

# INDIANA'S NEGLECT OF A DEPENDENT STATUTE: USES AND ABUSES

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## INTRODUCTION

### A. *State v. George*<sup>1</sup>

At approximately one o'clock in the afternoon of March 13, 1993, in Boone County, Indiana, Karen George approached a "T" intersection when another car turned the corner short, almost colliding with Ms. George. To avoid the collision, Ms. George applied the brakes and turned toward the ditch, losing control on the icy road. She missed the other car, but spun around and landed on top of a cement abutment that protected the end of a drain pipe. Her rear wheels were off the ground, so she could not get out of the ditch. The other car did not stop to help.

Ms. George and her eleven-year-old daughter, who was with her at the time, walked to a nearby house to call for help. It was a cold day and the house belonged to friends, so Ms. George had her daughter stay at the house while she went back to the car to wait for help to arrive.

During routine questioning, the responding police officer asked if anyone had witnessed this one-car accident. Ms. George replied that other than the people in the car she had swerved to miss, only her daughter witnessed the accident. After telling the officer where her daughter was, she and the officer walked around the car to see if it had been damaged. Only then did the officer notice that Ms. George stumbled and was unsteady on her feet. He then noticed the smell of alcohol on her breath. A blood-alcohol level test showed she had 0.23 percent by weight of alcohol in her blood. She was arrested for operating a vehicle while intoxicated.<sup>2</sup> After reading the police report, the prosecutor decided to charge Ms. George not only with driving while intoxicated, a class C misdemeanor,<sup>3</sup> but also for neglect of a dependent,<sup>4</sup> a class D felony.<sup>5</sup>

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\* IND. CODE § 35-46-1-4(a) (1993).

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1. *State v. George*, Trial No. 06D02-9303-CF95 (Boone County Superior Court, Criminal Division 2, tried November 21, 1993).

2. IND. CODE § 9-30-5-1 (1993) ("A person who operates a vehicle with at least ten-hundredths percent (0.10%) by weight of alcohol in the person's blood commits a Class C misdemeanor.").

3. "A person who commits a Class C misdemeanor shall be imprisoned for a fixed term of not more than sixty (60) days; in addition, he may be fined not more than five hundred dollars (\$500)." IND. CODE § 35-50-3-4 (1993).

4. IND. CODE § 35-46-1-4(a) (1993).

5. IND. CODE § 35-50-2-7 (1993) provides:

(a) A person who commits a Class D felony shall be imprisoned for a fixed term of one and one-half (1 1/2) years, with not more than one and one-half (1 1/2) years added for aggravating circumstances or not more than one (1) year subtracted for mitigating circumstances. In addition, he may be fined not more than ten thousand dollars (\$10,000).

(b) Notwithstanding subsection (a), if a person has committed a Class D felony, the court may

*George* is a recent example of prosecutors' creative use of Indiana's Neglect of a Dependent Statute<sup>6</sup> to protect dependents. Part I of this Note provides a detailed study of prior *use* of this statute. In Part II, which explores *abuse* of the statute, this Note examines problems that have been encountered in applying the statute. Part II further provides the outcome of the *George* case, and other recent applications of the statute, which demonstrate the need for revising the statute. Part III concludes this Note with a recommendation for updating the statute.

### B. Current Status of the Statute

Indiana's Neglect of a Dependent Statute states that:

(a) A person having the care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:

- (1) places the dependent in a situation that may endanger his life or health;
- (2) abandons or cruelly confines the dependent;
- (3) deprives the dependent of necessary support; or
- (4) deprives the dependent of education as required by law;

commits neglect of dependent, a Class D felony. However, except for a violation of clause (4), the offense is a Class B felony if it results in serious bodily injury. It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.<sup>7</sup>

The Indiana Code defines "person,"<sup>8</sup> "dependent,"<sup>9</sup> "support,"<sup>10</sup> "knowingly,"<sup>11</sup> "intentionally,"<sup>12</sup> "confine,"<sup>13</sup> and "serious bodily injury,"<sup>14</sup> while the Indiana courts have defined other terms used in this statute. The word "cruelly," used to describe a confinement, requires that the confinement "is likely to result in a harm such as

enter judgment of conviction of a Class A misdemeanor and sentence accordingly.

*Id.* ("A person who commits a Class A misdemeanor shall be imprisoned for a fixed term of not more than one (1) year; in addition, he may be fined not more than five thousand dollars (\$5000)." IND. CODE § 35-50-3-2 (1993).)

6. IND. CODE § 35-46-1-4(a) (1993).

7. *Id.*

8. "'Person' means a human being, corporation, limited liability company, partnership, unincorporated association, or governmental entity." IND. CODE § 35-41-1-22 (1993).

9. IND. CODE § 35-46-1-1 (1993); *see infra* text accompanying notes 34-41.

10. "'Support' means food, clothing, shelter, or medical care." IND. CODE § 35-46-1-1 (1993).

11. "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so." IND. CODE § 35-41-2-2(b) (1993).

12. "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so." IND. CODE § 35-41-2-2(a) (1993).

13. "As used in [the Kidnapping and Confinement] chapter, 'confine' means to substantially interfere with the liberty of a person." IND. CODE § 35-42-3-1 (1993).

14. "'Serious bodily injury' means bodily injury that creates a substantial risk of death or that causes serious permanent disfigurement, unconsciousness, extreme pain, or permanent or protracted loss or impairment of the function of a bodily member or organ." IND. CODE § 35-41-1-25 (1993).

disfigurement, mental distress, extreme pain or hurt, or gross degradation, and yet does not necessarily endanger the dependent's life or health."<sup>15</sup> "Whether the confinement is 'cruel' is to be determined by an objective standard, based upon the nature or extent of the punishment. Thus, confinement which is unreasonable under the facts and circumstances may be 'cruel' regardless of the actor's motive."<sup>16</sup>

The word "necessary," used to modify the support required for a dependent, is a flexible and relative adjective ranging "from mere convenience to that which is indispensable."<sup>17</sup> In the neglect of a dependent context, one court, over dissent, applied the term's plain and ordinary meaning to conclude that "necessary support is essential, indispensable or absolutely required food, clothing, shelter, and medical care; i.e., food, clothing, shelter, and medical care without which the dependent's life or health is at risk or endangered."<sup>18</sup> This definition causes subsection (1) of the Neglect of a Dependent Statute to overlap subsection (3), but does not render subsection (1) superfluous.<sup>19</sup> Subsection (3) uses the verb "deprives," which "is used to describe the conduct of taking away, removing, or divesting."<sup>20</sup> Subsection (1) uses the verb "places," which usually describes "the conduct of putting something in a particular position."<sup>21</sup> This court, over dissent, applied the subsection (1) standard to subsection (3) and concluded that malnutrition, by itself, is not enough to support a conviction under the Neglect of a Dependent Statute.<sup>22</sup> "[T]here is a critical difference between malnutrition in the sense of poor nutrition and malnutrition which endangers or places at risk a dependent's health or life."<sup>23</sup>

In the 1985 case of *State v. Downey*, the Indiana Supreme Court held in a unanimous decision that, construed literally, the Neglect of a Dependent Statute is unconstitutionally broad and vague.<sup>24</sup> The "major part" of the vagueness in the statute is caused by the "double contingency factored into the definition of the crime by the phrase 'may endanger.'"<sup>25</sup> The court saved the statute from nullification by giving it a narrowing construction.<sup>26</sup> "[T]he statute is to be regarded as applying to situations that endanger the life or health of a dependent. The placement must itself expose the dependent to a danger which is actual and appreciable."<sup>27</sup>

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15. Hartbarger v. State, 555 N.E.2d 485, 487 (Ind. Ct. App. 1990).

16. *Id.*

17. Ricketts v. State, 598 N.E.2d 597, 600 (Ind. Ct. App. 1992) (quoting *Indiana Broadcasting Corp. v. Star Station of Ind.*, 388 N.E.2d 568, 573 (Ind. Ct. App. 1979)).

18. *Id.*

19. *Id.* at 600.

20. *Id.* at 600-01.

21. *Id.* at 600; but see *infra* text accompanying notes 58-59.

22. *Ricketts*, 598 N.E.2d at 601.

23. *Id.*

24. *State v. Downey*, 476 N.E.2d 121 (Ind. 1985).

25. *Id.* at 123.

26. *Id.*

27. *Id.*

Failure to instruct the jury that the danger to the dependent must be actual and appreciable will result in the reversal of a conviction and a remand for retrial.<sup>28</sup> However, instructions containing the statute's original "may endanger" language do not erroneously provide a jury with a lower standard of harm than is required by the *Downey* decision as long as other instructions include the *Downey* mandate that the State must prove that the defendant placed the dependant in a situation that actually and appreciably endangered the life of the dependant.<sup>29</sup> "Jury instructions must be construed as a whole, and if when so considered, they state the law fully and correctly, they are not erroneous."<sup>30</sup> The State has the burden of proving that the dependent's life is in actual and appreciable danger.<sup>31</sup>

The purpose of the Neglect of a Dependent Statute is to "authorize the intervention of the police power to prevent harmful consequences and injury to dependents. . . . Law enforcement officials need not await loss of life, limb or property, but may intervene where conduct is sufficient to warrant belief that such an ultimate harmful consequence will ensue."<sup>32</sup> The goal of the statute is the protection of children.<sup>33</sup>

## I. USES

### A. *Who Can Be a Dependent?*

A significant aspect of Indiana's statute is that it is a neglect of a "dependent" statute, not a "child" neglect statute.<sup>34</sup> "Dependent" is statutorily defined as: "(1) an unemancipated person who is under eighteen (18) years of age; or (2) a person of any age who is mentally or physically disabled."<sup>35</sup> In addition to the majority of cases where the defendant is responsible for an unemancipated child under the age of eighteen, the statute has also been used against those who are responsible for the care of the mentally disabled<sup>36</sup> and the physically disabled.<sup>37</sup> Many dependents are both physically and mentally disabled.<sup>38</sup> The disability may be a result of old age,<sup>39</sup> but not necessarily so.<sup>40</sup>

28. *McCullough v. State*, 608 N.E.2d 1009, 1010 (Ind. App. 1993).

29. *White v. State*, 547 N.E.2d 831, 835 (Ind. 1989); INDIANA JUDGES ASS'N, INDIANA PATTERN JURY INSTRUCTIONS: CRIMINAL, Instruction No. 7.09 (2d ed. 1991).

30. *White*, 547 N.E.2d at 835.

31. *Dayton v. State*, 501 N.E.2d 482, 484 (Ind. Ct. App. 1986).

32. *Downey*, 476 N.E.2d at 123.

33. *Ware v. State*, 441 N.E.2d 20, 23 (Ind. Ct. App. 1982).

34. *But cf.* Carolyn M. Trier, Note, *Indiana's Criminal Treatment of Abusive Parents: Problems in Need of Solutions*, 24 VAL. U. L. REV. 553, 557-64 (1990) (refers to the statute as "The Child Neglect Statute").

