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Fearing the Bogeyman: How the Legal System's Overreaction to Perceived Danger Threatens Families and Children

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FEARING THE BOGEYMAN:
HOW THE LEGAL SYSTEM'S OVERREACTION
TO PERCEIVED DANGER
THREATENS FAMILIES AND CHILDREN

*David Pimentel**

ABSTRACT

In the last generation, American parenting norms have shifted dramatically, reflecting a near obsession with child safety and especially the risk of stranger abduction. A growing body of literature shows, however, that the threats to children are more imagined than real, and that the effort to protect children from these “bogeymen” may be doing more harm than good. Advocates of “Free-Range” parenting argue that giving children a long leash can help them learn responsibility, explore the world outside, get physical exercise, and develop self-sufficiency. But the State, usually acting through Child Protective Services (CPS), is likely to second-guess parents’ judgments on such issues, and enforce the overprotective and arguably harmful norms. Researchers and policymakers agree that CPS intervenes in far too many cases, traumatizing families by “removing” children and being slow to reunite such families even after a removal is found to have been unwarranted. Indeed, a child who is *not* being maltreated at home is far more likely—by multiple orders of magnitude—to be seized by CPS than by a kidnapper. Thus CPS, in the name of child safety, *becomes* the bogeyman, the child-snatcher parents should fear.

The problems are traceable to the vague statutes—starting with the Child Abuse Prevention and Treatment Act of 1974—that fail to accommodate the risk-management decisions parents must routinely make or to respect parental discretion. In effect, these statutes give CPS broad power to intervene in families that eschew the overprotection craze, and deny Free Range parents the latitude to trust their own parenting instincts, or to defend their families from government intrusion. Moreover, CPS faces

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strong incentives to make removal and foster care a remedy of first resort even when it is unclear that a child is endangered at all.

The statutes should be redrafted in a way that (1) recognizes parenting as an exercise in risk management, using a “grossly disproportionate” standard for risk assessments, and (2) protects parents’ discretion in making those judgment calls by employing an “abuse of discretion” standard for interventions. At the same time CPS’s incentives should be restructured to discourage unwarranted interventions and to enable caseworkers to devote energies and resources to keeping children safe *within* their own families, rather than coercing conformity by threatening removal. Until such changes are made, Free Range parents, and all parents, will be intimidated into adhering to these stifling, overprotective norms, to the detriment of society, of families, and of the children themselves.

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INTRODUCTION

One of the critical rights and privileges parents should enjoy is the discretion to raise their children as they see fit. This principle has been respected and upheld by common law courts for centuries. As American and Commonwealth societies became increasingly concerned about child abuse over the past two generations,¹ however, much of the deference previously accorded to parents has atrophied, at least on matters of child protection and safety.² The State no longer hesitates to intervene when children are at risk of harm. To a large degree, society no longer trusts parents to manage the risks.

As child safety concerns have become a societal priority, they have revolutionized parenting at the same time. Parenting norms in the U.S. now reflect a near obsession with safety, including a paranoia over the risk of stranger abduction,³ viewing “sex offenders [as] the new bogeymen.”⁴ But this new emphasis is not necessarily healthy for kids or for families. The data shows that parents’ new obsession with safety is not grounded in reality, that kids are far safer than they’ve ever been, and that the risk of stranger abduction is negligible.⁵ Moreover, there is growing evidence that an exaggerated response to perceived risks subjects children far more

¹ Joel Best identifies 1962 as the “beginning of contemporary concern about child abuse.” JOEL BEST, THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD VICTIMS, 6 (1990) (citing the publication that year of C. Henry Kempe, et al., *The Battered-Child Syndrome* 181 J. AM. MEDICAL ASS’N 17-24 (1962)).

² See discussion *infra* Part I.A.

³ “Paranoia” is used here not in the clinical sense, *i.e.* there is no diagnosis of mental illness. Rather, it is used in its more colloquial sense, meaning “a tendency on the part of an individual or group toward excessive or irrational suspiciousness and distrustfulness of others.” Merriam-Webster Online Dictionary (2014), <http://www.merriam-webster.com/dictionary/paranoia> (last viewed January 11, 2014).

⁴ Andrew Extein, *Fear the Bogeyman: Sex Offender Panic on Halloween* (Huffington Post, Oct. 25, 2013), http://www.huffingtonpost.com/andrew-extein-msw/fear-the-bogeyman-sex-off_b_4161136.html.

⁵ Extein, *supra* note 4.

probable and immediate harm. By keeping kids indoors where they are “safe,” for example, we restrict their activity levels which, in turn, negatively affects their health and development.⁶

“Free-Range” parenting advocates resist these new protective norms, arguing also that if kids are denied an opportunity to develop or demonstrate independence, they will grow up with a diminished sense of personal responsibility and self-sufficiency.⁷ Yet even these parents are now afraid to give their kids that longer leash, not because they fear harm to the kids, but because they fear the intervention of Child Protective Services (CPS).

The legal problem comes with determining when it is appropriate for the State to intervene in the family to protect children. If the legal standard is identified in terms of “risk” to the child, that poses a serious problem for enforcement, since avoiding one risk often exposes the child to another risk. And if the concept of unacceptable risk to a child is dictated by evolving community norms, norms now skewed by sensationalized media and unsubstantiated paranoia, Free Range parents will be threatened and bullied into adhering to the new standards of overprotection.

The standards applied by CPS personnel, therefore, must be scrutinized and revised to protect the reasonable discretion of parents in the risk-management decisions they make for their children. CPS’s incentive structure should be revisited as well, as the allocation of legal and financial responsibilities prompt CPS to err on the side of intervening—and removing children from their families—too quickly and too often. Thus the State becomes the bogeyman, for it is CPS, not the stranger abductor, who poses the more credible threat to snatch one’s children away.⁸ Absent reforms in CPS’s mandate, authority, or practice, State intervention will

⁶ See, e.g., CYNTHIA OGDEN & MARGARET CARROLL, DIV. OF HEALTH & NUTRITION EXAMINATION SURVEYS, PREVALENCE OF OBESITY AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, TRENDS 1963–1965 THROUGH 2007–2008 (2010), available at http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf; see also discussion of child obesity at note 102 *infra*.

⁷ LENORE SKENAZY, FREE-RANGE KIDS: GIVING OUR CHILDREN THE FREEDOM WE HAD WITHOUT GOING NUTS WITH WORRY, xxi (2009); see also Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1275 (2011) (stating that the heavy monitoring involved in Intensive Parenting has been shown to prevent children from developing independence, self-sufficiency, and the coping skills needed to handle the hardships of life).

⁸ See *infra* notes 131-134 and accompanying text.

unnecessarily disrupt many families, and the threat of such intervention will coerce the rest into a type of overprotection that is not only unwarranted but unhealthy for society, for the family, and for the children themselves.

I. PARENTAL DISCRETION V. STATE CONTROL

A. *The Child Protection Priority and the Decline of Legal Deference to Parents*

The State's policy priorities toward children and families necessarily involve a difficult balancing act. Child protection, which may on occasion require removing an at-risk child from a dangerous home environment, necessarily comes at the expense of other compelling priorities, including the integrity of the family and the interest in keeping families intact.⁹ The law has long recognized that, as a general proposition, society is best served by strengthening and protecting families, so children can be raised by their own parents, who presumably know them best and love them best.¹⁰

At the same time, the policy protects a fundamental human right, to bear children, and to raise their own children as they see fit. Indeed, the Supreme Court has ruled that parents' discretion over the moral education of their own children is protected as a matter of substantive due process,¹¹ observing, in *Troxel v. Granville* in 2000, that the parents' interest in the care, custody and control of their children—elsewhere labeled as the interest in “parental autonomy”¹²—“is perhaps the oldest of the

⁹ Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773 (2008) (highlighting the potential conflict between parental autonomy and child protection).

¹⁰ See, e.g., *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816 (1977); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

¹¹ *Troxel v. Granville*, 530 U.S. 57, 66 (2000) (“[I]t cannot now be doubted that the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution protects the fundamental right of parents to make decisions governing the care, custody, and control of their children.”); see also *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (“In a long line of cases, we have held that, in addition to the specific freedoms protected by the Bill of Rights, the ‘liberty’ specially protected by the Due Process Clause includes the right to . . . direct the education and upbringing of one’s children”)

¹² Elaine M. Chiu, *The Culture Differential in Parental Autonomy*, 41 U.C. DAVIS L. REV. 1773 (2008) (highlighting the potential conflict between parental autonomy and child protection); Ursula C. Basset, *Autonomous Choices of Adults and the Rights of Children: Can a Satisfactory Balance Ever be Achieved?* (unpublished manuscript).

fundamental liberty interests recognized by this Court.”¹³

At the same time, the concept of parental autonomy is arguably oxymoronic, as *autonomy* implies control of oneself, whereas *parenting* is all about care of another.¹⁴ Indeed, to recognize unfettered parental autonomy is to disregard entirely the interests of the child, and for hundreds of years, Anglo-American law did precisely that, declining to intervene in internal family matters to protect children from their own parents.¹⁵ By the mid-twentieth century, however, with growing recognition of the problem of child abuse,¹⁶ these principles had begun to erode, and the interest in child protection acquired significant legal force.¹⁷ The changes came piecemeal, but in a variety of contexts, as courts and legislatures acknowledged and responded to what was perceived as a national crisis of threats to children.¹⁸

1. Demise of the Parental Immunity Doctrine

One key example of this shift is the decline of the common law parental immunity doctrine.¹⁹ The doctrine held that a child cannot sue her or his parent in tort, lest such legal disputes undermine the societal interest in family unity.²⁰ In recent years, the doctrine has been broken down, and in some states fully abrogated, based in large part on concerns about child

¹³ *Troxel*, 530 U.S. at 65.

¹⁴ *Basset*, *supra* note 12.

¹⁵ See Francis Barry McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975, 975-76 (1988). Or to protect wives from their husbands, for that matter. See, e.g., *State v. Oliver*, 70 N.C. 60 (1874).

¹⁶ BEST, *supra* note 1.

¹⁷ See statutes cited *infra* at note 24.

¹⁸ BEST, *supra* note 1, at 152 *et seq.*

¹⁹ For a nice discussion of parental immunity, noting that the doctrine is far from dead and that, for a variety of reasons, they should not fear tort liability related to their parenting decisions, see Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533 (2013). The fear of tort liability, however, is unlikely to be a primary concern of parents. For a discussion of parental fear of *criminal* liability, see David Pimentel, *Criminal Child Neglect and the “Free Range Kid”: Is Overprotective Parenting the New Standard of Care?* 2012 UTAH L. R. 947 (2012). This article, however, discusses the far more immediate fear of CPS intervention.

²⁰ See Michele Goodwin & Naomi Duke, *Capacity and Autonomy: A Thought Experiment on Minors’ Access to Assisted Reproductive Technology*, 34 HARV. J.L. & GENDER 503, 518 (2011) (“[P]arental immunity . . . [was] justified as furthering individual and broader social goals. . . . As a public policy matter, courts deemed it in society’s interest that households reside in harmonious companionship unimpaired by the tensions that could arise from litigation.”).

abuse,²¹ and a new, higher priority placed on interests in child protection.²²

2. Federal Legislation

Even more compelling than the evolving common law is the series of legislative actions—both state and federal—aimed at protecting children, and therefore, necessarily, undermining interests in parental autonomy. Although historically and traditionally a matter of state law, the child welfare system has become increasingly federalized since 1974,²³ under a series of statutes passed by Congress in the years that followed.²⁴ Two of

²¹ Amy L. Nilsen, Comment, *Speaking Out Against Passive Parent Child Abuse: The Time Has Come to Hold Parents Liable for Failing to Protect Their Children*, 37 HOUS. L. REV. 253, 270, 275-77 (2000).

²² See Chiu, *supra* note 12 (highlighting the potential conflict between parental autonomy and child protection).

²³ 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, 485-89 (2008). The adoption of The Child Abuse Prevention and Treatment Act (CAPTA), adopted in 1974, is now codified at 42 U.S.C. § 5106.

²⁴ The federal statutes include the Victims of Child Abuse Act of 1990, 42 U.S.C. § 13001 (designed to improve investigation and prosecution of child abuse and neglect; established “regional children’s advocacy centers” to assist communities in developing programs designed to improve resources available to families and communities, provide support to child welfare workers, and increase training for medical professionals in approaching the problem of child abuse; provides grants to states to implement these local children’s advocacy centers by meeting specific criteria enumerated in the statute; provides grants to national organizations for the establishment of a court-appointed advocate program was also developed within the Act and grants to the judiciary and staff for training in handling child abuse and neglect cases; instituted a requirement for criminal background checks for federal employees working with children; and significantly, §13031 also mandated certain professionals engaged in a professional capacity on Federal lands or facilities to report suspected child abuse or neglect); Indian Child Welfare Act of 1978, 25 U.S.C. § 1901 (set forth the policy of the United States as protecting and preserving tribal families and establishing minimum Federal standards for the removal of tribal children from their families and their placement into the foster care homes that reflect tribal culture and values); Adoption and Safe Families Act of 1997, 42 U.S.C. § 1305 (establishes an Advisory Committee on Adoption Foster Care and Information to assess the various methods employed in the foster care and adoption systems and data regarding the children in the system; Foster Care Independence Act of 1999, 42 U.S.C. § 1305 (establishes “demonstration projects” which states can qualify for to implement certain desired policies, e.g., transition foster care children into society, increase “positive outcomes” for children, and prevent child abuse and neglect); Child and Family Services Improvement Act of 2006, 42 U.S.C. § 625 (authorizes grants to states, programs, and public/private institutions for the administration and supervision of child welfare research); Adam Walsh Child Protection and Safety Act of 2006, 42 U.S.C. § 16901 (establishes a national system for registration of sex offenders to prevent child sexual abuse). The Child Abuse Prevention

the federal statutes are particularly significant, and will be discussed separately.

a. The Child Abuse Prevention and Treatment Act (CAPTA)

Perhaps the most significant legislative action in this period is CAPTA, enacted by the U.S. Congress in 1974, and its series of reauthorizations.²⁵ It was the first federal venture into a subject area that had been exclusively the domain of state law.²⁶ It provided funding to states to fight child abuse, if and only if the states met certain minimum standards for responding to child abuse in their respective jurisdictions.²⁷

The legislative history of CAPTA illustrates the difficulty in defining child abuse and neglect, in striking the difficult balance between child protection on the one hand, and preserving both the liberty interests of parents and societal interests in the integrity of the family on the other. The original bill introduced by Congressman Mario Biaggi in 1971 defined child abuse as including:

the physical or mental injury, severe abuse or maltreatment of a child under the age of sixteen by a person who is responsible for the child's care and protection or who is a member of the child's household, occurring under circumstances which indicate that the child's health or welfare is harmed or threatened thereby, as determined in accordance with regulations prescribed by the Secretary.²⁸

The original Senate version of the bill did not contain any definition of child abuse or neglect, but ended up incorporating the House's definition.²⁹ However, that definition was subjected to a series of amendments in the House to increase the age of a child to eighteen, to include "negligent treatment," and to encompass sexual abuse, all of which were included in the version of CAPTA passed and enacted in 1974.³⁰ The definition was further modified in subsequent reauthorizations of CAPTA to include

and Treatment Act of 1974, and the Adoption Assistance and Child Welfare Act of 1980 deserve, and get, more thorough treatment in the text.

