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The ''officially released'' date that appears near the beginning of each opinion is the date the opinion will be published in the Connecticut Law Journal or the date it was released as a slip opinion. The operative date for the beginning of all time periods for filing postopinion motions and petitions for certification is the ''officially released'' date appearing in the opinion. In no event will any such motions be accepted before the ''officially released'' date.

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KATZ, J., dissenting. In *State* v. *Miranda*, 245 Conn. 209, 715 A.2d 680 (1998) (*Miranda I*), the certified question before this court was whether the facts and circumstances of this case were sufficient to create a legal duty to protect the victim from parental abuse pursuant to General Statutes § 53a-59 (a) (3). As part of that inquiry, we first examined whether the failure to act can create liability under that statute: ''In other words, by failing to act in accordance with a duty, does a defendant commit a crime, such as assault in the first degree in violation of § 53a-59 (a) (3), that is not specifically defined by statute in terms of an omission to act but only in terms of cause and result?'' Id., 215. We concluded that, if someone has an undisputed affirmative legal obligation to protect and provide for his minor child, his failure to protect the child from abuse could constitute a violation of § 53a-59 (a) (3). Id., 220–21. We then concluded that the duty to protect could be imposed on the defendant, Santos Miranda, an adult member of the household unrelated to the child. Id., 226. Thereafter, in *State* v. *Miranda*, 260 Conn. 93, 109, 794 A.2d 506, cert. denied, 537 U.S. 902, 123 S. Ct. 224, 154 L. Ed. 2d 175 (2002) (*Miranda II*), we determined that the defendant had fair warning of the consequences of his failure to protect the victim from her mother's abuse because criminal liability under § 53a-59 (a) (3) was neither unexpected nor indefensible by reference to existing common law.

Today, a majority of the court concludes in a per curiam opinion that, despite the legislature's failure to act in response to two en banc decisions by this court, our interpretation of § 53a-59a was incorrect. A plurality of the court, as expressed in a concurring opinion, concludes that, even someone who has an undisputed affirmative legal obligation to protect and provide for a minor child, like a parent, cannot, as a matter of law, commit a violation of § 53a-59 (a) (3) if he or she fails to protect that child from abuse. Another plurality of the court, expressed in a second concurring opinion, decides that, even if a parent who fails to protect the victim from parental abuse can be liable for a violation of § 53a-59a, the defendant in this case, who considered himself the victim's parent, established a familial relationship with the victim's mother and her children and assumed the role of a father, cannot be held liable. Respectfully, I disagree with my colleagues.

I

I begin with the doctrine of stare decisis, the principle that cautions courts to tread lightly into the world of overruling precedent. ''The doctrine [of stare decisis] requires a clear showing that an established rule is incorrect and harmful before it is abandoned''; (internal

quotation marks omitted) *White* v. *Burns*, 213 Conn. 307, 335, 567 A.2d 1195 (1990); and ''counsels that a court should not overrule its earlier decisions unless the most cogent reasons and inescapable logic require it. . . . Stare decisis is justified because it allows for predictability in the ordering of conduct, it promotes the necessary perception that the law is relatively unchanging, it saves resources and it promotes judicial efficiency. . . . It is the most important application of a theory of decisionmaking consistency in our legal culture and it is an obvious manifestation of the notion that decisionmaking consistency itself has normative value.'' (Citations omitted; internal quotation marks omitted.) *George* v. *Ericson*, 250 Conn. 312, 318, 736 A.2d 889 (1999).

I recognize that ''[s]tare decisis is not an inexorable command. The court must weigh [the] benefits [of stare decisis] against its burdens in deciding whether to overturn a precedent it thinks is unjust. . . . If law is to have a current relevance, courts must have and exert the capacity to change a rule of law when reason so requires.'' (Citation omitted; internal quotation marks omitted.) *Conway* v. *Wilton*, 238 Conn. 653, 660, 680 A.2d 242 (1996). In assessing the force of stare decisis, we must, however, be ''especially cautious about overturning a case that concerns statutory construction.'' (Internal quotation marks omitted.) *Ferrigno* v. *Cromwell Development Associates*, 244 Conn. 189, 202, 708 A.2d 1371 (1998).

Today, despite the legislature's failure over the last seven years to respond to this court's interpretation of § 53-59a, a majority of the court determines that our earlier decision was incorrect. ''Time and again, [however] we have characterized the failure of the legislature to take corrective action as manifesting the legislature's acquiescence in our construction of a statute. . . . Once an appropriate interval to permit legislative reconsideration has passed without corrective legislative action, the inference of legislative acquiescence places a significant jurisprudential limitation on our own authority to reconsider the merits of our earlier decision.'' (Internal quotation marks omitted.) *Hall* v. *Gilbert & Bennett Mfg. Co.*, 241 Conn. 282, 297, 695 A.2d 1051 (1997); see, e.g., *Rivera* v. *Commissioner of Correction*, 254 Conn. 214, 251–52, 756 A.2d 1264 (2000) (citing principle of stare decisis and relying on legislature's failure to act over six year period as basis for refusing to overrule *Howard* v. *Commissioner of Correction*, 230 Conn. 17, 644 A.2d 874 [1994], in which this court construed calculation of good time credits earned on multiple sentences). Thus, ''[w]hile we are aware that legislative inaction is not necessarily legislative affirmation . . . we also presume that the legislature is aware of [this court's] interpretation of a statute, and that its subsequent nonaction may be understood as a validation of that interpretation.'' (Internal quotation

marks omitted.) *State* v. *Hodge*, 248 Conn. 207, 262–63, 726 A.2d 531, cert. denied, 528 U.S. 696, 120 S. Ct. 409, 145 L. Ed. 2d 319 (1999).

