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Intervention Between Parent and Child: A Reappraisal of the State’s Role in Child Neglect and Abuse Cases

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INTERVENTION BETWEEN PARENT AND CHILD: A REAPPRAISAL OF THE STATE’S ROLE IN CHILD NEGLECT AND ABUSE CASES

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I. INTRODUCTION

A. THE CURRENT PROCESS: AN OVERVIEW

This year in the United States more than 140,000 children will be brought into court on the ground that they are being neglected or abused by their parents. Once a court agrees that it has sufficient cause to assume jurisdiction in order to protect a child, there is a high probability that the child will be separated from his family for months or years, or permanently. In addition, the parents may find

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1. The 1975 figure is projected from statistics of the Department of Health, Education and Welfare. The last year for which official figures are available is 1972, when 141,000 neglect cases were brought to court. U.S. DEPT. OF HEALTH, EDUCATION AND WELFARE, JUVENILE COURT STATISTICS 14, table 11 (1972) (table for 1972).

2. A 1974 study revealed that out of a random sample of 100 child abuse or neglect complaints received by the Superior Court of the District of Columbia in 1973, 89 complaints were followed by petitions for court action. In 82 of the 89 cases, the children were removed from their homes for the period of time prior to court hearing. M. Burt, THE SYSTEM FOR NEGLECTED AND ABUSED CHILDREN IN THE DISTRICT OF COLUMBIA 10 (1974). In Los Angeles in 1972, removal was ordered in 62 percent of the 1,656 cases in which jurisdiction was assumed. Mnookin, Foster Care—In Whose Best Interest, 43 HARV. EDUC. REV. 599, 606 (1973). A study of neglect proceedings from 1968 to 1969 in the state of New York found that over 51 percent resulted in the child’s placement away from home or in protective supervision of the family. Note, An Appraisal of New York’s Statutory Response to the Problem of Child Abuse, 7 COLUM. J. LAW & SOC. PROB. 51, 72 table I (1971). A 1965 study in Pennsylvania found that over half the children receiving services from child welfare agencies still were being removed from their parents despite the alleged availability of in home services. OFFICE OF CHILDREN AND YOUTH, PA. DEPT’ OF PUBLIC WELFARE, PENNSYLVANIA FACT BOOK ON CHILDREN AND YOUTH (1965), cited in Levine, Caveat Parent: A Demystification of the Child Protection System, 35 U. PITT. L. REV. 1, 20 n.102 (1973).

3. See notes 211-17 infra and accompanying text (discussion of termination of parental rights).
themselves subjected to criminal prosecution or at least to a succession of police investigators, social work investigators, social case workers, mental health professionals, and court hearings. Despite the disruptive impact this process obviously can have on children and their families, at present there is little consensus about when a court should find that a particular child is neglected or abused. Parents convicted of neglect in one community might never have been brought to court in another. Perhaps the most prevalent characteristic of families charged with neglect is poverty; this raises the troubling possibility that class or cultural bias plays a significant role in decisions to label


6. See generally H. Maas & R. Engler, Children in Need of Parents (1959). The survey of neglect practices in nine communities ranging in size and composition from rural areas to urban centers showed less variation in practice than the authors' knowledge of the statutory differences had led them to expect. They concluded, "It was more the way in which a judge perceived his role, and the way in which he was perceived in his role by others in the community that determined legal practices in child welfare." Id. at 310.
children neglected or abused, because it is clear that child abuse occurs in families of all income levels.\(^7\)

Just as there is little agreement on when intervention in a particular family is justified, there is little agreement about what forms of intervention are constructive. The predominant approach is to separate parent and child.\(^8\) While separation may protect a child from being beaten by his family, the separation itself may seriously damage the child’s emotional health, particularly if the child is shifted from one temporary home to another during the separation.\(^9\)

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7. See D. Gil, \textit{Violence Against Children: Physical Child Abuse in the United States} 112 table 22 (1970). Proportionately more of the reported incidents, however, involve low income families. A 1967 survey indicated that while nearly 65 percent of reported incidents involved families having incomes under $6,999, such families represented less than 42 percent of the total population. \textit{Id.} The disproportionate representation of poor families also appears in statistics reporting court findings of neglect. A 1964 study in Minnesota found that whereas only 3 percent of the families in the general population were receiving public assistance, 42 percent of the families reported to be neglecting their children were receiving such assistance. 

Boehm, \textit{The Community and the Social Agency Define Neglect, in 1964 Child Welfare} 453, 459. Similar findings were reported in a 1966 study in New York City. Forty-five percent of the households whose children were placed in foster care were supported primarily by public assistance at the time of placement, while only 7.9 percent of the general population received such assistance. See S. Jenkins & E. Norman, \textit{Familial Deprivation and Foster Care} 25 (1972). Repeated confirmation of such statistics has prompted one child welfare expert to conclude: [O]rganized programs for children turn out, when examined, to be programs for the poor, for blacks, and for the otherwise disadvantaged. There is no harm in that alone, but the programs are poor. Foster families and institutions are a dead end for children who use them for more than a few months—and perhaps half the children do.


8. On March 31, 1971, some 266,070 children in the United States were living in foster family homes or group homes, while another 93,826 were in institutions. 


9. See J. Coldstein, A. Freud, & A. Solnit, \textit{Beyond the Best Interests of the Child 31-35 (1973).} The authors provide a thoughtful discussion of a child’s need for continuity of relationships and describe the consequences of disruptions of continuity, which vary with the ages of the children. The authors observe:

\textit{In infancy, from birth to approximately 18 months, any change in routine leads to food refusals, digestive upsets, sleeping difficulties, and crying . . . .} [M]oves from the familiar to the unfamiliar cause discomfort, distress, and delays in the infant’s orientation and adaptation within his surroundings.

Change in the caretaking person for infants and toddlers further affects the course of their emotional development . . . . When infants and young children find themselves abandoned by the parent, they not only suffer separation distress and anxiety, but also setbacks in the quality of their next attachments, which will be less trustworthy. Where continuity of such relationships is interrupted more than once, as happens due to multiple placements in early years, the children’s emotional attachments become increasingly shallow and indiscriminate . . . .
Unfortunately, legal commentary has not emphasized the issues of when or how the state ought to intervene to protect children from their parents. Most recent articles have concentrated instead on secondary issues such as how to increase the scope or frequency of reporting to public agencies incidents of suspected child abuse or neglect. Although better reporting may increase public awareness of the present system and spur public pressure for reform of neglect practice, bringing more families into court before the evidence demonstrates that society can help neglected or abused children or their families may increase the harm being done.

B. ANALYSIS OF COMPETING INTERESTS

Three primary interests must be addressed in any neglect proceeding: those of the family, those of the child, and those of the state. The first, the interests of the family, best can be analyzed if broken down further into the separate interests of each parent of siblings.

For school-age children, the breaks in their relationships with their psychological parents affect above all those achievements which are based on identification with the parents' demand, prohibitions, and social ideals. Where children are made to wander from one environment to another, they may cease to identify with any set of substitute parents. Multiple placement at these ages puts many children beyond the reach of educational influence, and becomes the direct cause of behavior which the schools experience as disrupting and the courts label as dissocial, delinquent, or even criminal.

Id. at 32-34. See also Mahler, Symbiosis and Individuation, 29 Psychoanalytic Study of the Child 89 (1974). But see M. Rutter, Maternal Deprivation Reassessed (1972) (review of the existing social science literature on separation). Rutter points out that "problems arise in the analysis of the effects of very long-term separations which may occur for a diversity of reasons. Thus, there is a very extensive literature showing an association between 'broken homes' and delinquency. However, in some cases the breakup of the home is no more than a minor episode in a long history of family discord and disruption." Id. at 63.


12. If the child has been abandoned, the parental interests are insubstantial, but difficult procedural issues may remain, particularly since the doctrine of Stanley v. Illinois may have created rights for biological fathers. See 405 U.S. 645 (1972).

13. The term parent should be understood to extend to a de facto parent, a caretaker who has acted as a substitute parent or guardian of the child for an extended period of time. Cf. J. Colestein, A. Freud, & A. Solnit, supra note 9, at 98 (concept of psychological parent).
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and of the extended family. Our legal system for the most part has acknowledged only the interests of the parents and has considered only sporadically the interests of siblings or other relatives outside the nuclear family. Moreover, most courts have operated on the questionable assumption that the interests of the two parents are not in conflict. The one major exception, child custody cases, dramatically reveals the general inability of the legal system to pierce successfully the veil of the harmonious family unit.