²⁵ 42 U.S.C. § 5106g.

²⁶ Davidson, *supra* note 23, at 485-90.

²⁷ *Id.*

²⁸ H.R. 10336, 92d Cong. (1971).

²⁹ S. 1191, 93d Cong. (1973).

³⁰ H. Rep. No. 93-685, at 29-30 (1973).

sexual exploitation,³¹ as well as the denial of medical treatment and nutrition to disabled children.³² One of these later modifications also expanded the scope of liability to childcare providers.³³ Thus, by 1989 reauthorized CAPTA defined child abuse and neglect as

The physical or mental injury, sexual abuse or exploitation, negligent treatment, or maltreatment of a child 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 thereby, as determined in accordance with regulations prescribed by the Secretary.³⁴

But that definition proved to be too inclusive and intrusive. In 1995, the Senate Committee on Labor and Human Resources issued a report finding that the rate of unsubstantiated reports of child abuse and neglect had skyrocketed and were “overwhelming an already overburdened child protective system.”³⁵ The Committee noted with concern that such unfounded reports were detrimental to both children and families: Not only do some of these reports result in unjustified removals, the investigation itself intrudes upon and disrupts the family privacy and security, which similarly compromises the best interests of the child³⁶

Additionally, the Committee stated that the “dramatic increase” in children being removed from their homes and placed in foster care was problematic due to the inherent limitations of the foster care system in supporting the child as well as the instances of child abuse occurring in foster homes.³⁷ The Committee stressed the importance of the child remaining with his or her family, stating that “[w]here a child can safely remain at home, he should be allowed to. No longer can we assume that a child will automatically be better off placed outside the home.”³⁸

³¹ H. Rep. No. 95-609, at 223 (1977).

³² See generally *To Amend the Child Abuse Prevention and Treatment and Adoption Act of 1978: Hearing on H.R. 1904 Before the Subcomm. on Select Educ. of the H. Comm. on Educ. and Labor*, 98th Cong. 1 (1980).

³³ H. Rep. No. 11-82, at 36 (1984) (Conf. Rep.).

³⁴ Child Abuse Prevention, Adoption, and Family Services Act of 1988, Pub. L. No. 100-294, 101 Stat. 102.

³⁵ S. Rep. No. 104-117, at 3491 (1995).

³⁶ *Id.* See also Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 418-19 (2005).

³⁷ S. Rep. No. 104-117, at 3492.

³⁸ *Id.* at 3493.

Therefore, the Committee recommended amending the 1989 definition of child abuse to allow states “to limit abuse and neglect definitions to serious harm to a child,”³⁹ striking a new balance that gave greater deference to family integrity and autonomy. Importantly, Congress did not suggest that it was tipping the scales back toward parental autonomy *at the expense of* child protection. Rather, it stated that the best interests of children required that the intrusions and interventions be scaled back.⁴⁰

In the end, Congress settled on the language in effect today, defining “child abuse and neglect” as

[a]ny 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 any act or failure to act which presents an imminent risk of serious harm.⁴¹

Note the use of the word “serious” twice in the revised definition, and the elimination of the reference to mere “negligent treatment.” Although the Committee emphasized that individual states could expand the definition to define child abuse and neglect more broadly,⁴² the change was designed to limit CPS intervention to cases where the child was actually being harmed in an effort to ease the workload of CPS caseworkers and to limit unwarranted interventions.⁴³

Although the Committee’s report shows that the change in definition was meant to curtail CPS intervention 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.⁴⁴ Indeed, the change appears to have had minimal effect in reducing the number and frequency of unwarranted interventions.⁴⁵ The legal standard is still sufficiently vague to threaten the autonomy and deference that parents might otherwise enjoy in making parenting decisions.

b. Adoption Assistance and Child Welfare Act of 1980

³⁹ *Id.* at 3504.

⁴⁰ *Id.* at 3491-93.

⁴¹ 42 U.S.C. § 5106g.

⁴² S. Rep. No. 104-117, at 3504.

⁴³ *See id.*

⁴⁴ *See discussion infra* Part III.A.

⁴⁵ *See discussion infra* Part I.A.3.

The Adoption Assistance and Child Welfare Act authorizes funding for states for foster care and adoption assistance, provided that a state plan meets extensive criteria set forth in the statute, one of which is the requirement that a state agency report to the appropriate agency or official suspected child abuse or neglect.⁴⁶ The Act also requires each state plan to consult its child abuse and neglect registry for reports involving potential foster care parents, relatives, and guardians of children.⁴⁷ If a state plan meets the federal requirements, then the state receives federal funding and must make foster care maintenance payments on behalf of each removed child.⁴⁸ The placement of a child in foster care must be in the “best interest of the child” pursuant to Section 672.⁴⁹

What is significant about this statute is the substantial federal funding provided to support the removal of children from their families, to place them in foster care.⁵⁰ Only if and when the child is removed and placed in foster care does this federal money begin to flow.⁵¹ This gives state agencies a strong incentive to effect the removals, and get the children placed in foster care as soon as possible.⁵² It also creates financial incentives to keep kids in foster care, since this source of funding disappears once a child is reunited with her family.⁵³

3. Statistics on Removals

Child removals are lawful in every state, with many states allowing emergency removals without first obtaining a court order.⁵⁴ The statistics on child removals by CPS reveal a disturbing trend, specifically a steady increase in the number of children removed from their homes.⁵⁵ In 2003, a reported 206,000 children were removed.⁵⁶ Just five years later that number had risen to 267,000 children removed from their homes following a CPS

⁴⁶ 42 U.S.C. § 1305 (1980).

⁴⁷ 42 U.S.C. § 671.

⁴⁸ 42 U.S.C. § 672.

⁴⁹ *Id.*

⁵⁰ See generally *Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, UNITED STATES DEPT. OF HEALTH & HUMAN SERVICES (2005), <http://aspe.hhs.gov/hsp/05/fc-financing-ib/>.

⁵¹ *Id.*

⁵² See *id.*

⁵³ See discussion of CPS incentives *infra* Part II.B.

⁵⁴ Thomas L. Hafemeister, *Castles Made of Sand? Rediscovering Child Abuse and Society's Response*, 36 OHIO N.U. L. REV. 819, 882 (2010).

⁵⁵ *Id.* at 883.

⁵⁶ *Id.*

investigation, a jump of nearly thirty percent (30%).⁵⁷ The high rate of removals is especially disturbing when considering that over forty-one percent (41%) of children removed from their homes are found not to have been maltreated.⁵⁸

Numerous objections have been voiced about the removal mechanisms used by CPS in the various states. Critics argue that temporary protective custody orders become *de facto* permanent placements because CPS caseworkers do not promptly return children to their families.⁵⁹ They claim that CPS caseworkers are too quick to remove children from their homes, resulting in unjustified removals where the child was suffering neither abuse nor neglect.⁶⁰ Finally, critics are concerned that caseworker discretion plays too great a role in determining if a child should be taken away from his or her family.⁶¹ The broad discretion given to caseworkers results in (1) inconsistency in removal determinations, (2) caseworkers being unduly quick to pursue removal, particularly in neglect cases,⁶² where the indicators are not as clear as in direct abuse cases, and (3) the possibility that the caseworker's own views and biases will be interjected in the determination.⁶³

Such significant caseworker discretion has raised the related concern that judges give too much deference to the agency's decision to remove a child from his or her home.⁶⁴ The judges' typically heavy caseload, plus the caseworker's greater familiarity with the specifics of the case, makes it

⁵⁷ *Id.* at 878.

⁵⁸ *Id.* at 879 (“[O]ver one out of every three children removed from their homes are not found to have been maltreated (41.6% in 2008)”) (citing CHILD. BUREAU, U.S. DEP'T HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2008, at tbl. 6-6 (2010)).

⁵⁹ Hafemeister, *supra* note 54, at 879; Lois Weithorn, *Envisioning Second-Order Change in America's Responses to Troubled and Lonesome Youth*, 33 HOFSTRA L. REV. 1345, 1389 (2005); Paul Chill, *Child Protection in the 21st Century: Burden of Proof Begone: The Pernicious Effect of Emergency Removal in Child Protective Proceedings*, 41 FAM CT. REV. 457, 457 (2003).

⁶⁰ Hafemeister, *supra* note 54, at 879; Weithorn, *supra* note 59, at 1389; Chill, *supra* note 59, at 457.

⁶¹ *Id.* at 881; BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE 88-90 (1984).

⁶² *Id.* (citing CHILD MALTREATMENT 2008, *supra* note 58). Indeed, neglect is the cited basis for child removals in over sixty-eight percent (68.5%) of all removals. *Id.*

⁶³ *Id.* at 881; Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 287-88 (2007).

⁶⁴ *See* Hafemeister, *supra* note 54, at 886-87.

tempting for judges to rubber-stamp the agency's decisions.⁶⁵ And if CPS already has incentives to intervene too quickly, as discussed below, the system suffers if the judicial check on CPS actions is not meaningfully exercised.

B. The Child Protection Priority and the New Trend toward Intensive Parenting

The growing policy priority of protecting children is reflected not just in actions by the State.⁶⁶ The norms of parenting have also evolved to bring far greater emphasis to child safety, as parents assert far greater control, and far closer supervision of their children's activities, and at later ages, than ever before. The obsession with safety is part of a larger societal trend in favor of "Intensive Parenting," in which parents closely monitor many aspects of their children's life, acquire sophisticated knowledge of their children's development needs, intervene with the schools and other institutions on their children's behalf, and orchestrate their children's leisure time activities.⁶⁷

A primary theme in Intensive Parenting is an obsession with safety, especially with the risk of stranger abduction. Parents operating under these new norms no longer allow their children to play in the parks or the neighborhood unsupervised.⁶⁸ What might have been a typical pickup baseball (or stickball) game in the neighborhood sandlot has now given way to organized soccer leagues, where children are shuttled to and from practices and games in minivans, are under constant adult (and usually parental) direction and control, and are provided with adult-arranged treats

⁶⁵ *Id.*

⁶⁶ Such actions, as already discussed, show up in all three branches of government: legislative (*e.g.* CAPTA, car seat laws), judicial (*e.g.* decline of parental immunity), and executive (*e.g.* CPS increasingly pro-active in interventions).

⁶⁷ Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221, 1232 (2011).

⁶⁸ The term "unsupervised" is itself problematic, as some would apply the term to any child who is not under continuous observation and control. "Supervisors" in an employment context, however, assert reasonable checks and monitoring without watching their charges at all times. Similarly, it should be possible to responsibly "supervise" one's children—particularly as they get older—by sending them outside to play in their own yard. The fact that the parent is not physically outside, in the presence of the children and watching them play, does not mean they are "unsupervised"; the parent knows where they are and can check up on them on regular intervals. The kids too know that a parent is close and can be called to if there is a problem.

after each game.⁶⁹ In the name of safety, kids who in previous generations would have walked or bicycled to school are now routinely driven there, primarily so they can be under constant adult observation en route.⁷⁰

1. Assumptions Underlying Overprotective Parenting

The cultural shift that brings this highly-protective approach to parenting is documented—and lamented—in Bernstein and Triger’s important article “Over-parenting.”⁷¹ The authors are unsparing, noting that the obsession with protecting children is often unhealthy, even for the child whose safety is being safeguarded.⁷²

The new emphasis on child safety apparently comes at least in part from the perception that the world is more dangerous for children than it used to

⁶⁹ While adults will arrange for treats after the game, it is unlikely that the treats will be homemade. Safety concerns—presumably the fear that homemade treats may be tainted in some way—again come into play, leading parents to opt for pre-packaged snacks. *See, e.g., What to Take for Team Snack Day*, <http://lifeasmom.com/2012/04/what-to-take-for-team-snack-day.html> (“Prepackaged is best I shy away from homemade items on snack day because I want the other parents to feel comfortable . . .”).

⁷⁰ Jane E. Brody, *Turning the Ride to School into a Walk*, N.Y. TIMES Sep. 11, 2007, at F7, available at <http://www.nytimes.com/2007/09/11/health/11brod.html>. (Forty years ago, half of all students walked or bicycled to school. Today, fewer than 15 percent travel on their own steam. One-quarter take buses, and about 60 percent are transported in private automobiles, usually driven by a parent or, sometimes, a teenager.”)

⁷¹ Bernstein & Triger, *supra* note 67, at 1233.

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

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

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

Id. (emphasis added).

⁷² Bernstein & Triger, *supra* note 67, at 1226. *See also* discussion of the free-range parenting movement, *infra* Part I.B. 2.

be.