35. IND. CODE § 35-46-1-1 (1993).

36. *See, e.g., Lomax v. State*, 510 N.E.2d 215 (Ind. Ct. App. 1987) (appellant placed her mentally disabled, adult son in conditions that constituted a health hazard); *Parrish v. State*, 459 N.E.2d 391 (Ind. Ct. App. 1984) (appellants confined 80-year-old man because they believed he was crazy).

37. *See, e.g., Bean v. State*, 460 N.E.2d 936 (Ind. 1984) (appellants beat adult dependent who was microcephalic, frail, and mildly retarded); *Klagiss v. State*, 585 N.E.2d 674 (Ind. Ct. App. 1992) (appellant convicted after death of his 80-year-old mother).

38. *See, e.g., Bean*, 460 N.E.2d at 936; *Kerlin v. State*, 573 N.E.2d 445 (Ind. Ct. App. 1991).

39. *See, e.g., Klagiss*, 585 N.E.2d at 674; *Kerlin*, 573 N.E.2d at 445; *Parrish*, 459 N.E.2d at 391.

40. *See, e.g., Bean*, 460 N.E.2d at 936; *Lomax*, 510 N.E.2d at 215.

Additionally, there is no requirement that the person be adjudicated a dependent in order to apply the statute.<sup>41</sup>

### B. *Who Can Be a Defendant?*

While most defendants in a neglect of a dependent case are the parents of the dependent, the statute clearly states that the person charged does not have to be under any legal obligation to care for the dependent, but may be one who assumes responsibility voluntarily.<sup>42</sup> The responsibility does not have to be assumed with the authority or permission of the one who has the legal obligation.<sup>43</sup> Consequently, the statute has been used against a stepfather,<sup>44</sup> a mother's boyfriend,<sup>45</sup> a father's roommate,<sup>46</sup> and a guardian's husband.<sup>47</sup> The statute has also been used to bring charges against an intermediate care facility,<sup>48</sup> the corporation that owns an intermediate care facility,<sup>49</sup> the employees of an immediate care facility,<sup>50</sup> the medical director of a health care facility,<sup>51</sup> and the administrator of a health care facility.<sup>52</sup> All of these defendants were found to have assumed responsibility for the care of a dependent and then either inflicted injury on or failed to provide adequate care for that dependent.

### C. *Is There an Act Requirement?*

While most charges of neglect of a dependent are against a defendant who acts in a way that injures the dependent, action is not required by the statute. Subsections (3) and (4) of the statute define violations in terms of "depriving" the dependent of "necessary support"<sup>53</sup> and of "education as required by law."<sup>54</sup> Failure to provide a dependent with adequate or prompt medical care has been classified as depriving the dependent of

41. *State v. Springer*, 585 N.E.2d 27, 29-30 (Ind. Ct. App. 1992) (quoting *Bean*, 460 N.E.2d at 942).

42. IND. CODE § 35-46-1-4(a) (1993).

43. *Dowler v. State*, 547 N.E.2d 1069, 1072 (Ind. 1989).

44. *Shoup v. State*, 570 N.E.2d 1298, 1303-04 (Ind. Ct. App. 1991).

45. *Wilson v. State*, 525 N.E.2d 619, 625 (Ind. Ct. App. 1988).

46. *Dowler*, 547 N.E.2d at 1071-72.

47. *Bean v. State*, 460 N.E.2d 936, 942 (Ind. 1984).

48. *State v. Monticello Developers, Inc.*, 502 N.E.2d 927 (Ind. Ct. App. 1987), *vacated*, 527 N.E.2d 111 (Ind. 1988) (intermediate care facility for the mentally retarded and the developmentally disabled was charged with neglect of a dependent when a retarded resident was burned when left unattended in a bathtub filled with hot water).

49. *Id.* at 932 (corporation charged using an agency relationship theory when the offense was committed by the corporation's agent acting within the scope of the agent's authority).

50. *Id.* at 929.

51. *Kerlin v. State*, 573 N.E.2d 445, 446-47 (Ind. Ct. App. 1991) (appellant served as a medical consultant to a nursing home, provided medical care to each of the patients at least once a month, and was charged when two patients had to be hospitalized when they did not recover from problems for which appellant had administered treatment); *see infra* text accompanying notes 66-69.

52. *State v. Springer*, 585 N.E.2d 29 (Ind. Ct. App. 1992) (this charge is based on the same facts that lead to the charge in *Kerlin*, a companion case); *see infra* text accompanying notes 70-73.

53. IND. CODE § 35-46-1-4-(a)(3) (1993).

54. IND. CODE § 35-46-1-4-(a)(4) (1993).

necessary support<sup>55</sup> and also as "placing" the dependent in a situation of actual and appreciable danger under subsection (1).<sup>56</sup> While seemingly requiring an act, subsection (1)<sup>57</sup> has been interpreted to encompass inactions as well as positive actions. An example of inaction that a court interpreted as a placement occurred when a parent allowed a child to remain in a living arrangement knowing that the child was being abused and did nothing to prevent the abuse.<sup>58</sup> This placement, whether from an act or an inaction, need not be for any specific length of time.<sup>59</sup> It could be a continuous dangerous condition, a pattern of abuses over a long period of time, or a one-time situation of very brief duration.<sup>60</sup> But the situation, at a minimum, must place the dependent's life or health at risk or in danger.<sup>61</sup>

There is a limit, however, as to how far a court will go in finding a voluntary assumption of the care of a dependent and in allowing a conviction for failing to act. In *Fisher v. State*,<sup>62</sup> a defendant allowed a custodial parent and that custodial parent's dependent to move into the defendant's home, knowing that the custodial parent was physically abusing the dependent. The court found the defendant not guilty of neglect of a dependent even though the defendant did not report the abuse. While such a defendant could be found to have voluntarily assumed the care of the dependent by providing a home, food, and services, and the child could also be found to have been in a dangerous situation by living with an abusive parent, the *Fisher* court concluded that the defendant had not "placed" the dependent in that dangerous situation.<sup>63</sup> The defendant did not have the authority to separate the parent from the dependent, so the only alternative was to report the abuse. The court held that failure to report the abuse in this case was not enough to establish that the defendant knowingly or intentionally "placed" the defendant in a dangerous situation as required by the Neglect of a Dependent Statute.<sup>64</sup>

The *Fisher* circumstances are very different from the situation where the parent moves into the home of a person who then abuses the child and the parent does nothing. Since the parent has the legal care of the dependent, failure to act constitutes neglect.<sup>65</sup>

In a contrasting case, however, the court in *Kerlin v. State* went quite far in applying the Neglect of a Dependent Statute to a physician who allegedly was negligent in providing care for elderly patients who lived in a health care facility.<sup>66</sup> The physician was

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55. See, e.g., *Hall v. State*, 493 N.E.2d 433, 436 (Ind. 1986); *Ricketts v. State*, 598 N.E.2d 597, 601 (Ind. Ct. App. 1992).

56. See, e.g., *Hall*, 493 N.E.2d at 436; *Kerlin v. State*, 573 N.E.2d 445, 448 (Ind. Ct. App. 1991); *Johnson v. State*, 555 N.E.2d 1362, 1366 (Ind. Ct. App. 1990); *Lomax v. State*, 510 N.E.2d 215, 219-20 (Ind. Ct. App. 1987); *Dayton v. State*, 501 N.E.2d 482, 483-84 (Ind. Ct. App. 1986).

57. IND. CODE § 35-46-1-4-(a)(1) (1993).

58. *Wilson v. State*, 525 N.E.2d 619, 623 (Ind. Ct. App. 1988).

59. *Lomax*, 510 N.E.2d at 220.

60. *Wilson*, 525 N.E.2d at 624.

61. *Id.* at 625.

62. 548 N.E.2d 1177 (Ind. Ct. App. 1990).

63. *Id.* at 1179.

64. *Id.* at 1179-80.

65. *Wilson*, 525 N.E.2d at 623.

66. *Kerlin v. State*, 573 N.E.2d at 445 (Ind. Ct. App. 1991). Charges of neglect of a dependent were

the medical director at a nursing home and provided medical care to each of the patients at least once a month. The two indictments alleged that the physician was negligent when one patient died from gangrene after the physician had been consulted and another was hospitalized for treatment of a chronic eye infection and toe infection two weeks after the physician had treated the patient. There is no question that these elderly patients were physically disabled and thus dependents, but the court took a large step in saying that they were the medical director's dependents.<sup>67</sup>

In contrast to cases where a defendant was charged with neglect for failing to seek medical treatment for dependents who were in need,<sup>68</sup> the physician in *Kerlin* did provide medical care for the patients. He correctly diagnosed their conditions and ordered appropriate treatment for them, relying on the nursing home staff to carry out the treatment and monitor the situations. In regard to the patient suffering from gangrene, the physician saw the patient on several occasions and transferred her to the more intensive care of a hospital and other physicians when he thought it was necessary. The patient then died after the family chose not to amputate the gangrenous limb. As for the other patient, the treatment did not cure the problem, but the chronic eye infection required further attention, and the toe infection was at least partially a result of the patient's own behavior.<sup>69</sup> The physician was not responsible for the conditions suffered by either of these patients. The nursing home staff and the families had more contact with these patients than the physician. Although, the physician treated the patients appropriately and then transferred them to the hospital for more help when they did not respond to the treatment, he was still charged with neglect of a dependent.

The facts of the *Kerlin* case even resulted in charges being brought against the administrator of the health care facility in *State v. Springer*.<sup>70</sup> The *Springer* court concluded that determining whether the patients at the facility were the administrator's "dependents" is a fact question for the jury.<sup>71</sup> Even though the administrator employed a medical director who was responsible for providing medical care to each of the patients at the facility, the possibility still existed that the administrator might be found guilty of neglect of a dependent if the medical director did not provide adequate care.<sup>72</sup> Additionally, although other statutes are specifically directed to the protection of adults in residential health care facilities, the Neglect of a Dependent Statute can nonetheless be applied.<sup>73</sup>

The *Kerlin* and *Springer* courts conflict with the *Fisher* court in their application of the neglect statute. While the *Kerlin* and *Springer* courts were liberal in applying the

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also found applicable to the administrator of this health care facility in the case of the dependent who had a chronic eye infection and infected toes. *State v. Springer*, 585 N.E.2d 27 (Ind. Ct. App. 1992); see *infra* text accompanying notes 70-73.

67. *Kerlin*, 573 N.E.2d at 450-51 (Baker, J., dissenting).

68. See, e.g., *Davis v. State*, 476 N.E.2d 127 (Ind. Ct. App. 1985); see *supra* notes 55-56 and accompanying text.

69. *Kerlin*, 573 N.E.2d at 451-52.

70. *Springer*, 585 N.E.2d at 27.

71. *Id.* at 30.

72. *Id.* at 31.

73. *Id.* at 30.

statute to someone who had little contact with the victim and was acting to help the victim, the *Fisher* court refused to apply the statute to someone who knew of abuse and voluntarily provided care for the dependent, but did nothing to help. While the question of whether a victim is the defendant's "dependent" is a fact question for the jury,<sup>74</sup> this divergent application of the Neglect of a Dependent Statute demonstrates a lack of clarity in how the statute is to be applied.