The law quite clearly addresses the interests of the parents: parents in England and the United States traditionally have been vested with the authority to raise their own children without state intervention. Social historians have chronicled inroads on the traditional powers of the family resulting from changes in the economic structure and the gradual assumption of traditional family activities by other institutions such as schools or hospitals. Similarly, case law reflects some inroads which have been made on the traditionally sacrosanct power of the parent. Nonetheless, the overwhelming weight of legal authority

14. Compare Orr v. State, 123 N.E. 470 (Ind. Ct. App. 1919) (child abandoned by parents but taken into grandparents' home and treated with great affection is not a neglected child) and In re Sneed, 230 Ore. 13, 368 P.2d 334 (1962) (although mother afforded no care, child who was in actual though not legal custody of grandmother could not be declared neglected absent showing that grandmother's care was inadequate) with Bee v. Robbins, 303 S.W.2d 827 (Tex. Civ. App. 1957) (child whose mother was dead and whose father was serving 50 year prison sentence was neglected even though child was cared for by maternal grandparents); cf. In re Frances, 49 Misc. 2d 372, 297 N.Y.S.2d 566 (Fam. Ct. N.Y. City 1966) (battered child who had been living with mother and stepfather discharged to maternal grandmother with visitation by mother only in home of grandmother).

15. If, for example, a father is a chronic child beater but the mother is a model caretaker, the dilemma to be resolved is whether the court should declare the child abused and remove him from home, or should allow the mother to keep the child on the condition that she separate from her spouse. Most courts have not considered these issues. Cf. In re Halamuda, 85 Cal. App. 2d 219, 192 P.2d 781 (Dist. Ct. App. 1948) (mother's failure to protect child from father's extreme cruelty is mental cruelty on her part).

16. See J. Goldstein & J. Katz, The Family and the Law 176-216 (1965). The authors describe a six year battle between the parents over custody of three children. The costs of the battle included legal fees in excess of $45,000, court expenses of between $10,000 and $15,000, and immeasurable emotional damage to the parents and the children. Id. at 562.


18. See State v. Bailey, 157 Ind. 324, 61 N.E. 730 (1901) (right of state to prosecute parents who did not send their children to school confirmed); cf. Stuart v. School Dist. No. 1, 30 Mich. 69 (1874) (legislation taxing public to pay for schooling upheld). But cf. Pierce v. Society of Sisters, 268 U.S. 510, 535 (1935) ("fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only"). Recently, the Supreme Court agreed to exempt Amish
continues to support the rights of parents to control the upbringing of their children. This right has even achieved constitutional status.

The interests of children, unlike those of parents, generally have not been recognized as legal rights. For example, children have no legal right to medical care or to a nutritionally adequate diet. The neglect process has provided virtually the only legal redress for children who lack such necessities. Unfortunately, the process is an indirect solution which normally results in the placement of a needy child in the custody of a new caretaker rather than in the establishment of minimum standards of medical care or nutrition or in the provision of goods or services directly to the child.

The lack of consensus about the basic rights of children provides one of the main bases for the disagreement over the standards for neglect findings. It is unlikely that standards detailing the conditions believed to be necessary to the growth and development of children into mature human beings, both physically and emotionally, will soon

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children from the compulsory school laws after the eighth grade, but the Court seemed motivated more by the productive and law-abiding nature of the Amish community than by concern for general parental rights. Wisconsin v. Yoder, 406 U.S. 205, 222 (1972).


20. See Meyer v. Nebraska, 262 U.S. 390, 402 (1933) (although state rearing of all children has "been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it will hardly be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."); cf. Wisconsin v. Yoder, 406 U.S. 205, 235 (1972) ("primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition"); May v. Anderson, 345 U.S. 528, 533 (1953) (right of custody considered more important than property rights).

21. No implication that adults have a legal right to medical care or to a nutritionally adequate diet is intended. However, adults do have rights not accorded minors that permit them to acquire goods and services. Adults are not prohibited from working and have the right to travel, to marry, to obtain medical treatment without the consent of a parent or guardian, and to sue for loss of services when their children are injured. See Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (waiting period for welfare migrants violates right to travel); Loving v. Virginia, 388 U.S. 1, 12 (1967) (marriage is an essential personal right); W. TIFFANY, HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS § 131 (1896) (parents have right to sue for loss of child's services).
be established or recognized as legal rights.\textsuperscript{22} Indeed, the imposition of such conditions as a matter of law in most instances would result in an unacceptable degree of state intrusion into family life.

The law, however, has sanctioned some degree of state intervention into family life; over the centuries a general guide for intervention has developed in the extensive body of case law interpreting the state's \textit{parens patriae} power.\textsuperscript{23} The state acts as the primary protector of children from abuse or neglect. It may at first seem strange, therefore, to separate the interests of the child from those of the state. But the state has interests other than those inherent in its \textit{parens patriae} role, and these other interests may conflict with those of the child in a particular case.\textsuperscript{24} For example, the state has a strong interest in maintaining family autonomy.\textsuperscript{25} The state's desire to maintain family autonomy is not only a matter of tradition, but also reflects a recognition of the family's effectiveness as a social institution; no one has devised a better system for overseeing the rearing of most children. Autonomous families not only provide the conditions needed for the physical and emotional development of individual children, but also make possible a religious and cultural diversity that might disappear if the state extensively regulated or controlled child rearing.\textsuperscript{26} A second interest of the state is the exercise of its police power interest.


\textsuperscript{23} See \textsuperscript{22} infra and accompanying text.

\textsuperscript{24} See \textit{State ex rel. Juvi. Dep't of Multnomah County v. Wade}, 527 P.2d 753 (Ore. Ct. App. 1974). The court in \textit{Wade} commented:

\begin{quote}
Although the conflict between the interests of the state and those of the child are not as apparent as the child-parent conflict . . . the fact that in most cases the termination of parental rights makes the state the recipient of the child's custody . . . thereby enabling it to consent to an adoption . . . indicates that the potential may not be insubstantial. When terminations are viewed as a means of facilitating adoptions, one becomes aware that they will always promote the interests of the state regardless of the peculiar interests of any single child; terminations aid the state in meeting the demand for 'adoptable' children while also relieving it from financial costs of long-term foster care, homemaker services, and other welfare or public services.
\end{quote}

\textit{Id.} at 757.

\textsuperscript{25} As Roscoe Pound observed, "in general it remains true that the social interest in the family as a social institution requires the law to proceed with great caution in securing the interests of children against their parents." Pound, \textit{Individual Interests in the Domestic Relations}, 14 \textit{Mich. L. Rev.} 177, 186 (1916).

\textsuperscript{26} See B. RUSSELL, MARRIAGE AND MORALS 171-74 (1929), \textit{reprinted} in J. GOLDSTEIN & J. KATZ, supra note 16, at 455-58. Russell commented that "the administrator invariably likes uniformity. It is convenient for statistics and pigeonholing, and if it is the 'right' sort of uniformity it means the existence of large numbers of human beings of the sort that he considers desirable. Children handed over to the mercy of institutions will therefore tend to be all alike, while the few who cannot conform to the recognized pattern will suffer persecution, not only from their fellows, but from the authorities." \textit{Id.} at 458.
Without reopening the traditional debate about whether this is primarily an interest aimed at deterrence or at punishment, one who analyzes the neglect process should study the police power interest because of its potential for undermining the parens patriae role of the state.

At least two other key interests of the state—administrative efficiency and fairness—may conflict with the interests of the child in neglect proceedings. The public interest in the efficient use of public resources may explain why the state does not pursue its parens patriae power where intervention is not clearly preferable to nonintervention and why it uses public resources only when the gain to the individuals served and the long term social saving exceed the cost of intervention. By providing counsel to both indigent parents and children in neglect proceedings, for example, the state’s public interest in fairness may be balanced by the costs and thereby decrease its willingness to intervene.

C. AN APPROACH TO REFORM

The analytic confusion which has resulted in part from the paucity of legal commentary addressed to standards or dispositions in neglect proceedings has been compounded by the lack of systematic evaluation of how this public intervention has operated over the centuries. Part two of this article, therefore, is devoted to an examination of the historic antecedents of the present neglect process and will illuminate the way the law has defined and protected the competing interests of child, family, and state in each of three eras. Three specific issues will be considered: (1) the purpose of intervention; (2) the standards established to guide intervention decisions; and (3) the dispositions provided for children declared “neglected.” With the insight provided by this backlog of experience, as well as by current behavioral science studies, part three assesses the current patchwork of standards and dispositions of the fifty states and the District of Columbia. A final section presents specific recommendations for drafting future neglect statutes.

II. HISTORY OF NEGLECT INTERVENTION

A. FROM TUDOR TIMES TO THE NINETEENTH CENTURY

1. The Poor Law Heritage. The sixteenth century was a period of economic transition and stress in England, during which bands
of "sturdy beggars" began to fill the roads and to terrorize town and country.  