Some argue that . . . the world has become—or appears to be—a more dangerous place. Consequently, parents are “simply” responding to that new danger—or to a perception of danger. Many point to a new “culture of fear” and especially to widely publicized stories of kidnapping, Internet pornography, and sexual predators.⁷³

Surveys show that people in the United States believe their communities are more dangerous now than in the past,⁷⁴ despite overwhelming evidence that children, in the United States at least, are far safer today than they have ever been.⁷⁵ Moreover, the things parents fear, and consequently take precautions against, are not the primary threats to their children.⁷⁶ Overlooking the risk of car accidents, a far more serious risk to children,⁷⁷ parents, are motivated by the risk of stranger abduction. They forbid their children to roam freely in neighborhoods, walk to school, play unsupervised in parks or even in their own front yards, for fear that they will be abducted.⁷⁸

At the same time, parents today have far lower expectations of their children’s competence to care for themselves, exercise judgment, or bear responsibility.⁷⁹ In previous generations, it was typical to expect preteens to

⁷³ MARGARET K. NELSON, *PARENTING OUT OF CONTROL: ANXIOUS PARENTS IN UNCERTAIN TIMES* 17 (2010)

⁷⁴ WARWICK CAIRNS, *HOW TO LIVE DANGEROUSLY: THE HAZARDS OF HELMETS, THE BENEFITS OF BACTERIA, AND THE RISKS OF LIVING TOO SAFE* 6 (2008)

⁷⁵ DANIEL GARDNER, *THE SCIENCE OF FEAR: WHY WE FEAR THE THINGS WE SHOULDN’T—AND PUT OURSELVES IN GREATER DANGER* 290–304 (2008) (describing how the world is safer now than it ever has been before); BRYAN CAPLAN, *SELFISH REASONS TO HAVE MORE KIDS: WHY BEING A GREAT PARENT IS LESS WORK AND MORE FUN THAN YOU THINK* 102 (2011) (“Conditions today aren’t merely better [than they were in the 1950s]. They improved so much that government statisticians changed their denominator [for youth mortality] from deaths per 1,000 to deaths per 100,000.”); *id.* at 101 (showing a table showing that in every age group—infants to twenty-four years of age—children are safer now than they were in the 1950s).

⁷⁶ Christie Barnes contrasts the top ten concerns of parents (with kidnapping, snipers, terrorism, and stranger danger, topping the list) with “the real causes of death and injury for most children,” which places car accidents as number one on the list, with disease second. CHRISTIE BARNES, *THE PARANOID PARENTS GUIDE: WORRY LESS, PARENT BETTER, AND RAISE A RESILIENT CHILD* 38–39 (2010)

⁷⁷ *Id.*; see also *infra* notes 100–101.

⁷⁸ *Id.*

⁷⁹ LENORE SKENAZY, *FREE-RANGE KIDS: GIVING OUR CHILDREN THE FREEDOM WE HAD WITHOUT GOING NUTS WITH WORRY* 68–76 (2009). “Stay-at-home moms used to just

milk cows, manage newspaper routes, or babysit infants.⁸⁰ Today, however, it is virtually unheard of to leave small children in the care of a preteen, or even a young teenager.⁸¹ “This development is all the more marked considering that mobile phones have created a virtually instant line of communication between the sitter and the parents, something unheard of in earlier eras when younger sitters were considered acceptable.”⁸²

Parents take extraordinary precautions in any case, driven in large part by fears: many of them based not on reality, but on imagined and exaggerated threats to their children.⁸³ There are a variety of reasons that parents may overestimate the risks to their children, and psychologists have explored these various mental biases.⁸⁴

Most compelling, perhaps, is the impact of the media, which has found that playing to viewers’ fears can greatly increase viewership:

[T]he need for “good numbers”—that is, high viewership— influences every channel, newspaper, and advertiser to aggressively compete for advertising and viewership within the ever-fragmented media marketplace. This can result in a willingness to show more “low-brow” images, and to “hawk” violence with redoubled vigor. . . . In television and print news, far from merely reporting objectively on

tell their kids to go outside and play. Now mom *and* dad tag along with their kids as supervisors, or servants.” CAPLAN, *supra* note 75, at 11.

⁸⁰ See generally Hara Estroff Marano, *A Nation of Wimps*, 37 PSYCHOL. TODAY, Nov. 1, 2004, at 64–68, available at <http://www.psychologytoday.com/articles/pto-20041112-000010.html> (arguing that as the nature of childhood moved away from children working, parents began to assume that kids could not handle difficult situations; parents feel the need to save their child from any difficulty, when in reality the child could cope with the situation if the parent had properly equipped her for it). “Children are a lot more resilient and robust than we give them credit for. . . . [A] few knocks along the way are unlikely to scar anyone for life; they might even make them stronger.” CARL HONORÉ, *UNDER PRESSURE: RESCUING OUR CHILDREN FROM THE CULTURE OF HYPER-PARENTING* 248 (2009).

⁸¹ And those who dare do it risk the opprobrium of the community. See Bridget Kevane, *Guilty as Charged*, BRAIN, CHILD, <http://web.archive.org/web/20120630132923/http://brainchildmag.com/essays/summer2009/kevane.asp> (last visited August 8, 2013).

⁸² David Pimentel, *Notable and Quotable*, WALL ST. J. (Mar. 15, 2012, 7:16 PM), <http://online.wsj.com/article/SB10001424052702304692804577281842896031250.html>.

⁸³ GARDNER, *supra* note 75, at 16; See also BEST, *supra* note 1, at 9. “In short, there is no clear, compelling evidence that the recent concern for child-victims reflects a real increase in children’s victimization.”

⁸⁴ *Id.*, discussing, *inter alia*, the “availability heuristic.”

crime, media companies are now major stakeholders that profit from our carefully cultivated *fear of crime*.⁸⁵

The principle applies not just to the crime threat, of course, but to any threat to one's children. The teaser "could your child be next?" virtually guarantees that a parent will tune in, read on, or click through.⁸⁶ As a result the media reports are crafted to overstate the risks to children, and shape both public attitudes and parental response at the same time.⁸⁷

One reason for this response is explained by psychologists as the "availability heuristic": the idea that people assess the likelihood of particular events occurring according to how easily they can recall such events occurring in the past.⁸⁸ Horrific stories about harm to children, including stranger abductions and sexual abuse, however rare those instances may be, are burned into people's memories—in part because the stories themselves are so horrible, and in part because of the media saturation such stories generate—and are therefore easily recalled.⁸⁹ Concluding that such events are common, loving parents naturally worry a

⁸⁵ Rachel Lyon, *Media, Race, Crime, and Punishment: Re-Framing Stereotypes in Crime and Human Rights Issues*, 58 DEPAUL L. REV. 741, 744 (2009) (emphasis added). Warrick Cairns makes a related observation:

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

CAIRNS, *supra* note 74, at 96. The media personalizes victims to the viewers, which affects the viewer's emotions and causes them to be afraid of risks that statistically are so minute they will almost surely never affect the viewer. *Id.* at 97–99.

⁸⁶ Pimentel, *Criminal Child Neglect and the "Free Range Kid"*, *supra* note 19 at 964.

⁸⁷ See GARDNER, *supra* note 75, at 158–59 (explaining that the way people estimate risk is directly related to how images, such as those seen on the news, make them feel). Further, unusual events such as floods or riots appear common because that is what the media chooses to feature. *Id.* at 159–61. See also generally NASSIM NICHOLAS TALEB, *THE BLACK SWAN: THE IMPACT OF THE HIGHLY IMPROBABLE* (2nd Ed. 2010) (explaining, in Chapter 6, the "narrative fallacy," which leads people to overestimate the likelihood of events if they've heard of such events in story (narrative) form).

⁸⁸ GARDNER, *supra* note 75, at 46–48.

⁸⁹ See DANIEL SCHACTER, *THE SEVEN SINS OF MEMORY: HOW THE MIND FORGETS AND REMEMBERS* 178–79 (2001) (explaining that when people are shown a series of pictures that include ordinary scenes, such as a mother walking her child to school, as well as dreadful scenes, such as a child being hit by a car, they will recall the negative scenes far more readily than the others); see also GARDNER, *supra* note 75, at 49 (discussing the same study).

lot about them,⁹⁰ and take extraordinary precautions to protect their children from them. The reality, that the prevalence and probability of such harms is tiny, even negligible, and certainly unworthy of the typical investment in worry and precaution,⁹¹ remains widely unacknowledged, and is actively doubted even when pointed out.⁹²

2. The Backlash to Overprotection: “Free Range Kids” and Related Trends

At the same time, a variety of voices have begun speaking out against this prevailing parental paranoia about these threats to our children. Lenore Skenazy, the *de facto* standard bearer for the anti-overprotection movement, characterizes her crusade as “Fighting 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.”⁹³ She coined the term “Free Range Kids,” pithily suggesting that we care more about the quality of life of the chickens we eat than of the children we raise. Indeed we assiduously deny our kids even a modest measure of freedom in their play and in their lives, all in a desperate effort to protect them from real and imagined (but mostly imagined) dangers they face in modern society.⁹⁴

While Skenazy’s wit and popular blog put her at the forefront of the movement, there are plenty of others weighing in, many with scholarly research, to demonstrate how many of the precautions being called for and taken are (1) entirely unwarranted by the risks actually presented, and (2) harmful in themselves.⁹⁵ The popular press has given some attention to the

⁹⁰ One recent poll found that 50% of polled parents stated they worried “a lot” about someone kidnapping their child. KIM JOHN PAYNE, *SIMPLICITY PARENTING* 179 (2009).

⁹¹ CAPLAN, *supra* note 75, at 93-107.

⁹² The author, after presenting the data on child abductions at an academic conference in Cleveland, OH in 2012, was directly confronted by an otherwise brilliant scholar, who insisted that he would *never* allow his daughter to walk to school, no matter what the data showed.

⁹³ <http://www.freerangekids.com>.

⁹⁴ See generally SKENAZY, *supra* note 79.

⁹⁵ See, e.g., HONORÉ, *supra* note 80; Marano, *supra* note 80; HARA ESTROFF MARANO, *A NATION OF WIMPS: THE HIGH COST OF INVASIVE PARENTING* (2008); CAIRNS, *supra* note 74; JOEL BEST, *THREATENED CHILDREN: RHETORIC AND CONCERN ABOUT CHILD-VICTIMS* 132–38 (1993); GARDNER, *supra* note 75; PAYNE, *supra* note 90; NELSON, *supra* note 73; Bernstein & Triger, *supra* note 67; CAPLAN, *supra* note 75; DAVID FINKELHOR ET AL., U.S. DEP’T OF JUSTICE, *NONFAMILY ABDUCTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS*, NATIONAL INCIDENCES STUDIES OF MISSING, ABDUCTED, RUNAWAY AND THROWN-AWAY CHILDREN 1, available at

issue as well, including a Time Magazine cover story in 2009 entitled “The Growing Backlash Against Overparenting.”⁹⁶

3. Parenting as Risk Management

So what’s the harm in a little extra caution? Isn’t it better to err on the side of safety, especially when it comes to something as precious as our children? The answer is a resounding “no.” There are serious costs, losses, and even *risks* associated with investing in precaution. Economists and lawyers who remember Learned Hand’s famous *Carroll Towing* formula will argue that optimal investments in precaution must be based on accurate estimates of both (1) the probability of harm, and (2) the extent of such harm if it occurs.⁹⁷

The reality of parenting is that it is an exercise in risk management. Anything a parent does to protect a child from one harm—*i.e.* to reduce either the likelihood or the extent of harm to that child—almost necessarily subjects that child to increased risk of other harms.⁹⁸ Moreover, distorted fears and precautions taken against misperceived risks actually expose children to *greater* risks of genuine harm, even as they protect children from imagined, but more widely feared risks. As Skenazy puts it, “What we forget is that these ‘safety’ choices are not without dangers of their own.”⁹⁹ So the parent can only choose *between* risks; it is a fool’s errand to try to insulate children from harm altogether.

For example, parents today are far more likely to drive their kids to their various destinations than ever before. A major motivation is the perception that alternatives to travel by automobile—*e.g.* walking to school, biking to soccer practice, staying home alone while mom runs an errand—are too

http://www.missingkids.com/en_US/documents/nismart2_nonfamily.pdf.

⁹⁶ Nancy Gibbs, *The Growing Backlash Against Overparenting*, TIME (Nov. 20, 2009), <http://www.time.com/time/magazine/article/0,9171,1940697,00.html>; see also, *e.g.*, Roni Caryn Rabin, *Dangers Lurk Closer to Home*, N.Y. TIMES, Sept. 15, 2008, at H7, available at <http://www.nytimes.com/2008/09/15/health/healthspecial2/15risks.html>; Jane E. Brody, *Turning the Ride to School into a Walk*, N.Y. TIMES Sep. 11, 2007, at F7, available at <http://www.nytimes.com/2007/09/11/health/11brod.html>.

⁹⁷ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947); see discussion *infra* Part III.B.1.

⁹⁸ *Id.* at xx-xxi (citing childhood obesity, diabetes, vitamin D deficiencies, high rates of childhood depression, and “college breakdown” all as likely downsides of overprotecting children).

⁹⁹ SKENAZY, *supra* note 79, at xx.

dangerous for kids in today's world. Of course, by driving the child to school, the parent reduces the risk, such as it is, that the child will be targeted by pedophile predators, but only by placing the child in one of the most dangerous places occupied by children in American society today: inside a moving automobile.¹⁰⁰ Indeed, the American Academy of Pediatrics has published statistics suggesting that "being driven to school in a passenger vehicle is by far the most dangerous way to get there."¹⁰¹

Moreover, over-protection itself carries risks of harm:

Close control of children's environments and the insistence on constant supervision has been shown to impair the child's ability to develop independence, responsibility, and self-reliance. Unwillingness to allow children to engage in vigorous physical play out of doors . . . has resulted in children spending most of their time in sedentary activity, exacerbating the public health problem of child obesity. Keeping children in sanitized environments has been tied to a startling spike in child allergies and has impaired the children's ability to develop natural immunities.¹⁰²

Balancing these risks is a judgment call unique to each person, based on the values and the risk aversion of the individual. Safety and security expert Bruce Schneier explains the subjectivity of risk management decisions this way:

There is no single correct level of security; how much security you have depends on what you're willing to give up in order to get it. This trade-off is, by its very nature, subjective—security decisions are based on

¹⁰⁰ As noted *supra*, note 76, automobile accidents are the number one killer of children in today's society. BARNES, at 38–39.

