children engage in unsupervised activities in public and have received criticism for their actions).

186. RESTATEMENT (SECOND) OF TORTS § 282 (AM. LAW INST. 1965) (emphasis added).

187. *Id.* § 298.

188. *Id.* § 431(a) (emphasis added).

adopt the objective analyses outlined in tort law, including the unreasonable risk of harm language, states will be able to more appropriately recognize the parent-child relationship and evaluate parental decisions.

A. The Jurisdictional Approach

A few jurisdictions have incorporated some form of tort doctrine into their child neglect statutes.[189] But these forms are based on the res ipsa loquitur ("the thing speaks for itself")[190] framework, which presumes negligence.[191] Res ipsa loquitur statutory frameworks tend to work against the parents who allow their children to remain unsupervised in public because child neglect law enforcement, through the discretion of law enforcement officials, has criminalized parents who do not conform to overprotective norms.[192] Furthermore, res ipsa loquitur frameworks in parental termination statutes directly counter the fundamental right parents have in caring for, and maintaining custody and control of, their children,[193] and the presumption that fit parents act in their children's best interests.[194]

In the case of parents who believe developing childhood independence is important, there is no quantitative injury—actual or reasonably perceived—caused by leaving a child unsupervised in reasonable proximity to his or her parents. However, a finding of unsubstantiated neglect is analogous to a presumption of neglect, and once a prima facie case is established, parents are unlikely to

189. *See In re* Philip M., 624 N.E.2d 168, 172 (N.Y. 1993) (stating that New York child abuse and neglect statute, McKinney's Family Court Act § 1046, was modeled after the res ipsa loquitur doctrine).

190. 65A C.J.S. *Negligence* § 853 (2010 & Supp. 2015).

191. *See* Byrne v. Boadle (1863) 159 Eng. Rep. 299 (Exch.) 300 (indicating that a presumption of negligence, res ipsa loquitur, can arise from an accident where the mere fact that the accident happened is evidence of negligence).

192. *See* Levine, *supra* note 11, at 593–95 (discussing several cases involving the New York statute and how such statutes "mirror society's conception of parental obligations, and . . . based on socially acceptable," but not necessarily legally acceptable, "parenting methods"); *see also supra* Sections 1.A–B (describing the background and results of the Meitiv and Harrell cases).

193. *See* Troxel v. Granville, 530 U.S. 57, 65–67 (2000) (explaining that this parental fundamental right is protected under the Due Process Clause of the Fourteenth Amendment).

194. *See* Dalrymple, *supra* note 65, at 144 (stating that some state statutes require courts to find parental unfitness before even considering the best interests of the child).

overcome the presumption.[195] Indeed, a finding of abuse or neglect "constitutes a permanent, and significant, stigma . . . [that] might indirectly affect [a parent's] status in potential future proceedings."[196]

In contrast to implementing child neglect statutes under a presumption of neglect, some courts have adopted a more comprehensive approach to enforcement. For example, in *Nicholson v. Scoppetta*,[197] the New York Court of Appeals set forth principles to guide both child welfare agencies and the courts in determining a more useful and objective standard of care in child neglect and abuse cases.[198] The court noted that, under New York law, "neglect" should require a parent's failure in exercising a "'*minimum* degree of care' . . . not maximum, not best, not ideal—and the failure [to supervise] must be actual, not threatened."[199] Additionally, "courts must evaluate parental behavior objectively," according to a reasonable person standard that takes into account the "special vulnerabilities of the child" and the relevant facts of each case.[200] A standard that recognizes a "minimum degree of care" accounts for diverging parenting philosophies and places the burden on the state to apply the law to the facts of the case. A standard that expands on this notion by balancing a probability assessment with additional factors will allow states to more uniformly interpret child abuse and neglect laws and provide a more clear and objective standard in evaluating parents' behavior.

B. Incorporating Heightened Standards—Three Steps

Parents should be liable for supervising their children and the consequences resulting from their choices made as parents; after all, they are ultimately responsible for their children's welfare and are in the best position to evaluate their children's capabilities. Indeed, parents have a duty of care to take reasonable steps to prevent a *known* injury from occurring, the breach of which could constitute

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195. *See* Levine, *supra* note 11, at 594–95 (explaining that the presumption in res ipsa loquitur cases is hard to rebut in part because the cases that lend themselves to application of the doctrine are usually extreme).

196. *Id.* at 616 (quoting *In re* H. Children, 548 N.Y.S.2d 586, 587 (App. Div. 1989)).

197. 820 N.E.2d 840 (N.Y. 2004).

198. *Id.* at 846–47.

199. *Id.* at 846.