The number of poor mushroomed to the point that private charities no longer could provide adequate relief. As a result, Parliament began to provide for the relief of the poor and their children on a systematic basis. As early as 1535 a statute provided that "[c]hildren under fourteen years of age, and above five, that live in idleness, and be taken begging, may be put to serve by the governors or cities, towns, etc. to husbandry, or other crafts or labors." In 1601, the Elizabeth Poor Law consolidated similar early legislative efforts into a single, comprehensive program of poor relief that became the model for the next three centuries in America as well as England.

The Elizabethan system aided the poor in several ways. It provided for the establishment of tax-supported hospitals and poor houses, or almshouses, to shelter the poor who were too old or too ill to work. The employable poor were compelled to work or sent to houses of correction if they refused to work. Finally, children of the poor were put to work or apprenticed. In each parish the system was administered by the church warden and several substantial householders, who were selected as overseers of the poor of the parish, and who were empowered to set to work or to apprentice "the children of all such whose parents shall not by said churchwardens and overseers, or the greater part of them, be thought able to keep and maintain their children." To minimize costs, the overseers limited eligibility for relief to the poor who had been born in a community or had lived there for a long time. Thus, in addition to providing relief, the poor laws established restrictions on rights to travel, on personal civil rights, and particularly on parental rights.

It is impossible to determine exactly how many children were separated from their families under this legislation; hundreds were shipped to the American colonies beginning in 1617, and thousands were later

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29. I. Pinchbeck & M. Hewitt, Children in English Society 93 (1969) [hereinafter cited as I. Pinchbeck]. See also R. Kelso, The History of Public Poor Relief in Massachusetts, 1620-1900, at 3-29 (1922) (description of the link between economic conditions and the first poor relief legislation).
30. 27 Hen. 8, c. 25 (1535).
31. 43 Eliz. 1, c. 2 (1601).
33. 43 Eliz. 1, c. 2, §§ I, III, XII (1601).
34. Id. §§ I, IV.
35. Id. §§ I, V. In theory, apprenticeship involved training in the master's "craft, mystery, or occupation," while indenture was simply a work contract. In practice, both usually involved little training. See G. Abbott, I The Child and the State 79-255 (1938).
36. 43 Eliz. 1, c. 2, §§ I, V (1601).
37. See tenBroek I, supra note 32, at 259.
38. I. Pinchbeck, supra note 29, at 165-07.
impressed into the Merchant Marine. As distasteful as the cavalier separation of children from their parents may seem today, however, the conclusion that the statutes manifested only discriminatory attitudes toward the poor would be mistaken; the apparent harshness was more a product of cost consciousness than of discrimination. According to Professor tenBroek, "Once the public agreed to pay the bill, it acquired a pressing concern about the size of the bill and an active interest in finding methods for reducing it." The system of "binding out" poor children reduced the costs; the children who were bound out could pay for part of their care through their own labor. Similarly, the decision to separate poor children from their families and to put them to work did not necessarily indicate class bias because in this pre-child labor law era most children worked and upper class families of the time frequently sent adolescents to other families for training. Indeed, the poor laws were quite humanitarian in their attempt to provide poor children with proper work attitudes as well as useful skills in an age when no other public education or training was available.

The record of providing skills through apprenticeship, however, apparently was poor almost from the start. "Rogues soon swarmed again," complained Lord Coke in 1624, and the cause allegedly was the failure of the overseers to apprentice children. The Privy Council for a time tried to correct the enforcement problems, but the outbreak of civil war soon made them worse. By mid-century, an increasingly harsh and repressive policy toward the poor emerged. Soon work houses for children were established, in sharp contrast with the earlier benevolent statutory scheme for training.

2. The Growth of Parens Patriae. For children who were not poor, the law provided little legal protection. Children had no rights

40. tenBroek I, supra note 32, at 286.
42. I. Pinchbeck, supra note 29, at 22-33. See also P. Ames, CENTURIES OF CHILDHOOD 365-66 (1962); J. Gillis, YOUTH AND HISTORY 17 (1974). The lack of discrimination in child rearing practice of the period does not imply that those practices had no negative effects on adult personalities. One commentator has concluded that "a large number of adults . . . of the gentry class in . . . the sixteenth and seventeenth century, were emotionally stunted and found it extremely difficult to establish warm personal relationships with other people." Laurence Stone, The Massacre of the Innocents, N.Y. Rev. Books, Nov. 14, 1974, at 25.
43. Cf. I. Pinchbeck, supra note 29, at 242 (while life undoubtedly was hard for many apprentices, many poor children received sound training, and the alternatives to apprenticeship must have been far worse for many children).
44. See id. at 143.
45. See id.
46. See id. at 146.
of action when physically mistreated by their parents. Originally even the parental duty of support was considered to be more a moral than a legal obligation. On rare occasions, equity would override a father's right to custody, but only at the request of another relative—usually the mother—who wanted the child or when the child had an estate large enough to reimburse a court-appointed guardian. 

The protection equity accorded these infants apparently arose as much from their revenue value as from concern for their well-being. Under the feudal system of land ownership, a minor's guardian could profit handsomely by controlling the minor's estate, by marrying the ward to one of his own heirs, or by selling the right to marriage. As early as 1503, the Crown established a Master of Wards to protect the estates of minors and to regulate the sale of their wardships upon the deaths of their fathers. In 1540, Henry VIII formalized this state regulation by establishing the Court of Wards. Under this system, guardianship of the person, like that of the estate, went to the highest bidder and substantial revenues accrued to the crown.

During the seventeenth century, opposition began to mount both to the disregard shown to the claims of mothers and to the marriages forced on young children. Eventually the Court of Wards was abolished and fathers were authorized to appoint by deed or will a guardian of the person for children who survived them. In addition, the chancellor began to protect wards from economic injury, and allowed the wards to bring petitions against their guardians for an accounting of the rents and profits of their land. Soon the chancellor required guardians to provide their wards with suitable education.

47. See C. VERNIER, AMERICAN FAMILY LAWS § 267 (1936) (a parent not civilly liable at common law for injury to his minor child; rule applicable even if the injury was great or willful).

48. See W. TIFFANY, supra note 21, § 231; cf. 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 446-49 (1828) (duty of parents to provide for their children is principle of natural law). As late as 1840, English judges held that "in point of law, a father who gives no authority enters into no contract, is no more liable for goods supplied to his son, than a brother, or an uncle, or a mere stranger would be." Mortimore v. Wright, 151 Eng. Rep. 502, 504 (Ex. 1840).

49. See W. TIFFANY, supra note 21, § 247-48.


51. See I. PINCHBECK, supra note 29, at 59.

52. See Ex parte Daedler, 228 P. 467 (Cal. 1924).

53. Pinchbeck reports that during the reign of Queen Elizabeth I the sale of wardships brought an average annual income of £14,677 to the crown. If the full profits had been paid directly to the Court of Wards rather than to intermediary officials, the Queen might have made almost £2,000,000 annually. See I. PINCHBECK, supra note 29, at 60.

54. See id. at 72-73.

55. 12 Car. 2, c. 24, §§ I, VIII (1660).


57. Id. at 153.
The concept of parens patriae reportedly was used for the first time in 1696 in *Falkland v. Bertie*. Lord Somers there stated that with the dissolution of the Court of Wards, what he termed pater patriae responsibility of the King for the care of charities, infants, idiots, and lunatics returned to the Chancery. The parens patriae power gradually was expanded to justify court interference to protect wards from the misdeeds of testamentary guardians and eventually interference to protect a child from exploitation by third parties despite the fact that his father was alive and able to protect his interests. But not until 1827 did a court consider directly the scope of the court’s jurisdiction to intervene between parent and child. Then, in *Wellesly v. Beaufort*, Lord Eldon ruled that “this Court has not the means of acting, except where it has property to act upon. It is not, however, from any want of jurisdiction that it does not act, but from a want of means to exercise that jurisdiction; because the Court cannot take on itself the maintenance of all the children in the kingdom.” This view of the court’s power controlled until 1847 when the court in *In re Spence* held that an intervention to protect a child from his parent or guardian was proper in the absence of property. Lord Chancellor Cottenham announced:

I have no doubt about the jurisdiction. The cases in which this Court interferes on behalf of infants, are not confined to those in which there is property. Courts of law interfere by habeas for the protection of the person of any body who is suggested to be improperly detained. This Court interferes for the protection of infants, qua infants by virtue of the prerogative which belongs to the Crown as parens patriae, and the exercise of which is delegated to the Great Seal.

In contrast to the equity court, the courts at law considered custody strictly a parental prerogative with two narrowly construed exceptions.