¹⁰¹ Brody, *supra* note 95; *see also* CAPLAN, *supra* note 75, at 37 ("Driving your third-grader to the store is vastly more dangerous than leaving him at home without a bodyguard.")

¹⁰² Pimentel, *Criminal Child Neglect and the "Free Range Kid"*, *supra* note 19 at 958–59 (citing, *inter alia*, Bernstein & Triger, *supra* note 67, at 1275; CYNTHIA OGDEN & MARGARET CARROLL, DIV. OF HEALTH & NUTRITION EXAMINATION SURVEYS, PREVALENCE OF OBESITY AMONG CHILDREN AND ADOLESCENTS: UNITED STATES, TRENDS 1963–1965 THROUGH 2007–2008 (2010), available at http://www.cdc.gov/nchs/data/hestat/obesity_child_07_08/obesity_child_07_08.pdf; HONORÉ, *supra* note 80, at 252; Juliana Keeping, *University of Michigan Research: Too Much Sanitizing Might Make Allergies More Likely for Kids*, ANN ARBOR.COM (Nov. 29, 2010, 11:17 AM), <http://www.annarbor.com/news/university-of-michigan-research-too-much-sanitizing-might-make-allergies-more-likely-for-kids>; BARNES, *supra*, note 76, at 38–39).

personal judgments. Different people have different senses of what constitutes a threat, or what level of risk is acceptable.¹⁰³

These inherently subjective decisions were historically entrusted to parents, and for good reason—there is no one right answer: (1) should a parent permit her son to play high school football? (2) should a parent permit her daughter to climb the tree in the backyard or build a treehouse in it? (3) should a parent permit his child to participate in a scout hike or overnight camp through a wilderness area containing ticks, poison ivy, or yellowjackets?

Certainly these questions should be answered by the parents, who are entitled to make the judgment call for their own child. They are in the best position to know whether the risks to the child's development—physical, social, or otherwise—from being excluded from these arguably dangerous activities outweigh the risks inherent in the activities themselves. They will know better than anyone the extent to which this particular child *needs* that particular social or athletic experience, how well the child can be trusted to act in a safe and responsible manner,¹⁰⁴ and how resilient this child may be to the social or physical harms that may come with the experience (or that come from being sheltered from that experience). And even if the parent didn't know best, the parent does have a liberty interest in deciding how to raise his or her own child.¹⁰⁵

Because the risk management decisions are inherently subjective, it makes little sense to entrust those decisions to someone outside the family, such as a CPS caseworker, unfamiliar with the history, relationships, and personalities at play. Even if there were a "correct" answer to these questions, there would be little reason to believe that CPS is more likely to hit upon it than the parents themselves.

II. THE THREAT OF STATE INTERVENTION IN THE FAMILY

Of course, as parents weigh and manage the risks their children are exposed to, they now have to consider another risk: the possibility that

¹⁰³ BRUCE SCHNEIER, *BEYOND FEAR: THINKING SENSIBLY ABOUT SECURITY IN AN UNCERTAIN WORLD* 17 (2003).

¹⁰⁴ An outsider looking in may say that a 12-year-old is too young to babysit a younger sibling, but a 15-year-old is mature enough. No one knows better than the young person's parents, however, the child's true maturity level; certainly some 12-year-olds are up to the task, just as some 15-year-olds are surely unfit for such responsibility.

¹⁰⁵ See *Troxel and Glucksberg*, *supra* note 11.

someone else may disapprove of their decisions and prompt the State to intervene in their family. As noted above, the State is far more willing than ever before to second-guess parenting choices and take action to protect children from their own parents.¹⁰⁶ The risks associated with leaving one's toddlers in the care of their 12-year-old older sibling, for example, is complicated not only by what harm may come to the children (affected by a whole range of factors, including how long they will be left alone, how far away the parents are, how accessible they are by cell phone, how mature this particular 12-year-old is, etc.), but by the risk of State intervention.¹⁰⁷ The “what’s the worst that can happen?” scenario is no longer limited to the organic risks of the situation, but now includes the risk that the parent’s risk-management choice may be second-guessed, that CPS will decide to intervene and remove the children from the home, or even that the parent may be charged with criminal child neglect or endangerment.¹⁰⁸

In other words, it is no longer sufficient for the parent to trust her own judgment as to what is best for her kids, she has to take into account the judgment of others. The difficult job of risk management is now complicated by new questions: (1) “What will the neighbors think?” (2) “Will they call CPS on me?” (3) “Will CPS—who doesn’t know my 12-year-old—think 12-year-old is too young and try to take my kids away from me?” (4) “Might I be at risk of criminal prosecution?” And given the societal trend toward overprotection, even a would-be Free Range parent is likely to be intimidated into highly protective parenting, erring on the side of overprotection even though their best parenting judgment and instincts tell them this is bad for their kids.

A. The Threat of Prosecution for Criminal Child Neglect

The prospect of criminal prosecution is not as far-fetched as it may seem. In 2012 in Jonesboro, Arkansas, a mother was charged with and

¹⁰⁶ See discussion *supra* Part I.B.

¹⁰⁷ See, e.g., the story of Bridget Kevane, *supra* note 81. See also Ari Mason and Josh Chapin, Mom Left Young Kids Alone to Go Clubbing: Police, NBC CONNECTICUT (December 31, 2013) (describing the arrest of a mother for felony “risk of injury to a minor” when she left her 13-year-old in charge of his 4- and 1-year-old sisters), available at <http://www.nbcconnecticut.com/news/local/Young-Kids-Home-Alone-While-Mom-Goes-Clubbing-Police-238166161.html>; Police: Bridgeport mom left kids home, went to club, NORWICH BULLETIN (December 31, 2013), <http://www.norwichbulletin.com/article/20131231/NEWS/131239947>.

¹⁰⁸ *Id.* Other examples are detailed in Pimentel, *Criminal Child Neglect and the “Free Range Kid”*, *supra* note 19 at 967-71.

convicted of child endangerment for making her 10-year-old walk to school, a consequence she had imposed on him after he had been kicked off the school bus for misbehavior (a fifth offense) on it.¹⁰⁹ Many parents would have made a different parenting choice, of course, and certainly the police officer who made the arrest in this case was worried about risks the child faced:

“You ask yourself the question, is that safe for the child?” said Jonesboro Police spokesman Sgt. Lyle Waterworth.

“And if you wouldn’t want your child doing it, you probably don’t need some (other) child doing it.

“There were a number of things that could have happened to the child. The child could have been injured, abducted,” said Sgt. Waterworth.¹¹⁰

But differences of opinion about proper, or ideal, parenting are bound to exist. Moreover, all parents presumably make mistakes from time to time, and surely not all of these parenting choices warrant criminal punishment.

The police officer’s attitude is interesting in several respects. First, he assumed that if another person’s parenting choices don’t conform to the police officer’s—“if you wouldn’t want your child doing it”—it is appropriate to treat the other’s parenting choice as a criminal offense. Second, the police officer gave great priority to the risk of injury and abduction, with no specifics as to how and whether these are likely risks in that (or any) community.¹¹¹ Third, the police officer apparently gave little or no weight to the risks of raising children without consequences for their bad behavior; this mother made a risk management decision that her son needed to learn a lesson—it was a fifth offense after all—and whatever hardships or risks are associated with walking to school, they were outweighed by the importance of helping the child learn to take responsibility for his actions.¹¹² In the name of protecting the child from imagined risks of injury

¹⁰⁹ *Mother who “forced 10-year-old son to walk 5 miles to school faces jail time for endangerment”* DAILY MAIL (February 19, 2012) <http://www.dailymail.co.uk/news/article-2103412/Mother-forced-10-year-old-son-walk-5-miles-school-faces-jail-time-endangerment.html>

¹¹⁰ *Id.*

¹¹¹ And, as noted above, there is considerable evidence that these risks are negligible. See discussion *supra* Part I.B.1.

¹¹² The media reported that the child told the police officer, “Please don’t take me home. Mother will beat me.” *Supra* note 109. Whether or not this is true—a child might well make such a statement to get the police officer to back off—it is a compelling statement. The police officer’s insistence that the mother’s chosen punishment for her child “overstepped the mark” is likely to result in forcing some other kind of punishment that

or abduction, the police officer's intervention subjected the child to another, arguably far more serious long-term risk: that the child grow up with the sense that his mother is powerless to discipline him, and that he need not bear the consequences of his own bad behavior.¹¹³

The fact that this is an isolated incident in no way undermines its significance. The case got national, and indeed international, media attention,¹¹⁴ so the message is sent in powerful terms to parents everywhere: the threat of criminal prosecution is real, if your parenting does not measure up to others' perceptions of adequate protection. And the case is probably not isolated at all. A Montana professor was prosecuted for leaving her young children at the mall for two hours in the care of her 12-year-old daughter and her 12-year-old friend, and the prosecutor in that case insisted on pursuing the case unless the mother pleaded guilty.¹¹⁵ The Arkansas mother, faced with similar options, pleaded guilty in order to avoid jail time.¹¹⁶ No doubt a great many cases of parental arrests in cases such as

will not be visible to busybody neighbors and meddling law enforcement officers. *Id.* Unfortunately, this may include corporal punishment, as nothing else has worked apparently (it was a fifth offense on the bus), and she can no longer use "walking to school" as a disciplinary measure. Worse, maybe she has used corporal punishment in the past, and it failed to get his attention. The police's action in this case only undermines her ability to parent effectively, or certainly to trust her own judgment of how best to teach her child what he needs to learn.

¹¹³ Ironically, this mother would have faced no criminal liability had she physically hurt her child—by spanking, for example—as "parental discipline" is a long-recognized defense to a charge of battery. WAYNE R. LAFAVE, *CRIMINAL LAW*, 566 (5th ed. 2010). But while she should not have been prosecuted for inflicting direct physical harm to her child (as long as she was trying to teach him a lesson), she *was* punished for subjecting him to a highly speculative and largely imagined risk. Of course, experts on child discipline would likely favor the approach she *did* adopt, as it reflected the logical and natural consequences of the child's misbehavior. See FOSTER CLINE & JIM FAY, *PARENTING WITH LOVE AND LOGIC* (2006). Not only is a "logical consequences" approach far more likely to inspire a child to make better choices in the future than the fear of physical pain, it also avoids all the negative impact for the child and for the parent-child relationship that comes with corporal punishment. Amanda L. Krenson, *Reining in the Parental-Discipline Defense: Addressing the Need for Standards that Work to Protect Indiana's Children*, 44 VAL. U. L. REV. 611 (2010).

¹¹⁴ The *Daily Mail*, a UK publication, reported the story. *Supra* note 109. WHDH News in Boston reported the story as well, under the heading "National News." <http://www1.whdh.com/news/articles/national/12006732172267/mother-cited-for-making-son-walk-to-school/>.

¹¹⁵ Kevane, *supra* note 81.

¹¹⁶ *Mom makes son walk to school, no jail time*, KAIT (ABC) News, (April 30, 2012) ("Borders was fined \$520 but did not receive any time in jail.") <http://www.kait8.com/Global/story.asp?S=17957538>.

these do not show up in reported cases, or generate media attention, precisely because the parents are so eager to cooperate, avoiding jail time and any continuing threat to take their children away from them.

But it is not necessary for these cases to end in conviction, or even an arrest, for parents to feel intimidated. It is enough that the police pay a visit and make inquiries, following up on a report, for parents to be shaken and frightened of possible State intervention.¹¹⁷

B. The Threat of Child Protective Services Intervention: Loss of Custody

1. Serious Threat / Genuine Fear

Although the threat of criminal prosecution may enter into the parents' mind when making the various risk management judgments required of parents today, the threat of CPS intervention may be more immediate and compelling.¹¹⁸ The reason for parental fear of CPS intervention can be illustrated in a recent event in Ohio.

In March 2013, a father of a six-year-old "Free Range Kid" allowed his daughter to begin doing the three-block walk to the post office in their suburban residential community.¹¹⁹ They had done the walk together many times, and the daughter was eager to be more independent.¹²⁰ Her solo adventure did not go unnoticed, and soon a bus driver, and a city utility

¹¹⁷ In the mid-1990s, the author, then living in a suburban community in California, confronted with a temper tantrum from his two-year-old's on the front porch of his home, determined in consultation with his spouse that the best parental response to the tantrum was to ignore it. A passer-by, however, witnessed the scene, perceived it as a callous disregard of a child's distress, and called the police. The child abuse inquiry that followed was both upsetting and frightening, despite the fact that no charges were ever filed. It should come as no surprise that the experience has replayed in the minds of those parents frequently as they have made parenting risk management decisions, and has strongly influenced those decisions.

¹¹⁸ Indeed, in the mind of the author, the primary fear during the police inquiry over his two-year-old's public tantrum was not the fear of criminal liability, but the fear that the child would be removed from his home pending further investigation. *See supra* note 117.

¹¹⁹ Lenore Skenazy, 6-y.o. *Who Walked Alone to Post Office May be Removed from Her Home*, <http://www.freerangekids.com/6-y-o-who-walked-alone-to-post-office-may-be-removed-from-her-home/#sthash.A2e92J07.dpuf>. The author has spoken and corresponded directly with the father in this case, but respecting the family's request for privacy and anonymity, withholds names and locations.