200. *Id.*

negligence.[201] The rationale underlying particularized foreseeability is that a failure to warn would likely result in an injury.[202] But such foreseeability does not necessarily impose a duty because what one parent might deem neglectful[203] might be reasonable parenting for another.[204]

Parents are not expected to have a heightened reason to know that their child may be injured at any moment,[205] but they should be held liable if they are aware of, but ignore, an injury that might reasonably occur after leaving a child unattended. For example, the Ohio Court of Appeals, in observing that there is always a possibility of injury when a child walks home alone, found that those responsible for supervising a child who was beaten by a classmate on his way home could not "foresee the unforeseeable," and, rather, the violent nature of the classmate was the direct and proximate cause of injury.[206] The court observed that lack of supervision could only be described as a remote cause of the injury, "if any, requiring . . . conjecture to sustain any connection between the absence and injury" necessary for a finding of neglect.[207] Because insulating a child from one risk can expose them to another,[208] a legal standard that acknowledges the

201. J.S. v. R.T.H., 714 A.2d 924, 930, 935 (N.J. 1998) (holding that a person has a duty to prevent an injury when he or she has actual knowledge or a reason to know that an injury will result from a crime).

202. *Id.* at 930.

203. In the Meitiv case, a bystander reported the unattended children to the police for the first incident on October 27, 2014. Metcalf, *supra* note 77.

204. The Meitivs allowed their children to play outside and walk a short distance home in a familiar area. *See* Smith & Effron, *supra* note 174. The Meitivs stand by their parenting style and have taken legal action against Maryland CPS and the Montgomery County Police. *See* Metcalf, *supra* note 77. They are being represented by the Washington D.C. law firm Wiley Rein on a pro bono basis. *Id.*

205. *See* R.H. v. Mischenko, No. L-2373-06, 2011 WL 2320844, at *4–5 (N.J. Super. Ct. App. Div. June 3, 2011) (per curiam) (finding that the parents in this case did not have a duty to know that their child may be assaulted by a third party when measured against the standard of "particularized foreseeability" adopted in *J.S.*, 714 A.2d at 935); Champion v. Dunfee, 939 A.2d 825, 831 (N.J. Super. Ct. App. Div. 2008) (holding that an individual has no duty to control the conduct of a third party to prevent harm to another).

206. Finkenbine v. Hengsteler, No. 17-84-2, 1985 WL 7409, at *1, *3 (Ohio Ct. App. Sept. 30, 1985) (quoting Person v. Gum, 455 N.E.2d 713, 716 (Ohio Ct. App. 1983)).

207. *Id.* at *3; *see also Person*, 455 N.E.2d at 714, 716 (refusing to hold an elementary school teacher liable for injuries a child sustained when he was struck by a car while walking home from school because the teacher's conduct was not the proximate cause of the child's injuries).

208. *See* Pimentel, *supra* note 52, at 277 ("It will usually be impossible for parents to insulate their children entirely from risks of serious harm."); *see also Finkenbine*, 1985 WL 7409, at *3 (observing that there is always the possibility of danger and injury when a child is walking unsupervised (citing *Person*, 455 N.E.2d at 716)).

foreseeable likelihood of risk would allow parents and law enforcement officials to more effectively exercise their discretion.[209]

Granted, a revision of child neglect statutes will create a more rigid standard and give less discretion to law enforcement officials, but the law should account for, and accommodate, different parenting styles. A statute is not "unconstitutionally vague" when "individuals of ordinary intelligence" can understand what conduct the statute proscribes and prohibits.[210] However, statutes are currently written abstractly and protect against only the most egregious conduct.[211] Bright line laws proscribing acceptable conduct are helpful, but those setting acceptable limits on activities children may engage in do not account for varying degrees of child maturity and parenting styles.[212] To effectuate a more objective standard allowing for more uniform law enforcement, states should first enforce their statutes under a hybrid foreseeability and economic analysis standard. This standard should then be analyzed along with guidelines to streamline discretionary enforcement of child neglect statutes as well as the best interest of the child standard, while also acknowledging that parents should enjoy the fundamental right to raise their children without undue interference.

1. Employing economic analyses in reevaluating child neglect statutes

A parent should certainly be held liable for unreasonable actual or perceived harm to his or her child. Although many statutes define child neglect in terms of "imminent" or "substantial" risk of harm, they

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209. *Cf.* Pimentel, *supra* note 52, at 277–80 (incorporating "risk management" into legal standards will allow "room to consider and respect the proper role and exercise of parental discretion").

210. State v. Downey, 476 N.E.2d 121, 122 (Ind. 1985).

211. *See, e.g.*, Demontigney v. State, 593 N.E.2d 1270, 1271–72 (Ind. Ct. App. 1992) (declining to hold the Indiana child neglect statute unconstitutionally vague because "people of ordinary intelligence" would be able to determine that parents, who chained their young child to a bed for long periods of time, allowing him to defecate and urinate on himself without food or water, clearly "abandon[ed] or cruelly confin[ed their child]").