I consider the legislature's failure to act in the face of our interpretation of § 53a-59 (a) (3) to be highly significant. Although the issue of whether to extend criminal liability to a particular class of persons based on a duty to act was a matter of common-law adjudication, the issue of whether § 53a-59 (a) (3) can be applied to an act of omission as well as commission is a matter of statutory construction. The legislature often has decided to revisit a statute interpreted by this court or to react to a judicial interpretation that the legislature deemed inaccurate.[1] For example in *Bhinder* v. *Sun Co.*, 263 Conn. 358, 374, 819 A.2d 822 (2003), we recognized that the legislature, in response to our prior decision in that wrongful death case permitting common-law apportionment of damages to a third party who acted intentionally or recklessly; see *Bhinder* v. *Sun Co.*, 246 Conn. 223, 242, 717 A.2d 202 (1998); had enacted a statute precluding apportionment between parties on any basis other than negligence. As a result, we reversed our original decision in *Bhinder* in light of that clarifying legislation, stating: ''[W]e have often held . . . that it is as much within the legislative power as the judicial power—subject, of course, to constitutional limits other than the separation of powers—for the legislature to declare what its intent was in enacting previous legislation.'' (Internal quotation marks omitted.) *Bhinder* v. *Sun Co.*, supra, 263 Conn. 372. Thus, it is clear that ''[t]he legislature has the power to make evident to us that it never intended to provide a litigant with the rights that we had previously interpreted a statute to confer.'' *State* v. *Blasko*, 202 Conn. 541, 558, 522 A.2d 753 (1987). Implicit in our decisions recognizing the legislature's authority to clarify its intent by subsequent legislation was the recognition that pending cases, even those that provided the impetus for the clarifying legislation, could be affected. *Greenwich Hospital* v. *Gavin*, 265 Conn. 511, 520, 829 A.2d 810 (2003); see, e.g., *Oxford Tire Supply, Inc.* v. *Commissioner of Revenue Services*, 253 Conn. 683, 692–94, 755 A.2d 850 (2000) (recognizing that legislature had enacted legislation during judicial proceedings of case to clarify statutory scheme as result of improper construction by trial court and applying legislation retroactively); *State* v. *Magnano*, 204 Conn. 259, 273, 528 A.2d 760 (1987) (same); see also *Andersen Consulting, LLP* v. *Gavin*, 255 Conn. 498, 517, 767 A.2d 692 (2001) (recognizing retroactive effect of clarifying legislation).

Accordingly, it is clear that the legislature had the authority to make it evident that it never intended to punish someone under § 53a-59 (a) (3) for his failure to act or to prevent harm, after either the *Miranda I* or *Miranda II* decision. Its failure to respond to either of these decisions involving this defendant strongly sug-

gests that our initial determination was proper.

II

I next question the wisdom of revisiting the issue in this case. I recognize the fairness exercised when a court, which decides that an earlier interpretation of a statute was incorrect, affords the benefit of that determination to the defendant who was harmed by the earlier ruling. There is, however, an issue of finality of judgments, a consideration that questions whether it is judicious for the court to revisit issues previously decided against a litigant. ''[T]he doctrine of res judicata, or claim preclusion, [provides that] a former judgment on a claim, if rendered on the merits, is an absolute bar to a subsequent action [between the same parties or those in privity with them] on the same claim.'' (Internal quotation marks omitted.) *Fink* v. *Golenbock*, 238 Conn. 183, 191, 680 A.2d 1243 (1996). ''The [doctrine] . . . [is] based on the public policy that a party should not be able to relitigate a matter which it already has had an opportunity to litigate. . . . [W]here a party has fully and fairly litigated his claims, he may be barred from future actions on matters not raised in the prior proceeding.''[2] (Internal quotation marks omitted.) Id., 192–93.

The doctrine of res judicata applies to criminal as well as civil proceedings and to state habeas corpus proceedings. *McCarthy* v. *Warden*, 213 Conn. 289, 294–98, 567 A.2d 1187 (1989), cert. denied, 496 U.S. 939, 110 S. Ct. 3220, 110 L. Ed. 2d 667 (1990). In the context of habeas proceedings, however, we have recognized that, ''[a]lthough the doctrine of res judicata in its fullest sense bars claims that could have been raised in a prior proceeding, such an application in the habeas corpus context would be unduly harsh. . . . Unique policy considerations must be taken into account in applying the doctrine of res judicata to a constitutional claim raised by a habeas petitioner. . . . Foremost among those considerations is the interest in making certain that no one is deprived of liberty in violation of his or her constitutional rights. . . . With that in mind, we limit the application of the doctrine of res judicata in circumstances such as these to claims that actually have been raised and litigated in an earlier proceeding.'' (Citations omitted; internal quotation marks omitted.) *Thorpe* v. *Commissioner of Correction*, 73 Conn. App. 773, 778–79 n.7, 809 A.2d 1126 (2002); see, e.g, *Asherman* v. *State*, 202 Conn. 429, 443, 521 A.2d 578 (1987) (concluding that defendant's claim of juror misconduct was barred by res judicata because claim was identical to claim previously raised and decided).

There is no doubt that the issue in this appeal is the same issue that was raised by the defendant and decided against him by this court in the defendant's first challenge to his conviction, *Miranda I*. The only question then is whether the circumstances warrant a deviation

from our well settled doctrine. I am not persuaded. As I explain more fully in part III of this opinion, the catalyst for our reconsideration of the defendant's assault convictions is the severity of the sentence imposed. The majority does not proclaim the defendant innocent of all wrongdoing. In other words, this is not a case in which the court concludes that what was once deemed to have been criminal behavior is now innocent. On the contrary, the court, as well as the defendant, acknowledges that his conviction for risk of injury was proper.[3] The issue is whether the defendant properly was charged. Had his sentence of incarceration been for concurrent time, there would have been no point from a practical standpoint nor, I venture to guess, interest from a legal stance in revisiting this issue. Thus, the doctrine of res judicata presents a paramount consideration that should not be driven by sentencing considerations.

III

Turning to the merits of the inquiry, I continue to believe that the defendant in this case properly was convicted of assault in the first degree in violation of § 53a-59 (a) (3) because he recklessly engaged in conduct thereby causing serious physical injury in that he failed to act, help or aid the child victim by promptly notifying authorities of her injuries, taking her for medical care, removing her from her circumstances and guarding her from future abuses. As a result of his failure to help her, the child was exposed to conduct that created a risk of death to her, and the child suffered subsequent serious physical injuries. This court set forth the facts the trial court reasonably had found in *Miranda I*, supra, 245 Conn. 212–14. As best as I can determine, nothing has changed in this regard.