¹²⁰ *Id.*

worker, and the police are involved.¹²¹ The daughter was detained by police, who initially refused to return her to her father's custody; CPS advised police to return the child, and sent their own staff to investigate the alleged endangerment of the child.¹²² The father, believing he had done nothing wrong, and therefore had nothing to answer for, declined to speak to or cooperate with the CPS caseworkers.¹²³ Ultimately, the parents were served with a complaint alleging neglect and dependency, seeking to take the girl into "protective supervision" or "temporary custody."¹²⁴

The incident generated a small media buzz, with HuffingtonPost Live devoting almost a half hour to an online discussion, with the tag line: "A father let his six-year-old walk a few blocks to the local post office alone, and now Protective Services may take his child. Parents will always worry, and predators do exist, but we have to teach kids to be independent...for their own safety."¹²⁵ The story was also picked up by *Reason* magazine's blog, with the somewhat inflammatory headline "Ohio CPS Wants to Snatch Kid Away from Family that Has Taught Her Self-Sufficiency," among others blogs and online news sources.¹²⁶

This Ohio incident betrays deep irony. The parents who were trying to teach self-sufficiency had to weigh the risks of allowing their six-year-old to venture out on a three-block excursion unaccompanied. They presumably were savvy enough to know the risks in their quiet residential neighborhood. They knew which two intersections she would need to traverse, and know what she had learned about crossing the street safely.¹²⁷ They knew that the risk of stranger abduction was negligible. But it turned out that the greatest threat, and the greatest risk to the child, may have been

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.* A copy of the complaint is on file with the author.

¹²⁵ <http://live.huffingtonpost.com/r/segment/515d8925fe34441bd4000040>

¹²⁶ Scott Shackford, *Ohio CPS Wants to Snatch Kid Away from Family that Has Taught Her Self-Sufficiency*, Reason.com (April 3, 2013), <http://reason.com/blog/2013/04/03/ohio-cps-wants-to-snatch-kid-away-from-f>; see also, e.g., Conor Friedersdorf, *Thank Goodness Kids Do Belong to Their Parents*, The Atlantic (April 10, 2013), <http://www.theatlantic.com/politics/archive/2013/04/thank-goodness-kids-em-do-em-belong-to-their-parents/274840/>; Cory Doctorow, *Parents in danger of having six-year-old daughter taken away for letting her walk to their local post office on her own*, Boing Boing (April 3, 2013), <http://boingboing.net/2013/04/03/parents-in-danger-of-having-si.html>; VA Viper, (April 3, 2013) <http://vaviper.blogspot.com/2013/04/free-range-kids-has-continuing-story-of.html>.

¹²⁷ Skenazy, *supra* note 119.

the State itself, which purported to be acting in the interest of the child. It was the State that took the child from the post office and into detention, kept her from her parents (at least for a short time), and then threatened to remove the child from her family altogether. The lesson to be learned, by parents everywhere who read this story, is that their risk management decisions must incorporate the risk that the State will intervene.

By exposing children and families to a new threat, a new risk, the State is not making the world safer for children and families, but more dangerous, particularly as the intervention or removal itself is likely to be traumatic for the child.¹²⁸ Those elusive lessons in self-sufficiency and personal responsibility are harder to teach than ever, with parents living in fear of their neighbors' judgments, backed by the threat of State force.

A number of studies have been conducted that assess perceptions of CPS, and document parents' fears:

One of the concepts dominating the discussion in the[] studies on family perception of CPS is the power over families that parents believe caseworkers have. In Gary Dumbrill's study on parental perception of CPS agencies, parents describe this perceived power over them as negative "absolute," "tyrannical," indomitable, and "frightening." . . . Parents' feelings of helplessness, vulnerability, and fear are magnified by the perception that CPS is an indomitable force that cannot be confronted or questioned.¹²⁹

The sheer power, or perceived power, of CPS has tremendous potential to distort parents' risk-management decisions. In today's world, the parent is effectively coerced into acting on emerging cultural standards of overprotection, rather than the parent's own judgment as to what is best for their child, precisely because those standards are likely to be enforced by CPS, backed by the threat (and power) to take one's children away.

While it might be tempting to dismiss the fear of CPS intervention as overblown—much like the threat of stranger abduction—there is considerable evidence that CPS is often too quick to effect removal of

¹²⁸ See discussion of Costs/Consequences of Over-intervention, *infra* Part III.C.

¹²⁹ Soledad A. McGrath, *Differential Response in Child Protection Services: Perpetuating the Illusion of Voluntariness*, 42 U. MEM. L. REV. 629, 656-57 (2012) (citing, *inter alia*, Gary Dumbrill, *Parental Experience of Child Protection Intervention: A Qualitative Study*, 30 CHILD ABUSE & NEGLECT 27 (2006)).

children from their families and homes. Congress said as much in 1995,¹³⁰ and the problem has not gotten better in the years following.¹³¹ Again, in 2008, 267,000 children were removed from their homes as a result of a maltreatment investigation.¹³² About a third of these were “nonvictims,” for whom no maltreatment was found.¹³³ Contrasted with the 115 children who are victims of stereotypical stranger abduction each year,¹³⁴ it appears that a child who has not been maltreated is far more likely—by multiple orders of magnitude—to be taken from the family by CPS than be taken from the family by a stranger abduction.¹³⁵

2. Over-reporting

Free Range parents are unlikely to fly under the radar because the law encourages over-reporting of suspected instances of child endangerment. All fifty states have imposed mandatory reporting requirements on medical personnel, teachers, school officials, and social workers, and forty-nine require law enforcement offers to report.¹³⁶ As of 2010, eighteen states had broadened the requirement to include “all citizens.”¹³⁷

These requirements are bolstered by a system of incentives virtually guaranteed to result in serious over-reporting. In addition to the requirement that parties report who have no training or expertise in how to identify a report-worthy situation, the law of forty-six states imposes criminal penalties on those who become aware of suspicious facts, but fail to report

¹³⁰ *Supra* note 35.

¹³¹ CHILD MALTREATMENT 2008, *supra* note 58.

¹³² CHILD MALTREATMENT 2008, *supra* note 58.

¹³³ CHILD MALTREATMENT 2008, *supra* note 58, at Table 6-6 (87,211 “nonvictims” removed); Hafemeister, *supra* note 54, at 879 (“[O]ver one out of every three children removed from their homes are not found to have been maltreated.”).

¹³⁴ DAVID FINKELHOR ET AL., U.S. DEP’T OF JUSTICE, *NONFAMILY ABDUCTED CHILDREN: NATIONAL ESTIMATES AND CHARACTERISTICS*, NATIONAL INCIDENCES STUDIES OF MISSING, ABDUCTED, RUNAWAY AND THROWN-AWAY CHILDREN 1, available at http://www.missingkids.com/en_US/documents/nismart2_nonfamily.pdf. Stereotypical kidnappings are defined as “abductions perpetrated by a stranger or slight acquaintance and involving a child who was transported fifty or more miles, detained overnight, held for ransom or with the intent to keep the child permanently, or killed.”

¹³⁵ *Id.* This ratio, 966:1, includes only those CPS removals for which no maltreatment was found. Overall, a child is 2,322 times more likely to be taken from the family by CPS than taken from the family by a kidnapper.

¹³⁶ Hafemeister, *supra* note 54, at 851 (2010). Forty-one states require members of the clergy to report, and California identifies thirty-eight separate categories of persons who carry legal duties to report. *Id.* at 851-52.

¹³⁷ *Id.* at 853-54.

that a child may be at risk.¹³⁸

To further encourage potential reporters to err on the side of reporting, CAPTA requires, as a condition of federal funding, that the states provide immunity from liability to all reporters of child abuse.¹³⁹ Virtually all states now provide such immunity,¹⁴⁰ so there is no legal downside risk for reporting, but considerable exposure, including criminal prosecution in most states, for a failure to report.

These legal provisions create a perfect storm for over-reporting. And CPS cannot and will not ignore the resulting flood of reports for a variety of reasons discussed below.¹⁴¹ Erring on the side of child protection means acting to protect—usually to remove—the child, even if the reports are not fully investigated. And in an era of growing filings and limited resources, timely and complete investigations may well be a luxury the system cannot afford. Hence, the over-reporting results in too-hasty and unwarranted removals, a common phenomenon documented above.¹⁴²

Given that one of the key elements of Free Range parenting is allowing kids to be out and about on their own, taking responsibility for themselves, they are highly visible to the rest of the community. While stereotypical child abuse takes place behind closed doors and often goes undetected, Free Range parenting is apparent to all the neighbors, any of whom may disapprove, view it as neglect, and report it.

As explained above, Congress took note of the over-reporting problem in 1995. Reacting to the flood of unsubstantiated reports of child abuse and neglect, which were “overwhelming an already overburdened child protective system,” Congress restricted the definition of “child abuse and neglect” in its 1995 re-authorization of CAPTA.¹⁴³ The statutory change failed to stem the tide of unsubstantiated reports, however. As of 2011, the overwhelming majority of reports were unsubstantiated: of those reports that CPS deemed worthy of a response, nearly 3.3 million nationwide, fifty-

¹³⁸ *Id.* at 864. Seven states specifically add provisions for civil liability as well. *Id.* at 865.

¹³⁹ 42 U.S.C. § 5106a(b)(1)(B)(i).

¹⁴⁰ Hafemeister, *supra* note 54, at 860. Until 1996, the immunity applied even to reports made in bad faith. In 1996, CAPTA scaled back the immunity requirement, providing protection only for “good faith” reports. *Id.*; 42 U.S.C. § 5106a(b)(2)(A)(vii).

¹⁴¹ See discussion *infra* Part II.B. 4.

¹⁴² See discussion *supra* Part I.A.3.

¹⁴³ S. Rep. No. 104-117, at 3491 (1995).

nine percent (59%) were either intentionally false or otherwise unsubstantiated.¹⁴⁴

3. Inadequate Legal Standards – Vague and Overbroad

Unfortunately, CAPTA’s definition of child abuse and neglect, like the standards applied in most states, is too vague and overbroad to afford the parents much, if any, protection.¹⁴⁵ The definition includes “any act or failure to act which presents an imminent risk of serious harm.”¹⁴⁶

First, CAPTA is overly broad because it portrays risk as an evil to be eliminated or avoided, rather than an inevitability to be managed.¹⁴⁷ By defining child abuse and neglect in these terms, CAPTA implicates relatively innocuous decisions—certainly within the purview of parental discretion—but that involve inherent risk, such as allowing one’s child to participate in sports activities, or piling the kids in the car to go on a family vacation, both of which carry the risk of serious injury.¹⁴⁸ Although most parents would agree that sports are beneficial to children by promoting physical exercise, developing coordination, and encouraging teamwork, under CAPTA’s expansive definition, even this “good risk” arguably falls under the definition of child abuse or neglect.

Similarly, most parents would agree that the benefits of a family vacation outweigh the risk of an automobile accident, and yet the statutory language—“imminent risk of serious harm”—give little ground for distinguishing the reasonable risk from the unreasonable risk.¹⁴⁹

The problem of over-breadth and vagueness is not limited to CAPTA, but is duplicated at the state level. Legal definitions of child abuse and neglect are often purposefully broad and/or vague to allow states to exercise wide discretion in determining if a child is being abused or neglected, and

¹⁴⁴ CHILD. BUREAU, U.S. DEP’T HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2011, at tbl. 3-1 (2010), available online at <http://www.acf.hhs.gov/sites/default/files/cb/cm11.pdf> (last checked, July 25, 2013). Indeed, CPS was able to substantiate abuse or neglect for only 18.5% of the children who were the subject of these reports. *Id.*

¹⁴⁵ See 42 U.S.C. § 5106g.

¹⁴⁶ 42 U.S.C. § 5106g.

¹⁴⁷ See *id.*; see also discussion *supra* Part I.B.3.

¹⁴⁸ See 42 U.S.C. § 5106g.

¹⁴⁹ See discussion of “imminence” *infra* Part III.A.1.

should subsequently be removed from the family.¹⁵⁰ Several state definitions of child abuse and neglect use language similar to CAPTA's, defining abuse or neglect in terms of "risk" of harm.¹⁵¹

Once CPS has decided a child is being abused or neglected, that finding generally triggers the removal statute, so the next step is removing the child from his or her family.¹⁵² However, state standards for removal, like state

¹⁵⁰ Doriane Lambelet Coleman, *Storming the Castle to Save the Children: The Ironic Costs of a Child Welfare Exception to the Fourth Amendment*, 47 WM. & MARY L. REV. 413, 428 (2005).

¹⁵¹ See, e.g., ALASKA STAT. ANN. § 47.10.011 (West 2013) (defining a "child in need of aid" where maltreatment has occurred as instances where "the child has suffered substantial physical harm, or there is a substantial risk that the child will suffer substantial physical harm, as a result of conduct by or conditions created by the child's parent, guardian, or custodian or by the failure of the parent, guardian, or custodian to supervise the child adequately."); ARIZ. REV. STAT. ANN. § 8-201(22)(a) (2013) (defining neglect in part as "[t]he inability or unwillingness of a parent, guardian, or custodian of a child to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes an unreasonable risk of harm to the child's health or welfare."); CAL. WELF. & INST. CODE § 300 ("The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted nonaccidentally upon the child by the child's parent or guardian.") ("The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child."); 325 ILL. COMP. STAT. ANN. 5/3 (West 2013) (defining an "abused child" as a child whose parent or guardian "creates a substantial risk of physical injury to such child by other than accidental means which would be likely to cause death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function."); KY. REV. STAT. ANN. § 600.020 (West 2013) (defining an "abused or neglected child" as being one whose parent or guardian "[c]reates or allows to be created a risk of physical or emotional injury...to the child by other than accidental means."); MD. CODE ANN., FAM. LAW § 5-701 (defining "neglect" as the "leaving of a child unattended or other failure to give proper care and attention to a child by a parent...that indicate...that the child's health or welfare is harmed or placed at substantial risk of harm."); MICH. COMP. LAWS ANN. § 722.622 (West 2013) (defining "child neglect" in part as "[p]lacing a child at an unreasonable risk to the child's health or welfare."); MONT. CODE ANN. § 41-3-102 (2013) (defining "child abuse or neglect" in part as "substantial risk of physical or psychological harm to a child."); 23 PA. CONS. STAT. ANN. § 6303 (West 2013) (defining "child abuse" as "[a]ny recent act, failure to act or series of such acts or failures to act by a perpetrator which creates an imminent risk of serious physical injury to or sexual exploitation of a child under 18 years of age."); R.I. GEN. LAWS ANN. § 40-11-2 (West 2013) (defining "abused and/or neglected child" as a child whose parent "[c]reates or allows to be created a substantial risk of physical or mental injury to the child.");

¹⁵² See, e.g., OHIO REV. CODE ANN. § 2151.353 (West 2013); FLA. STAT. ANN. § 39.402 (West 2013); CAL. WELF. & INST. CODE § 361 (West 2013); TEX. FAM. CODE ANN. § 262.001 (West 2013).

standards for a finding of neglect of abuse, are also problematic.¹⁵³ Emergency removal statutes often mirror the language of CAPTA, including those states with the highest rates of unsubstantiated reports.¹⁵⁴ For example, Texas and Ohio require that a child be in “immediate danger” of physical or emotional harm to justify removal,¹⁵⁵ while Florida and New York similarly impose an “imminen[ce]” requirement.¹⁵⁶ California states that a child must be in “substantial danger.”¹⁵⁷ Like the federal definition of child abuse and neglect under CAPTA, however, these terms are undefined and result in the same problem—CPS caseworkers having too much discretion and latitude to determine whether and when a child should be removed from his or her parents.¹⁵⁸ In exercising this discretion, a CPS caseworker is inevitably influenced by his or her own preconceived, gut-level notions of “good parenting,”¹⁵⁹ notions that are very likely to err on the side of overprotection and intervention.¹⁶⁰ Nothing in the statutory standards, vague and broad as they are, will protect the Free Range parent from such second-guessing and harassment.