212. *See* MD. CODE ANN. FAM. LAW § 5-701(e), (s)(1)–(2) (LexisNexis 2012 & Supp. 2015) (setting age limits for when a child can be left unattended in Maryland); Pimentel, *supra* note 123, at 992 (providing hypotheticals that demonstrate the varying degrees of maturity in children); *see also* State v. Massey, 715 N.E.2d 235, 238–39 (Ohio Ct. App. 1998) (involving a mother who was found to be merely imprudent, and not neglectful, when she left her two-and-a-half-year-old daughter in the bathtub and returned approximately thirty seconds to four minutes later to find her unresponsive, which, in the court's view, implicated only speculative risks to the child and did not create a substantially foreseeable risk of harm to a child of her age).

do not specify whether such risks are reasonably perceived.[213] They simply state that a parent may be found neglectful for placing their child in harm's way.[214] Even statutes that specify risks as "substantial" or "imminent" do not define what constitutes substantial or imminent harm.[215] Such language, compounded by a standard of care that has shifted from allowing children more autonomy to overprotection, has discriminated against some families who are at the mercy of a law enforcement official's definition of "substantial" or "imminent."[216]

Applying an economic analysis to child neglect determinations will help control judicial discretion in interpreting the law. The courts, when determining whether a risk of harm is foreseeable, balance the probability of harm against the cost of prevention and social utility of an act.[217] The holding in *Chicago, Burlington & Quincy Railroad Co. v. Krayenbuhl* is particularly helpful in reevaluating child welfare statutes under this analysis. The court in *Krayenbuhl* recognized that while there were several risks associated with the use of dangerous machinery, the public benefit of using these machines far outweighed the dangers they posed because the machines are necessary for commerce and other business-related purposes.[218] Such devices should be used in the least restrictive manner until the dangers of using them outweigh the benefits. To minimize risk, such as loss of life or limb, the railroad should impose restrictions on the most efficient use of the turntable by ensuring it was locked when not in use.[219] Accordingly, "the interference with the proper use of the turntable occasioned by the use of such [a] lock is so slight that it is

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213. *See* MD. CODE ANN. FAM. LAW § 5-701(e), (s)(1)–(2) (outlining the Maryland child neglect statute that applied to the Meitiv case); *see supra* note 58 (listing the statutes of several states that follow CAPTA's definition of child neglect); *see also* DEL. CODE ANN. tit. 10, § 901(16), (18)(b)(3) (2013) (outlining a child neglect statute that does not specify the minimum culpability for neglect).

214. *See supra* notes 124–25 and accompanying text (explaining how some states have either repealed or modified the tests used under those statutes).

215. *See, e.g.*, MD. CODE ANN. FAM. LAW § 5-701(s)(1)–(2) (stating that a finding of neglect requires a finding of "substantial risk," but does not define what constitutes a "substantial risk of harm" or a "substantial risk of mental injury"); *see also supra* notes 54–56 and accompanying text.

216. *See supra* Part II (outlining the shift to overprotection, its relation to statutory enforcement, and its effect on families from different socioeconomic backgrounds).

217. *See* Chi., Burlington & Quincy R.R. Co. v. Krayenbuhl, 91 N.W. 880, 881–82 (Neb. 1902) (employing an economic analysis to determine liability for a railroad company after a turntable was left unlocked and severed a boy's foot).

218. *Id.* at 882–83.

219. *Id.*

outweighed by the danger to be anticipated from an omission to use it; therefore the public good . . . demands the use of the lock."[220]

There are a variety of laws in the United States requiring certain safety measures because the public overwhelmingly believes there is foreseeable or unreasonable harm in the absence of such measures. For example, as of November 2015, nineteen states have laws prohibiting parents from leaving their children unattended in cars, while fifteen others proposed laws that would make it illegal to do so[221]; twenty-one states and the District of Columbia have mandatory bicycle helmet laws for children below a certain age, generally under sixteen[222]; and all states have adopted some form of mandatory seat belt[223] and child passenger seat laws.[224] These and similar laws[225] reflect the public's perception that the likelihood of harm anticipated from using proper restraints and helmets is very slight,[226] or at least significantly reduced, compared to the danger anticipated from not using them.[227] Likewise, many families choose to live in coastal flood zones or earthquake-prone areas despite the chance of

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220. *Id.*

221. *Children Left Unattended in Vehicle Laws by State*, KIDSANDCARS.ORG, http://www.kidsandcars.org/state-laws.html (last visited Mar. 27, 2016).

222. *Helmet Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, http://www.ghsa.org/html/stateinfo/laws/helmet_laws.html (last updated Nov. 2015).

223. *See Seat Belt Laws*, GOVERNORS HIGHWAY SAFETY ASS'N, http://www.ghsa.org/html/stateinfo/laws/seatbelt_laws.html (last updated Nov. 2015) (listing the seat belt laws of every state, the minimum covered age, and the penalty for first time offenders).

224. *See id.* (listing the child restraint laws for every state, which includes the age and weight when a rear-facing seat is required, the ages and weight where an adult seat belt is permissible, and the penalty for first time offenders).