*D. Is There an Injury Requirement or Limitation?*

According to the statute, the defendant does not have to actually injure the dependent to be convicted, just "place[] the dependent in a situation that may endanger his life or health."<sup>75</sup> This has been interpreted to mean "expose the dependent to a danger which is actual and appreciable."<sup>76</sup> While most cases do involve injuries to the dependent, defendants have been convicted when no actual injuries to the dependent occurred.<sup>77</sup> Bruises on a dependent's body, alone, do not constitute sufficient evidence to allow a trier of fact to infer a situation of actual and appreciable danger.<sup>78</sup> If the defendant's behavior results in a serious bodily injury<sup>79</sup> the offense is raised<sup>80</sup> from a Class D felony<sup>81</sup> to a Class B felony.<sup>82</sup> The statute has been invoked not only to protect against physical injuries, but also mental injuries.<sup>83</sup> The statute has also been used in situations that resulted in the dependent's death,<sup>84</sup> but some opposition to this use has been expressed.<sup>85</sup>

74. *Kerlin*, 573 N.E.2d at 448.

75. IND. CODE § 35-46-1-4-(a)(1) (1993).

76. *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985); *see supra* notes 24-31 and accompanying text.

77. *See, e.g., Sample v. State*, 601 N.E.2d 457 (Ind. Ct. App. 1992) (mother convicted for failure to obtain prompt medical care for her four-month-old infant after the child fell and fractured her skull even though the child's physician testified that the delay itself did not constitute an actual and appreciable threat to the child's life or health); *Johnson v. State*, 555 N.E.2d 1362 (Ind. Ct. App. 1990) (mother convicted when she delayed obtaining medical care for her burned seventeen-month-old infant because there was a risk of severe infection even though the delay did not actually cause any harm).

78. *Dayton v. State*, 501 N.E.2d 482, 484 (Ind. Ct. App. 1986).

79. "Serious bodily injury" is defined by IND. CODE § 35-41-1-25 (1993); *see supra* note 14.

80. IND. CODE § 35-46-1-4(a) (1993).

81. IND. CODE 35-50-2-7 (1993); *see supra* note 5.

82. IND. CODE § 35-50-2-5 (1993) provides:

A person who commits a Class B felony shall be imprisoned for a fixed term of ten (10) years, with not more than ten (10) years added for aggravating circumstances or not more than four (4) years subtracted for mitigating circumstances; in addition, he may be fined not more than ten thousand dollars (\$10,000).

*Id.*

83. *See, e.g., DeMontigny v. State*, 593 N.E.2d 1270, 1272 (Ind. Ct. App. 1992); *Riffel v. State*, 549 N.E.2d 1084, 1088 (Ind. Ct. App. 1990).

84. *See, e.g., Lamphier v. State*, 534 N.E.2d 699 (Ind. 1989); *McClaskey v. State*, 540 N.E.2d 41 (Ind. 1989); *Strong v. State*, 538 N.E.2d 924 (Ind. 1989); *Hall v. State*, 493 N.E.2d 433 (Ind. 1986); *Bean v. State*, 460 N.E.2d 936, 942-43 (Ind. 1984); *Shipley v. State*, 620 N.E.2d 710 (Ind. Ct. App. 1993); *Mallory v. State*, 563 N.E.2d 640, 643-44 (Ind. Ct. App. 1990); *Gasaway v. State*, 547 N.E.2d 898 (Ind. Ct. App. 1989); *Hill v. State*, 535 N.E.2d 153, 155-56 (Ind. Ct. App. 1989).



## II. ABUSES

A. *The Double Jeopardy Problem*

When a dependent dies as a result of neglect, the defendant is often charged with a voluntary or involuntary manslaughter, reckless homicide, or murder offense along with a charge of neglect of a dependent resulting in serious bodily injury.<sup>86</sup> A double jeopardy issue arises when the defendant is convicted of both charges. The issue also arises in cases where the defendant is charged with both battery and neglect of a dependent<sup>87</sup> and, in cases like *State v. George*,<sup>88</sup> where the defendant is charged with both operating a motor vehicle while intoxicated and with neglect of a dependent because the dependent was in the car at the time.<sup>89</sup> Different tests are used to determine if the two offenses in these situations are separate, punishable offenses, or if the neglect charge is a lesser included offense so that punishment for both would be double jeopardy.

Double jeopardy is barred by both the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution<sup>90</sup> and by Article 1, Section 14 of the Indiana Constitution.<sup>91</sup> The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution applies to the states through the Fourteenth Amendment.<sup>92</sup> “[T]he Fifth Amendment guarantee against double jeopardy . . . protects against multiple punishments for the same offense.”<sup>93</sup> “[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.”<sup>94</sup> This is known as the *Blockburger* test.

“While the Indiana decisions appear to generally follow *Blockburger* it is clear that through its own constitutional provision against double jeopardy Indiana may provide its citizens more rights than those guaranteed federally.”<sup>95</sup> When applying the test in Indiana,

85. See, e.g., *Lamphier*, 534 N.E.2d at 701 (Shepard, C.J., concurring and dissenting) (Legislative revision of the statute defining “serious bodily injury” to omit actions that resulted in death shows legislative intent to exclude such situations from the statute. The neglect statute is not intended to cover situations in which the victim dies.); *McClaskey*, 540 N.E.2d at 45 (Shepard, C.J., concurring) (Situations in which the dependent dies should be treated as homicides and not as matters of neglect.).

86. See, e.g., *Lamphier*, 534 N.E.2d 699 (Ind. 1989); *McClaskey*, 540 N.E.2d 41 (Ind. 1989); *Strong*, 538 N.E.2d 924 (Ind. 1989); *Hall*, 493 N.E.2d 433 (Ind. 1986); *Bean*, 460 N.E.2d 936 (Ind. 1984); *Shipley*, 620 N.E.2d 710 (Ind. Ct. App. 1993); *Gasaway*, 547 N.E.2d 898 (Ind. Ct. App. 1989).

87. *Christie v. State*, 536 N.E.2d 531 (Ind. Ct. App. 1989).

88. See *supra* notes 1-5 and accompanying text.

89. See, e.g., *State v. Kellogg*, Trial No. 30D02-9207-CF00031 (Hancock County, Superior Court, Criminal Division 2, tried June 17-18, 1993); *State v. Kincaid*, Trial No. 06D02-9303-CF124 (Boone County, Superior Court, Criminal Division 2, tried Jan. 4, 1994).

90. *Smith v. State*, 408 N.E.2d 614, 622 (Ind. Ct. App. 1980).

91. *Christie*, 536 N.E.2d at 532.

92. *Benton v. Maryland*, 395 U.S. 784, 794 (U.S. 1969).

93. *North Carolina v. Pearce*, 395 U.S. 711, 717 (U.S. 1969).

94. *Blockburger v. United States*, 284 U.S. 299, 304 (U.S. 1932) (citations omitted).

95. *Hall v. State*, 487 N.E.2d 181, 182 (Ind. Ct. App. 1986) (Garrard, J., dissenting from denial of petition for rehearing [citations omitted]).

the "double jeopardy analysis does not end with an evaluation and comparison of the statutory provisions. The factual bases alleged by the State in the information or indictment and upon which the charges are predicated must also be examined."<sup>96</sup> If the State alleges the same facts for two separate charges, then punishment for both crimes is barred, but if the charges are not facially duplicative, then the defendant can be punished for the "two separate, independent and distinct criminal offenses."<sup>97</sup>

While Indiana courts are bound by the Indiana Supreme Court's interpretation of the Double Jeopardy Clause under the Indiana Constitution,<sup>98</sup> the Indiana Supreme Court has not had the opportunity for such an interpretation since the latest developments from the United States Supreme Court. In addition to the *Blockburger* "same facts" test, a "same conduct" test<sup>99</sup> has been used, but is now disfavored.<sup>100</sup>

In *George* and other recent cases with similar charges, Indiana case law indicates that convictions for operating a motor vehicle while intoxicated and for neglect of a dependent could not both stand. Since "both charges are based on the same acts occurring over the same time period[,] . . . convictions for both offenses cannot stand because one offense was the instrument by which the other was committed."<sup>101</sup> "When the same act constitutes two separate crimes, the very essence of double jeopardy principles prevents two separate convictions."<sup>102</sup> This argument is being made in a case similar to *George* which is currently before the Indiana Court of Appeals.<sup>103</sup>

While this is a "same conduct" argument, the factual charges in the information or indictment would be different in a "same facts" argument. The charge of operating a vehicle while intoxicated would only have to allege that the defendant operated a vehicle with at least 0.10 percent by weight of alcohol in that defendant's blood.<sup>104</sup> A neglect of a dependent charge would also have to allege the additional facts that the defendant had the legal care of a dependent and knowingly or intentionally placed that dependent in a dangerous situation.<sup>105</sup> This is a good argument that the neglect charge "requires proof of additional fact[s] which the other [charge] does not."<sup>106</sup> However, when interpreting the double jeopardy issue in a case with similar charges, the Indiana Supreme Court concluded that the same act had to be proven for both charges, so "no additional facts were necessary to prove the perpetration of either of these two offenses."<sup>107</sup>

96. *Hall*, 493 N.E.2d at 435.

97. *Christie v. State*, 536 N.E.2d 531, 533 (Ind. Ct. App. 1991).

98. *Shiple v. State*, 620 N.E.2d 710, 717 (Ind. Ct. App. 1993).

99. *Grady v. Corbin*, 495 U.S. 508 (U.S. 1990); *see supra* text accompanying note 94.

100. *United States v. Dixon*, 113 S.Ct. 2849 (U.S. 1993).

101. *Shiple v. State*, 620 N.E.2d at 717.

102. *Id.*

103. Appellant's Brief at 8-9, *Kellogg v. State*, No. 30A01-9310-CR-337 (Ind. Ct. App. filed Dec. 15, 1993).

104. IND. CODE § 9-30-5-1 (1993).

105. IND. CODE § 35-46-1-4(a) (1993); *see supra* text accompanying notes 42-43, and 55-61; *see infra* text accompanying notes 114-119.

106. *See supra* text accompanying notes 94-97.

107. *Hall v. State*, 493 N.E.2d 433, 436 (Ind. 1986) (quoting *Howard v. State*, 481 N.E.2d 1315, 1318 (Ind. 1985)) (neglect of a dependent charge and reckless homicide charge were both based on the parents' same

To remain consistent, the Indiana Supreme Court would also have to say that convictions of operating a vehicle while intoxicated and neglect of a dependent who was in the car at the time both "could not stand, for one is the instrumentality by which the other was committed."<sup>108</sup> Under these circumstances, "the former would be a lesser included offense which would merge with the greater offense."<sup>109</sup> In fact, the Indiana Supreme Court gave the example of a drunk driver who kills a pedestrian and is convicted for both driving while intoxicated<sup>110</sup> and for driving while intoxicated, resulting in the death of another person<sup>111</sup> as an example of two convictions that could not both stand.<sup>112</sup> Similarly, convictions for driving while intoxicated, and for driving while intoxicated resulting in the endangerment of a dependent, arising out of the same act, cannot both stand.