4. CPS Incentives

The parental fear that CPS will take away their children is justified not only by inadequate legal standards, but also by a system of incentives that encourages CPS to pursue removal as a first, rather than a last resort. These incentives shift the focus from family preservation to preemptive removal, which can be devastating for both the child and the family.¹⁶¹

a. Financial Incentives for Early Removals

¹⁵³ See Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 154 (2003); Coleman, *supra* note 150, at 428.

¹⁵⁴ *Id.* at 442-44. The top ten states with the highest amount of unsubstantiated claims of child abuse and neglect are California, New York, Texas, Florida, Ohio, Michigan, North Carolina, Illinois, Georgia, and Tennessee. *Id.* at 443.

¹⁵⁵ TEX. FAMILY CODE ANN. § 262.104 (West 2013); OHIO REV. CODE ANN. § 2151.31 (West 2013).

¹⁵⁶ FLA. STAT. ANN. § 39.401 (West 2013); N.Y. FAMILY LAW § 1024 (McKinney 2013).

¹⁵⁷ CAL. WELFARE & INSTITUTIONS CODE § 361 (West 2013).

¹⁵⁸ Kurt Mundorff, Note, *Children as Chattel: Invoking the Thirteenth Amendment to Reform Child Welfare*, 1 CARDOZO PUB. L. POL’Y & ETHICS J. 131, 152 (2003).

¹⁵⁹ See *id.* at 153.

¹⁶⁰ See discussion *infra* Part II.B.4.

¹⁶¹ See *id.* at 157-62.

The greatest incentive for CPS to remove children is the resulting financial benefit associated with foster care, under the Adoption Assistance and Child Welfare Act.¹⁶² Once removed from their families, most children are placed in foster homes with non-relatives, and even though these foster care placements are meant to be temporary, children typically remain there for more than twenty-eight months.¹⁶³ By some estimates, as many as 250,000 children who enter the foster care system annually are needlessly removed from their homes.¹⁶⁴ A study conducted in 1981 concluded that roughly half of the children in foster care were never maltreated by their parents.¹⁶⁵ More recent data from the Department of Health and Human Services, as already noted, pegs this number at 41.6%.¹⁶⁶

The number and duration of these needless removals make sense when one considers the financial implications for states and local agencies. Foster care is generously funded by federal sources, so as soon as CPS places a child in foster care, the federal money begins to flow, and one less case has to be funded from CPS's own budget.¹⁶⁷ Moreover, once the child is placed, the federal money keeps coming as long as he or she remains in the foster care system.¹⁶⁸ The federal government spends five billion dollars annually on foster care alone,¹⁶⁹ distributed primarily under Title IV-E of the Social Security Act.¹⁷⁰ Foster care spending represents sixty-five percent of federal funds allocated to child welfare purposes, while post-removal adoption assistance constitutes another twenty-two percent.¹⁷¹ In contrast, federal funds used for abuse prevention, family preservation, and reunification

¹⁶² 42 U.S.C. § 1305 (1980).

¹⁶³ Hafemeister, *supra* note 54, at 878-79.

¹⁶⁴ Mundorff, *supra* note 158, at 150-51.

¹⁶⁵ *Id.* at 151 (citing Douglas J. Besharov, "Doing Something" about Child Abuse: The Need to Narrow the Grounds for Intervention, 8 HARV. J. OF L. & PUB. POL. 539, 558 (1985)).

¹⁶⁶ CHILD MALTREATMENT 2008, *supra* note 58; NINA BERNSTEIN, THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE 366 (2001).

¹⁶⁷ See Sankaran, *supra* note **Error! Bookmark not defined.**, at 288-93.

¹⁶⁸ *Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, UNITED STATES DEPT. OF HEALTH & HUMAN SERVICES (2005), <http://aspe.hhs.gov/hsp/05/fc-financing-ib/>.

¹⁶⁹ *Id.*

¹⁷⁰ Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 300 (2007).

¹⁷¹ *Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, UNITED STATES DEPT. OF HEALTH & HUMAN SERVICES (2005), <http://aspe.hhs.gov/hsp/05/fc-financing-ib/>. The foster care business is lucrative because states can receive up to \$33,091 annually in federal funds for each eligible child who is placed in foster care. *Id.*

efforts comprise only eleven percent of all federal child welfare program funds, spent under Title IV-B of the Social Security Act.¹⁷² Moreover, unlike the permanent authorization in place for foster care spending under Title IV-E, these latter funds are capped and must periodically be reauthorized by Congress.¹⁷³

The effects of such a skewed system are clear, and are heavily lamented in a 2005 Report from the federal Department of Health and Human Services: *Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*.¹⁷⁴ States are essentially encouraged to place children in foster care indefinitely instead of focusing their efforts on family preservation. If a state returns a child to his or her family, federal funding is cut off and the state must draw upon state or local funds to pay for continued monitoring and family support services.¹⁷⁵

The perverse financial incentives that promote foster care over family preservation are exacerbated by the Adoption and Safe Families Act of 1997. That legislation allows states to pursue reunification efforts with families while simultaneously seeking adoption placement for the removed children.¹⁷⁶ The Act also provides incentive payments to states to increase the number of children who are adopted out of foster care.¹⁷⁷ Thus, the statute embodies two conflicting goals—adoption and reunification—with financial incentives skewed heavily toward the former, ultimately devaluing family reunification. Further, the Act sends the message that CPS workers may pursue adoption placements, instead of first attempting reunification.¹⁷⁸ The combined emphasis on foster care and adoption placement grossly outweighs family reunification efforts, making it that much harder for parents to get their children back after they have been taken away by CPS.

b. Incentives to Avoid Criticism

¹⁷² *Federal Foster Care Financing: How and Why the Current Funding Structure Fails to Meet the Needs of the Child Welfare Field*, UNITED STATES DEPT. OF HEALTH & HUMAN SERVICES (2005), <http://aspe.hhs.gov/hsp/05/fc-financing-ib/>.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ Sankaran, *supra* note 171, at 300.

¹⁷⁶ 42 U.S.C. § 671(a)(15)(F) (2006).

¹⁷⁷ See Adoption and Safe Families Act of 1997, 42 U.S.C. § 673(b).

¹⁷⁸ See Naomi R. Cahn, Symposium, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1190 (1999).

Yet another incentive for CPS to swiftly remove a child from his or her family is the fear of public reprisal if it does not intervene. If CPS receives a report but dismisses the allegation as unsubstantiated, the resulting fallout if the child is later harmed reflects poorly on the agency. The pressure exerted by public opinion is illustrated by the media outrage that surrounded the death of a six-year-old girl in New York City in 1995.¹⁷⁹ Responding to the public outcry, the Commissioner of the city's child welfare agency initiated an aggressive policy toward parents suspected of child abuse or neglect.¹⁸⁰ He declared that "any ambiguity regarding the safety of the child will be resolved in favor of removing the child from harm's way. Only when families demonstrate to the satisfaction of [the agency] that their children are safe and secure will the children...be returned to the home."¹⁸¹ The removal rates in that jurisdiction then skyrocketed from 8,000 in 1995 to nearly 12,000 just two years later.¹⁸² In addition, the city increased its number of neglect cases from 6,658 in 1995 to nearly 11,000 in 1998.¹⁸³

This example illustrates the persuasive force of public perception upon the actions of CPS. CPS caseworkers, not wanting to be perceived as jeopardizing the safety of children, are as responsible for the loss of a single child, began to err on the side of removal. From a publicity standpoint, the downside of thousands of unwarranted removals was far preferable to the blowback that would come from a single death that might have been avoided.

C. Consequences/Costs of Over-Intervention

While it might be understandable that CPS would, when in doubt, choose to "play it safe" and err on the side of removing children, the toll taken by unwarranted interventions and removals must also be taken into account. Because CPS is tasked with protecting children, it should also give high priority to protecting children from the trauma associated with removal. It is ironic that CPS would unnecessarily subject large numbers of children to this nightmare—over 111,000 in 2008¹⁸⁴—all in the name of keeping children safe and protecting their best interests.

¹⁷⁹ Symposium, *Rights of Parents with Children in Foster Care: Removals Arising from Economic Hardship and the Predicative Power of Race*, 6 N.Y. CITY L. REV. 61, 61-62 (2003).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 62.

¹⁸² *Id.* at 64.

¹⁸³ Symposium, *supra* note 179, at 64.

¹⁸⁴ CHILD MALTREATMENT 2008, *supra* note 58.

Removing a child from his or her family can disrupt the emotional bonds between family members, with devastating consequences for everyone, including the child being “protected” by such removal.¹⁸⁵ The disruption is emotionally and psychologically damaging to the child because the child is physically separated from his or her family and usually placed in foster care with strangers.¹⁸⁶ Moreover, the foster care system itself may present a greater threat to the child’s physical safety and emotional wellbeing than remaining with his or her family.¹⁸⁷ A child is more likely to be sexually and physically abused in the foster care system.¹⁸⁸ Children in foster care are also more likely to die from abuse than children who remain with their family.¹⁸⁹ According to the Children’s Defense Fund, once children are placed in foster care it is difficult to be reunited with their families, causing many to remain in the system until emancipation.¹⁹⁰ Thus, while removal may be pursued with dispatch in the name of protecting the child perceived to be at risk, it is not so quick or easy to reunify the family, even though the child may be at equal or greater risk in the foster care environment.

Children are not the only ones harmed from unwarranted intervention by CPS. Parents must undergo the intrusive nature of the CPS investigation and experience the heartache of having their child physically removed from their arms and placed with strangers.¹⁹¹ Even if the intervention does not end with removal, the investigation itself intrudes upon the family’s privacy and threatens its preservation, causing emotional and psychological damage.¹⁹² The tragedy is magnified when considering that the majority of investigations are unjustified because of unsubstantiated reports.¹⁹³ Families must also endure the stigma associated with the CPS investigation, even if the reports are later found to be meritless.

¹⁸⁵ Cahn, *supra* note 178, at 1191 (citing Andre P. Derdeyn, *Foster Parent Adoption: The Legal Framework*, in *THE PSYCHOLOGY OF ADOPTION* 332, 336-37 (1990)); Hafemeister, *supra* note 54, at 906; Coleman, *supra* note 150, at 421, 518-21.

¹⁸⁶ Hafemeister, *supra* note 54, at 878-79.

¹⁸⁷ Mundorff, *supra* note 158, at 149-50; Hafemeister, *supra* note 54, at 907; Weithorn, *supra* note 59, at 1324 n.83.

¹⁸⁸ Mundorff, *supra* note 153, at 150 (citing Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 *NEW ENG. L. REV.* 129, 137 (2001)).

¹⁸⁹ *Id.* (citing Wexler, *supra* note 188).

¹⁹⁰ *Id.*

¹⁹¹ Coleman, *supra* note 150, at 443-44; Cahn, *supra* note 178, at 1191.

¹⁹² Coleman, *supra* note 150, at 441.

¹⁹³ *Id.* at 443-44; *CHILD MALTREATMENT 2011*, *supra* note 144.

The resulting message for parents is that open and notorious Free Range parenting may be a high-risk proposition. Because CPS has compelling incentives to intervene and to remove children, and because the interventions are so disruptive and harmful to children and families, parents may need to studiously avoid *any* parenting decision likely to draw CPS's attention.

Needless intervention and subsequent removal of a child also imposes financial costs upon society at large. As noted above, the federal government allocates considerable funds to the foster care system,¹⁹⁴ and both groundless investigations and unjustified removal of children only creates additional expenses which must be paid through its federal, state or local taxes.¹⁹⁵ CPS may perceive removals to be costless, because the cost of foster care is covered from federal sources, but the cost is nonetheless borne by society, and the taxpayers, as a whole.

III. IN SEARCH OF APPROPRIATE LEGAL STANDARDS

Finding and clarifying the appropriate legal standard for State intervention in the family poses a particularly troublesome challenge, because it is not clear which side to “err” on. In criminal law, we apply a very demanding legal standard, at least in terms of burden of proof, because we want to give the accused the benefit of the doubt. We err on the side of acquittal, rather than run the risk of convicting an innocent person. In so doing, society strikes a balance that likely allows many guilty parties to escape criminal conviction, simply because the prosecutor is unable to overcome the presumption of innocence.

In the case of child protection, however, society is not willing to give parents the benefit of the doubt. The defenseless child needs to be protected, so we err on the side of protecting the child from feared endangerment and neglect, creating systems of over-reporting and over-intervention, even on flimsy suspicions of endangerment. The upshot is that when parents are suspected of neglect or endangerment, the system employs a *de facto* presumption of guilt, rather than a presumption of innocence, and least when it comes to issues of intervention and removal.

¹⁹⁴ Mundorff, *supra* note 164, at 1213-14.