225. *Cf.* Yun v. Ford Motor Co., 669 A.2d 1378, 1381 (N.J. 1996) (Garibaldi, J., dissenting) (per curiam) (arguing that the plaintiff was liable for injuries sustained when he exited his car on the side of a highway and ran into traffic to retrieve a spare tire assembly that fell off because the plaintiff created a clearly dangerous condition, and stating that the state highway regulations prohibiting such behavior is "proof that society has concluded that such actions are dangerous, unreasonable and, therefore, prohibited").

226. For example, it may be more difficult to remove a child from a booster seat or infant base in an emergency. *See* Pimentel, *supra* note 52, at 283–84 (emphasizing that despite risks associated with child restraint laws, "the scientific consensus is that risks associated with unbuckled children are *far* greater than the costs and risks associated with putting them in approved safety restraints").

227. *See Child Safety*, INS. INST. FOR HIGHWAY SAFETY, http://www.iihs.org/iihs/topics/t/child-safety/fatalityfacts/child-safety (last visited Mar. 27, 2016) (observing that, as a result of mandatory child restraint laws, the rate of automobile crash deaths per million children younger than thirteen has decreased by seventy-eight percent—from 3643 to 939—between 1975 and 2013).

danger to their homes and families. They believe that the anticipated danger is remote in comparison to the reward, such as superior educational or employment opportunities, from living in these areas. Parents would not argue that child restraint laws overreach because they are aware of the serious risks associated with automobile use, which is substantiated by data showing the reduction in the number of automobile-related deaths in the past several decades.[228] An economic analysis demonstrates that the public overwhelmingly perceives the absence of helmet and seat belt laws to be an unreasonable risk because the harm likely to result from using them is much less than the danger anticipated from not using them, thereby demonstrating their social utility. Similarly, it is unlikely someone would question a judgment call about relocating based on favorable opportunities despite an increased risk of harm. Economic analysis of negligence has been applied in various areas to determine the utility of a behavior,[229] which can be extended to child neglect determinations to show whether the act a child is engaging in has a higher social utility than the harm it poses.

Although parenting views have shifted dramatically, every family approaches child supervision differently. Using an economic analysis for questionable activities where neglect may be difficult to quantify will provide a more objective foundation in assessing child neglect laws, particularly those that discriminate against parents who allow their children to remain unsupervised in public. For example, the Meitivs initially only allowed their children to play in their yard unsupervised.[230] When the Meitiv children proved they could play alone responsibly, their parents allowed them walk unsupervised for very short distances.[231] Mr. and Mrs. Meitiv assessed their children's capabilities and allowed them to walk to and from the local library and school bus stop only when they became sufficiently familiar with the neighborhood and proved capable of doing so.[232] Free-range

228. *Id.*

229. For an analogous framework applied to a negligence case in tort, *see supra* notes 98–102, 220 and accompanying text (analyzing the social utility of keeping a dangerous railroad contraption locked so it poses a significantly reduced threat).

230. *See* Peter Gray, *Meet Danielle Meitiv: Fighting for Her Kids' Rights*, PSYCHOL. TODAY (Apr. 11, 2015), https://www.psychologytoday.com/blog/freedom-learn/201504/meet-danielle-meitiv-fighting-her-kids-rights.

231. *Id.*; *see also* Wallace, *supra* note 79 (emphasizing that the children previously walked and played alone in closer proximity to their home prior to the second incident).

232. *See* Gray, *supra* note 230 (stating that the Meitivs, after an interview involving the second incident where the children were detained by Montgomery County, Maryland police, felt their children were ready to walk home from the nearby park).

parents in particular will be helped by an economic analysis of negligence because it takes into account the social utility of the act in which the child is engaging, and the courts are likely to agree that allowing children to remain unsupervised at times can benefit psychological and physical health. While an economic analysis is helpful in quantifying difficult choices that some parents make, other indicators are both necessary and helpful in ascertaining the likelihood of a "substantial" or "imminent" injury in cases where parents do not have a choice but to allow their children to remain unsupervised, as in the Harrell case. At this point, the operative question becomes whether that risk of harm is substantially foreseeable or unreasonable.

2. Analyzing the foreseeability or likelihood of resulting harm

When a court cannot clearly determine the level of culpability by employing an economic analysis in evaluating suspected abuse or neglect, it should consider the foreseeability or likelihood of harm resulting from the action the child is engaging in. Child abuse and neglect statutes employ vague language because there are infinite ways for negligence to manifest. However, as previously discussed, child neglect statutes that employ vague language, though stating a transformative standard of care, have caused inconsistent removal determinations.[233] After carefully weighing the facts and circumstances of each case, it should not be particularly difficult to determine the foreseeability of an injury, or whether an injury is substantially connected to a negligent act. If a risk that is reasonably perceived—such as allowing children to play in the back of a car unrestrained or walking in a dangerous neighborhood at night unsupervised—manifests in injury, a parent may be found guilty of abuse or neglect.[234] But parents should not be liable for the unforeseen consequences of their parental discretion, particularly those that do not cause injury and have social utility because they intend to instill a sense of independence, self-reliance, and maturity in children, and ultimately provide them with a better life.[235] If negligence was found in similar cases without a substantial likelihood

233. *See supra* Parts I–II (cataloguing various state-level child neglect statutes and explaining their inconsistent application).