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59. Id. at 818. Other reports of the case do not include the term pater patriae. See Cogan, supra note 56, at 167-68. Curiously, the infant in *Falkland* lost her claim in the Court of Chancery and only later prevailed in the House of Lords. See *Falkland v. Bertie*, 1 Eng. Rep. 155, 156 (H.L. 1697).
63. Id. at 243.
64. 41 Eng. Rep. 937 (Ch. 1847).
65. Id. at 938.
66. See *De Manneville v. De Manneville*, 10 Ves. 59 (Ch. 1804). Originally only fathers had custody rights and they could enforce them even against a child’s mother. See 9 Halsbury’s Statutes of England 772 (T. Chitty ed. 1929). In 1839 Parliament authorized chancery to award children under seven to mothers. 2 & 3 Vict., c. 54 (1838). In 1873 Parliament extended chancery’s power; chancery thereafter could award children under 16 to their mothers. The Custody of Infants Act, 30 & 37 Vict., c. 12 (1873).
The law courts did not use the *parens patriae* concept of determining and acting on the best interests of the child.

The Elizabethan Poor Law thus had established what Professor tenBroek later termed a dual standard of law for families. For the poor, state intervention between parent and child was not only permitted but encouraged in order to effectuate a number of public policies, ranging from the provision of relief at minimum cost to the prevention of future crime. For all others, the state would separate children from parents only in the most extreme circumstances, and then only when private parties initiated court action.

3. Reception by the Colonies. The American colonies soon adopted the Elizabethan policy of binding out poor children for work or training; the policy was well suited to the needs and ethics of a pioneer society where even small children were expected and required to make themselves useful. While some eighteenth century statutes reflected a growing interest in education, the majority of neglect statutes continued to focus on family income or idleness as the justification for separating children from their parents. Similarly, some

68. See tenBroek I, supra note 32, at 257-58. Blackstone observed:
Our laws, though their defects in this particular cannot be denied, have in one instance made a wide provision for breeding up the rising generation: since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents, by the statutes for apprenticing poor children . . . and are placed out by the public in such a manner, as may render their abilities, in their several stations, of the greatest advantage to the commonwealth . . . . The rich, indeed, are left at their own option, whether they will breed up their children to be ornaments or disgraces to their family.
W. BLACKSTONE, supra note 48, at 451.
70. See ch. 4, [1735] Mass. Sess. 541. This early Massachusetts statute reflected concern for at least rudimentary skills: “Where persons bring up their children in such gross ignorance that they do not know, or are not able to distinguish the alphabet or twenty-four letters at the age of six years, the overseers might bind the children out to good families for a decent and Christian education.” *Id.*
71. See H. FOLKS, THE CARE OF DESTITUTE, NEGLECTED AND DELINQUENT CHILDREN 167-68 (reprint 1970). In 1673, for example, Connecticut provided that:
In any person or persons that have had or shall have relief or supplies from any town, shall suffer their children to live idly or mispend their time loitering, and to bring them up in such or employ them in some honest calling which may be profitable unto themselves and the public; or if there be any family that cannot, or do[es] not provide competently for their children, whereby they are exposed to want and extremity; it shall be lawful for the selectman and overseers of the poor in each town and they are hereby ordered and empowered with the assent of the next
of the early statutes authorized the separation of children from any parents who failed to care for them rather than only from poor parents, but the authorities nonetheless apparently understood that only the children of the poor were to be taken by the state. The common law courts in the colonies, like those in England, provided little protection for children beyond the ambit of the protection given poor children under the poor law statutes. Courts of law in America did take some initiative in protecting the best interests of children instead of deferring entirely to the father. Some fathers therefore lost custody of the child to the mother, and a few parents lost custody to nonparents. With the exception of infrequent criminal prosecutions, however, no suits involving custody were initiated by the state, and even in the criminal prosecutions, courts only rarely separated nonpoor children and parents.

 magistrates or justices of the peace, to bind any poor children belonging to such town to be apprentices ...


72. See 6 Va. Stat. 32 (Hening 1819). The 1748 Virginia statute provided: "Where any person or persons shall be, by their county court, judged incapable of supporting and bringing up their child or children in honest courses . . . it shall be lawful for the church wardens of the parish . . . by order of their county court, to bind every such child or children apprentices, in the same manner, and under such covenants and conditions as the law directs for poor orphan children." Id., reprinted in 1 CHILDREN AND YOUTH, supra note 69, at 263.

73. See 1 CHILDREN AND YOUTH, supra note 69, at 63-71, 262-68.

74. W. Tiffany, supra note 21, at 246-52. The first recorded American opinion recognizing the best interests standard apparently is Mercein v. People. 35 Am. Dec. 653 (N.Y. 1840). The court in Mercein allowed a sick, three year old child to remain with the mother because the interest of the infant was found to be paramount. See id. at 663-65. While the court claimed that it was applying an established American principle, it failed to cite any supportive American authority.

Subsequently, in Marshall v. Reams a court denied a custody claim made by a child's uncle because he had administered immoderate and cruel punishment to the child. 32 Fla. 499, 506-07, 14 S. 95, 97 (1893). Citing Mercein as authority, the court acknowledged that mothers have a right to transfer custody of their illegitimate children, but held that "in no case should custody be given to the father who was a drunkard and a man of gross immorality, the custody of a minor child, especially when that child was a girl." Id. at 653.

75. See Chapsky v. Wood, 26 Kan. 659, 659-57 (1881); Mercein v. People, 35 Am. Dec. 653, 653 (N.Y. 1840). In Chapsky the court, in denying a father's request for custody of his daughter, distinguished a parent's custodial right from an absolute property right. 26 Kan. at 652-53. The court commented, "No case can be found in which courts have given to the father who was a drunkard and a man of gross immorality the custody of a minor child, especially when that child was a girl." Id. at 653.

76. See Garver v. Gordon, 41 Ind. 93 (1872) (unrelated person appointed guardian); Dumain v. Gwynne, 92 Mass. 270 (1883) (charitable institution).

77. See Johnson v. State, 21 Tenn. 183 (1841). Johnson was the first American appeal involving a conviction of parents for child abuse. The defendants were accused of striking their child, tying him to a bedpost, and whipping him. The jury found them guilty of assault and battery. Id. at 184. The appellate court remanded
As in England, the poor children found to be neglected were bound out for work or apprenticeship.\(^7\) Again, the process reflected a desire to minimize welfare costs and to train children to work, rather than simple class bias. The Puritans and the Quakers in particular firmly believed that work was an integral part of the training of children.\(^7\) Many parents voluntarily apprenticed their children, both for financial and for educational reasons. New York provided that any male infant or unmarried female under eighteen might be bound as an apprentice or steward if consent was given by the infant's father if he was alive and able to consent, by the mother if the father could not give consent, by a duly appointed guardian if both parents were dead or incapacitated, or by the overseers of the poor or any judge of the county courts.\(^6\)

Indentures for children bound out by either county superintendents or overseers of the poor in New York had to contain an agreement that the child would receive instruction in reading and writing. A male child had to receive instruction in arithmetic as well.\(^9\) These educational requirements, common throughout the colonies, later were extended to voluntarily apprenticed children and constituted the only significant American improvement in traditional English apprenticeship procedures.\(^1\)

the case, however, on the ground that the jury had been instructed improperly on their duty to determine whether the punishment inflicted by the parents was excessive.

Similarly, in State v. Jones the defendant was charged with whipping and choking his sixteen year old daughter without cause. 95 N.C. 465 (1886). On appeal, a guilty verdict was reversed on the grounds that the law should not interfere in the domestic affairs of families unless the punishment causes permanent injury or is inflicted with a malicious nature and without honest purpose. \(\text{Id. at 468.}\) By contrast, in Fletcher v. People the court held that it was needless cruelty and false imprisonment to keep a blind child in a damp cellar during mid-winter without cause. 52 Ill. 395, 396-97 (1869). As a result the defendant father was convicted of false imprisonment and sentenced to pay a $300 fine. \(\text{Id.}\)

78. Child labor remained unregulated until well after the Civil War. Even when regulation began, it was confined to limitations on hours and did not prohibit child labor. See 1 G. Abbott, supra note 35, at 260-61. In 1860, when organized labor called for an end to the employment of children under fourteen, the motivation apparently was as much a desire to protect union jobs as a genuine concern for children. See M. Carroll, Labor and Politics 81 (1923). As late as 1900, nearly one out of five children between ten and fifteen years of age was employed. See 2 Children and Youth, supra note 69, at 605.