"The defendant commenced living with his girlfriend and her two children in an apartment [in Meriden] in September, 1992. On January 27, 1993, the defendant was twenty-one years old, his girlfriend was sixteen, her son was two, and her daughter, the victim in this case, born on September 21, 1992, was four months old. Although he was not the biological father of either child, the defendant took care of them and considered himself to be their stepfather. He represented himself as such to the people at Meriden Veteran's Memorial Hospital where, on January 27, 1993, the victim was taken for treatment of her injuries following a 911 call by the defendant that the child was choking on milk. Upon examination at the hospital, it was determined that the victim had multiple rib fractures that were approximately two to three weeks old, two skull fractures that were approximately seven to ten days old, a brachial plexus injury to her left arm, a rectal tear that was actively 'oozing blood' and bilateral subconjunctival nasal hemorrhages. On the basis of extensive medical evidence, the trial court determined that the injuries

had been sustained on three or more occasions and that none of the injuries had been the result of an accident, a fall, events that took place at the time of the child's birth, cardiopulmonary resuscitation, a blocked air passageway or the child choking on milk. Rather, the trial court found that the injuries, many of which created a risk of death, had been caused by great and deliberate force.

"The trial court further found in accordance with the medical evidence that, as a result of the nature of these injuries, at the time they were sustained the victim would have screamed inconsolably, and that her injuries would have caused noticeable physical deformities, such as swelling, bruising and poor mobility, and finally, that her intake of food would have been reduced. The court also determined that anyone who saw the child would have had to notice these injuries, the consequent deformities and her reactions. Indeed, the trial court found that the defendant had been aware of the various bruises on her right cheek and the subconjunctival nasal hemorrhages, as well as the swelling of the child's head, that he knew she had suffered a rectal tear, as well as rib fractures posteriorly on the left and right sides, and that he was aware that there existed a substantial and unjustifiable risk that the child was exposed to conduct that created a risk of death. The trial court concluded that despite this knowledge, the defendant 'failed to act to help or aid [the child] by promptly notifying authorities of her injuries, taking her for medical care, removing her from her circumstances and guarding her from future abuses. As a result of his failure to help her, the child was exposed to conduct which created a risk of death to her and the child suffered subsequent serious physical injuries . . . ." Id.

On the basis of the foregoing facts, as reasonably found by the trial court, in *Miranda I*, this court engaged in our traditional process to determine whether the defendant's conduct constituted a violation of § 53a-59 (a) (3). Indeed, in *Miranda II*, supra, 260 Conn. 106–109, in deciding whether this court's application of § 53a-59 (a) (3) in *Miranda I* to the defendant was reasonably foreseeable, we recognized as follows the well reasoned process that we previously had employed in making that initial determination.

"[In *Miranda I*] we employed the ordinary tools of statutory construction.[4] We examined the plain language of § 53a-59 (a) (3), the text of our statutes, the common law of our state and other jurisdictions, other Connecticut statutes governing similar conduct, and treatises addressing this issue. These ordinary tools of statutory construction enabled us to conclude that under the facts of this case, it is appropriate to recognize an affirmative duty to act and to impose criminal liability for the failure to act pursuant to that duty. *Miranda I*, supra, 245 Conn. 221.

"First, the court examined the plain language of § 53a-59 (a) (3) and the text of our statutes. We determined that the plain language of § 53a-59 (a) (3) [does not] preclude criminal liability from attaching to an omission to act when a legal duty to act exists and injury results.[5] Id., 220–21. In addition, many statutes that expressly impose a legal duty to act and attach liability for failure to comply with that duty and other statutes impose liability for failure to comply with a duty found either in a separate statute or in the common law. Id., 219. We also concluded that our Penal Code did not foreclose the possibility of a duty and criminal liability for the breach of that duty existing under the facts of this case.[6] Id., 219–20. We concluded that the text of § 53a-59 (a) (3) and other statutes did not prevent us from recognizing that, under the facts of this case, the defendant had a common-law duty to act and his failure to do so exposed him to criminal liability under § 53a-59 (a) (3). Id., 220–21.

"Second, we examined the common law in Connecticut and other jurisdictions. Common law courts frequently look to the decisions of other jurisdictions in determining whether to alter or modify a common law rule in light of changed circumstances, increased knowledge, and general logic and experience. *Rogers* v. *Tennessee*, [532 U.S. 451, 464, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001)]. In addition, although due process does not require that a person know the common law of every jurisdiction, an examination of the common law of other jurisdictions is surely relevant to whether [a change in common law] . . . in a particular case can be said to be unexpected and indefensible by reference to the law as it then existed. Id. We concluded that [i]t is undisputed that parents have a duty to provide food, shelter and medical aid for their children and to protect them from harm under the common law of Connecticut and other jurisdictions.[7] [*Miranda I*], supra, 245 Conn. 222. In looking at the common law of other jurisdictions, we also found that some jurisdictions have imposed a duty to protect a child from harm on adult individuals, other than parents, who establish familial relationships and assume responsibility for the care of a child.[8] Id., 223.

"We analyzed four cases from other jurisdictions[9] with facts similar to the present case. In examining those cases, we deduced that these courts [in other jurisdictions] have examined the nature of the relationship of the defendant to the victim and whether the defendant, as part of that relationship, had assumed a responsibility for the victim to determine whether the defendant had a duty to act under the particular circumstances of each case. Id. We found the reliance by these courts on this combination of factors persuasive. Id. Using this same combination of factors, we determined in the present case that when the defendant, who con-

sidered himself the victim's parent, established a familial relationship with the victim's mother and her children and assumed the role of a father, he assumed, under the common law, the same legal duty to protect the victim from the abuse as if he were, in fact, the victim's guardian. Id., 226. An examination of the common law of other states indicated that it was not unexpected and indefensible to impose a common-law duty on the defendant to protect the victim under the facts of this case. See *Rogers* v. *Tennessee*, supra, 532 U.S. 464.

"Third, we examined other Connecticut statutes governing conduct similar to that at issue in the present case. We looked to other relevant statutes governing the same or similar subject matter because the legislature is presumed to have created a consistent body of law. [*Miranda I*], supra, 245 Conn. 229, citing *Daly* v. *Del-Ponte*, 225 Conn. 499, 510, 624 A.2d 876 (1993). We concluded, therefore, that because § 53-21 [the risk of injury statute], without any explicit restriction, holds responsible *any* person who permits abuse of a child to occur, to prescribe a duty in connection with § 53a-59 (a) (3) to prevent such abuse furthers a harmonious and consistent body of law . . . .[10] [*Miranda I*], supra, 245 Conn. 230.