234. However, one commentator argues that even an unreasonable parenting decision should not warrant removal because "[p]arents are not perfect and will make occasional mistakes, missteps, or omissions, even negligent ones." Pimentel, *supra* note 52, at 284.

235. *See supra* Section I.A.5 (describing the circumstances surrounding the arrest of Debra Harrell, who was working to support her daughter).

of harm, parents could be negligent "for any and all consequences, however novel or extraordinary."[236]

Data has shown that children are much safer today than they were twenty years ago[237] and that fears reinforcing overprotective standards are largely misguided.[238] Some have even suggested that helicopter parenting norms can increase the risk of various health-related issues,[239] which children may carry into adulthood.[240] If there is

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236. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 101 (N.Y. 1928).

237. *See* DAVID FINKELHOR & RICHARD ORMROD, U.S. DEP'T OF JUSTICE, CHARACTERISTICS OF CRIMES AGAINST JUVENILES 3 (2000) (indicating that juveniles make up a small percentage of victimization rates in the United States); Christopher Ingraham, *There's Never Been a Safer Time to Be a Kid in America*, WASH. POST (Apr. 14, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/14/theres-never-been-a-safer-time-to-be-a-kid-in-america (analyzing the sharp decline in child-related mortality statistics between 1990 and 2012, which includes a forty percent decline in reports of missing children and a more than a sixty-six percent drop in child pedestrians struck and killed by cars); *see also* CHILD MALTREATMENT, *supra* note 63, at ii (stating that between 2009 and 2013, child victimization rates dropped from 9.3 to 9.1 per 1000 children, which accounts for approximately 23,000 fewer victims).

238. *See* Pimentel, *supra* note 52, at 250–51 (asserting that, although car accidents are by far the most serious risk to children, parents' overprotection stems from misguided fears of stranger abduction, which constitutes a very remote threat to children); *see also* FINKELHOR & ORMROD, *supra* note 237, at 7 (stating that eighty percent of perpetrators against juveniles are known to the victim, and "[d]espite the stereotypes about stranger molesters and rapists, sex offenses are the crimes least likely to involve strangers as perpetrators"); Sam Wright, *Free-Range Parents and the Law*, ABOVE THE LAW (Apr. 21, 2015, 10:00 AM), http://abovethelaw.com/2015/04/free-range-parents-and-the-law (suggesting that allowing a child to walk home from a playground may be "less of a threat to that child's safety than the everyday act of buckling . . . into a car"); *Crime in the United States 2012*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/tables/1tabledatadecoverviewpdf/table_1_crime_in_the_united_states_by_volume_and_rate_per_100000_inhabitants_1993-2012.xls (reporting that between 1993 and 2012, violent crime declined from a rate of 747.1 per 100,000 inhabitants to 386.9 per 100,000 inhabitants; murder and non-negligent manslaughter from 9.5 to 4.7; forcible rape 41.1 to 26.9; robbery 256 to 112.9; and aggravated assault 440.5 to 242.3).

239. *See, e.g.*, Pimentel, *supra* note 52, at 255 (contending that close supervision of a child's environment can discourage a child from developing autonomy and self-confidence, exacerbate childhood obesity because children spend the majority of their time indoors in sedentary activity, and hinder the development of natural immunities due to lack of exposure to other children and the outdoors); Pimentel, *supra* note 123, at 958 (averring that helicopter parents who restrain children from playing outdoors also "impair[s] the child's ability to develop independence, responsibility, and self-reliance"); *see also* CHERYL D. FRYAR ET AL., PREVALENCE OF OVERWEIGHT AND OBESITY AMONG CHILDREN AND ADOLESCENTS 1 (2014) (stating that 16.9% of children and adolescents aged two to nineteen are obese, and 14.9% are overweight, while the percentages for these same groups in the early 1970's were 10.2% and 5.2%, respectively); Brody, *supra* note 75 (linking the significant rise in

neither an actual injury nor one that is reasonably foreseeable as a result of similar actions, there can be no finding of neglect if other risk factors are not present. Terms such as "substantial," and phrases like "endangers the life" have been incorporated into many states' child neglect statutes[241] and have resulted in rulings of parental neglect in cases where an injury is only remotely foreseeable.[242] As a result, it appears these terms and phrases have been interpreted over the years to mean "any egregious harm that can occur, *even if unlikely*," which is why Ms. Harrell in South Carolina, the Meitivs in Maryland, and other parents who, whether by choice or not, allow their children to be unsupervised, have been held civilly and criminally liable for child neglect.[243] The result is the perpetuation of the helicopter parenting standard and reinforcement of largely unfounded fears of danger to children.[244] Furthermore, child neglect statutes neither require any showing of harm to the child nor specify the foreseeability of harm likely to occur, tend to look at the parents exclusively, and do not emphasize the child's behavior.[245]

In *Palsgraf*, Justice Cardozo held that negligence is based on the foreseeability of harm, where a more foreseeable risk imports a heightened duty to prevent that risk from manifesting.[246] Applying Justice Cardozo's analysis to the Meitiv case, for example, would yield more just results because there was no foreseeable "substantial risk of harm"[247] to the children walking home from a park midday in a well-populated neighborhood after their parents determined they were

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childhood depression, anxiety disorders, and Type 2 diabetes over the past five decades to the decline in outdoor play among children).