79. See 1 G. Abbott, supra note 35, at 270-71. In 1840, an order of the General Court of Massachusetts requiring the magistrates of the several towns to see "what course may be taken for teaching the boys and girls in all forms the spinning of the yarne" revealed the Puritan view. \(\text{Id. at 270.}\) Similar Quaker beliefs were embodied in an early Pennsylvania law, which provided that all children "of the age of twelve years shall be taught some useful trade or skill, to the end none may be Idle." \(\text{Id. at 271.}\)


81. See id. § 11.

82. See 1 Children and Youth, supra note 69, at 105.
The indentures were supposed to last for three to five years, but they frequently lasted far longer.\textsuperscript{83} Similarly, employers theoretically were obligated to provide suitable board, lodging, and medical attention, but penalties for failure to meet these obligations resulted only if the apprentice or his parent or guardian pursued a successful tort action or a court imposed fine.\textsuperscript{84} Taking an apprentice unlawfully meant only that the master might be found guilty of a misdemeanor punishable by a $500 fine.\textsuperscript{85} Apprentices who violated their indentures, by contrast, could be imprisoned until they were 21 or returned, like runaway slaves, to serve as punishment double the time they were absent.\textsuperscript{86} Although binding out was a widely used method of caring for neglected children prior to and during the nineteenth century,\textsuperscript{87} the minimum age for binding out increased over the years, perhaps because of a growing recognition of the special needs of children but more probably because the spread of slavery and the greater availability of adult manpower made the labor of young children less attractive to employers.\textsuperscript{88} Until old enough to be bound out, poor children were either maintained in their own homes at public expense under a system known as "outdoor relief," or were boarded out to private families, again at public expense.\textsuperscript{89} New England communities devised a thrifty variant of boarding out known as "vendue," whereby the town officials auctioned local poor to the lowest bidders, whose bid represented what the bidder would charge the state for boarding the poor.\textsuperscript{90}

\textsuperscript{83} See id. at 104. "Voluntary apprentices normally served for seven years . . . . Compulsory apprentices on the other hand served until they were twenty-one, regardless of their age at the time of indenture. Since some were placed in infancy, their term of service often far exceeded seven years." Id.
\textsuperscript{84} See ch. 931, § 5, [1871] N.Y. Laws, 94th Sess. 2149 (fine of $100 to $1000 authorized).
\textsuperscript{85} See id. § 18.
\textsuperscript{86} See id. § 39.
\textsuperscript{87} Outdoor relief was the system of care provided for most pauper children and adults at the beginning of the nineteenth century, but binding out also was in general use. See H. Folks, supra note 71 at 4, 8; 1 CHILDREN AND YOUTH, supra note 69 at 64. A typical indenture agreement of the time stressed both the obedient behavior expected of the apprentice and the duties of the master owed to the apprentice. See D. Carey, History of Malden 403 (1899), reprinted in R. Kelso, supra note 29, at 169-70.
\textsuperscript{88} For example, in 1834 the almshouse on Long Island adopted a rule that girls under the age of 10 and boys under 12 should not be bound out. See H. Folks, supra note 71, at 17. In 1847, an almshouse commissioner concluded that girls should not leave the institution before they were 13 and that boys should not leave until they were 15. Id. at 20.
\textsuperscript{89} See id. at 3-4.
\textsuperscript{90} See A. Marvin, History of Winchendon Massachusetts 267-68 (1868), reprinted in 1 CHILDREN AND YOUTH, supra note 69, at 267-68. Vendue literally means "sale" in French, and the system sometimes was called "selling the poor." Id. at 268. See also S. Adams, Grandfather Stories 282-87 (1935).
Neglect proceedings in the nineteenth century continued to be primarily part of the poor relief program, but they gradually were expanded to protect children from parental immorality and abuse. The first state intervention to protect a child from parental abuse occurred in 1874. According to the more dramatic versions of the episode, eight-year-old Mary Ellen Wilson was rescued only through the efforts of the recently formed New York Society for the Prevention of Cruelty to Animals, which argued that children were, after all, members of the animal kingdom. Within a few months the first Society for the Prevention of Cruelty to Children was formed in New York City by Elbridge Gerry, who had argued Mary Wilson's case.

The Society's records demonstrate that poverty, rather than cruelty, continued to be the major justification for family interventions, despite the organization's professed dedication to protecting children from cruelty. Further, the Society focused on punishing cruel parents.

91. New York provided in 1833 that the mayor, recorder, any two alderman, or two special justices might commit to the almshouse or other suitable place any child found in a state of need or suffering, or abandoned, improperly exposed, neglected, soliciting charity from door to door, or whose mother was a notorious or immoral woman. See H. FOLKS, supra note 71, at 169. See also People v. Giles, 152 N.Y. 136, 46 N.E. 336 (1897) (children found in house of prostitution held to be neglected); People ex rel. Van Riper v. New York Catholic Protectory, 106 N.Y. 604, 13 N.E. 435 (1887) (child in company of prostitute held to be neglected); In re Diss Debar, 3 N.Y.S. 667 (Sup. Ct. 1899) (children of adulteress convicted of fraud held to be neglected).


Mary Ellen Wilson was not removed from her biological parents, as is commonly assumed, but from foster parents. Her case thus reveals more about the neglect of children placed in state custody than about parental neglect. Significantly, at the end of the proceedings so often hailed in social work literature, Mary Ellen was sent off to an institution; she was "saved"—but only in the sense of being removed from her foster parents, the Connollys. Apparently no one has ever bothered to find out how she fared after she was placed by the state a second time. Her case is a curious landmark for social work agencies, although those of us who criticize the agencies for often failing to provide adequate dispositions for the children they take into custody might consider it an apt selection. See generally 2 CHILDREN AND YOUTH, supra note 69, at 185-92.

93. See R. McCREA, supra note 92, at 135-41. The Society announced that it was organized to rescue from "the dens and slums of the City the little unfortunates whose lives were rendered miserable by the system of cruelty and abuse which was constantly practiced upon them by the human brutes who happened to possess the custody and control of them." N.Y. Times, Dec. 17, 1874, at 3, col. 2, reprinted in 2 CHILDREN AND YOUTH, supra note 69, at 190.

94. During its first ten months of operation, the New York Society brought 72 cases to court attention. The cruelty charges ranged from one against a park police man for throwing a small boy into the basin of a fountain, wetting the child all over, and sending him home in that condition to one against a father for beating his son.
The Society's efforts facilitated passage of a neglect statute authorizing any New York court that convicted a parent for criminal abuse or neglect to commit their children to an orphanage or to effect any other disposition that was available for pauper children. The new statute focused principally on preventing the exploitation of children for commercial purposes rather than on enhancing their physical or emotional development.

The dispositions provided for neglected children in the nineteenth century clearly confirm the lack of concern with the emotional needs of children and the growing movement to punish parents. At the beginning of the century, the outdoor relief system was widely attacked. Complaining of parents who were loafers and chiselers, the Massachusetts Committee on Pauper Laws in its 1821 report concluded that outdoor relief was the worst method of relief, and that almshouse care was the most economical and best method, especially when it provided work opportunities. In 1824, the secretary of state in New York reported similar views to his legislature. In the same year, New York established the first system of county poorhouses in the country. Within a decade fifty counties had erected such institutions.

over the head with the butt end of a whip. See N.Y. Society for the Prevention of Cruelty to Children, First Annual Report 30-31 (1876). Only twenty of the first cases involved abuse, however, while over forty were in response to poverty. See id. at 30-44. A surprisingly large number of the cases involved organ grinders who were using children to aid in their begging routines. See id. at 34-37.

95. See id. at 6-7. The Society's report noted that other institutions had failed to enforce adequately statutes passed to punish persons who mistreated children. Id.

96. See ch. 122, § 3, [1876] N.Y. Laws 99th Sess. 96. Section 1 of the statute made it a misdemeanor for persons having custody of children to use or employ the children in singing, dancing, begging, or other immoral practices. Id. § 1. Whenever a court determined that a child had been so used, the court could "commit such child to an orphan asylum, charitable or other institution, or make such other disposition thereof as now is or hereafter may be provided by law in cases of vagrant, truant, disorderly, pauper or destitute children." Id. § 3.

97. See id. § 1. The early preoccupation with the exploitation of children by circuses survives in many criminal as well as civil statutes. In the District of Columbia, for example, it is a misdemeanor for any person "having in his custody or control a child under the age of fourteen years, who shall in any way dispose of it with a view to its being employed as a acrobat, or a gymnast, or a contortionist, or a circus rider, or a rope walker, or in any exhibition of like dangerous character, or as a beggar, or mendicant, or pauper, or street singer, or street musician; . . ." D.C. Code Ann. § 22-901 (1973).


In retrospect, it is hard to understand why almshouses were considered a reform; at the time, however, reformers believed that the state could better instill in children proper work attitudes and skills if it used publicly managed institutions instead of leaving children with their own poor and therefore suspect parents. Some soon recognized, however, that state control was achieved at the cost of contaminating the children with the "bad attitudes" of their adult compatriots in the almshouses.