### B. *The Intent Problem*

Another area that has caused confusion in applying the Neglect of a Dependent Statute is the question of what culpability standard to apply. An objective standard is an external standard of conduct that the community demands, while a subjective standard is based on the individual judgment or perceptions of the particular actor.<sup>113</sup> The Neglect of a Dependent Statute says that the behavior must be done "knowingly or intentionally."<sup>114</sup> "A person engages in conduct 'intentionally' if, when he engages in the conduct, it is his conscious objective to do so."<sup>115</sup> "A person engages in conduct 'knowingly' if, when he engages in the conduct, he is aware of a high probability that he is doing so."<sup>116</sup> When a statute specifies a particular kind of culpability, it is required as to all material elements of the offense, unless the statute specifies otherwise.<sup>117</sup>

The correct interpretation of this culpability statute is that it mandates a subjective intent standard.<sup>118</sup> "[T]he accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation."<sup>119</sup> While seemingly a clear interpretation of the culpability statute, not all courts have followed it when applying the Neglect of a Dependent Statute.

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act of failure to provide medical treatment for their son).

108. *Id.*

109. *Id.*

110. IND. CODE ANN. § 9-11-2-2 (Burns Supp. 1985).

111. IND. CODE ANN. § 9-11-2-5 (Burns Supp. 1985).

112. *Hall*, 493 N.E.2d at 436.

113. *See, e.g.*, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 173-74 (5th ed. 1984); *Ware v. State*, 441 N.E.2d 20, 21 (Ind. Ct. App. 1982).

114. IND. CODE § 35-46-1-4(a) (1993).

115. IND. CODE § 35-41-2-2(a) (1993).

116. IND. CODE § 35-41-2-2(b) (1993).

117. *See, e.g.*, IND. CODE § 35-41-2-2(d) (1993); *Williford v. State*, 577 N.E.2d 963 (Ind. 1991) (DeBruiler, J., dissenting to denial of transfer).

118. *Armour v. State*, 479 N.E.2d 1294, 1297 (Ind. 1985).

119. *Id.*

The problems started with a 1980 case, *Smith v. State*,<sup>120</sup> in which the appellant claimed that the State had failed to prove the requisite intent element. While discussing the intent requirement under the current Neglect of a Dependent Statute, the *Smith* court quoted a 1977 decision, *Hunter v. State*,<sup>121</sup> which upheld the conviction of the appellants under an old statute prohibiting cruelty and neglect of children.<sup>122</sup> That statute was repealed by the 1976 enactment of the current chapter on Offenses Against the Family,<sup>123</sup> which took effect July 1, 1977.<sup>124</sup> The *Hunter* opinion, in turn, concluded that the intent requirement of the old cruelty and neglect of children statute had, in effect, been removed by a 1967 Indiana Supreme Court decision, *Eaglen v. State*,<sup>125</sup> which found the defendant guilty under the child neglect statutes.<sup>126</sup> The *Eaglen* court decided that "neglect" was to be defined using an objective, "reasonable parent" standard and that even if the defendant "had no actual knowledge that his child was extremely ill, since he could easily have become aware of that fact had he exercised his statutory duty," then the lack of actual knowledge provided the defendant with no defense.<sup>127</sup>

The old neglect of child statute said:

Neglect of a child shall consist in any of the following acts, by anyone having the custody or control of the child;

(a) wilfully failing to provide proper and sufficient food, clothing, maintenance, regular school education as required by law, medical attendance or surgical treatment, and a clean and proper home, or (b) failure to do or permit to be done any act necessary for the child's physical or moral well-being . . . .<sup>128</sup>

When the defendant claimed he did not know or could not tell that his child was sick, the Court responded by citing a 1914 English case, *Oakey v. Jackson*,<sup>129</sup> that construed a similar English statute. That English statute said:

If any person over the age of sixteen years, who has the custody, charge, or care of any child or young person, wilfully . . . neglects . . . such child or young

120. 408 N.E.2d 614 (Ind. Ct. App. 1980), *overruled by* *Armour v. State*, 479 N.E.2d 1294 (Ind. 1985).

121. 360 N.E.2d 588 (Ind. App. 1977).

122. *Id.* at 605; IND. CODE ANN. § 35-14-1-4 (Burns 1971).

123. IND. CODE § 35-46-1 (1988 & Supp. 1992).

124. Act of Feb. 25, 1976, Pub. L. No. 148, 1976 Ind. Acts 718 (codified as amended at Ind. Code § 35-46-1 (1993)).

125. 231 N.E.2d 147 (Ind. 1967); *Hunter*, 360 N.E.2d at 604.

126. *Eaglen*, 231 N.E.2d at 151. *See* IND. CODE ANN. §§ 10-813 to 10-815 (Burns 1956) (This section was carried forward into the new Indiana Code of 1971 as §§ 35-14-1-2 to 4. Section 10-815, the penalty section of the cruelty and neglect of children statutes, became § 35-14-1-4. Cruelty and neglect of child is defined in § 10-813 which was carried forward as § 35-14-1-2. So the *Eaglen* and *Hunter* courts were using the same statutes which were in different versions of the Code. The only changes made to the statutes between these two cases was in the penalty provisions. But the current Neglect of a Dependent Statute is a completely different statute.).

127. *Eaglen*, 231 N.E.2d at 150.

128. IND. CODE ANN. § 10-813 (Burns 1956).

129. [1914] 1 K.B. 216 (Eng.).

person, or causes or procures such child or young person to be . . . neglected . . . in a manner likely to cause such child or young person unnecessary suffering or injury to his health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, . . . and for the purposes of this section a parent or other person legally liable to maintain a child or young person shall be deemed to have neglected him in a manner likely to cause injury to his health if he fails to provide adequate food, clothing, medical aid, or lodging for the child or young person, or if, being unable otherwise to provide such food, clothing, medical aid, or lodging, he fails to take steps to procure the same to be provided under the Acts relating to the relief of the poor.<sup>130</sup>

But the question before the English judges was not whether the parent had the requisite state of mind to “wilfully” neglect the child. The question was whether the refusal to allow an operation constituted a failure to provide adequate medical care.<sup>131</sup> The court concluded that this was a question of fact to be decided at the trial level.<sup>132</sup> To give the trial court guidance, the court quoted the common law definition of “wilful neglect.” The *Smith* court and the *Eaglen* court both quoted part of the *Oakey* court’s definition of “neglect,” which is “the want of reasonable care—that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind.”<sup>133</sup> This is an objective standard which is to be used to determine if the parent had a duty to act.

However, this definition is not to be used to determine the culpability standard necessary for a conviction under the statute. Its sole use is to determine whether the parent had a duty to act. If no duty exists, then there can be no conviction, regardless of what action the parent takes. If it is determined that a duty does exist, using this objective standard, then the parent can only be found guilty if the trier finds that the parent “wilfully” neglected to take action.<sup>134</sup>

Both the *Eaglen* and the *Smith* courts failed to utilize the English court’s definition of “wilfully.” The *Oakey* court defined “willfully” to mean “that the act is done deliberately and intentionally, not by accident or inadvertence, but so that the mind of the person goes with it.”<sup>135</sup> This is a subjective standard that is to be applied to the mental element of the crime. Additionally, the rest of the court’s definition of “neglect,” which both the *Eaglen* and the *Smith* courts failed to quote is: “that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps.”<sup>136</sup> This further contemplates the idea of a conscious, subjective choice on the part of the parent. In determining the objective standard to which a person must subjectively

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130. The Children Act, 1908, 8 Edw. 7, c. 67, § 12, (Eng.).

131. *Oakey*, [1914] 1 K.B. at 220.

132. *Id.*

133. *Id.* at 219.

134. See IND. CODE ANN. § 10-813 (Burns 1956).

135. *Oakey*, [1914] 1 K.B. at 219.

136. *Id.* at 219-20.

choose to adhere to avoid conviction under this statute, it must be a choice that is available for the reasonable parent to make.

The *Eaglen* court concluded that even assuming the parent did not know the child was ill, "since he could easily have become aware of that fact had he exercised his statutory duty, such a contention provide[d] appellant no defense."<sup>137</sup> The court reasoned that it had a duty to "enforce the minimum standards of parental knowledge and conduct clearly and definitely delineated by our child-neglect statutes."<sup>138</sup> This is an objective standard that the Indiana Supreme Court decided should be used in construing the old neglect of child statute. The *Hunter* court summarized the *Eaglen* court's decision regarding the intent element by saying that it "in effect removes the requirement of intent."<sup>139</sup> This reinforces the use of an objective standard in construing the old statute.

The end result is that in construing the culpability standard required to convict a defendant under Indiana's new Neglect of a Dependent Statute, the *Smith* court erroneously relied on a 1914 English court's interpretation of the standard to be used to determine whether a person has a duty to seek care for a child under a 1908 English statute that was very similar to Indiana's old neglect of child statute, which was repealed, effective July 1, 1977.<sup>140</sup> Indiana courts have interpreted this 1914 English opinion as meaning that when deciding whether a person has wilfully neglected a child, they are to do so using an objective standard. The courts reached this conclusion without mentioning the English court's definition of "wilfully." The *Smith* court incorporated these cases into its decision construing the new Neglect of a Dependent Statute without mentioning the statute that defines culpability terms,<sup>141</sup> which was enacted in 1976 as part of the same Act that also included the new Neglect of a Dependent Statute. Additionally, the old neglect of child statute and the English Children Act both used the word "wilfully," while the new Neglect of a Dependent Statute uses the terms "knowingly or intentionally."

As the *Smith* court correctly stated, the situation is different when the "offense grows out of the nonperformance of an affirmative duty imposed by law for the care and protection of a [dependent]."<sup>142</sup> When the defendant does a positive act that violates the statute, the State must then prove: (1) the defendant knowingly or intentionally, (2) did the act that violates the statute, and (3) that the defendant had the care of the dependent, whether assumed voluntarily or because of a legal obligation.<sup>143</sup> But when the offense rises out of inaction, the *Smith* court was nearly accurate, despite the misleading discussion that led to its conclusion that "the words 'knowingly' or 'intentionally' require the State only to prove that the defendant parent was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child."<sup>144</sup> While citing the *Eaglen* case, which held that knowledge was not necessary for

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137. *Eaglen*, 231 N.E.2d at 150.

138. *Id.*

139. *Hunter*, 360 N.E.2d at 604.

140. IND. CODE ANN. § 35-14-1-2 (Burns 1973 & Supp. 1976).

141. IND. CODE § 35-41-2-2 (1993).

142. *Smith v. State*, 408 N.E.2d 614, 621 (Ind. Ct. App. 1980).

143. *See, e.g.*, IND. CODE § 35-46-1-4(a) (1993); INDIANA JUDGES ASS'N, INDIANA PATTERN JURY INSTRUCTIONS: CRIMINAL, Instruction No. 7.09 (2d ed. 1991).

144. *Smith*, 408 N.E.2d at 621.

a conviction, the *Smith* court concluded that use of the words "knowingly and intentionally" in the new statute did require knowledge on the part of the defendant for a conviction.

