

3. CREATE A NEW FELONY OFFENSE OF ENDANGERING THE WELFARE OF A CHILD

Late Christmas Eve, Traci Leach brought her young children, ages 2 and 11, with her as she visited a crack house. The children were left outside on the landing as the mother disappeared inside the house. Leach eventually left the crack house and brought her children to buy ice cream at a bodega. In a nearby park, where Leach had taken her children to eat the ice cream, she told the children that she had to make a phone call. She then left her children alone in the park; it was approximately 3 am and 35 degrees outside. In the dead of this cold night, the children were left to wait. As the hours passed, and their mother still had not returned, the children began to search for her in the park and nearby areas. They returned to the crack house and continued to wander the neighborhood alone. Noting the frigid temperature, the bodega owner from whom they purchased the ice cream allowed the children to stay inside his store to keep warm. Night turned into dawn, and their mother was still nowhere to be found. Eventually, at 7:15 am on Christmas Day, the police noticed the wandering children and brought them to the precinct. Sadly, for these children, spending the night alone on the streets, in dangerously cold weather, was merely a part of the sustained pattern of abuse, neglect, and abandonment that they experienced at the hand of their mother.¹

Unfortunately, for children like these, New York's criminal statutes often fail to adequately address this type of abuse – where the only charge available to prosecutors is Endangering the Welfare of a Child, an A misdemeanor.² An A misdemeanor is pun-

ishable by up to one year in jail, but typically individuals convicted of an A misdemeanor receive much shorter sentences, often only conditional discharge or probation. The Penal Law needs to protect innocent child victims; justice is not done when a person in a position of trust subjects a child to gross abuse and neglect and only receives a misdemeanor penalty.

The felony proposed by the Law Enforcement Council would cover cases that involve behaviors that are too harmful to the child to be treated as a misdemeanor, but which do not rise to the level of a class B felony assault. Aggravated Endangering the Welfare of a Child, a class E felony, would penalize a person in a position of trust who knowingly acts in a way likely to be injurious to the child's physical, mental, or emotional welfare. The charge requires that one of two aggravating factors be present: the offender has previously been convicted of a crime in which the victim was a minor, or the conduct includes acts that cause the child extreme pain or which are carried out in an especially vicious or sadistic manner.

Notably, New York already has enhanced felony charges for Endangering the Welfare of an Elderly or Mentally Disabled Person. There is even a statute which makes Aggravated Cruelty Against an Animal a felony-level offense.³ It is unjustifiable that those who repeatedly endanger children are subject to more lenient penalties than those who abuse animals. This gross inequity should not be allowed to persist.

Among other states, Florida, California, Delaware, Texas, Georgia, Illinois, and Iowa have all recognized that a misdemeanor penalty is inadequate in these situations.⁴ Child endangerment is a grave offense wherever it occurs, and the children of New York State deserve no less protection than those living in other states.

CURRENT STATUTORY FRAMEWORK DOES NOT APPLY TO CASES FREQUENTLY SEEN BY PROSECUTORS

Under current statutes, in order to prosecute child abuse as a felony, prosecutors must prove the *intentional* infliction of *serious physical injury* or the causation of physical injury with the use of a *dangerous weapon*. The nuances of the New York State Penal Code make this a challenging charge in many cases of child abuse for three reasons.

First, the definition of “serious physical injury” is defined as “physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted impairment of the function of any bodily organ.”⁵ In most cases of child abuse, however, particularly in the earlier stages of abuse, the actions do not result in a telltale serious physical injury. In many of these cases, children may be put in danger through abandonment or neglect or subjected to other physical or emotional cruelties that do not fall under the Penal Law definition of “serious physical injury.”

Second, to meet the lower threshold of intentionally causing “physical injury,” which is defined as “impairment of physical condition or substantial pain,”⁶ the abuser must have used a “deadly weapon” or a “dangerous instrument.”⁷ While knives, guns and automobiles qualify, hands, fists, and feet do not qualify as “weapons” under the Penal Law definitions; abuse inflicted by hitting, kicking, or punching frequently falls through the gap in the law.

Third, the law currently focuses on the *intentional* infliction of harm. Under New York State law, a criminal act is intentional if the actor's “conscious objective” is to engage in the criminal act.⁸ Conversely, a person acts recklessly if he or she “is aware of and

consciously disregards” a substantial risk that can arise from these actions.⁹ However, the vast majority of child abuse results from legally *reckless* acts of people in positions of trust to the child. This standard of recklessness means that the caretaker may not intend the injury, but nonetheless consciously disregards the risk of injury, and that disregard is a gross deviation from the standard of conduct that a reasonable person would observe.

This leaves prosecutors two options: a B felony, a high-level felony punishable by a minimum of five years in prison,¹⁰ or an A misdemeanor, a low-level charge that garners little or no jail time. There is no available middle ground that appropriately addresses the nature of these crimes.

ENHANCE PENALTIES FOR PERSONS IN A POSITION OF TRUST WITH PRIOR CHILD ABUSE CONVICTIONS

The proposed felony endangering statute applies to a person charged with any duty or responsibility for the health, education, welfare, supervision, or care of the child. This requirement recognizes the increased danger and isolation faced by a child when his or her abuser is an adult to whom the child would otherwise turn for help. Persons in a position of trust should be the first people to recognize that a child is being endangered, but when they are the abuser, the child must hope that outsiders will intervene.