Criticism of the almshouses grew dramatically during the 1820s and 1830s. In 1844, the prominent reformer Dorothea Dix denounced the conditions in the almshouses of New York and condemned particularly the commingling of children with adults and the lack of education. Not surprisingly, the movement to replace outdoor relief with almshouses soon was followed by an additional reform, the establishment of separate institutions for children. New York, one of the first states to respond, established a separate facility for children on Randall's Island in 1848. The establishment of separate facilities did not result immediately, however, in the improvement of the treatment of children. In 1849, 280 of the 514 infants in New York's new facility reportedly died of cholera. Moreover, by 1867, 2300 children resided in almshouses in New York, compared with 1300 in 1856, despite the strong criticism of poorhouses issued in an official report in 1856. Interestingly, pressure to establish separate institutions for children ultimately emerged less in response to the horrors of the almshouses than as incident to the growing movement to separate juvenile and adult offenders in correctional institutions.


103. A contemporary observer characterized a nineteenth century almshouse in Steuben County, N.Y., as a haven for insane, imbecile, diseased, and decrepit adults. See Letchworth, Report on Pauper and Destitute Children, quoted in 2 G. Abbott, supra note 35, at 70-71. Letchworth described one group of adults with whom children were intermingled as follows: "Here was an insane woman raving and uttering gibberings, a half crazy man was sardonically grinning, and an overgrown idiotic boy of malicious disposition was teasing, I might say torturing, one of the little boys. There were several others adults of low types of humanity." Id.

104. See H. Folks, supra note 71, at 38.

105. See id. at 39-39, 73-81.

106. See H. Folks, supra note 71, at 20-21.


108. In 1856, a Select Committee appointed by the New York Senate to investigate all the charitable institutions of the state reported that the poorhouses were "the most disgraceful memorials of public charity," that the evidence obtained showed "filth, nakedness, licentiousness, general bad morals--gross neglect of the most ordinary comforts and decencies of life," and that the institutions were "for the young the worst possible nurseries." See 1 CHILDREN AND YOUTH, supra note 69, at 647.

ing that the founders of the first children's institutions realized that even those institutions were not good places for children and intended the institutions to be only temporary or transitional places for care.110

Charles Loring Brace, an early critic of institutional care, organized the Children's Aid Society in New York in 1830 to place needy children with families in the West.111 Brace justified these out-of-state placements with the remarkably modern view that "the ordinary experience of life in an ordinary family are [sic] a better preparation for self-support and self-guidance than institutional training."112 In the end, however, Brace did much to encourage the placement of children in institutions rather than with families, for widespread dissatisfaction began to develop with his out-of-state placements.113 Critics complained that there was no guarantee of religious matching of the children and their new families, that there was no supervision of care

110. Thus at the Fourth Annual Conference of Charities in 1877, Theodore Roosevelt observed: "Benevolent ladies think that during their early years [neglected] children should be guarded from temptation, and that this is best accomplished by keeping them in an institution. The fact is, that they are less able to bear temptation when brought up in an institution. In the event of dependent children being supported by the state, a law should be passed, limiting the time when the state should provide for such children in any institution. They should be transferred to families as fast as possible." Proceedings of the Fourth Annual Conference of Charities 79 (1877).


112. C. Brace, The Dangerous Classes of New York and Twenty Years of Work Among Them (1872). Brace believed that out-of-state placements of children into family units would avoid the deleterious effects that slum life has upon children. Even the title of his work reflected the nineteenth century belief that poverty, sin, and crime were linked. A few excerpts present the full flavor of this influential book:

[T]hough the crime and pauperism of New York are not so deeply stamped in the blood of the population, they are even more dangerous. The intensity of the American temperament is felt in every fiber of these children of poverty and vice.

[The young ruffians of New York are the products of accident, ignorance, and vice. . . .

. . . .

There are thousands on thousands in New York who have no assignable home, and "fit" from attic to attic, and cellar to cellar; there are other thousands more or less connected with criminal enterprises; and still other tens of thousands, poor, hardpressed, and depending for daily bread on the day's earnings, swarming in tenement-houses, who behold the gilded rewards of toil all about them, but are never permitted to touch them. . . .

Id. at 26-29.

113. One study claimed that the Society between 1853 and 1880 placed between 40,000 and 50,000 children out of state. See E. Wines, The State of Prisons 129 (1880 ed., reprint 1968). But see H. Folks, supra note 71, at 68 (estimated placement of 1,000 per year between 1854 and 1875). Some states considered the problem serious enough to pass statutes barring unapproved interstate placements. See generally 2 G. Abbott, supra note 35, at 133-63.
after the children were placed, and that sheer physical distance made it difficult if not impossible for parents to reclaim their children after the parents overcame the hardship that had caused their temporary inability to care for the children.\textsuperscript{14}

In 1875 the opposition to almshouse care of children finally was codified in New York.\textsuperscript{15} Removal of children from almshouses was merely a stopgap reform, however, since the problem of where to place the children remained. New York responded to the displacement challenge by authorizing local communities either to subsidize private child care agencies or to develop a new system of public institutions.\textsuperscript{16} Most communities adopted the subsidy system, and private institutions multiplied and flourished.\textsuperscript{17}

Variations on the New York model abounded. Ohio and several other states established county orphanages,\textsuperscript{18} while Michigan estab-
lished both a state school for dependent children, which was given the power to bind out the children, and a local option to establish separate institutions for children.\textsuperscript{119} Massachusetts, by contrast, authorized local officials and, if the local officials failed, state officials to place out children in the first large scale foster-care program.\textsuperscript{120} Ironically, however, while Massachusetts avoided the deleterious emphasis on institutional placements, as late as 1923 it had more children in almshouses than did any other state.\textsuperscript{121}

Regardless of the theoretical solution adopted, many states had trouble developing effective safeguards to ensure quality care. For example, in 1881 the newly strengthened New York neglect provisions were applied to an officer of a child saving institution who was found to have neglected to provide a child with wholesome and sufficient food, clothing, medicine and sanitation, and thereby to have injured the child's health.\textsuperscript{122} Moreover, the child saving institutions often served merely as an intermediate placement step, because many were empowered to bind out their charges to private families in a confused mixture of adoption and on-the-job training.\textsuperscript{123}

While many factors may have contributed to the expansion of the parens patriae role of the late nineteenth century to include the protection of children from physical abuse, one factor deserves particular attention because of the light it may shed on contemporary neglect problems. That factor is the widespread change in attitudes toward parental discipline that began in the nineteenth century. The best evidence indicates, for example, that canings and whippings were widespread among all classes in America, and persisted until the last two generations.\textsuperscript{124} Old fashioned whipping did not diminish in popu-

\textsuperscript{119} See H. Folks, supra note 71, at 82-102; 2 G. Abbott, supra note 35, at 12-14.
\textsuperscript{120} See H. Folks, supra note 71, at 73-74.
\textsuperscript{121} In 1923 Massachusetts still had 367 children in almshouses; New York, by contrast, had only 16. U.S. Bureau of the Census, Paupers in Almshouses Table 61, at 50 (1923), reprinted in 2 G. Abbott, supra note 35, at 12 n.2.
\textsuperscript{122} Cowley v. People, 83 N.Y. 464, 468-70 (1881).
\textsuperscript{123} An 1884 New York statute, for example, provided that children's institutions were authorized to bind out children who had been surrendered there as paupers or had been left by their parent or legal guardian with no provision for support for at least one year. Ch. 438, § 5 [1884] N.Y. Laws 512-13.
\textsuperscript{124} See de Mause, The Evolution of Childhood, 1 Hist. of Childhood Q. 503, 544-45 (1974). Indeed, Lloyd de Mause concluded that prior to the eighteenth century a large percentage of the children born in Europe and the United States would be considered battered children by modern standards. See id. at 542. See also Radbill, A History of Child Abuse and Infanticide in The Battered Child 3 (R. Helfer & C. Kempe eds. 1968).

Any indictment of past child care must be qualified, however. While some parents throughout history have believed it wrong to discipline their children too strictly, many who might seem cruel by modern standards were motivated by a sincere desire to do what then was considered best for their children rather than by sadism or cruelty.
lar acceptance in most of Europe and America until the nineteenth century. Even in the early twentieth century, child care experts continued to counsel parents to train their children firmly in order to discourage bad habits. However, it is clear that the social consensus concerning proper parental behavior began to change at the close of the nineteenth century.

The ambivalence society felt toward the reform of parental discipline is nowhere better revealed than in the concurrent movement toward use of the neglect process to prevent delinquency. One sign of this merger of benevolence and hostility toward wayward youth was the unprecedented use of the parens patriae power to justify the new and sweeping juvenile delinquency statutes.

125. A discussion of corporal punishment in an English magazine in the 1860s revealed a fairly even division of parents between those who indicated they were appalled at the very idea and others who reported, with evident satisfaction, the beneficial results they achieved. See de Mause, supra note 124, at 416. Whipping survived longest in Germany; 80 percent of German parents still admit that they beat their children. See id. at 544.