"We also reviewed treatises, which demonstrated that the trend of Anglo-American law has been toward enlarging the scope of criminal liability for failure to act in those situations in which the common law or statutes have imposed an affirmative responsibility for the safety and well-being of others.[11] Id., 215, citing 1 W. LaFave & A. Scott, Substantive Criminal Law (1986) § 3.3; annot., 61 A.L.R.3d 1207 (1975); annot., 100 A.L.R.2d 483 (1965). As Professors LaFave and Scott stated in their treatise, if two people, though not closely related, live together under one roof, one may have a duty to act to aid the other who becomes helpless. 1 W. LaFave & A. Scott, supra, § 3.3 (a), p. 286."[12] (Internal quotation marks omitted.) *Miranda II*, supra, 260 Conn. 106-109.

"We conclude[d] [therefore] that our recognition of a common-law duty that required the defendant either to take affirmative action to prevent harm to the victim or be exposed to criminal liability under § 53a-59 (a) (3) was not unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue. *Rogers* v. *Tennessee*, supra, 532 U.S. 461, quoting *Bouie* v. *Columbia*, [378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964)]. To reach the conclusion that we did, we relied on ordinary tools of statutory construction. Those tools of statutory construction demonstrated that by reference to the law as it then existed, it was neither unexpected nor indefensible to impose a common-law duty on the defendant to protect the victim under the facts of this case and to impose criminal liability for his failure to so act. [Accordingly,

we concluded] . . . that this court's recognition of a common-law duty and the application of § 53a-59 (a) (3) were reasonably foreseeable and did not deprive the defendant of due process in accordance with the standard articulated in *Bouie*." (Internal quotation marks omitted.) *Miranda II*, supra, 260 Conn. 109–10.

Today, despite the fact that in *Miranda II*, the court essentially reinforced the reasoning that informed the first case involving this defendant, the majority of the court changes its opinion—a plurality determines that even a parent cannot be held liable for reckless assault under § 53a-59 (a) (3) for failing to prevent abuse of his or her own child, as discussed in Justice Vertefeuille's concurrence, and another plurality determines that, even if the assault statute contemplates omission by someone with a duty to act, the defendant does not fall within that category under the facts of this case, as discussed in Justice Borden's concurrence. I continue to abide by our earlier recognition that an omission to act may create criminal culpability under our Penal Code even though the law defining the offense, as here, provides that the defendant must have "engage[d] in conduct which create[d] a risk of death to another person, and thereby cause[d] serious physical injury . . . ."[13] General Statutes § 53a-59 (a) (3). Indeed, I venture to guess that a majority of this court would acknowledge that, if a mother, who did not herself inflict any punishment on her child, but allowed her boyfriend to inflict brutal beatings that caused serious physical injury to her infant, were charged with reckless assault, she should be treated no differently than if she had allowed her child to starve nearly to death or wander into traffic and be hit by a vehicle. In either instance, she would have engaged in conduct that constituted a gross deviation from the standard of conduct that any reasonable parent would observe under the circumstances.[14] In either instance, the injury caused by the mother's conduct would have been a foreseeable and natural result of her conduct, thereby making her criminally responsible. See *State* v. *Spates*, 176 Conn. 227, 233–35, 405 A.2d 656 (1978), cert. denied, 440 U.S. 922, 99 S. Ct. 1248, 59 L. Ed. 2d 475 (1979). The difference in the present case, however, is that it was the mother who inflicted the injuries, and someone other than an adoptive or biological parent who failed to protect the infant.

Finally, I want to reiterate that imposing criminal liability for omissions is not tantamount to creating a common-law crime. Although we no longer have common-law crimes, we have preserved "the common law rules of criminal law not in conflict with [our Penal Code]. . . . The rule applicable to omissions does not define a substantive crime. Failure to act when there is a special relationship does not, by itself, constitute a crime. The failure must expose the dependent person to some proscribed result. The definition of proscribed

results constitutes the substantive crime, and it is defined in the criminal code.'' (Internal quotation marks omitted.) *State* v. *Williquette*, 129 Wis. 2d 239, 253–54, 385 N.W.2d 145 (1986). The rule regarding omissions, therefore, is not inconsistent with § 53a-59 (a) (3). To constitute the cause of the harm, it is not necessary that the defendant's act be the sole reason for the realization of the harm that has been sustained by the victim. The defendant does not cease to be responsible for his otherwise criminal conduct because there were other conditions that contributed to the same result. As we pointed out previously, the mother's violent actions were of such a nature as to put any ordinary, reasonable person on notice that the child's life truly and realistically was in immediate peril. The defendant easily could, and should, have removed the child from this danger. His failure to do so, under the circumstances previously described, is sufficient to support a finding by the trial judge that his failure to act was a contributing cause of the child's unfortunate injuries.

Therefore, at the risk of repeating myself, I would not adopt a broad general rule covering other circumstances, but, rather, I would conclude only that, ''in accordance with the trial court findings, when the defendant, who considered himself the victim's parent, established a familial relationship with the victim's mother and her children and assumed the role of a father, he assumed, under the common law, the same legal duty to protect the victim from the abuse as if he were, in fact, the victim's guardian. Under these circumstances, to require the defendant as a matter of law to take affirmative action to prevent harm to the victim or be criminally responsible imposes a reasonable duty. That duty does not depend on an ability to regulate the mother's discipline of the victim or on the defendant having exclusive control of the victim when the injuries occurred. Nor is the duty contingent upon an ability by the state or the mother to look to the defendant for child support. [See *W.* v. *W.*, 248 Conn. 487, 504–505, 728 A.2d 1076 (1999) (concluding that man who was not biological father, but who consistently had treated child as his daughter, was estopped from denying paternity for purposes of child support)]. Moreover, whether the defendant had created a total in loco parentis relationship with the victim by January, 1993, is not dispositive of whether the defendant had assumed a responsibility for the victim. *Leet* v. *State*, [595 So. 2d 959, 962 (Fla. App. 1991)]. If immediate or emergency medical attention is required from a child's custodian it should not matter that such custodian is not the primary care provider or for that matter a legally designated surrogate.'' (Internal quotation marks omitted.) *Miranda I*, supra, 245 Conn. 226–27.

