BORDEN, J., with whom PALMER, J., joins, concurring. I fully agree with and join the well reasoned majority opinion. I write separately, however, to emphasize the following points.

When determining whether the defendant, Judith Scruggs, had notice that the conditions in her apartment fell within the scope of General Statutes § 53-21 (a) (1), the trial court should have applied the objective standard advocated for by the state. Specifically, contrary to the trial court's memorandum of decision, which characterized this case as a "hard case, [but] not a close case," and improperly focused on the fact that Daniel Scruggs' physical and mental frailty made the risk to his mental health obvious, the defendant's culpability should have been gauged by reference to the likely effect of the conditions in the defendant's apartment on the mental health of *any* twelve year old child. This standard reflects the state's theory of criminal liability specifically articulated in response to the defendant's motion for judgment of acquittal at the end of the state's case-in-chief.

In my view, analyzing this case under the objective standard, it remains a close call with respect to whether the defendant had adequate notice that her conduct made her susceptible to criminal liability. What tips the balance in favor of a conclusion that the defendant had inadequate notice and, therefore, that § 53-21 (a) (1) is unconstitutionally vague as applied to the defendant's conduct, is the evidence regarding the investigation of the case by the department of children and families (department).

The record reflects that the department had opened a file on Daniel in the months before his suicide and, only days before his suicide, had conducted a home visit and inspected the living conditions there. The department closed its file six days prior to Daniel's suicide. There also was uncontroverted evidence that the department's investigator instructed the defendant to "keep Daniel home until he [could be] transferred to the new school."

Thus, only days before Daniel's death, the agency of the state of Connecticut that is dedicated to protecting children from abuse and neglect, had, by its conduct and words, sent a clear message to the defendant that the department saw no significant cause for concern regarding Daniel's health and welfare. Indeed, the department's message was that the defendant should keep Daniel home from school in the very conditions that the same state of Connecticut, through its criminal prosecutorial arm, later charged created an unreasonable risk to his mental health. Although, of course, the

law enforcement arm of the state is not bound by a prior determination, express or implied, of the department, from a standpoint of fair notice, the defendant reasonably cannot be expected to make the legal distinction between the two agencies' subject matter jurisdictions. From the viewpoint of the ordinary citizen, it is not fair, and does not comport with adequate notice, for the state to say, in effect, we have no concern for Daniel's health by virtue of his living conditions, and then to say, but we will prosecute the defendant criminally for maintaining those same living conditions.

As noted by the majority, "[a] statute . . . [that] forbids or requires conduct in terms so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process. . . . Laws must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." (Citations omitted; internal quotation marks omitted.) *State* v. *Cavallo*, 200 Conn. 664, 667, 513 A.2d 646 (1986). This standard has not been met when the state's child protection and criminal prosecution arms come to different conclusions based on the same conditions in the same time frame.

The state claims that the department made a mistake in its assessment of the likely effect of Daniel's living conditions on his mental health, and that such a mistake does not absolve the defendant of criminal liability. This argument is unpersuasive. Regardless of whether the department made a mistake by closing its investigation and recommending that the defendant keep Daniel home, it does not change the fact that the department's recommendation deprived the defendant of fair notice that her conduct would be susceptible to criminal liability under § 53-21 (a) (1). Put simply, in the absence of authoritative sources that speak to the level of housekeeping that places the defendant's conduct outside the scope of criminal liability, whether it be statute, court cases, newspaper reports, or some other public information, the defendant was entitled to rely on the department's implicit conclusion, on the day that it was given, that her home was within an acceptable range of cleanliness. Accordingly, I agree with the majority that § 53-21 (a) (1) is unconstitutionally vague as applied to the defendant's conduct.