This is a modification of the objective standard because it does require the defendant's awareness of the facts. A "pure" objective standard would only require that the defendant be in a situation that a "reasonable" person would realize required affirmative action to protect their dependent. By requiring an awareness of the facts, the *Smith* court's interpretation would excuse a defendant who did not perceive the surrounding circumstances, either due to a lack of ability to perceive or due to a lack of attentiveness. But this is insufficient for the subjective standard required by the statute.

A jury may infer that a person intends the natural and probable consequences of his voluntary acts.<sup>145</sup> Knowledge or intent is a mental function and, absent an admission, can be inferred from an examination of the facts and circumstances.<sup>146</sup> Therefore, the *Smith* court's interpretation would be an accurate statement of the law if the State also proved that the defendant was, in fact, a reasonable parent. The culpability statute requires, at a minimum, that upon acting, the accused was "aware of a high probability that he [was] doing so."<sup>147</sup> If the State only proved that the accused "was aware of facts that would alert a reasonable parent under the circumstances to take affirmative action to protect the child,"<sup>148</sup> then the possibility exists that the accused was not a reasonable parent. The accused might have been aware of the facts without realizing that such facts constituted a duty to take affirmative action. Failure to take affirmative action under such circumstances would not violate the statute as it would not be a "knowing" decision.

The *Smith* court further defends its position by reasoning

that there is little essential difference in the expressed purpose of child protection between [the old] and the present statutes . . . . The affirmative duty of a parent to care for and protect his child, the rationale therefore, and the standard of care imposed thereby as expressed in *Eaglen* and *Hunter*, are equally applicable to the present statutes.<sup>149</sup>

While true, this ignores the changes in the statute, most importantly, the change from "wilfully" to "knowingly and intentionally" and the enactment of the statutory definitions of those terms.

One court defended the *Smith* court's decision by expressing the belief that the decision to use an objective standard was really an attempt to define the actus reus of the statute instead of the mens rea.<sup>150</sup> An objective standard should be used to determine if

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145. See, e.g., *Sandstrom v. Montana*, 442 U.S. 510 (1979) (explaining that this cannot relieve the State of its burden of proof on an essential element of a charged crime; it can merely create a permissive inference, not a mandatory presumption); *Blackburn v. State*, 519 N.E.2d 554, 556-57 (Ind. 1988).

146. See, e.g., *Mitchell v. State*, 557 N.E.2d 660, 664-65 (Ind. 1990); *Stout v. State*, 528 N.E.2d 476, 482 (Ind. 1988); *Gibson v. State*, 515 N.E.2d 492, 496 (Ind. 1987); *Perkins v. State*, 392 N.E.2d 490, 495 (Ind. App. 1979).

147. IND. CODE § 35-41-2-2(b) (1993).

148. *Smith*, 408 N.E.2d at 621.

149. *Id.*

150. *McMichael v. State*, 471 N.E.2d 726, 731-32 (Ind. Ct. App. 1985).

an affirmative duty to take action for the care and protection of the dependent is imposed by the law. If a subjective standard were used, a person with a very high standard who did not act according to that standard could be convicted even when the dependent was not really in a dangerous situation at all. At the same time, a person with a very low standard could not be convicted when knowingly placing their dependent in a very dangerous situation because the situation did not require action according to their low standard.<sup>151</sup> Indiana appellate courts do, in fact, apply an objective standard when faced with the issue of whether there was a duty to act.<sup>152</sup> But the statutes require a subjective intent element for a conviction, which is at odds with the *Smith* court's statement of what the State must prove for a conviction.<sup>153</sup>

Similarly, an objective standard should also be used to determine if a confinement is "cruel"<sup>154</sup> under subsection (2)<sup>155</sup> of the statute and what constitutes "necessary"<sup>156</sup> support under subsection (3).<sup>157</sup>

In 1982, another Indiana appellate court was faced with the issue of whether the proper interpretation of the word "knowingly" in the Neglect of a Dependent Statute meant an objective standard or a subjective standard in *Ware v. State*.<sup>158</sup> The *Ware* court cited a 1908 Indiana Supreme Court decision<sup>159</sup> that was decided prior to the passage of the new neglect and culpability statutes in which the court stated that "the term 'knowingly' in a criminal proceeding imports that the accused person knew what he was about, and, possessing such knowledge, proceeded to commit the crime of which he is charged."<sup>160</sup> This is a subjective standard, but since the Indiana Supreme Court had not yet interpreted this term under the new statutes, the *Ware* court had to decide whether to use the objective intent standard the Indiana Supreme Court had applied to the old neglect of child statute or use the subjective standard previously used by the courts in conjunction with the term "knowingly" and mandated by the new culpability statute. This new culpability statute was the "first attempt in Indiana to codify the degrees of *mens rea*, or mental intent, required for the commission of crime."<sup>161</sup> The *Ware* court acknowledged that the *Smith* court had determined that the statute was to be interpreted using an objective standard, but also realized that the *Smith* court had failed to consider the new

151. See *Hartbarger v. State*, 555 N.E.2d 485 (Ind. Ct. App. 1990); see *infra* text accompanying notes 237-39.

152. See *supra* notes 133-34 and accompanying text; see *infra* notes 185-86, 191, and 194 and accompanying text; cf. *Hartbarger*, 555 N.E.2d at 487 (applying an objective standard to determine if a confinement was "cruel" under IND. CODE § 35-46-1-4(a)(2)); cf. *Ricketts v. State*, 598 N.E.2d 597, 600-01 (Ind. Ct. App. 1992) (applying an objective standard to determine if support was "necessary" under IND. CODE § 35-46-1-4(a)(3)).

153. See *supra* text accompanying note 144.

154. *Hartbarger*, 555 N.E.2d at 487; see *supra* text accompanying notes 15-16.

155. IND. CODE § 35-46-1-4(a)(2) (1993).

156. *Ricketts*, 598 N.E.2d at 600; see *supra* text accompanying notes 17-23.

157. IND. CODE § 35-46-1-4-(a)(3) (1993).

158. *Ware v. State*, 441 N.E.2d 20, 21 (Ind. Ct. App. 1982).

159. *Id.* at 22.

160. *State v. Bridgewater*, 85 N.E. 715, 718 (Ind. 1908).

161. IND. CODE ANN. § 35-41-2-2 (West 1978) (Commentary, by Charles A. Thompson).



culpability statute. Using principles of statutory construction, the *Ware* court analyzed the statutes anew.<sup>162</sup>

“In reviewing a statute, [the court’s] foremost objective is to determine and effect legislative intent.”<sup>163</sup> “It is the duty of the court to construe statutes passed at the same session of the legislature in such manner as to give effect and efficiency to both statutes . . . .”<sup>164</sup> “A comparison of the language of the present Act with that of its forerunner is also instructive.”<sup>165</sup> A change in wording from that of the former act strongly indicates legislative intent to change the pre-existing law.<sup>166</sup> “[W]here, in an act it is declared that a term shall receive a certain construction, the courts are bound by that construction, though otherwise the language would be held to mean a different thing.”<sup>167</sup>

Applying these principles, the court represented legislative intent by finding that:

[t]he culpability definition statute and the child neglect statute were passed during the same legislative session. The effect of the former—which defines “knowingly” in subjective terms—is to impose upon Indiana courts a consistent and uniform system for defining the *mens rea* of the crimes enumerated in the Indiana Code. The principal difference between the previous child neglect statute and the current version is the inclusion in the new statute of two possible degrees of mental intent—“knowingly” or “intentionally.” Thus, we can conclude that the legislature, by inserting degrees of mental intent in the child neglect statute and succinctly defining those degrees in the culpability definition statute, intended to effect a change in the former statute and thereby bind the courts. In order to be convicted of knowingly neglecting a dependent under IC 35-46-1-4(a)(1), the accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation. Our conclusion promotes uniformity, the obvious goal of the culpability definition statute, without defeating the goal of the child neglect statute, to-wit, protection of children. Requiring proof of subjective knowledge in applying subsection (a)(1) of the child neglect statute is hardly inconsistent with the legislative objective.<sup>168</sup>

But this same court, when confronted with the issue again in the 1985 case of *Davis v. State*, demonstrated the confusion in this area by quoting the *Smith* court when it stated that the Neglect of a Dependent Statute

requires the endangerment or abandonment to have been either knowing or intentional. Although a parent need not possess a specific intent to commit neglect, he or she must at a minimum be ‘aware of facts that would alert a

162. *Ware*, 441 N.E.2d at 22.

163. *Spaulding v. International Bakers Servs., Inc.*, 550 N.E.2d 307, 309 (Ind. 1990).

164. *Olszewski v. Stodola*, 82 N.E.2d 256, 257 (Ind. 1948).

165. *Wallis v. Marshall County Comm’rs*, 546 N.E.2d 843, 844 (Ind. 1989).

166. *See, e.g., id.*; *Gingerich v. State*, 93 N.E.2d 180, 182 (Ind. 1950).

167. *Spaulding*, 550 N.E.2d at 309 (quoting *Department of State Revenue v. Crown Dev. Co.*, 109 N.E.2d 426, 428-29 n.1 (Ind. 1952)).

168. *Ware*, 441 N.E.2d at 23.

reasonable parent under the circumstances to take affirmative action to protect the child.<sup>169</sup>

The *Davis* court then concluded that a father's conviction could not stand even if he knew that his hours-old newborn was going to be left at the side of a gravel road by the mother because he was not present at the birth or the abandonment. Requiring the parent to be present at the time of an abusive act for a conviction is at odds with other cases in which a parent was found guilty of neglect of a dependent upon leaving their child alone with someone they knew was abusive to their child and that person did in fact injure the child.<sup>170</sup> Under the statutory standard, the father in *Davis* should have been found guilty of neglect of a dependent if he knew his child was going to be abandoned and did nothing to dissuade or stop the mother. The court's conclusion could only be supported if evidence showed that the father did not know the baby was going to be abandoned, not just by showing his absence.

Another appellate court, in *McMichael v. State*, addressed the issue in 1984 and agreed that the subjective standard was mandated by the culpability statute<sup>171</sup> before the Indiana Supreme Court finally addressed the issue in 1985<sup>172</sup> and held that the *Ware* and *McMichael* appellate courts

correctly apply the subjective standard mandated by our culpability defining [sic] statute. We now hold that the level of culpability required when a child neglect statute requires knowing behavior is that level where the accused must have been subjectively aware of a high probability that he placed the dependent in a dangerous situation.<sup>173</sup>

The Indiana Supreme Court in another case explained in dictum that "it is not necessary to show that the defendant purposely inflicted . . . injury."<sup>174</sup> It is enough to show that the defendant placed the dependent in a situation the defendant knew was dangerous.<sup>175</sup> But this did not end the confusion on the culpability issue.

In 1990, the appellate court, which had first applied the objective standard to the new Neglect of a Dependent Statute in *Smith*, followed the Indiana Supreme Court's mandate and applied a subjective intent standard.<sup>176</sup> But later that year, in *Hastings v. State*, the same appellate court accurately began its analysis by stating that "[i]n order to obtain a conviction for neglect of a dependent, the State must show that the accused was subjectively aware of a high probability that the accused placed the dependent in a dangerous situation."<sup>177</sup> However, in the next sentence, the court quoted its *Smith*

169. *Davis v. State*, 476 N.E.2d 127, 140 (Ind. Ct. App. 1985).