Finally, I disagree with my colleagues that the continuing demographic trend, which we first noted in *Miranda I*, supra, 245 Conn. 228, that reflects a signifi-

cant increase in nontraditional alternative family arrangements; United States Bureau of the Census, Marital Status and Living Arrangements: March 1984, Current Population Reports, Series p-20, No. 399 (1985); counsels against the imposition of liability in this case. I do not agree that persons inclined to enter relationships that involve children will consciously decide against such involvement for fear of being held responsible if and when a child is abused or neglected. Because more and more children will be living with or may depend upon adults who do not qualify as a natural or adoptive parent, the fact that we are, at best, affording protection only to those children whose adult caregivers have chosen to have their relationships officially recognized hardly advances the public policy of protecting children from abuse.

Accordingly, I respectfully dissent.

[1] Indeed, the plethora of cases in which we have noted that the legislature has enacted legislation in response to one of our decisions lends strong support to the proposition that the legislature will not hesitate to take action when it views our decisions as misconstruing its intent. See, e.g., *Quarry Knoll II Corp.* v. *Planning & Zoning Commission*, 256 Conn. 674, 727–28, 780 A.2d 1 (2001) (determining that legislature had enacted Public Act 00-206, § 1 (g), in reaction to our decision in *Christian Activities Council, Congregational* v. *Town Council*, 249 Conn. 566, 589, 735 A.2d 231 [1999]); *Greenwich Hospital* v. *Gavin*, 265 Conn. 511, 514 n.3, 829 A.2d 810 (2003) (stating that ''[General Statutes §] 12-263b, the gross earnings statute, was enacted by the General Assembly as an emergency certified bill in response to the decision in *New England Health Care Employees Union District 1199, SEIU AFL-CIO* v. *Mount Sinai Hospital*, 846 F. Sup. 190, 195–200 [D.Conn. 1994], rev'd, 65 F.3d 1024 [2d Cir. 1995]''); *In re Michael S.*, 258 Conn. 621, 629, 784 A.2d 317 (2001) (concluding that No. 86-185, § 2, of 1986 Public Acts was enacted to overrule our decision in *In re Juvenile Appeal [85-AB]*, 195 Conn. 303, 488 A.2d 778 [1985]); *King* v. *Sultar*, 253 Conn. 429, 442, 754 A.2d 782 (2000) (''legislative history of . . . the bill eventually enacted as Public Acts 1971, No. 524, § 1, and codified at [General Statutes] § 7-433c, clearly and unequivocally demonstrates that the legislature enacted § 7-433c in direct response to our decision in *Ducharme* [v. *Putnam*, 161 Conn. 135, 285 A.2d 318 (1971)]); *Colonial Penn Ins. Co.* v. *Bryant*, 245 Conn. 710, 720 n.17, 714 A.2d 1209 (1998) (stating that General Statutes § 38a-336 [f] ''was enacted in response to our decision in *CNA Ins. Co.* v. *Colman*, 222 Conn. 769, 610 A.2d 1257 [1992]''); *Federal Deposit Ins. Corp.* v. *Hillcrest Associates*, 233 Conn. 153, 167–68, 659 A.2d 138 (1995) (concluding that legislature amended statute ''in response to our decision in *Dime Savings Bank* [v. *Pomeranz*, 123 Conn. 581, 196 A. 634 (1938)]'').

[2] The presumption of finality of judgments is also underscored by the law of the case doctrine, which ''expresses the practice of judges generally to refuse to reopen what has been decided . . . .'' (Internal quotation marks omitted.) *Suffield Bank* v. *Berman*, 228 Conn. 766, 774–75, 639 A.2d 1033 (1994). We have applied the law of the case doctrine in criminal cases to preclude defendants from relitigating claims decided in earlier appeals of the same case. See, e.g., *State* v. *Ross*, 269 Conn. 213, 263, 849 A.2d 648 (2004) (''The defendant now claims that the trial court's denial of his motion to sever the cases prior to the second penalty phase was improper . . . [on three grounds]. These are precisely the same issues, however, as the issues raised by the defendant before the first guilt phase and reviewed by this court in [the defendant's previous appeal from the imposition of the death penalty, *State* v. *Ross*, 230 Conn. 183, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995)]. Accordingly, we conclude that this claim is governed by the law of the case and that the trial court properly denied the motion to sever.'').

[3] Indeed, I am puzzled by the characterization of the language in § 53a-59 (a) (3) by Justice Vertefeuille in her concurrence as ''affirmative'' when the risk of injury statute, General Statutes § 53-21, which indisputably applies to the defendant's failure to act in this case, uses language—''causes or permits'' and ''does any act''—that could be labeled similarly.

[4] I find it curious that, despite this express recognition in the majority opinion in *Miranda II*, supra, 260 Conn. 106, which Justice Vertefeuille authored, that we previously had applied our traditional tools of statutory construction, the concurring opinion by Justice Vertefeuille in this appeal nevertheless states that the *Miranda I* majority failed to engage in any analysis of § 53a-59 (a) (3).

[5] I would suggest that any claim that ''inaction'' cannot constitute ''conduct'' within § 53a-59 (a) (3), ''can be dismissed with little discussion. We approved the principle long ago that a cause of death sufficient to establish criminal liability could be an act, or omission to act. *State* v. *Tomassi*, 137 Conn. 113, 119, 75 A.2d 67 [1950]; see Perkins, Criminal Law (2d Ed.), Causation, § 9, pp. 732 et seq.'' *State* v. *Spates*, 176 Conn. 227, 232 n.3, 405 A.2d 656 (1978), cert. denied, 440 U.S. 922, 99 S. Ct. 1248, 59 L. Ed. 2d 475 (1979) (making statement in connection with interpretation of General Statutes § 53a-55 [a] [3]).

It also is significant that, as we noted in our maiden voyage into this case, ''[i]n recognition of the broad term 'engage in conduct,' as chosen by the legislature in § 53a-59 (a) (3), suggesting at least the want of due care, the failure to respond and the disregard of responsibility, the defendant does not claim that the plain language of the statute precludes criminal liability from attaching to an omission to act when there is a legal duty to do so. Nor does the defendant challenge the long-standing and fundamental principle that 'conduct' can include the failure to act when there is a duty to act. 1 W. LaFave & A. Scott, Substantive Criminal Law (1986) § 3.3 (a).'' *Miranda I*, supra, 245 Conn. 215 n.8.