126. In 1928 John Watson proposed a “sensible way” to treat children: Treat them as though they were young adults. Dress them, bathe them with care and circumspection. Let your behaviour always be objective and kindly firm. Never hug and kiss them, never let them sit in your lap. If you must, kiss them on the forehead when they say goodnight. Shake hands with them in the morning. Give them a pat on the head if they have made an extraordinary good job of a difficult task. Try it out. In a week’s time, you will find how easy it is to be perfectly objective with your child and at the same time kindly. You will be utterly ashamed of the mawkish sentimental way you have been handling it.

J. WATSON, PSYCHOLOGICAL CARE OF INFANT AND CHILD 81-82 (1928). Watson claimed that his method would produce “a child as free as possible of sensitivities to people and one who, almost from birth, is relatively independent of the family situation.” Id. at 186. This prompted two modern authorities on child development to speculate that Watson himself had been hurt deeply in his interpersonal relations and had proposed this almost psychopathic style of life as a defense against emotional pain. See L. STONE & J. CHURCH, CHILDHOOD AND ADOLESCENCE 115-16 (3d ed. 1973).

127. Elbridge Gerry, president of the New York Society for the Prevention of Cruelty to Children, told the Ninth Annual Conference of Charities in 1882 that “physical cruelty is the parent of vice. Want and neglect are the incentives to crime. And crime not only destroys its perpetrator, but eats like a corroding ulcer into the nation which countenances its existence.” NINTH ANNUAL CONFERENCE OF CHARITIES AND CORRECTIONS, PROCEEDINGS 130 (A. Wright ed. 1883).

128. See Van Walters v. Board of Children’s Guardians, 132 Ind. 567, 569-70, 32 N.E. 569, 569 (1892). The court in Van Walters noted the balance between state and familial interests, and concluded: It has been for many centuries theoretically true that the state, through its appropriate organs, is the guardian of the children within its borders. [But] it is still true that the equally great principle that natural right vests in parents the custody and control of their children is confirmed and enforced. This high and strong natural right yields only when the welfare of society or the children themselves comes into conflict with it; but where there is such conflict the supreme right of
merger was so successful that it was not challenged until 1967,\textsuperscript{129} and even then the challenges met with mixed results.\textsuperscript{130}

C. THE MODERN ERA

1. Contemporary Standards. Two major changes in the goals of neglect enforcement occurred in the beginning of the twentieth century. First, changes in the poor relief system, particularly the development of "mother's aid" and aid to dependent children\textsuperscript{131} made it possible for states to stop removing children from parents because of family poverty; for the first time poverty became a defense to rather than a ground for a neglect finding.\textsuperscript{132} This new distinction between neglect and destitution was highlighted by a 1930 New York statute which provided that destitute children were to be housed separately from those who were delinquent, neglected, or abandoned.\textsuperscript{133} Not until 1962, when poverty in theory became an

\textit{Id. See also In re Ferrier, 103 Ill. 367, 371-73 (1882) (\textit{parens patriae} extends to care and protection of ill-treated children); State v. Brown, 50 Minn. 353, 359, 52 N.W. 935, 936 (1892) (state assumes parental duty consonant with \textit{parens patriae}); Milwaukee Indus. School v. Supervisors, 40 Wis. 328, 337-40 (1876) (state commitment of children does not invade parents' natural rights).}

129. See \textit{In re Gault}, 387 U.S. 1, 14-26, 30 (1967).


132. In 1922, New York redefined a neglected child as one "whose parents, guardian or custodian neglects and refuses when able to do so to provide necessary medical, surgical, institutional or hospital care." Ch. 547, art. I, § 2(4)(f) [1922] N.Y. Laws 1261. By labelling a child "destitute" rather than neglected, however, the state retained the power to intervene in a family because of poverty. \textit{Id.} § 5. Subsection 7 of the 1922 statute defined a destitute child as one "who through no neglect on the part of its parents or custodian is destitute or homeless, or in a state of want or suffering due to lack of sufficient food, clothing, shelter, medical or surgical care." \textit{Id.} § 2(7).

133. See ch. 393, art. III, § 28(g) [1930] N.Y. Laws 839. See also Commonwealth v. Dee, 222 Mass. 184, 110 N.E. 287 (1915) (purpose of neglect law was to provide for the removal of children from those parents who are undesirable and unfit, and not from parents who are merely poor).

The legislature apparently was more willing to distinguish between children whose parents intentionally neglected them and children whose parents did not, than to distinguish and separate children who were passive victims of parental neglect from
absolute defense to state intervention in New York, was the change
begun in 1922 made complete. The legislature abolished the destitute
child category and redefined a neglected child as one "whose parent
or other person legally responsible for his care does not adequately
supply the child with food, clothing, shelter, education, or medical
or surgical care, though financially able or offered financial means to
do so." Unfortunately, a second section of the 1962 statute allowed
its application to families who were simply poor or unconventional,
for neglect was defined also to include "improper guardianship, includ-
ing lack of moral supervision or guidance." The vagueness of this
standard was tempered only slightly by a requirement that the state
show that the child "suffers or is likely to suffer serious harm" from
the improper guardianship and that the child "required the aid of the
court," before the statute could be invoked.

The second major change in neglect practice in the twentieth cen-
tury was the expansion of the parens patriae role of the states to
encompass protection of children from emotional as well as physical
harm. Often this change was accompanied by a revision of statutes
that made parental immorality a basis for state intervention. In New
York, for example, impairment of emotional health and impairment
of mental or emotional condition were made grounds for intervention
in 1970, while "lack of moral supervision" was eliminated. Similarly,
in 1963 Idaho authorized intervention where a child was "emotionally
maladjusted" or where a child who had been denied proper parental
love or affectionate association "behaves unnaturally and unrealistically
in relation to normal situations, objects, and other persons."

children accused of committing crimes. Today, the prohibition against commingling
of neglected and delinquent children is widely considered a necessary facet of a model
juvenile system. Differentiation between neglected children and juvenile offenders
was the practice as early as the sixteenth century when juvenile offenders were in-
carcerated with adult offenders. The reform of the juvenile court, which resulted in
the removal of juvenile offenders from adult jails, first created the problem of the
commingling of delinquent and neglected children.

135. Id. § 312(b).
136. Id.
legislature in 1972 provided a more specific definition of these new phrases; impairment
of emotional health was defined as:

a state of substantially diminished psychological or intellectual functioning
in relation to, but not limited to such factors as failure to think,
control of aggressiveness or self destructive impulses, ability to think
and reason, or acting out or misbehaviour, including incorrigibility, un-
governability or habitual truancy; provided, however, that such impair-
ment must be clearly attributable to the unwillingness or inability of
the respondent to exercise a minimum degree of care toward the child.

N.Y. FAMILY CT. ACT § 1012(h) (McKinney Supp. 1974).
These changes undoubtedly reflect the influence of both Freud and a growing body of child development specialists, who documented the emotional needs of children and affirmed the importance of being raised in a family. The state’s new interest in protecting children from emotional harm, then, confronted the newly recognized interest in avoiding separation of parents and children. Dispositions in the twentieth century nevertheless have lagged behind the statutory ideals and reforms, because even the most progressive states continue to ignore the importance of family ties in several important respects.

2. Modern Dispositions. While the dangers of raising children in institutions is well documented and the trend is away from institutional care, thousands of children remain in institutions. Further, although foster care, the most frequent disposition employed today, is in most cases better for children than institutional care, courts too often overlook the fact that foster care usually is not superior to family care.

The modern reliance on foster care may be explained in part by the fact that a child’s stay in foster care in theory is only a temporary stopover until the child can be reunited with his or her own parents. All the available evidence suggests that short term foster care is the exception rather than the rule, but the myth of short term care is pervasive, and most foster care programs are administered as if all of the children eventually will return home.


140. See S. Provence & R. Lipton, Infants in Institutions (1968). The authors discuss the effect that institutional care has on the motor behavior, reactions to people, language development, and discovery of body and sense of self. Id. at 65-68, 81-84, 91-94, 100-04, 118-21.

141. The percentage of dependent children receiving specified types of care away from home during this century breaks down as follows:

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<tr>
<td>In institutions</td>
<td>77</td>
<td>68</td>
<td>53</td>
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<td>In foster homes</td>
<td>15</td>
<td>30</td>
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<td>Awaiting placement</td>
<td>2</td>
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<tr>
<td>Elsewhere</td>
<td>6</td>
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2 CHILDREN AND YOUTH, supra note 69, at 398; U.S. DEP’T OF HEALTH, EDUCATION AND WELFARE, supra note 8, at table 6.

142. See Low, Foster Care of Children: Major Trends and Prospects, 4 Welfare Review 12, 13 (Oct. 1966) (79,400 children were in institutions in 1965; estimated 61,900 in 1975).