When child abuse leads to death or serious injury, investigators often find that these tragic endings were preceded and foreshadowed by a pattern of cruel acts that did not cause lasting injury. Seven-year-old Nixzmary Brown suffered a multitude of abuses before she died at the hands of her mother and stepfather in January 2006, including being tied with bungee cords and duct

tape and being forced to eat cat food, urinate in a litter box, and sleep standing up. Not one of these acts on its own would have sustained a felony-level charge of assault, but the viciousness and sadism with which they were carried out distinguish them from acts of misdemeanor-level endangering.

People in a position of trust with prior convictions for crimes against children – such as Endangering the Welfare of a Child, Assault, Rape, and Sexual Abuse – should not be entitled to misdemeanor treatment for a subsequent endangering conviction. Rather, caretakers who commit endangering, and have been previously convicted of one or more crimes against a child, should be guilty of a felony.

In 2009, of the 46,428 reports of child abuse and neglect in New York City, more than 34 percent had at least one prior report.¹¹

ENHANCE PENALTIES FOR PERSONS IN A POSITION OF TRUST WHO CAUSE A CHILD EXTREME PAIN OR ACT IN AN ESPECIALLY VICIOUS OR SADISTIC MANNER

Abusive acts can cause extreme physical pain or be carried out in an especially vicious or sadistic manner against children without causing the kind of serious physical injury required for felony-level assault. Duct taping and strapping a special needs child to a seat for an extended period of time, disciplining a child by making her stand outside in freezing weather at night in only underwear and a t-shirt, or hanging a child by the wrists in a darkened closet are all real-life examples of cruelty to children that cause extreme pain without necessarily resulting in serious physical injury.

Special Education Teacher Leaves Own Child at Home Alone Every Day for Two Years

On May 1, 1992, an anonymous tip led the police to the home of a special education teacher in Middle Village, Queens. Inside the house, they found piles of garbage and a dead cat on the dining room floor. They also found a two-year-old little boy wearing seven diapers and infested with ticks. The child purred like a cat and did not know how to use his thumbs. It became apparent that the child had not had any interaction with anyone except his mother. Investigators learned that the defendant had given birth to the boy at home and had kept his existence a secret ever since, leaving him alone in the house every day with bottles of milk to drink and multiple diapers wrapped around him. Child development experts who examined the boy said that as a result of his life-long isolation, he had severe developmental delays. It required months in foster care before the child began to eat solid foods, speak, and exhibit increased development. The only charge possible upon arrest was Endangering the Welfare of a Child, an A misdemeanor.

- People v. Piccininni, Queens County

Scientists have linked victims of child abuse with cognitive problems such as learning disabilities, poor impulse control, lower academic achievement, depression, and delayed brain development. In addition, victims are more likely than children who were not abused to engage in criminality throughout their lifetime.¹²

A child living in New York should not have to wait for help until he or she suffers permanent injury or death. A felony endangering statute would provide law enforcement with a valuable tool to protect children at the onset of abuse, rather than at the tragic end.

SUMMARY

The Law Enforcement Council recommends adding an Aggravated Endangering the Welfare of a Child statute in order to address circumstances in which a child's welfare is seriously threatened by a person entrusted with that child's care. Current law does not adequately hold parents and other caretakers accountable when they repeatedly abuse their charges, place their children in grave danger, or act in a particularly vicious or sadistic manner.

The current endangering misdemeanor penalizes parents and guardians who fail to take actions to prevent their children from abuse, neglect or delinquency, but it provides no enhanced penalty for parents and guardians who take active roles in abusing their children. When children are abused by those who are responsible for their care, the psychological and emotional toll is great.

New York needs enhanced sanctions so that law enforcement can effectively intervene on behalf of our most helpless citizens – our children – before they fall victim to more serious crimes.

6. N.Y. Penal Law §10.00(9).

7. N.Y. Penal Law §§10.00(11), (12).

8. N.Y. Penal Law § 15.05(1).

9. N.Y. Penal Law § 15.05(3).

10. B felonies include Manslaughter in the First Degree, Aggravated Sexual Abuse in the First Degree, and Kidnapping in the Second Degree.

11. "New York City Child Welfare Indicators Annual Report 2009" New York City Administration for Children's Services, (2010), *available at* http://www.nyc.gov/html/acs/downloads/pdf/stats_annual_indicators.pdf.

12. Jill Goldman, et al "A Coordinated Response to Child Abuse and Neglect: The Foundation for Practice," U.S. Dep't of Health and Human Services, Admin. for Children and Families, Children's Bureau, Office of Child Abuse and Neglect, (2003) *available at* <http://www.childwelfare.gov/pubs/usermanuals/foundation/foundationf.cfm>.

1. *People v. Traci Leach*, New York County.

2. The depraved indifference standard interpreted by the Court of Appeals has made it nearly impossible to charge Reckless Endangerment in the First Degree, a D felony, in these cases.

3. N.Y. Agriculture and Markets Law § 353-a.

4. Florida Title XLVI, Ch. 827.03; California Penal Code §§ 273a, 273d; Delaware Title 11, Chapter 5 § 1102; Texas Penal Code Title V, Ch. 22 § 22.041; Georgia Code § 16-5-70; Illinois ILCS Chapter 720, Act 5 §12-21.6; Iowa Title XVI, Subtitle 1, § 726.6.

5. N.Y. Penal Law §10.00(10).