Finally, I note that the legislative history referenced by Justice Vertefeuille's concurring opinion sheds no light on this issue. As Justice Vertefeuille notes, Robert Testo, then chairperson of the commission to revise the criminal statutes (commission), stated in testimony before the judiciary committee that the commission had looked at the American Law Institute's Model Penal Code, as well as New York's Penal Code, when drafting the 1969 Penal Code. Conn. Joint Standing Committee Hearings, Judiciary, 1969 Sess., p. 11. The remarks to which she refers, however, were addressed to the Penal Code generally and not to any particular statute or term. Thus, in the absence of any specific discussion on the commission's adoption or rejection of any model code provision in connection with its discussion of § 53a-59 or any other specific provision that bears on the issue before us, I draw no significance from the drafters' failure to adopt a particular definition of the term ''conduct.''

[6] Specifically, in *Miranda I*, supra, 245 Conn. 219–20, we turned to, inter alia, General Statutes § 53a-4 (''[t]he provisions of this chapter shall not be construed as precluding any court from recognizing other principles of criminal liability or other defenses not inconsistent with such provisions'' [internal quotation marks omitted]), as well as the official commentary to that provision. Commission to Revise the Criminal Statutes, Penal Code Comments, Connecticut General Statutes Annotated (West 1985) § 53a-4, p. 196 (''The purpose of this savings clause is to make clear that the provisions of [General Statutes §§] 53a-5 to 53a-23, which define the principles of criminal liability and defenses, are not necessarily exclusive. A court is not precluded by sections 53a-5 to 53a-23 from recognizing other such principles and defenses not inconsistent therewith.''). This court's opinion in *State* v. *Walton*, 227 Conn. 32, 630 A.2d 990 (1993), exemplifies our approach to interpreting § 53a-4 in light of certain common-law principles of criminal liability. In *Walton*, we adopted the *Pinkerton* principle of liability—that is, ''a conspirator may be held liable for criminal offenses committed by a coconspirator that are within the scope of the conspiracy, are in furtherance of it, and are reasonably foreseeable as a necessary or natural consequence of the conspiracy.'' Id., 43, citing *Pinkerton* v. *United States*, 328 U.S. 640, 647–48, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946). As we explained, we were ''not fashion[ing] an additional substantive offense by applying *Pinkerton* to the facts of [*Walton*] . . . [because the] *Pinkerton* principle does not create a substantive offense; it applies a particular principle of vicarious criminal liability to an appropriate case.'' *State* v. *Walton*, supra, 45 n.11.

I am mindful that the commentary to § 53a-4 sets certain limits to our authority by providing: ''This does not mean, however, that the court is free to fashion additional substantive offenses, for the [Penal Code] precludes, by repealing [General Statutes §] 54-117, the notion of common law crimes.'' Commission to Revise the Criminal Statutes, Penal Code Comments, Connecticut General Statutes Annotated (West 1994) § 53a-4, p. 223. As this dissent makes clear, however, I do not believe that in *Miranda I*, supra,

245 Conn. 209, the court created an additional substantive offense by holding the defendant in this case accountable. In other words, the edict against creating common-law crimes was not violated. Failure to act when there is a special relationship does not, by itself, constitute a crime. The failure must expose the dependent person to some proscribed result. The definition of proscribed results constitutes the substantive crime, and those results are defined in the Penal Code.

[7] As we explained in *Miranda I*, "[i]t is undisputed that parents have a duty to provide food, shelter and medical aid for their children and to protect them from harm. See *In re Juvenile Appeal (Docket No. 9489)*, 183 Conn. 11, 15, 438 A.2d 801 (1981). The inherent dependency of a child upon his parent to obtain medical aid, i.e., the incapacity of a child to evaluate his condition and summon aid by himself, supports imposition of such a duty upon the parent. *Commonwealth* v. *Konz*, 498 Pa. 639, 644, 450 A.2d 638 (1982). Additionally, [t]he commonly understood general obligations of parenthood entail these minimum attributes: (1) express love and affection for the child; (2) express personal concern over the health, education and general well-being of the child; (3) the duty to supply the necessary food, clothing, and medical care; (4) the duty to provide an adequate domicile; and (5) the duty to furnish social and religious guidance. *In re Adoption of Webb*, 14 Wash. App. 651, 653, 544 P.2d 130 (1975). Indeed, the status relationship giving rise to a duty to provide and protect that has been before the courts more often than any other relationship and, at the same time, the one relationship that courts most frequently assume to exist without expressly so stating, is the relationship existing between a parent and a minor child." (Internal quotation marks omitted.) *Miranda I*, supra, 245 Conn. 222. Consequently, criminal liability of parents based on a failure to act in accordance with common-law affirmative duties to protect and care for their children is well recognized in many jurisdictions. See footnote 8 of this opinion.