240. *See* Bernstein & Triger, *supra* note 4, at 1260 (noting that obesity in children, which has tripled between 1980 and 2004, is a key precursor to adulthood obesity).

241. *See supra* note 58 (outlining the statutes of several states that use a variation of the word "substantial" or provide even less emphasis in defining child neglect).

242. *See supra* Section I.A.5 (describing the Meitiv and Harrell cases).

243. *See supra* Section I.A.5 (describing the various contexts in which a parent can be held liable for child neglect).

244. *See supra* note 238 and accompanying text (asserting that despite the perception of stranger abduction as a "substantial risk" to children, it is not reasonably likely to occur).

245. *See* Wald, *supra* note 69, at 1000–01 (summarizing the current state standards for intervention and commenting that they define neglect in terms of parental conduct and seldom require a showing of harm to the child); *supra* note 12 and accompanying text (discussing *Rodriguez v. Dumpson*, 52 A.D.2d 299 (N.Y. App. Div. 1976), in which a family court dismissed the plaintiff's appeal because, in its view, her blindness prevented her from providing adequate care for her son).

246. Palsgraf v. Long Island R.R. Co., 162 N.E. 99, 100–01 (N.Y. 1928).

247. MD. CODE ANN. FAM. LAW § 5-701(s)(1) (LexisNexis 2012 & Supp. 2015).

capable of doing so.[248] Ms. Harrell, who, unlike the Meitivs, had no choice but to leave her daughter unsupervised, diminished any foreseeable harm by choosing a park in close proximity and providing her daughter with a cell phone to use in the event of an emergency.[249] In quantifying neglectful behavior, a foreseeability analysis takes the economic analysis approach a step further by ascertaining the likelihood of an injury in cases where children are unsupervised in public.

i. Intervening events serving as superseding causes

An argument can be made that a parent should be held accountable for their child's actions, as children are held to a lower standard of care unless they are engaging in an inherently dangerous activity.[250] But if the child was not engaging in an activity that society has not deemed to be unreasonably dangerous, or if the child was injured by a third party, parents should not be held unequivocally accountable for judgments that do not give rise to foreseeable harm.

In tort law, an intervening event that is unrelated to a parenting decision will serve as a superseding cause of injury and break the chain of causation that would normally permit a finding of negligence. If a child is injured as the result of a third party (e.g., hit by a car or assaulted), the parents should not be presumed neglectful. Law enforcement officials need to evaluate suspected cases of neglect on a case-by-case basis and look at the actual injury to determine whether it is a foreseeable consequence of a parenting decision. For example, in *State v. Forcum*,[251] a mother left her three young children, one of whom was six years old, at home with her sixteen-year-old drunk son while she went grocery shopping.[252] Despite deplorable sanitary conditions at the home, the Oregon Court of Appeals overturned her conviction of child neglect, stating that such an act "cannot be described as leaving her [youngest child] 'unattended' or as a specific act likely to endanger the child's health or welfare . . . [and the mother's] absence [did not] . . . create[] any greater risks than her presence."[253] In such cases, the evidence must show that a

248. Wallace, *supra* note 79.

249. Covert, *supra* note 84.

250. Robinson v. Lindsay, 598 P.2d 392, 393–94 (Wash. 1979) (en banc) (holding that "the child should be held to an adult standard of care" because he was engaged in the inherently dangerous activity of driving a snowmobile at the time of the accident).

251. 646 P.2d 1356 (Or. Ct. App. 1982).

252. *Id.* at 1357.

253. *Id.* at 1358.

parent who performs an act without recognizing an increased likelihood that the child may be harmed was different "in an extraordinary way from what others would have done in similar circumstances."[254]

If, for example, a child is walking home from a nearby park, as the Meitiv children were, and the child is hit by a speeding car while the children are legally crossing the road, the parents should not be held liable for neglect or negligent supervision solely because they should have been protecting their child. A finding of neglect in this and similar situations would be too remote to hold a parent liable, as the parental conduct was not a substantial factor in causing the injury.[255] If, on the other hand, the child was illegally crossing the street while the same car had a green light, one might presume that a parent might be guilty of neglect by not carefully evaluating their child's capabilities. Or if the child is not properly restrained in the car or is not wearing a bicycle helmet in violation of safety laws, a parent may be found neglectful.