¹⁹⁵ Cahn, *supra* note 178, at 1191 (noting that “prevention is more economically efficient than removal”).

There is some justification for such presumptions in cases of direct abuse, such as sexual molestation or exploitation, or direct physical abuse. But in the case of Free Range parenting, when 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*—it is a standard that is difficult to justify.

This approach might also make logical sense if the intervention in such families were costless or harmless. But, as noted above, erring on the side of child protection, and intervening too quickly, disrupts families and does untold damage to the very children it is trying to protect.¹⁹⁶ And often, it turns out—particularly in case of Free Range kids, whose parents are voluntarily assuming certain risks in order to teach important lessons, skills, or principles—there never was an unreasonable threat to the child’s well-being in the first place.¹⁹⁷ Moreover, the disruption of families and the harm to children is not limited to those families where CPS intervenes. The fear of such intervention certainly affects parental choices and, to the extent it prompts overprotective parenting, the children in those families are going to suffer the negative consequences of overprotection as well, even though such families never show up on CPS’s radar.¹⁹⁸

So the challenge is to find a legal standard that draws the appropriate line and strikes the best balance, recognizing that there is a serious downside to over-intervention (as healthy families are disrupted) as well to under-intervention (where genuinely endangered children are left in harm’s way).¹⁹⁹ The legal standards that prevail today, however, leave a great deal to be desired.

A. CAPTA’s “Imminent Risk of Serious Harm” Standard

One of the key difficulties with the legal standards is that they are articulated in terms of “risk,” characterizing risk as something bad that children should not be exposed to. CAPTA defines child abuse and neglect not only in terms of actual harm caused to a child but also as “[a]n act of

¹⁹⁶ See discussion *supra* Part II.C.

¹⁹⁷ See discussion *supra* Part II.C.; CHILD MALTREATMENT 2011, *supra* note 144.

¹⁹⁸ See discussion *supra* Part I.B.1 about the harm to children that comes with overprotective parenting.

¹⁹⁹ See Cahn, *supra* note 178, at 1191 (“The policy of child protective services exists on a continuum between child removal and family preservation.”); see also Jane Waldfogel, *Rethinking the Paradigm for Child Protection*, *Future Children*, 104, 108 (Spring 2008).

failure to act which presents an imminent risk of serious harm.”²⁰⁰

Parenting is an exercise in risk management, with one risk playing off another. It will usually be impossible for parents to insulate their children entirely from risks of serious harm. An effective legal standard should provide useful guidance to parents about the full range of acceptable risks, and leave parents to make the close judgment calls, within that range, for which risks to their children are worth taking, given the alternatives (and the costs and risks of such alternatives). Taking the risk-management decision away from the parents can be justified only in cases where the risks posed by the parental choice obviously and substantially outweigh costs and risks of alternatives.

But the statutes do not speak in terms of the management of risk, or the weighing of alternative risks.²⁰¹ They speak of risk as something that is inherently bad, and suggest that children who are exposed to risks may be abused or neglected.²⁰² CAPTA’s only limitations are that the risk must be “imminent” and the harm must be “serious.”²⁰³

1. Why “imminent”?

Given that risk is inherent in everything we do, it is entirely appropriate to make sure that legal consequences are not triggered by routine or innocuous risks, so some limitations are appropriate. CAPTA’s limitation to risks that are imminent, however, is a very curious choice for a definition of child abuse and neglect.²⁰⁴ The legislative history of CAPTA offers no clues as to how or why the word “imminent” was chosen.²⁰⁵

Dictionary definitions of “imminent” suggest that it is about the timing, or immediacy of the event: “ready to take place; near at hand.”²⁰⁶ This limitation makes a great deal of sense as a standard for summary or emergency removal of a child from his parents, as the purpose would be to rescue a child from a situation before the “imminent” serious harm can befall him. But the timing or immediacy of the harm does not make much

²⁰⁰ 42 U.S.C. § 5106g.

²⁰¹ See discussion *supra* Part II.B.3.

²⁰² See discussion *supra* Part II.B.3.

²⁰³ 42 U.S.C. § 5106g.

²⁰⁴ See *id.*

²⁰⁵ See discussion *supra* Part I.A.2.

²⁰⁶ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, 1130 (1986).

sense in a definition of abuse and neglect. Routinely exposing a child to radiation or other known carcinogens, under such a standard, might never qualify as abuse or neglect, simply because the resulting cancer that will kill the child someday is anything but “near at hand.”²⁰⁷

In contrast, driving on the freeway, with a child strapped into the vehicle, certainly exposes the child to an imminent risk of death. A fatal or debilitating accident could happen at any moment. Giving a child a vaccine is also an imminent risk, because the small percentage of children who react badly to the vaccine are likely to succumb almost immediately after inoculation.²⁰⁸ Both of these would appear to satisfy the statutory definition of “imminent risk of serious harm,” and yet few people would think that driving a child to the doctor to receive a vaccination constitutes abuse or neglect.

As these examples illustrate, Congress missed the mark in defining the type of risk that should be considered abuse and neglect. The imminence of the risk—while critical, perhaps, in a decision to do an emergency removal of a child from parental custody—should not be the focus in defining abuse and neglect in the first place.

2. Focus on “risk” is misplaced

The CAPTA definition of abuse and neglect steers attention away from the relevant considerations also by treating risk as something to be eliminated rather than managed.²⁰⁹ Because a parent’s attempt to shield a child from one risk exposes the child to another risk, parents lose either way under a standard that condemns parents for subjecting their child to risk.²¹⁰

²⁰⁷ More popular online dictionaries include references to *likelihood* in their definitions of “imminent.” *E.g.* “likely to occur at any moment.” <http://dictionary.reference.com/browse/imminent>; “liable to happen soon,” <http://www.collinsdictionary.com/dictionary/english/imminent>. The probability of harm, unlike immediacy of the potential harm, seems to be a far more appropriate limitation for the statutory definition of abuse and neglect. *See infra* Section III.B. 1 Probabilities of Harm and Severity of Harm. It is possible that Congress was thinking in terms of “probably risk” or “likely risk” even when it opted for the language “imminent risk.” But that is nothing but speculation.

²⁰⁸ “Life-threatening allergic reactions from vaccines are very rare. If they do occur, it is usually within a few minutes to a few hours after the shot.” *Possible Side-effects from Vaccines*, CTRS. FOR DISEASE CONTROL & PREVENTION (Feb. 27, 2012), <http://cdc.gov/vaccines/vac-gen/side-effects.htm>.

²⁰⁹ *See* 42 U.S.C. § 5106g.

²¹⁰ *See id.*

B. Incorporating Risk Management in the Legal Standard

A more meaningful and functional definition of child abuse and neglect should draw from the reality of parenting choices. A far more critical factor than the imminence of the harm is the likelihood of such harm. The severity of the harm must be factored in as well, and balanced against the risks and costs of precaution against such harm. If all these factors are brought into play by the statutory definition of abuse and neglect, and by the standards for State intervention, there will be room to consider and respect the proper role and exercise of parental discretion.

1. Probabilities of Harm and Severity of Harm: Calculating what Risks are Reasonable

The CAPTA definition already limits child abuse and neglect to situations where the risk is of “serious” harm.²¹¹ Surely this is appropriate, as the State’s interests cannot outweigh the family’s autonomy interests when the threatened harm is minor. What the definition lacks is appropriate consideration of the probability of such harm occurring.²¹²

Judge Learned Hand articulated the model for analyzing the appropriateness of precaution in the classic case of *Carroll Towing*.²¹³ In an attempt to determine whether the tugboat owner’s failure to take precautions to avoid the accidental sinking of a barge constituted negligence, Judge Hand proposed a formula that took into account three variables: “(1) The probability that she [the barge] will break away; (2) the gravity of the resulting injury, if she does; (3) the burden of adequate precautions.”²¹⁴ The tugboat owner would be deemed negligent, and therefore liable, for the failure to take precautions only if the cost (the “burden”) of taking precautions is less than the “expected value” of the anticipated harm (the probability of harm times the extent of such harm).²¹⁵

This rule arises in the context of torts, and attempts to refine and define

²¹¹ See 42 U.S.C. § 5106g.

²¹² See *id.*

²¹³ *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d. Cir. 1947)

²¹⁴ *Id.* at 173.

²¹⁵ *Id.* “Expected value” is a mathematic concept defined as “the sum of the values of a random variable with each value multiplied by its probability of occurrence.” <http://www.merriam-webster.com/dictionary/expected%20value> (last visited Aug. 6, 2013).

the concept of negligence, but it is ultimately a test of the reasonableness of risk management decisions.²¹⁶ Accordingly, the principle can apply with equal force to the risk management decisions that parents must make.²¹⁷

Applying this rule, it is clear that the extent of the potential harm is not particularly meaningful standing alone. The relevant variable is the extent of such harm *times its probability*. So if a parent subjects his or her child to the risk of stranger abduction by allowing her to walk to school, the risk can be weighed meaningfully only if the [extremely small] probability of such abduction is taken into account. Similarly, the probability of a child falling from a tree she has climbed may be much higher, but the likely harm [probably no more than a broken bone] is much smaller. The meaningful variable is the harm *times* its probability, or the expected value of the harm.²¹⁸

2. Opportunity Cost: Considering Risk in Light of the Best Alternative

The expected harm, as suggested by Learned Hand, should be weighed against the cost of avoiding such harm.²¹⁹ At the same time, the full weighing of risk requires that the parent take into account the risks of the *next best alternative* choice. In the case of parenting, these costs and risks include a wide range of factors, including the harm to the child from having his or her sense of independence stifled during those formative years, being denied the opportunity for physical exercise, etc. Indeed, one of the key contributions of the Free Range parenting movement has been the recognition of these costs and risks of overprotection. Again, the risk of leaving a child home alone while the parent drives to the store [the

²¹⁶ *See id.*

²¹⁷ Judge Learned Hand's analysis has been applied not only in tort law, but also in a variety of other legal contexts. *See, e.g.,* Saad Gul & Katherine M. Royal, *Burning the Barn to Roast the Pig? Proportionality Concerns in the War on Terror and the Damadola Incident*, 14 WILLAMETTE J. INT'L L. & DISP. RESOL. 49 (2006) (applying the Hand formula to international law to assess the use of force against terrorists); Daniel L. Freidlin, Note, *Just Say No: The Cipro Craze and Managed Care – Applying the Hand Formula to Managed Care Decisions*, 30 HOFSTRA L. REV. 1329 (2002) (using the Hand formula in health law to measure the costs and benefits of certain preventive treatments); Jeanne Andrea Di Grazio, Note, *The Calculus of Confidentiality: Ethical and Legal Approaches to the Labyrinth of Corporate Attorney-Client Communications via E-mail and the Internet – from Upjohn Co. v. United States and its Progeny to the Hand Calculus Revisited and Revised*, 23 DEL. J. CORP. L. 553 (1998) (proposing the Hand formula as a method to evaluate the necessity of safeguarding certain attorney-client electronic communications).

²¹⁸ For definition of “expected value” see *supra* note 215.

²¹⁹ *See generally* *Carroll Towing*, 169 F.2d at 173.

probability the child will come to harm in that amount of time multiplied by the severity of the harm] may seem significant, but the reasonableness of that choice can be evaluated only in terms of the costs and risks of the alternatives: *e.g.* the cost of hiring a babysitter every time the parent wishes to run an errand of that nature or, perhaps, the risks associated with taking the child along on the errand, which include the risk of death or serious injury from an automobile accident.

The upshot is that parents' choices may be fairly second-guessed only in the context of the larger picture of the risk management decisions they make. Distorted perceptions by neighbors and CPS caseworkers of the probabilities of harm will result in misguided judgments, condemning parents for choices that may be reasonable in the larger risk-management context.

The legal standards that speak of *reasonable* risk, therefore, come much closer to the relevant considerations. "Reasonableness" of parenting choices could be evaluated according to well established principles in negligence, including the *Carroll Towing* analysis.²²⁰ But CAPTA does not require that the risk be reasonable, only that it be "imminent," and that the threatened harm be "serious."²²¹

IV. RECOMMENDATIONS FOR ADDRESSING THE PROBLEM

The existing legal standards defining child abuse and neglect fail to capture what is really relevant in the risk management decisions parents must make, and consequently fail to give guidance either to parents on the limits of their discretion, or to CPS caseworkers on when they should intervene.²²² New legal standards are needed that give more meaningful guidance and that preserve parental discretion and autonomy, so they need not fear State intervention if they dare defy the current overprotective norms. At the same time, CPS's financial and other incentives need to be revisited. Finally, CPS should be rebranded as an agency aimed at protecting children by supporting their parents in the difficult task of parenting, and keeping families together, rather than as the parents' adversary, continually threatening to break up the family by removing the children.

²²⁰ *See id.*

²²¹ 42 U.S.C. § 5106g.

²²² *See* discussion *supra* Part III.

A. Adopt a New Legal Standard

As already suggested, a more appropriate legal standard for child abuse and neglect cases should be drawn up, one that reflects the risk-management aspects of parenting, and appreciates not just the threats to children, but also the costs and risks associated with protecting them.²²³

This risk management approach explains some of the specific child safety regulations that already exist. For example, every state in the U.S. has now adopted seatbelt and car seat laws for transporting children in motor vehicles. Notwithstanding the value of preserving parental discretion over their children, parents are not at liberty to let kids ride unbuckled, or in the back of a pickup. There are a variety of costs associated with this regulation, *e.g.* families pay a price in terms of comfort for children on long drives (as kids can no longer crawl around in the back of the station wagon, or lie down back there and sleep during the drive), and in the purchase of carseats for younger children, and in terms of having to drive multiple vehicles when taking the whole soccer team somewhere (rather than squeezing them all into the same car). There are also risks associated with buckling children, as it may be very difficult to remove them from the vehicle if it catches fire or plunges into a body of water. But the consensus is that the risks associated with unbuckled children are *far* greater than the costs and risks associated with putting them in approved safety restraints. Parents don't get to make that judgment call anymore, because the risk management calculus tips so heavily in favor of buckling kids up.²²⁴

A more generic definition of child endangerment, abuse, and/or neglect, applicable outside of the specific context of car seats and seat belts, should

²²³ Of course, some child abuse and neglect is done knowingly or even purposefully, as parents are consciously intending harm for their children. If the state has evidence of this type of *mens rea*, the state should be able to pursue active intervention without giving the parental choices the type of deference advocated in this section.