[8] Although we did not state the point expressly in *Miranda I*, it is clear that imposing such a duty on adults other than parents necessarily would impose a similar duty on parents to protect a child from harm. I note that, although there does not appear to be extensive law directly on point, the case law that is available appears to be unanimous in establishing a duty of a parent to act to protect his or her child, the breach of which will give rise to liability for, inter alia, abuse, manslaughter and assault. See, e.g., *Michael* v. *State*, 767 P.2d 193 (Alaska App. 1988) (father held criminally responsible for reckless assault for failure to protect child from mother's abuse), rev'd on other grounds, 805 P.2d 371 (Alaska 1991); *People* v. *Burden*, 72 Cal. App. 3d 603, 140 Cal. Rptr. 282 (1977) (father convicted of second degree murder for failure to feed his child after child died of malnutrition and dehydration); *People* v. *Stanciel*, 153 Ill. 2d 218, 606 N.E.2d 1201 (1992) (mothers guilty of homicide by allowing their abusive companions to retain role of disciplinarian over their children); *Smith* v. *State*, 408 N.E.2d 614 (Ind. App. 1980) (mother held criminally responsible for failing to prevent fatal beating of child by her lover), overruled on other grounds, *Armour* v. *State*, 479 N.E.2d 1294 (Ind. 1985); *Palmer v. State*, 223 Md. 341, 164 A.2d 467 (1960) (affirming mother's conviction of involuntary manslaughter based on her failure to protect her infant daughter from repeated abuse by her boyfriend); *State v. Walden*, 306 N.C. 466, 476, 293 S.E.2d 780 (1982) ("the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed"); *State* v. *Zobel*, 81 S.D. 260, 134 N.W.2d 101 (parents convicted of murder for neglect of children that resulted in death), cert. denied, 382 U.S. 833, 86 S. Ct. 74, 15 L. Ed. 2d 76 (1965), overruled on other grounds, *State* v. *Waff*, 373 N.W.2d 18 (S.D. 1985); *State v. Williquette*, 129 Wis. 2d 239, 385 N.W.2d 145 (1986) (concluding that mother's failure to prevent father's abuse of their children by leaving them in his care when she knew he regularly abused them physically and sexually constituted child abuse under language of statute); see also *State* v. *Peters*, 116 Idaho 851, 855, 780 P.2d 602 (App. 1989) (noting that parent has duty to protect and care for child and when injury results from failure to protect child from harm, failure to act will be "deemed to be the cause of those injuries").

[9] "*Leet* v. *State*, 595 So. 2d 959 (Fla. App. 1991); *State* v. *Orosco*, 113 N.M. 789, 833 P.2d 1155 (1991) [aff'd, 113 N.M. 780, 833 P.2d 1146 (1992)]; *People* v. *Wong*, 182 App. Div. 2d 98, 588 N.Y.S.2d 119, rev'd on other grounds, 81 N.Y.2d 600, 619 N.E.2d 600, 601 N.Y.S.2d 440 (1993); *People* v. *Salley*, 153 App. Div. 2d 704, 544 N.Y.S.2d 680 (1989) [appeal denied, 75 N.Y.2d 817, 551 N.E.2d 1245, 552 N.Y.S.2d 567 (1990)]." *Miranda II*, supra, 260 Conn.

108 n.9.

[10] I would note that our initial determination in *Miranda I* is consistent with the aim, purpose and policy behind numerous *other* statutes addressing family violence and child abuse. See, e.g., General Statutes §§ 46b-38a, 17a-101 and 17a-103.

General Statutes § 46b-38a, which sets forth definitions related to family violence prevention and response, provides in relevant part: "For the purposes of sections 46b-38a to 46b-38f, inclusive:

"(1) 'Family violence' means an incident resulting in physical harm, bodily injury or assault, or an act of threatened violence that constitutes fear of imminent physical harm, bodily injury or assault between family or household members. Verbal abuse or argument shall not constitute family violence unless there is present danger and the likelihood that physical violence will occur.

"(2) 'Family or household member' means (A) spouses, former spouses; (B) parents and their children; (C) persons eighteen years of age or older related by blood or marriage; (D) persons sixteen years of age or older other than those persons in subparagraph (C) presently residing together or who have resided together; (E) persons who have a child in common regardless of whether they are or have been married or have lived together at any time; and (f) persons in, or have recently been in, a dating relationship.

"(3) 'Family violence crime' means a crime as defined in section 53a-24 which, in addition to its other elements, contains as an element thereof an act of family violence to a family member and shall not include acts by parents or guardians disciplining minor children unless such acts constitute abuse. . . . "

General Statutes § 17a-101 (a) provides: "The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to such child and family."

General Statutes § 17a-103 (a) provides in relevant part: "Any . . . person having reasonable cause to suspect or believe that any child under the age of eighteen is in danger of being abused, or has been abused or neglected, as defined in section 46b-120, may cause a written or oral report to be made to the Commissioner of Children and Families or his representative or a law enforcement agency. The Commissioner of Children and Families or his representative shall use his best efforts to obtain the name and address of a person who causes a report to be made pursuant to this section. . . ."

[11] Specifically, in *Miranda I*, supra, 245 Conn. 221, we noted "four widely recognized situations in which the failure to act may constitute breach of a legal duty: (1) where one stands in a certain relationship to another; (2) where a statute imposes a duty to help another; (3) where one has assumed a contractual duty; and (4) where one voluntarily has assumed the care of another. 1 W. LaFave & A. Scott, supra, § 3.3 (a) (1) [through] (4), pp. 284–87."

[12] As we stated in *Miranda I*, supra, 245 Conn. 223, "[r]ecognizing the primary responsibility of a natural parent does not mean that an unrelated person may not also have some responsibilities incident to the care and custody of a child. Such duties may be regarded as derived from the primary custodian, i.e., the natural parent, or arise from the nature of the circumstances. *People* v. *Berg*, 171 Ill. App. 3d 316, 320, 525 N.E.2d 573 (1988) [(concluding that, although defendant had duty as any person under child endangerment statute based upon evidence that he lived with victim and her mother, would play with victim, feed and clothe her, discipline her and take her places, under circumstances of case there was insufficient evidence that defendant had endangered victim's health by not obtaining medical treatment)] . . . ." (Citation omitted; internal quotation marks omitted.)

[13] Although some of the cases referenced in this dissent involve offenses that do not incorporate the exact terminology of § 53a-59 (a), others come very close. For example, in *Michael* v. *State*, 767 P.2d 193, 197, (Alaska App. 1988), rev'd on other grounds 805 P.2d 371 (Alaska 1991), the Alaska Court of Appeals considered the defendant's conviction of assault in the second degree, which was statutorily defined as "recklessly *caus[ing]* serious physical injury to another person. [Alaska Stat. § 11.41.210 (a) (2).]" (Emphasis in original.) The question before the court was whether the defendant properly could be said to have caused the injuries to the minor child in that case if he recklessly had failed to act to protect her. *Michael* v. *State*, supra, 197.