170. *See, e.g., Hastings v. State*, 560 N.E.2d 664 (Ind. Ct. App. 1990); *Wilson v. State*, 525 N.E.2d 619 (Ind. Ct. App. 1988).

171. 471 N.E.2d 726 (Ind. Ct. App. 1984).

172. *Armour v. State*, 479 N.E.2d 1294 (Ind. 1985).

173. *Id.* at 1297 (citation omitted).

174. *Howard v. State*, 481 N.E.2d 1315, 1317 (Ind. 1985).

175. *Id.*

176. *Fisher v. State*, 548 N.E.2d 1177 (Ind. Ct. App. 1990); *see supra* note 133 and accompanying text.

177. *Hastings v. State*, 560 N.E.2d 664, 666-67 (Ind. Ct. App. 1990).

decision, saying that “[t]o make such a showing the State need only prove that the accused was aware of facts which would alert a reasonable parent under the circumstances to take affirmative action to protect the child.”<sup>178</sup> The Indiana Supreme Court rejected this holding; it is a misstatement of the law.<sup>179</sup>

The *Hastings* court further held that a mother’s prior guilty plea to a neglect of a dependent charge stemming from an incident in which her boyfriend physically abused her child was admissible to show that the mother had the requisite knowledge to hold her culpable for leaving the child with her boyfriend, thereby knowingly placing the child in a dangerous situation.<sup>180</sup> The mother’s conviction was reversed, however, because the trial court admitted statements by the mother to a welfare worker that she suspected her boyfriend had previously abused her child. These statements constituted an involuntary confession.<sup>181</sup> Thus its admission into evidence was fundamental error that required a reversal of the conviction.<sup>182</sup> Although the *Hastings* court misstated the law with respect to the intent element at the beginning of the opinion,<sup>183</sup> its analysis and conclusion correctly followed the use of a subjective intent standard.<sup>184</sup>

Two months later, in *Mallory v. State*, the same court again cited its *Smith* opinion, but this time as standing for the proposition that the objective standard is used to determine the standard of care a parent owes to his or her child<sup>185</sup>—a correct statement of the law.<sup>186</sup> The court also stated that “[a] parent is charged with an affirmative duty to care for her child.”<sup>187</sup> In *Mallory*, the jury was permitted to infer from circumstantial evidence that a parent knew the child needed medical care and could therefore conclude that the parent’s conduct constituted knowing neglect under the statute.<sup>188</sup>

In 1992, this court, in *Sample v. State*, again correctly applied the subjective intent standard to show the defendant’s knowledge.<sup>189</sup> The court stated that a subjective test should be applied to the knowledge element of the neglect of a dependent offense.<sup>190</sup> But the court then quoted a 1989 Indiana Supreme Court decision, which, in turn, quoted the *Eaglen* decision, to establish that an objective standard is used to define “neglect.”<sup>191</sup> The *Sample* court concluded that circumstantial evidence from the doctor’s description of the injury and opinion as to its probable appearance to the baby’s caretaker, the testimony of the child’s babysitter as to the child’s behavior and appearance, and the defendant’s own

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178. *Id.* at 667.

179. *Armour*, 479 N.E.2d at 1297; *see supra* notes 172-73.

180. *Hastings*, 560 N.E.2d at 670.

181. *Id.* at 669.

182. *Id.* at 670.

183. *See supra* text accompanying notes 177-79.

184. *Hastings*, 560 N.E.2d at 670-71.

185. *Mallory v. State*, 563 N.E.2d 640, 644 (Ind. Ct. App. 1990).

186. *See supra* text accompanying notes 133-34; *see infra* text accompanying notes 191 and 194.

187. *Mallory*, 563 N.E.2d at 644. The *Smith* case was also cited as standing for this proposition by

WAYNE R. LAFAYE AND AUSTIN W. SCOTT, CRIMINAL LAW § 3.3(a)(1) at 203-04 (2d ed. 1986).

188. *Id.*

189. *Sample v. State*, 601 N.E.2d 457 (Ind. Ct. App. 1992).

190. *Id.* at 458-59.

191. *Id.* at 459.

testimony was sufficient "to permit the jury to infer that [the defendant] was aware of a high probability that by failing to obtain medical treatment for her daughter, she was placing the child in a situation which endangered her life and health."<sup>192</sup> This statement suggests an objective standard—the baby's injury was such that it was obvious to a reasonable person that the baby needed medical attention. But the defendant's testimony, combined with permissible inferences from the circumstantial evidence constituted sufficient evidence of her actual knowledge that the child needed medical treatment<sup>193</sup> to satisfy the statutory knowledge requirement. The line between an objective standard and a subjective standard that is inferred from circumstantial evidence is a very fine one.

In *Rinker v. State*, the second district correctly used a subjective knowledge standard and an objective standard of neglect in terms of adequate nutrition and reasonably clean living conditions in upholding the conviction of a parent whose conduct was not as egregious as that in most neglect of a dependent cases.<sup>194</sup> While filthy living conditions and evidence of malnutrition were sufficient to support a conviction in *Rinker*,<sup>195</sup> the same court, a year later, held that "evidence of malnutrition, in and of itself, does not support the conclusion that the person's health or life is at risk or in danger," and was therefore insufficient to sustain a neglect of a dependent conviction.<sup>196</sup>

In *Fout v. State*, the third district also correctly applied the subjective standard, noting<sup>197</sup> that "[n]ormally a defendant's subjective awareness requires resort to inferential reasoning to ascertain a mental state. Thus, a court must view all the surrounding circumstances to determine whether the guilty verdict was proper."<sup>198</sup> This is the same method the *Sample* court used. In *Fout*, as in *Sample*, circumstantial evidence was used to infer the knowledge requirement as well as evidence from the defendant's own admissions.<sup>199</sup>

In *Fout*, the defendant was found guilty for failing to seek medical aid during the last stages of his wife's troubled pregnancy when the couple had been advised to proceed immediately to the hospital because the mother and the baby were at a very high risk of injury or death. The mother's water had broken five weeks before her due date. An examination had revealed the inherent dangers of a premature birth, that an infection was present, and that the fetus was in a breech position. However, the couple insisted on a home delivery. In fact, the baby was born prematurely at home, would not eat, experienced breathing difficulties, and died the next day. The couple never sought medical assistance. The defendant was convicted of an elevated Class B felony for neglect of a dependent that resulted in serious bodily injury even though the child would have had only a fifty percent chance of survival had immediate medical aid been administered. The fact that the baby did not survive and was not given any medical treatment, coupled with the evidence that the defendant refused medical treatment while

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192. *Id.* at 460.

193. *Id.* at 459-60.

194. 565 N.E.2d 344, 346 (Ind. Ct. App. 1991).

195. *Id.*

196. *Ricketts v. State*, 598 N.E.2d 597, 597 (Ind. Ct. App. 1992).

197. *Fout v. State*, 575 N.E.2d 340, 342 (Ind. Ct. App. 1991).

198. *Id.*

199. *Id.*

aware of the risks, was sufficient to support the conviction and enhancement to a Class B felony.<sup>200</sup>

In a companion case, the wife's conviction was reversed because of the "quite different records developed in the two cases."<sup>201</sup> The evidence showed that the defendant-wife was aware, before the birth, that her pregnancy was high risk because the baby was in the breech position and because her water had broken prematurely. The defendant did not comply with her doctor's instructions to go to the hospital after her water broke.<sup>202</sup> The evidence that showed that she was aware of the infection, however, was excluded because of the physician-patient privilege. Although the baby exhibited some signs of health problems in the twenty-four hours she was alive, none of the evidence showed that the mother knew these signs indicated that the baby had a serious problem. The evidence also showed that the baby died of the infection and had the mother obtained proper care for the baby, the baby would have had a substantial chance of surviving.<sup>203</sup> The court concluded that

the evidence of the element that is missing in this case, the knowledge of the danger to which she was exposing her child, was present in her husband's case. The absence of this evidence here distinguishes [the wife's] conviction from that of her husband, and the absence of this evidence is the reason why her conviction may not stand while her husband's may.<sup>204</sup>

The court reversed the wife's conviction because it was not supported by sufficient evidence.<sup>205</sup>

The *Fout* court required a high standard of evidence necessary for a showing of knowledge to sustain a conviction in a case that seemed to have sufficient circumstantial evidence from which the jury could infer the necessary knowledge element.<sup>206</sup> While the mother realized that the baby was in danger and that she should seek further medical assistance, the evidence did not show knowledge of the infection, the danger that actually caused the baby's death. This court required not only knowledge of a dangerous situation and inaction by the parent when help was readily obtainable; it also required evidence of knowledge of the danger that actually caused harm to the defendant, a standard higher than that required by the statute.

In a contrasting case, *White v. State*, the Indiana Supreme Court quoted the objective standard from *Eaglen* in deciding whether an environment of illegal drug use "poses an actual and appreciable danger to a dependent."<sup>207</sup> This is a case where the defendant's positive actions created the environment. The court found that the *Eaglen* court's objective standard, which had previously been applied to omissions, was the appropriate way to determine whether this environment of drug use created the requisite "actual and

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200. *Id.*

201. *Fout v. State*, 619 N.E.2d 311, 314 (Ind. Ct. App. 1993).

202. *Id.* at 313.

203. *Id.*

204. *Id.* at 314.

205. *Id.*

206. See *supra* text accompanying notes 145-46.

207. *White v. State*, 547 N.E.2d 831 (Ind. 1989).

appreciable danger" to the child—a violation of the statute.<sup>208</sup> The court determined that drug use did create such a danger and, since the defendant knowingly subjected the dependent to that environment, the conviction was upheld.<sup>209</sup>

The "knowing act" required in *White* was subjecting the dependent to an environment of illegal drug use, not knowingly subjecting the dependent to this environment knowing that the drugs were a danger to the dependent. Compared to *Fout*, the conviction resulted from a liberal application of the statute and interpretation of what constitutes an environment that poses an actual and appreciable danger. The child had observed both of her parents smoke marijuana repeatedly. On various occasions, the dependent had found marijuana and intravenous drug paraphernalia around the home where they lived. The dependent had also "observed her father at home on one or two occasions mash up a white powder and inject it into his arm."<sup>210</sup> The child was told it was "speed," but evidence was insufficient to show that the substance being injected was a narcotic drug or even a controlled stimulant.<sup>211</sup> In fact, no evidence was presented at trial that showed that the drugs presented a danger to the child except when an expert witness testified that "a child's exposure to an environment of illegal drug use constitutes an actual and appreciable danger by causing the drug-using parent to neglect that child's well-being."<sup>212</sup> But "[t]here was no evidence that either parent failed to provide the daughter with food, clothing, or shelter, or mistreated her in any way."<sup>213</sup> The court concluded that since drugs are illegal because of their harmful effects and consequences, the defendant's knowing exposure of his dependent to them was *per se* an actual and appreciable danger.<sup>214</sup>

The defendant was convicted on a second count of neglect of a dependent in *White* for providing the child with marijuana and smoking it with her.<sup>215</sup> However, the State presented no evidence that smoking marijuana is addictive or harmful to the health. The dissenting justice thought that there was not enough evidence that "the experimentation by the daughter on two or three occasions was such as to create an actual and appreciable danger to the child's life or health as is essential [for conviction]."<sup>216</sup>

The court split three to two in upholding the conviction for the first count and four to one on the second count. This demonstrates a very liberal application of the Neglect of a Dependent Statute to a situation where no evidence was proffered that the dependent was ever in any danger. Ironically, a stronger case could perceivably be made that smoking cigarettes in a dependent's presence constitutes a situation of an actual and appreciable danger to the life or health of that dependent.<sup>217</sup> This points out the vagueness

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208. *Id.* at 836.