²²⁴ Similar analysis applies to laws requiring bicycle helmets for children. The cost is low in terms of the protection that is afforded, and as a society, we will not trust a parent to exercise discretion on whether to insist on his child's wearing one. There are other compelling public policy benefits to making it a requirement as a matter of law, though. Parents can more easily overcome children's resistance to wearing helmets if the law requires it. And if the law requires it of everyone, the social stigma that may come with wearing a helmet (deemed "uncool" in certain social circles), is entirely removed, freeing all children to wear them without fear of teasing or taunting. In light of these benefits, balanced against the trivial costs, parents may welcome this curtailment of their own autonomy and discretion—the legal requirements *help* them in their quest to keep their children safe.

similarly draw upon the balancing of risks against the costs and risks of their alternatives. And parental discretion should be bounded only in situations where the balance—based on genuine risks (not merely perceived risk) of genuine harm—falls very heavily on one side, sufficiently to outweigh any countervailing costs and risks, and well as any interest in preserved parental discretion and autonomy.

1. Setting Higher Thresholds for Findings of Abuse and Neglect and for State Intervention in the Family

As noted above, child abuse and neglect must be defined in terms of competing risks and costs; parents should be encouraged to avoid *unreasonable* risks, meaning those risks that outweigh the costs and alternative risks of taking precautions against them. But even if a parenting choice is found to be unreasonable, that alone should not be enough to warrant State intervention in the family. Parents make mistakes, and occasional missteps or omissions, even negligent ones, should not justify so extreme a remedy as removing a child from the parent's custody and care.

Thus, even putting the reasonableness of the risk in proper context—considering both the probability of the harm and the costs/risks of the next best alternative—is not sufficient to protect parental discretion. Reasonable minds, including those of CPS caseworkers and the parents' whose actions they are judging, may well disagree as to what constitutes an unreasonable risk to a child. As long as parents may be second-guessed by CPS, they are likely to let fear of CPS intervention, rather than their own assessment of their children's best interests, drive their parenting decisions. And the result will be the perpetuation of overprotective norms.

- a. "Grossly Disproportionate" Risks

To ensure that parents get appropriate deference in the parenting of their children, therefore, the legal definition of abuse and neglect should be more demanding, and the threshold for CPS intervention should be much higher, than mere negligence. Parents—who typically know their kids better than anyone else and who also can also be presumed to care for and about those kids—are entitled to more deference than that. Moreover, they have due process rights in parental autonomy, a fundamental liberty interest that should not be treated lightly.²²⁵ Suspending those rights should require a

²²⁵ See *supra* notes 11-13, and accompanying text.

strong showing from CPS not just that the risks the children face are unreasonable—*i.e.* that the expected harm (the probability of harm times the severity of harm) is greater than the cost of precaution—but that the expected harm is *grossly* disproportionate to the costs and risks of the next best alternative.

Requiring CPS to meet this higher standard will go a long way toward protecting parental autonomy of Free Range parents, who may calculate the risks and costs of their parenting choices a little differently than mainstream parents. Indeed, requiring a showing of gross disproportionality will force the State to approach the issue in terms of actual probabilities and the seriousness of potential harms. That alone should eliminate the present threat that CPS will act on gut-level assessments, particularly those fed by media-driven fears and paranoia

b. “Abuse of Discretion” Standard

Another way to approach this problem is to formally establish that child-rearing and child safety issues are squarely placed within the sound discretion of parents, and that the State cannot intervene absent a clear showing that the parents abused that discretion. This would establish the legal presumption of deference to parental judgments on such issues, and that mere second-guessing of such parental choices cannot justify a CPS intervention.

This approach has the rhetorical advantage of framing the issue in terms of *discretion*, a concept that has been obscured somewhat in the recent push for and prioritization of child protection. It would also give Free Range parents a chance to justify their own actions and choices in terms of discretionary judgment calls, in order to fend off CPS interventions when endangerment or neglect charges are disputed.

2. Employing a Forward-looking Standard for Removal

As noted above, the question of whether there has been abuse or neglect, under applicable statutory standards, is closely linked to the determination of whether a child should be removed from his or her family’s custody and placed in foster care.²²⁶ But the two queries—whether neglect has happened in the past, and whether future neglect is sufficiently

²²⁶ See *supra* note 152 and accompanying text.

likely to warrant removal—are conceptually quite different, and in ways that make a great difference to parents.

The fact of past neglect or endangerment is not sufficient grounds for removal any more than a finding of tort liability automatically justifies a preventive injunction.²²⁷

The preventive injunction ... is not proper unless the defendant is threatening to commit a wrong in the future. The defendant's past trespass ... is not by that act alone threatening to wrong the plaintiff in the future. ... On the other hand, when demonstrators show intransigent determination to continue trespassing indefinitely, a preventive injunction may be appropriate.²²⁸

Similarly, a parental misjudgment in the past cannot alone justify removal unless the parent is “threatening” neglect in the future, or showing an “intransigent determination” to continue a pattern of endangerment for the child. Unfortunately, the Free Range parent is likely to be viewed, from the perspective of conventional overprotective norms, as precisely this type of future threat to the child’s perceived safety. So this standard is unlikely to help the Free Range parent.

But there is another difference between the preventive injunction and the removal of a child from his or her family: the preventive injunction typically preserves the status quo, whereas removal is a radical upending of the status quo. The extreme hardship on the family and the child, occasioned by a removal—one that is likely to prove unjustified in any case, and that will be difficult or slow to undo—militates strongly against removal, even under the “balance of hardships” analysis that motivates the grant of injunctive relief.²²⁹ Accordingly, notwithstanding a previous instance of neglect or endangerment, removal should be difficult to obtain, even more so than the typical preventive injunction to which it may be analogized.

²²⁷ “Abuse” may present a different scenario than neglect or endangerment. Certainly abuse deserves punishment, and the existence of past abuse may give rise to some presumptions of continuing risk to the victims of such abuse. Parental mistakes or misjudgments, even if they rise to the level of neglect, will not necessarily present an ongoing risk of harm to children sufficient to warrant removal.

²²⁸ DAN V. DOBBS, *LAW OF REMEDIES*, 164 (2d ed. 1993)

²²⁹ RICHARD L. HASEN, *REMEDIES: EXAMPLES AND EXPLANATIONS* 152-158 (2d ed. 2010); *See also* JAMES M. FISCHER, *UNDERSTANDING REMEDIES* 264-65 (2d ed. 2006).

B. Remove Financial and Other Incentives for CPS to Resort Too Quickly to Removal

As already noted, CPS has compelling incentives to do removals, even in ambiguous fact situations.²³⁰ Solving the problem of intimidation—the threat of State intervention forcing parents into overly protective parenting decisions—must include easing those pressures. Reallocating federal funding for foster care toward family reunification efforts, or toward support for families and parents to avoid the need for removal in the first place, will go a long way toward encouraging CPS to back off of its removal threat.

At the same time, a new statute, one that preserves parental discretion and allows removal only if there is a clear abuse of that discretion, will help insulate CPS from criticism when things go wrong. Even in worst-case scenarios, such as the death of the six-year-old in New York in 1995, CPS cannot be criticized for failing to intervene if the law does not allow such intervention.²³¹

C. New Emphasis, Rebranding of CPS

In performing its duties, CPS necessarily balances the need to protect children with the importance of preserving families. However, the current culture of over-protection, among other factors, has caused the pendulum to swing too far toward “child rescue” and away from family preservation. Society’s obsession with protection has influenced CPS to intervene, and parents, fearing such intervention, are bullied into overprotective parenting practices.

The task of parenting children is a difficult one, and given the uniqueness of personalities and circumstances, there is no one-size-fits-all approach to good parenting. It is little wonder that some parents struggle, and sometimes make mistakes. For anxious parents, trying hard to do right by their children, the threat of removal is hardly a helpful dynamic. Parents are far more likely to need education, guidance, support, and reassurance than the threat of unthinkable consequences.

The problem may be exacerbated by demographic shifts to smaller families. It means that a far greater proportion of children are being raised

²³⁰ See discussion *supra* Part II.B.4.

²³¹ See discussion *supra* Part II.B.4.

by inexperienced parents. When it was common to have four or five children in a family, 75-80% of the children in society were being raised by parents who had “done this before,” raising an older sibling. If the average family size in the U.S. drops to slightly less than two children per family,²³² a majority of children will be raised by parents doing this for the first time. And if those parents grew up in small households themselves, the likelihood that they participated in or even witnessed the rearing of younger siblings is dramatically diminished as well.²³³

If the statutory mandate, the funding mechanisms, and the legal responsibilities of CPS are substantially reformed, CPS can play a supportive role for struggling parents. By providing education and encouragement, rather than threats, CPS can remedy the deficiencies in parenting skills, and protect children *in* their family situation, rather than try to rescue them *from* their family situation. By scaling back the threat of removal, CPS can ease the intimidation of Free Range parents, and give them more space to parent as they see fit.

Indeed, certain communities recognize the need to educate parents and provide support. For example, the goal of the Strong Communities initiative in North Carolina is to use existing community resources to directly support families with young children.²³⁴ An outreach worker is assigned to a specific community to engage families, establish support programs for young parents, and encourage neighbors to become involved in after-school programs, mentoring, and parenting classes.²³⁵ This initiative focuses on building strong families and promoting neighborly communities.²³⁶

CPS can also look overseas to emulate models that provide support, rather than threats, to parents. In the Netherlands, for example, every mother is entitled to the support and help of a post-natal nurse, full-time, in

²³² Heather Whipps, Census: U.S. household size shrinking, <http://www.nbcnews.com/id/14942047/#.UfgP9o3qlsk>

²³³ The mathematical inevitability of this is illustrated when we consider the impact of China’s “one child” policy, were it to be fully implemented. It would ensure that no one has younger siblings or younger cousins (or cousins at all), and that every single child in the society is raised by parents who are doing this for the first and only time.

²³⁴ Robin J. Kimbrough-Melton & Dottie Campbell, *Strong Communities for Children: A Community-wide Approach to Prevention of Child Abuse and Neglect*, 31 FAM. COMMUNITY HEALTH 100, 105 (2008).

²³⁵ *Id.* at 105-06.

²³⁶ *Id.* at 110.

her home, for the first eight days after giving birth.²³⁷ The nurse, known as a *kraamzorg*, plays a critical role in supporting the mother in that difficult and critical transitional stage, can offer a great deal of reassurance, and can teach the parents, a great deal about proper care of an infant.²³⁸ This may be a contributing factor for the Netherlands' very low infant mortality rate, which runs at less than 63% the rate of infant mortality in the United States.²³⁹

The shift to an educational priority for CPS, rather than a focus on “rescue,” has additional advantages. It may help promote a more reasoned and reasonable debate over parenting practices. It could neutralize some of the fears inflamed by media coverage, helping parents see issues of child safety in a larger and more realistic context. CPS, with substantive expertise, and extensive experience that so many of today's parents lack, has the potential to validate some aspects of Free Range parenting, and educate all parents about how to more effectively manage the risks that children face today. In this way, CPS can help parents be more effective in protecting their children, establishing a supportive, rather than an adversarial relationship with parents.

CONCLUSION

Although the world is safer than ever for children, the parents who wish to act on that are increasingly at risk. Misperceptions of the threats to child safety have prompted a revolution in parenting norms, and in legal standards, in a misguided and ultimately futile attempt to insulate children from all risk. The problem is not merely one of wasted worry and wasted resources; there is growing evidence that our obsession with safety, distorted by unsubstantiated fears and media-fed paranoia, results in exposing children to other, arguably more serious risks to children's well-being and development.

²³⁷ *Kraamzorg, Parenting in Holland*, http://www.parentinginholland.com/nl/index.php?option=com_content&view=article&id=79&Itemid=105

²³⁸ *Id.*; see also *Kraamzorg – Post-natal Care in the Netherlands*, http://www.expatica.com/nl/family/kids/Kraamzorg-Postnatal-Care-in-the-Netherlands_13313.html (“Circumstances that warrant a higher level of *kraamzorg* include the number of children already in the family, existence of mental illness or communication barriers, an instable family situation, the birth of twins (or more) or problems with (breast)feeding.”)

²³⁹ Central Intelligence Agency, *The World Factbook* <http://www.cia.gov/library/publications/the-world-factbook/rankorder/2091rank.html>.

Exacerbating the problem is the fear of CPS intervention if parents fail to conform to the emerging norms of overprotective parenting. Therefore, parents, including Free Range parents, who genuinely believe their children will be better off if they grow up without the strictures of such overprotection, are effectively intimidated into conforming. Indeed, chances that a child will be abducted by a stranger—the number one fear of parents—is statistically small, and therefore unworthy of the degree of attention it gets. But the risk that a child who has not been maltreated will be taken from his or her family by CPS, is orders of magnitude greater. Ironically, therefore, parents who know enough not to fear child abduction are still likely to overprotect their children, because they do know enough to fear CPS intervention. CPS displaces the child molester in the role of bogeyman in this scenario by acting on statutory standards that typically do not respect the concept of reasonable risk, and by perverse incentives to resort to removal as a first resort, rather than as a last.

The solution to this problem comes with the redrafting of the statutes that define child neglect in a way that recognizes parenting as an exercise in risk management, and that protects parents' discretion in making those judgment calls. CPS funding mechanisms can be revised to enable caseworkers to devote energies to keeping children safe *within* their own families, and to support and reassure parents with the facts about keeping children safe, rather than terrorize them with threats. The pendulum has swung hard in favor of highly protective parenting in contemporary American society, and the legal standards for child protection, and the agencies entrusted with it, are likely to keep it there, despite compelling evidence that it should be allowed to swing back. Until the legal framework for child protection is dismantled and retooled, overprotection will remain the standard for society, with serious consequences for society, for families, and for the children themselves.