The assault statute did not define when a person can be said to have caused an injury to another, so the court first turned to the dictionary as a source to determine what the legislature intended in using the word ''caused.'' Id. The court noted that, ''Webster's New Collegiate Dictionary defines 'cause' as 'a: something that brings about an effect or a result b: a person or thing that is the occasion of an action or state, *esp*. an agent that brings something about c: a reason for an action or condition.' '' *Michael* v. *State*, supra, 197. Concluding that a result of the defendant's failure to intervene to prevent the injuries was that the child received further injuries, the court determined that the plain wording of the statute provided that the defendant's failure to take reasonable actions to protect his child from serious physical injury ''caused'' the injuries. Id. Additionally, the court was unimpressed with the defendant's contention that the state improperly had charged him with assault when two other statutes, ''reckless endangerment,'' and ''endangering the welfare of a minor,'' more closely fit the crime with which he was charged. Id., 200–201.

Similarly, in *Degren* v. *State*, supra, 352 Md. 404, the Maryland Court of Appeals considered whether a person with responsibility for a minor child who fails to prevent that child from being raped while the child is in her presence could be convicted of sexual abuse. The court examined article 27, § 35C (b) (1) of the Maryland Code, which provides that ''[a] parent or other person who has permanent or temporary care or custody or responsibility for the supervision of a child . . . who causes abuse to the child is guilty of a felony . . . .'' Abuse under the Maryland Code includes both ''[t]he sustaining of physical injury by a child as a result of cruel or inhumane treatment or as a result of a malicious act . . . under circumstances that indicate that the child's health or welfare is harmed or threatened thereby.'' Md. Code, art. 27, § 35C (a) (2) (i) (1957). Sexual abuse is defined as ''any act that involves sexual molestation or exploitation of a child.'' Md. Code, art. 27, § 35C (a) (6) (i) (1957). In affirming the trial court's judgment, the Court of Appeals rejected the petitioner's argument that, because the plain meaning of the word ''act'' as used in § 35C (a) (6) (i) denotes an affirmative act as opposed to an omission, she could not be held criminally liable for the sexual abuse of the child because her omission or failure to prevent another person's act of sexual molestation or exploitation is not punishable under the statute. *Degren* v. *State*, supra, 420–21.

Even in the cases involving statutes that resemble our aiding and abetting statute, General Statutes § 53a-8, the courts did not focus on whether the defendants actually had aided the principals in the pattern of abuse resulting in the death of the children, but relied instead on their affirmative duty to protect their children from the threat posed by others and *their failure to act*. For example, in *People* v. *Stanciel*, 153 Ill.2d 232–33, 606 N.E.2d 1201 (1992), the Illinois Supreme Court decided that, despite the existence of the term ''commission'' in the criminal accountability statute then in effect; see Ill. Rev. Stat. c. 38, para. 5-2 (1987) (''[a] person is legally accountable for the conduct of another when . . . (c) Either before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense''); the mothers' convictions of homicide properly were based on the result of an *omission* by someone with a duty to protect. *People* v. *Stanciel*, supra, 235–37.

Finally, even with regard to the cases Justice Vertefeuille attempts to distinguish by stating that the statutes involved therein ''directly criminalized inaction as well as action,'' a characterization with which I strongly disagree, those courts did not rely solely on a narrow interpretation of one word. For example, in *State* v. *Williquette*, 129 Wis. 2d 239, 250–54, 385 N.W.2d 145 (1986), the Wisconsin Supreme Court concluded that the ordinary and accepted meaning of the term ''subjects'' under the child abuse statute; Wis. Stat. § 940.201; is not limited to persons who actively participate in abusing children. Linking a duty to act to the concept of proximate cause to find the defendant guilty by omission, the court reasoned: ''[Section § 940.201] covers situations in which a person with a duty toward a child exposes the child to a foreseeable risk of abuse. . . . A person exposes a child to abuse when he or she causes the child to come within the influence of a foreseeable risk of cruel maltreatment. Causation in this context means that a person's conduct is a substantial factor in exposing the child to risk, and there may be more than one substantial causative factor in any given case. . . . [T]he defendant's alleged conduct, as the mother of the children, also was a contributing cause of risk to the children. She allegedly knew that the father abused the children in her absence, but she continued to leave the children

and to entrust them to his exclusive care, and she allegedly did nothing else to prevent the abuse, such as notifying proper authorities or providing alternative child care in her absence. We conclude that the defendant's conduct, as alleged, constituted a substantial factor which increased the risk of further abuse.'' (Citations omitted.) *State* v. *Williquette*, supra, 249–50. In reaching its decision, the Wisconsin Supreme Court expressly rejected the defendant's claim that an act of commission, rather than omission, is a necessary element of a crime, stating: ''The essence of criminal conduct is the requirement of a wrongful act. . . . This element, however, is satisfied by overt acts, as well as omissions to act where there is a legal duty to act. . . . [T]he general rule applicable to omissions . . . [is that] [s]ome statutory crimes are specifically defined in terms of omission to act. With other common law and statutory crimes which are defined in terms of conduct producing a specified result, a person may be criminally liable when his omission to act produces that result, but only if (1) he has, under the circumstances, a legal duty to act, and (2) he can physically perform the act. . . . [S]ome criminal statutes themselves impose the legal duty to act, as with the tax statute and the hit-and-run statute. With other crimes the duty must be found outside the definition of the crime itself—perhaps in another statute, or in the common law, or in a contract. . . . The requirement of a legal duty to act is a policy limitation which prevents most omissions from being considered the proximate cause of a prohibited consequence. In a technical sense, a person's omission, i.e., whether the person fails to protect, warn or rescue, may be a substantial factor in exposing another person to harm. The concept of causation, however, is not solely a question of mechanical connection between events, but also a question of policy. . . . The rule that persons do not have a general duty to protect represents a public policy choice to limit criminal liability. The requirement of an overt act, therefore, is not inherently necessary for criminal liability. Criminal liability depends on conduct which is a substantial factor in producing consequences. Omissions are as capable of producing consequences as overt acts.'' (Citations omitted; internal quotation marks omitted.) Id., 251–53.

[14] For example, in *State* v. *Mahurin*, 799 S.W.2d 840, 844 (Mo.), cert. denied, 502 U.S. 825, 112 S. Ct. 90, 116 L. Ed. 2d 62 (1990), the defendant parents, despite instructions by health care professionals on proper infant care upon discharge from the hospital after the birth of their twin boys, failed to properly feed the boys, resulting in the death of one of the children. The receipt of those instructions led the Missouri Supreme Court to find that the parents consciously had disregarded a risk to their child when they failed to properly feed him, and they were found to have acted recklessly. Id.