209. *Id.*

210. *Id.* at 833.

211. *Id.* at 838 (DeBruler, J., dissenting).

212. *Id.*

213. *Id.* at 838 (DeBruler, J., dissenting).

214. *Id.* at 836.

215. *Id.*

216. *Id.* at 838 (DeBruler, J., dissenting).

217. See *Smoke Hurting Children*, THE NEWS-SENTINEL (Fort Wayne), Jan. 6, 1994, at 1H (Surgeon General Joycelyn Elders opens a new campaign against secondhand smoke because of the harmful effects on

of the statute and the discretion that prosecutors have under such a statute in choosing when to apply it and to whom.

### C. *The Unconstitutionally Vague and Overbroad Problem*

Another issue that has been litigated several times in connection with the Neglect of a Dependent Statute is the statute's constitutionality. Indiana's neglect statutes have a history of constitutional attacks.<sup>218</sup> Indiana's Neglect of a Dependent Statute has been attacked as being both unconstitutionally vague and overbroad.<sup>219</sup> While several appellate courts have upheld the statute under such attacks, the Indiana Supreme Court has not done so very convincingly. To save the statute from being overbroad and vague, the Indiana Supreme Court narrowed its construction to apply only to situations that endanger the dependent's life or health with an actual and appreciable danger. However, the court stated that "[e]ven with this construction, there is a residual vagueness presented."<sup>220</sup> This suggests that the statute may still be open to further attacks and, indeed, it has been attacked several times since this opinion.<sup>221</sup>

When considering a constitutionality attack, "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."<sup>222</sup> The statute is judged on an "as-applied" basis.<sup>223</sup>

The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."<sup>224</sup>

"Objections to vagueness under the Due Process Clause rest on the lack of notice, and hence may be overcome in any specific case where reasonable persons would know that their conduct is at risk."<sup>225</sup> This is clearly an objective test.

The Indiana Supreme Court has stated that when addressing the constitutionality of a statute, a court must exercise self-restraint or be in danger of exceeding its own constitutional bounds when limiting the legislature to theirs. A court must act as a court,

children).

218. See generally Dirk William De Roos, Note, *Dependency and Neglect: Indiana's Definitional Confusion*, 45 IND. L.J. 606 (1970).

219. See, e.g., *State v. Downey*, 476 N.E.2d 121 (Ind. 1985); *Demontigney v. State*, 593 N.E.2d 1270 (Ind. Ct. App. 1992); *Klagiss v. State*, 585 N.E.2d 674 (Ind. Ct. App. 1992); *Kerlin v. State*, 573 N.E.2d 445 (Ind. Ct. App. 1991); *Mallory v. State*, 563 N.E.2d 640 (Ind. Ct. App. 1990).

220. *Downey*, 476 N.E.2d at 123.

221. See, e.g., *Mallory*, 563 N.E.2d at 640; *Kerlin*, 573 N.E.2d at 447; *Demontigney*, 593 N.E.2d at 1270; *Klagiss*, 585 N.E.2d at 674.

222. *United States v. Mazurie*, 419 U.S. 544, 550 (1975).

223. *Maynard v. Cartwright*, 486 U.S. 356, 361 (1988).

224. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982) (quoting *Coates v. City of Cincinnati*, 402 U.S. 611, 614 (1971)).

225. *Maynard*, 486 U.S. at 361.

not as a "supreme legislature."<sup>226</sup> The legislature is afforded a wide latitude of discretion in its job of determining public policy. The court has the constitutional power to limit the legislature to its lawful territory by "prohibiting legislation which, although enacted under the claim of a valid exercise of police power, is unreasonable and oppressive."<sup>227</sup> A court can also narrow the construction of a statute to save it from nullification if such a narrowing construction "does not establish a new or different policy basis and is consistent with legislative intent."<sup>228</sup> But "[a] court cannot amend a statute or establish public policy."<sup>229</sup> "The authority to define crimes and establish penalties belongs to the legislature."<sup>230</sup>

A statute is presumed constitutional until that presumption is overcome by a clear showing to the contrary.<sup>231</sup> "A statute will not be found unconstitutionally vague if individuals of ordinary intelligence would comprehend it to adequately inform them of the conduct to be proscribed."<sup>232</sup> A statute does not have to list each item of conduct that is prohibited, it only has to inform the individual of the "generally proscribed conduct."<sup>233</sup> By these standards, the Neglect of a Dependent Statute passes the test, especially since it begins with a presumption of constitutionality. By this objective test, a reasonable person would know that the responsibility of caring for a dependent includes a duty to protect and not endanger the life or health of the dependent. The law needs to enforce this duty because a dependent is not capable of self-protection.

But the Indiana Supreme Court has also stated that a statute must be written so that persons of common intelligence are not left to guess about its meaning nor differ as to its application.<sup>234</sup> "[T]here must be something in a criminal statute to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur. It cannot be left to juries, judges, and prosecutors to draw such lines."<sup>235</sup> The cases are full of examples of conflicting uses and opinions.<sup>236</sup> Since the Neglect of a Dependent Statute is so broadly written, prosecutors have a tool with which they can exercise a large amount of discretion both in whom they charge and under what circumstances.

An example of the exercise of prosecutorial discretion leading to a liberal application of the Neglect of a Dependent Statute can be found in a 1990 case where "cruel confinement"<sup>237</sup> charges were brought against a boy's parents when they punished him by

226. *Downey*, 476 N.E.2d at 122.

227. *Id.*

228. *Id.* at 123.

229. *Id.*

230. *Id.*

231. *Id.* at 122.

232. *Id.*

233. *Id.*

234. *Id.* at 123 (citing *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

235. *Id.* (quoting *Stone v. State*, 41 N.E.2d 609 (Ind. 1942)).

236. *See supra* text accompanying notes 62-74, 197-206, and 206-17; *see infra* text accompanying notes 244-50.

237. IND. CODE § 35-46-1-4(a)(2) (1993).



“grounding” him.<sup>238</sup> The parents locked the boy into his bedroom at night for a two-week period and did not allow him to associate with his siblings during the daytime when the parents were not there. The parents pled guilty to the charges. After their motion to withdraw the pleas was denied, they were sentenced to suspended one-year terms. The convictions were overturned because the court concluded that as a matter of law this situation could not constitute “cruel confinement.”<sup>239</sup>

This case demonstrates the power of a prosecutor in choosing when to apply this statute. These parents were arrested and originally charged with *six* counts of neglect of a dependent, all Class D felonies.<sup>240</sup> Each count of a Class D felony carries a potential penalty of imprisonment for a fixed term of one and one-half years, plus a possible fine of up to \$10,000.<sup>241</sup> That is a total possible penalty for each defendant in this case of imprisonment for nine years, plus a possible fine of \$60,000. Five of the counts were dropped and the sixth resulted in the conviction that was overturned.<sup>242</sup> The underlying concern is that a prosecutor has the power to place a parent in the position of having to defend against multiple felony charges for neglect of a dependent based on the seemingly innocent act of “grounding” the son.

Other examples include *State v. George*<sup>243</sup> and two similar cases, *State v. Kellogg*<sup>244</sup> and *State v. Kincaid*.<sup>245</sup> Each of these cases involved a parent who was operating a motor vehicle while under the influence of alcohol. Each parent was charged not only with the alcohol offense, but also with neglect of a dependent because each parent was accompanied by a minor child at the time. In *George*, the parent’s blood alcohol content was 0.23 percent, but the defendant was found not guilty of the neglect charge because the jury felt that even though the statutory elements were met, the additional Class D felony charge was “being too hard on the mother.”<sup>246</sup> The prosecutor then decided to drop the neglect of a dependent charge in the *Kincaid* case<sup>247</sup> because the blood alcohol level was only 0.16 percent. Since the jury had nullified the neglect charge in *George* with a 0.23 percent blood alcohol level, the prosecutor did not see any point in trying the second, weaker case.<sup>248</sup>

238. *Hartbarger v. State*, 555 N.E.2d 485 (Ind. Ct. App. 1990).

239. *Id.* at 486-87 (This is an example of a case where the defendants admitted that they knowingly committed the act and they subjectively thought they were guilty of a crime, but since the conduct was not proscribed, using an objective standard, they could not be guilty of a crime.); *see supra* text accompanying notes 150-53.

240. *Hartbarger*, 555 N.E.2d at 485.

241. IND. CODE § 35-50-2-7(a) (1993).

242. *Hartbarger*, 555 N.E.2d at 485-86.

243. *State v. George*, Trial No. 06D02-9303-CF95 (Boone County, Superior Court, Criminal Division 2, tried Nov. 17, 1993); *see supra* text accompanying notes 1-5.

244. *State v. Kellogg*, Trial No. 30A01-9310-CR-337 (Ind. Ct. App., filed Dec. 15, 1993).

245. *State v. Kincaid*, Trial No. 06D02-9303-CF124 (Boone County, Superior Court, Criminal Division 2, tried Jan. 4, 1994).

246. Telephone Interview with Rebecca S. McClure, Boone County Prosecutor, in Lebanon, Ind. (Jan. 6, 1994).

247. *Kincaid*, Trial No. 06D02-9303-CF124.

248. Telephone Interview with Rebecca S. McClure, Boone County Prosecutor, in Lebanon, Ind. (Jan.

In *Kellogg*, a case in a different county and under a different prosecutor, the jury convicted the defendant for both the alcohol charge and the neglect of a dependent charge, along with several other offenses.<sup>249</sup> The defendant's blood alcohol level was 0.18 percent. The difference between the *Kellogg* conviction and the *George* acquittal is the *George* jury's decision to nullify. These two cases differ from the *Kincaid* case in that the prosecutor decided not to try the *Kincaid* case on the neglect of a dependent charge. As the Indiana Supreme Court stated in *Downey*, "It cannot be left to juries, judges, and prosecutors to draw such lines."<sup>250</sup>

But juries, judges, and prosecutors often have to draw such lines in a variety of situations and with many statutes.<sup>251</sup> That is the nature of law. The Neglect of a Dependent Statute is inherently flexible to give prosecutors a workable tool with which to protect dependents. This flexibility is both useful and necessary. It enables prosecutors to do a more effective job of protecting dependents from being placed in dangerous situations.<sup>252</sup> The key to the constitutionality tests is that the statute is tested "as applied." The statute passes the constitutionality test as long as it is "defined so that a person of ordinary intelligence can perceive the wrong intended to be prohibited."<sup>253</sup>

Another example of a use of the Neglect of a Dependent Statute that shows the great flexibility of the statute is a test case in Marion County in which a mother was indicted because her gun was used in an accidental shooting involving children.<sup>254</sup> The mother's twelve-year-old son took his mother's loaded .357-caliber Magnum revolver out from under a daybed and was showing it to friends when it discharged, injuring one of the children. A loaded shotgun was also within easy reach of the children. The grand jury's indictment of the mother on neglect of a dependent charges surprised even the prosecutor. He sent the charges to the grand jury thinking they would not indict. In the wake of a number of local shooting injuries involving children, the prosecutor intended to use this case as an example to make a plea to the Indiana General Assembly for a new statute mandating the responsible ownership of guns.<sup>255</sup>

With this great flexibility, many other examples could eventually turn into neglect charges: drag racing with a dependent in the car, speeding with a dependent in the car, failing to comply with the seat belt or child safety restraint laws,<sup>256</sup> and subjecting dependents to an environment of cigarette smoke. The Indiana Supreme Court used the examples of raising a child in a high-rise apartment and mopping a kitchen floor in the

6, 1994).