A contextual approach that balances factors against the social utility of the act and the foreseeability of injury is appropriate in similar situations. Although many states reject negligent supervision of a child altogether under the parental immunity doctrine,[256] the Restatement (Second) of Torts offers several considerations that are important in determining whether an intervening event functions as a superseding cause that will sever liability for negligence:

> (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
>
> (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
>
> (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
>
> (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;

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254. State v. McLaughlin, 600 P.2d 474, 477 (Or. Ct. App. 1979).

255. *See, e.g.*, Phila. Mfrs. Mut. Ins. Co. v. Gulf Forge Co., 555 F. Supp. 519, 526 (S.D. Tex. 1982) (stating that liability for negligence "must flow from affirmative conduct which creates or augments the risk of harm").

256. *See, e.g.*, Zellmer v. Zellmer, 188 P.3d 497, 501 (Wash. 2008) (en banc) (reiterating that the parental immunity doctrine shields both natural parents and stepparents from "ordinary" negligent supervision of a child, but not willful or wanton misconduct).

> (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
>
> (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.[257]

Similar considerations would allow state legislatures to effectively modify child neglect statutes to identify or rule out superseding causes. The Illinois child neglect statute, for example, defines a neglected child by setting out a list of additional factors to be considered that can help guide law enforcement officials to more effectively exercise their discretion.[258] Still, parents in many jurisdictions risk the removal of their children because no specific criteria exist to define neglect, particularly when the child has not been injured.[259] Stronger statutory language will allow more effective determinations and elucidation of individualized facts. Because there are no clear guidelines, most jurisdictions only have examples from trial proceedings which are so heavily tailored to the facts of each case that they neither allow an objective assessment of neglect, nor expound a clear standard that is applicable to all cases.[260]

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257. RESTATEMENT (SECOND) OF TORTS § 442 (AM. LAW INST. 1965).

258. *See, e.g.*, 705 ILL. COMP. STAT. 405/2-3(1)(d) (West 2007) (incorporating fifteen separate factors to consider in negligent supervision determinations, including "the age of the minor; . . . [the] special needs of the minor[;] . . . the duration of time in which the minor was left[;] . . . the condition and location of the place where the minor was left[;] . . . the time of day or night[;] . . . the weather conditions; . . . the [proximity] of the parent or guardian[;] . . . 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; . . . [and] the age and physical and mental capabilities of the person or persons who provided supervision"); *see also* DEL. CODE. ANN. tit. 10, § 901(18)(b)(3) (2013) (incorporating factors that courts should consider in neglect determinations, such as "the child's age, mental ability, physical condition, the length of the caretaker's absence, and the context of the child's environment").

259. *See, e.g.*, *supra* Sections I.A.5, II.B, II.E (providing examples of how child neglect statutes have affected families that have not placed their child at risk of harm); *see also* DEL. CODE. ANN. tit. 10, § 901(16), (18)(b)(3) (defining neglect as a failure "to provide necessary supervision appropriate for a child when the child is unable to care for that child's own basic needs or safety"); IND. CODE ANN. § 35-46-1-4(a)(1)–(4) (West 2014) (stating that a parent commits neglect when that person "knowingly or intentionally (1) places the dependent in a situation that endangers the dependent's life or health; (2) abandons or cruelly confines the dependent; (3) deprives the dependent of necessary support; or (4) deprives the dependent of education as required by law").

260. *See supra* notes 166–70 and accompanying text (illustrating a case where a blind mother fought to regain custody of her son after a family court determined her disability prevented her from providing adequate parental care).

Consequently, the child's best interest is afforded no deference because it is interpreted at the sole discretion of a judge, who "can disregard and overturn *any* decision by a fit custodial parent."[261]

Ultimately, if a parent sanctions his or her child's activity where there is a remotely foreseeable risk of harm, it should not be seen as an aggravating factor in neglect determinations. If the opposite is true—the risk of harm is reasonably foreseeable or unreasonable—the activity would serve to undermine the deference given to parents in raising their children. Accordingly, the decision should be seen as an aggravating factor, which should be taken into consideration with other factors relevant to making an accurate determination.

3. Balancing economic factors and foreseeability of harm against additional factors

The courts should also consider the child's interests by applying additional factors to further clarify a standard that weighs the social utility of a child's activity and the foreseeable likelihood of a resulting injury. Factors specifically relating to the child may include the child's age, maturity level, special needs, capability of contacting someone in the event of an emergency, proximity to parents or siblings, familiarity with his or her surroundings, adequate clothing, and the child's own interest in being unattended. Environmental factors may include the time of day, crime statistics of the area, weather conditions, geographic location, access to food and water, and whether an injury resulted from the actions of a third party. Factors relating to a parent may include his or her age; cognitive capabilities; the reason the child was left unattended, whether due to a particular parenting value, economic hardship, illness, etc., and its effect on the parent's ability to provide adequate care for the child; the parent's ability, financial or otherwise, to secure child care; whether the parents allowed another person to supervise the child, and whether that person is capable of supervising a child.