249. *State v. Kellogg*, Trial No. 30D02-9207-CF00031 (Hancock County, Superior Court, Criminal Division 2, tried June 17-18, 1993).

250. *State v. Downey*, 476 N.E.2d 121, 123 (Ind. 1985).

251. Interview with Henry C. Karlson, Professor of Law, Indiana University School of Law—Indianapolis (January 12, 1994).

252. Telephone Interview with Rebecca S. McClure, Boone County Prosecutor, in Lebanon, Ind. (Jan. 6, 1994); Telephone Interview with Terry Snow, Hancock County Prosecutor, in Greenfield, Ind. (Jan. 7, 1994); Interview with Jeff Modisett, Marion County Prosecutor, in Indianapolis, Ind. (Jan. 7, 1994).

253. *Rhinehardt v. State*, 477 N.E.2d 89, 93 (Ind. 1985).

254. Kevin O'Neal, *Jury Indicts Mother*, INDIANAPOLIS NEWS, Dec. 24, 1993, at B2.

255. Interview with Jeff Modisett, Marion County Prosecutor, in Indianapolis, Ind. (Jan. 7, 1994).

256. IND. CODE §§ 9-19-11-2, -3 (1993).

presence of a small child as the "literal intendment of the provision, but . . . not a rational intendment."<sup>257</sup> While some of these situations are more dangerous to one's life and health than others, they all fit the literal elements of neglect of a dependent. These examples show that the language of the Neglect of a Dependent Statute is quite broad and as the statute is currently written, it will probably be subject to more constitutional attacks in the future. While prosecutors need a flexible, workable tool to do an effective job of protecting dependents, more clarity and guidance is needed in Indiana's Neglect of a Dependent Statute.

### III. PROPOSAL FOR A STATUTORY AMENDMENT

Many constitutional attacks and other problems could be avoided by amending the Neglect of a Dependent Statute. To begin, the word "may" should be struck from the statute to reflect the narrowing construction of the Indiana Supreme Court.<sup>258</sup> The statute should also include language reflecting the court's mandate that "[t]he placement must itself expose the dependent to a danger which is actual and appreciable."<sup>259</sup> Language should also be added stating that the placement can be a result of a positive act or a failure to act—an omission.<sup>260</sup> The statute should also explain that an objective standard determines whether the situation is "dangerous," the confinement "cruel," or the missing support "necessary."<sup>261</sup> Whether the action or omission on the part of the defendant that leads to the charge is knowing or intentional is to be determined using a subjective standard.<sup>262</sup>

A statement of policy, showing the legislature's intended use of the statute, would also be helpful. While such statements are not normally given by the Indiana General Assembly, this statement would give prosecutors and grand juries more direction regarding how and when the statute should be applied. It would also give juries and judges some guidance for determining when a charge is too trivial. This policy statement would help "indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur."<sup>263</sup>

When another statute covers a specific situation, this policy statement could also state whether that more specific statute is meant to be the exclusive means of addressing that situation or whether the broader, more general neglect statute could also be used. When a statute addresses a specific situation, that statute should be written in a way that covers all such situations, so the neglect statute is not needed. An example is the statutes that require that a child be properly fastened and restrained by a child passenger restraint system or a seat belt in a motor vehicle.<sup>264</sup> A violation is a Class C infraction,<sup>265</sup> which

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257. *Downey*, 476 N.E.2d at 123.

258. *Id.*; see *supra* text accompanying notes 24-27.

259. *Downey*, 476 N.E.2d at 123.

260. See *supra* text accompanying notes 57-58.

261. See *supra* text accompanying notes 15-23, 133-34, 151-52, 185-86, 191, and 194.

262. See *supra* text accompanying notes 171-73.

263. *Downey*, 476 N.E.2d at 123.

264. IND. CODE §§ 9-19-11-2, -3 (1993).

265. *Id.*

carries a penalty of up to \$500.<sup>266</sup> A person who operates a motor vehicle carrying a child who is not properly restrained places that child in a situation of actual and appreciable danger under the current Neglect of a Dependent Statute, which is a Class D felony.<sup>267</sup> The prevailing court interpretation is that the neglect statute can still be used, even when statutes which are specifically directed to a particular problem exist.<sup>268</sup> But the more specific child passenger restraint statutes in this situation should control. The violator should only be subjected to the penalty which the legislature mandated by those statutes that address that specific situation. If a stricter penalty is desired, the legislature should establish that public policy. "The authority to define crimes and establish penalties belongs to the legislature. A court cannot amend a statute or establish public policy . . ."

<sup>269</sup>

The proposed statute is as follows:

(a) A person having the legal care of a dependent, whether assumed voluntarily or because of a legal obligation, who knowingly or intentionally:

- (1) Places that dependent in a situation which is an actual and appreciable danger to the dependent's life or health;
- (2) Abandons or cruelly confines the dependent;
- (3) Deprives the dependent of necessary support; or
- (4) Deprives the dependent of education as required by law; commits neglect of a dependent, a Class D felony. However, except for violation of clause (4), the offense is a Class B felony if it results in a serious bodily injury.

Whether a situation is an "actual and appreciable danger" in clause (1), a "cruel" confinement in clause (2), or a lack of "necessary" support in clause (3) is a question for the trier of fact, to be determined using an objective, reasonable person standard. That is, whether a reasonable person of ordinary intelligence would perceive it as so.

A "placement" in a dangerous situation under clause (1) may be achieved by either a positive act or a failure to act when action is necessary to prevent a dangerous situation from occurring. When considering a danger to a dependent's health, mental health is to be considered as important as physical health.

The word "cruelly" requires that the confinement is likely to result in a harm such as mental distress, extreme pain or hurt, or gross degradation, and yet does not necessarily endanger the dependent's life or health.

In determining whether support is "necessary" under clause (3), clause (1) should be used as a guide—whether a lack of the support in question constitutes a situation of actual and appreciable danger to the dependent's life or health.

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266. IND. CODE § 34-4-32-4 (1993).

267. IND. CODE § 35-46-1-4(a)(1) (1993); *see supra* note 5.

268. *See State v. Springer*, 585 N.E.2d 27, 30 (Ind. Ct. App. 1992).

269. *Downey*, 476 N.E.2d at 123.

It is a defense that the accused person, in the legitimate practice of his religious belief, provided treatment by spiritual means through prayer, in lieu of medical care, to his dependent.

(b) If another statute is specifically directed to a particular situation, that more specific statute is intended to be the means by which that violation is addressed.

(c) The purpose of this statute is to authorize the intervention of the State's police power to prevent harmful consequences and injury to dependents. Law enforcement officials need not await loss of life, limb, or property, but may intervene where conduct is sufficient to warrant belief that such an ultimate harmful consequence will ensue. The goal of this statute is the protection of dependents. When a person is responsible for the care of a dependent, that responsibility carries with it an accountability that is designed to ensure that the responsible person will not knowingly or intentionally do anything that a reasonable person would not do that endangers the life or the mental or physical health of the dependent.<sup>270</sup>

In addition to this proposed statute, other more specific statutes should be considered that would apply to commonly recurring situations to replace the use of the more general Neglect of a Dependent Statute. An example is the gun responsibility legislation currently being advanced by the Marion County Prosecutor, which is designed to keep loaded guns out of the reach of children.<sup>271</sup> Other solutions include reconsidering some of the current statutes and updating the penalties as necessary to promote the protection of dependents.

Another possible solution is to add to appropriate statutes, as an aggravating circumstance, that the involvement of a dependent leads to a greater penalty. An example is the Criminal Recklessness Statute, which proscribes a reckless, knowing, or intentional act that creates a substantial risk of bodily injury to another person.<sup>272</sup> Use of a vehicle or a deadly weapon are both aggravating circumstances that result in greater penalties. The statute could likewise find an additional aggravating circumstance where the "other person" is a dependent. This would make the Criminal Recklessness Statute very similar to the Neglect of a Dependent Statute. An example that is already written into the Indiana Code involves the seat belt statutes. If a front seat passenger fails to use a seat belt,<sup>273</sup> it is only a Class D infraction,<sup>274</sup> a judgment of up to twenty-five dollars.<sup>275</sup> But if that passenger is under four years old, it is then a Class C infraction,<sup>276</sup> a judgment of up to \$500.<sup>277</sup> Similarly, an aggravating circumstance could be added to the drunk driving

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270. Subsection (b) of Ind. Code § 35-46-1-4, which deals with child selling, should be separated from the Neglect of a Dependent Statute and addressed in a separate section.

271. Interview with Jeff Modisett, Marion County Prosecutor, in Indianapolis, Ind. (Jan. 7, 1994).

272. IND. CODE § 35-42-2-2 (1993).

273. IND. CODE § 9-19-10-2 (1993).

274. IND. CODE § 9-19-10-8 (1993).

275. IND. CODE § 34-4-32-4(d) (1993).

276. IND. CODE §§ 9-19-11-2, -3 (1993).

277. IND. CODE § 34-4-32-4(c) (1993).

statutes,<sup>278</sup> saying that a greater penalty would ensue if a dependent is in the vehicle with a drunk driver. If such an amendment were proposed and not passed, that would indicate that the Neglect of a Dependent Statute should not be used in this situation.

#### CONCLUSION

Although these proposals do not solve all of the problems presented by the Neglect of a Dependent Statute, they do give juries, judges, and prosecutors clearer standards and more guidelines from the public-policy-establishing and the crime-and-penalty-establishing branch of our government. When coupled with the political pressure on prosecutors to serve the public well and the protection of the right to be tried by a jury of peers, these proposals will adequately provide "something to indicate where the line is to be drawn between trivial and substantial things so that erratic arrests and convictions for trivial acts and omissions will not occur."<sup>279</sup> When "considered with the . . . concepts of [danger,] neglect, care, custody, control, dependent, places, life, and health, and in conjunction with the social problem dealt with, minimal due process notice requirements are met."<sup>280</sup>

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278. IND. CODE §§ 9-30-5-1, -2 (1993).

279. *Downey*, 476 N.E.2d at 123.

280. *Id.*