Incorporating similar factors into child neglect statues, while carefully balancing them against the social utility of the child's activity and the foreseeability of an injury, may reduce the number of erroneous removals by treating all parents equally. For example, the Meitiv children were walking in the middle of the day in a safe, populated, and well-traveled area[262] only a few minutes from home[263]

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261. Troxel v. Granville, 530 U.S. 57, 67 (2000).

262. *See* Gray, *supra* note 230 (stating that the neighborhood the Meitiv children were walking was "pleasant, diverse, and very safe").

and understood where they were and where they were going.[264] The Meitiv parents are a seemingly well-educated, middle-class couple[265] that sought to promote independence and maturity in their children by allowing them to walk short distances unsupervised,[266] which had no effect on their capacity to provide adequate care for their children.[267] Likewise, if the police inquired as to why Ms. Harrell's daughter was playing in a park unsupervised, Ms. Harrell may not have been jailed or lost custody of her daughter.[268]

Under this hybrid framework, discretion in child neglect determinations will be controlled, allowing for more uniform law enforcement and affording parents more room to comfortably deviate from helicopter parenting norms should they choose to, all while acknowledging and preserving the constitutional precept protecting parents' rights to make child-rearing decisions and affording the child's best interest proper deference.

CONCLUSION

Parenting standards today contrast with traditional notions of the parent-child relationship, manifesting a tone that censures the personal freedom and privacy of families and the sense of adventure and imagination children possess.[269] Instead, parenting norms now reflect an obsession with child safety and overprotection, but parents' varied circumstances[270] create innumerable ways to properly raise

263. *See* Metcalf, *supra* note 77 (stating that police picked up the children approximately three blocks from their home).

264. *See* Wallace, *supra* note 79 (emphasizing that the children were walking home from a nearby playground).

265. *See* Gray, *supra* note 230 (stating that Mr. Meitiv is a "theoretical physicist and modeler who studies evolution at the molecular level at the National Institutes of Health," and Mrs. Meitiv is an oceanographer who works "as a freelance climate science consultant and science writer").

266. *Id.* (reporting that the Meitivs were closely monitoring their children's capabilities by initially only allowing them to play in their yard, then extending that range to the street in front of their house, and only permitting them to walk longer distances when they proved themselves capable of doing so).

267. *See* Smith & Effron, *supra* note 174 (observing that the Meitivs were fully capable of caring for their children, and their parenting philosophy reflects the way millions of adults were raised).

268. *See supra* Section I.A.5 (describing the Harrell case).

269. *See* Levs, *supra* note 7 (suggesting that parents who micromanage every detail of their children's daily schedule prevent them from "go[ing] out and play[ing]").

270. *See supra* Part II (analyzing the troubling results that child neglect statutes have had on various families where there was no actual or reasonably foreseeable harm to the child).

children. Although the Meitiv case is a clear example that parenting philosophies that do not conform to overprotective norms will be condemned,[271] the relevant statutes have led to discrimination against families for decades, which has threatened, and will continue to threaten, the bond of functional and loving families. However, the Supreme Court has consistently recognized for nearly a century that parents have the constitutional liberty to care for, raise, and guide their children, and an analogous privacy interest to do so "without the undue interference of strangers to them and to their child."[272] More critically, though, the many cases applying this principle have shown that there is a corresponding presumption that the "natural bonds of affection lead parents to act in the best interests of their children."[273]

Child abuse and neglect law enforcement reflects the shifting trend to helicopter parenting and the reinforcement of overprotective norms, which has influenced the interpretation of child neglect legislation. Because societal customs are ever-evolving, the legislature should institute the more objective-based standard of tort law in reevaluating child neglect statutes and provide specific guidelines as to what constitutes child abuse or neglect to control discretion in law enforcement. Revising child neglect statutes through the lens of tort law would provide a more comprehensive framework for child neglect standards, offer a fair and objective assessment of injury or potential injury to a child,[274] and avoid the social cost of criminalizing parenting practices that are neither abusive nor neglectful. Although the social utility of free-range parenting is evident, there is also social utility when a parent has no choice but to allow their child to remain unsupervised. In many such cases, parents are working to provide adequate food, clothing, and shelter so that their children may lead a better life. Absent any actual harm to a child, the standard should account for the utility in various child-rearing practices, the foreseeability of harm, and any other mitigating or aggravating factors that are helpful in making child neglect determinations.

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271. *See supra* notes 77–83 and accompanying text (detailing the Meitiv case and results from an investigation by Maryland CPS).

272. Troxel v. Granville, 530 U.S. 57, 87 (2000) (Stevens, J., dissenting).

273. *Id.* at 68 (majority opinion) (quoting Parham v. J.R., 442 U.S. 584, 602 (1979)).

274. *See supra* Part II (arguing that tort law can help guide legislatures to redraft child neglect statutes to recognize various parental philosophies and the deference afforded to parents in raising their children).