143: See notes 151-52 infra and accompanying text.


145. In the District of Columbia, for example, the average stay in foster care is seven years. M. Bunt, supra note 2, at 33. A 1973 study revealed that of 5,481 children in foster care in Iowa, 3,013 had been there for over two years, and 1,981 for over four. Schott, Iowa Assesses Its Foster Care Program, 1 Soc. & Rehab.
Perhaps the high water mark of this philosophy occurred in the case of In re Jewish Child Care Association. Laura Newberger, age five and a half, had lived almost four and a half years with her foster parents, the Sanders, who were under contract with the Jewish Child Care Association of New York. When the Sanders attempted to adopt Laura the agency decided that she should be removed from their care, even though the natural mother had not asked that Laura be returned, and the evidence indicated she was unable to assume responsibility for Laura's care or education. The New York Court of Appeals sustained the agency's action. Although claiming that it was acting in the best interest of the child, the court disclosed its predominant motivation when it observed that "[w]hat is essentially at stake here in the parental custodial right."  

The emphasis on the right of parents to repossess their children can have a negative impact on the children in foster care, for they know that their biological parents cannot or will not care for them and that no others consider the children really their own. In addition, the longer a child stays in foster care the greater is the probability
that the child will be displaced again, which may further impair the child's already fragile sense of self-worth. A 1963 study found that 28 percent of the children in foster care had been moved three or more times, and a later study revealed that the average number of placements for all children in foster care studied was 2.7. Not surprisingly, studies indicate that the longer children remain in foster care, the more prone they are to display signs of emotional disturbances.

The dangers of constant disruptions of care are well documented. Consequently, it is difficult to understand the failure of agencies that care for children to implement their espoused belief in the beneficial effects of continuous family care. In the nineteenth century, institutions were known to be bad places for children, yet they multiplied. Today the drawbacks of long term foster care and multiple placements have been documented repeatedly, yet they continue. This discouraging pattern of discrepancy between theory and practice in child care placements is so pervasive that the cause must be inherent in the system.

Perhaps, like an early Cruelty worker, the modern social worker who removes a child from home subconsciously is incapable of later placing the child permanently in someone else's care.

3. The Influence of Public Funding. Undoubtedly, institutional as well as individual pressures operate to maintain children in foster homes. In New York in 1969, for example, of the $4200 annual state allotment for each foster child, only $1800 went to the foster parents. The adoption agencies retained the remaining $2400 for clothing and medical expenses. That the agencies could pocket the difference if the $2400 exceeded actual expenses provided agencies with a clear incentive to keep children in foster care rather than to

152. See R. Geiser, supra note 144, at 57-60; Jaffe, Effects of Institutionalization on Adolescent Dependent Children, 48 CHILD WELFARE 64, 70-71, 111 (1969) (Israeli study). Geiser discusses the impact foster care has on a child's self-confidence, sense of self-worth, and self-identity. See R. Geiser, supra.
153. See note 9 supra.
155. Bowlby has labeled the glamour of saving neglected children the "rescue fantasy," and has warned "[i]nly if the caseworker is mature enough and trained enough to respect even bad parents and to balance the less-evident long-term considerations against the manifest and perhaps urgent short term ones, will she help the parents themselves and do a good turn to the child." J. BOWLLBY, CHILD CARE AND THE GROWTH OF LOVE 136 (Penguin ed. 1953).
return them to their natural parents or to place them with a new adoptive family.\textsuperscript{157}

Such a practice not only contravenes the best interests of the child and the findings of social science, but it is also fiscally unsound. Judge Justine Polier vividly described the public funding policies that have discouraged keeping children and their natural parents together at high cost to the taxpayers:

\begin{quote}
[M]others in the aid to families with dependent children (AFDC) program receive on the average less than $1 a day for each child. If we find the home is inadequate, that the mother is unable to cope with the problems of so many children, we remove the child to the home of a stranger or a series of strangers, paying from public funds up to $7 a day for the child's care. If the child is removed to an institution, the institution is paid up to $14 a day. Finally, if the child becomes emotionally disturbed, payments from public funds may range from $10 to $25 a day. Thus, the further the child is removed from his family, the more we are ready to pay for his support.\textsuperscript{158}
\end{quote}

A recent study estimated that in New York it costs the state $122,500 to rear a child to age 18 in foster care, compared to a projected cost of $25,560 for rearing that same child as part of a normal family.\textsuperscript{159} The funds that the state spends on foster care clearly could finance considerable special services for families with abuse or neglect problems.

Until recently, funding policies also have encouraged long term stays in foster homes because they made it more lucrative for families to provide foster care rather than to adopt the children. Currently, however, subsidized adoption programs in a growing number of states allow social agencies to make financial payments to adoptive parents after the legal consummation of the adoption and thereby eliminate one financial barrier that prevented many parents from adopting.\textsuperscript{160}

\begin{footnotesize}
\textsuperscript{157} See id. at 256.

\textsuperscript{158} Polier, The Invisible Legal Rights of the Poor, 12 CHILDREN 215, 218 (1965).

\textsuperscript{159} D. Fanshel & E. Shinn, Dollars and Sense in the Foster Care of Children: A Look at Cost Factors 20-21 (1972).


The Child Welfare League reported that 31 states and the District of Columbia had enacted subsidy legislation by March 1, 1974. CWLA Information Source Memorandum No. 11574 (March 1974). The states are California, Colorado, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, and Wisconsin. Id.
\end{footnotesize}
Three basic types of subsidy are offered: those for specific services such as medical care, legal services, or special education; time-limited subsidies to mitigate the immediate costs of acquiring a new member of the family; and long term subsidies paid periodically until the child reaches majority. By paying adoption subsidies at rates less than the foster care fee, states preclude adoption of children for money while they assist foster families or low-income families who are financially unable to shoulder the full cost of adoption.

4. Legal Barriers. The law has exacerbated the difficulty of devising more constructive neglect interventions and dispositions because the factfinding is separated from the disposition stage of the neglect process. Undoubtedly based in part on the criminal process model, which separates trial and sentencing in an effort to make the determination of criminal guilt as objective as possible, the division of the neglect process unfortunately has sometimes precluded the judiciary from fulfilling its parens patriae role, since a determination of whether intervention in a family would be in the best interests of a child often requires consideration of the alternatives available for the child. The split of factfinding and disposition decisions furthermore has encouraged an unfortunate focus on the child after removal is ordered, when follow-up progress reports are made to the courts. A simple request for information on the agency's progress toward the reunion of the child and family might do much to encourage agencies to fulfill this often overlooked responsibility.

162. See N.Y. Soc. Servs. Law § 398(k) (McKinney Supp. 1969) (authorizing such payments as are necessary for the welfare of the child).
164. In 1971 between 60,000 and 190,000 children were in need of adoption in the United States. Morgenstein, The New Face of Adoption, Newsweek, Sept. 13, 1971, at 68. The Child Welfare League that year estimated that as many as 60,000 nonwhite children were in need of adoption. Id. Nonwhite adoptions have always lagged behind white adoptions; in 1969, for example, of 171,000 legal adoptions, only 19,000 involved minority children. Id. Studies have shown that money is the primary factor deterring black families from adopting. See Herzog & Bernstein, Why So Few Negro Adoptions?, 12 Children 14, 16-17 (1965). Subsidized adoption programs, therefore, should facilitate the adoption of minority children by families of their own color. In New York from September 1968 to March 1970, the majority of the 92 approved subsidies went to blacks, and 17 of 21 legally finalized adoptions involved black families, while 3 involved Puerto Rican families. Gentile, supra note 160, at 762.
166. Bryce and Ehlert found that casework services were being provided to less than half the natural parents of children who were supposed to be returned to their natural parents. Bryce & Ehlert, supra note 151, at 502. Henry found that 73 percent of the
Courts could use programs that have successfully reunited neglected or abused children with their families as models for dispositions that would require more than simple removal of the child and would avoid leaving the burden of rehabilitation solely on the family. For several years, Doctors Henry Kempe and Ray Helfer have operated a clinic for families with child abuse and neglect problems. Through the use of lay therapists, parents anonymous groups, crises nurseries, and therapeutic day care centers, they have been able to reunite children with their parents in a phenomenal 90 percent of the cases. Recent developments in the use of family therapy also suggest that success can be achieved in many more situations of family pathology than was previously imagined possible.

III. CURRENT NEGLECT STANDARDS AND PRACTICE

A. PRINCIPLES OF REVIEW

The preceding survey of past neglect practice demonstrates the basis of the current conceptual dilemma: jurisdiction to protect children from physical and emotional harm was only recently embroidered on a statutory framework originally established to provide work or training for poor children and to minimize welfare costs and fraud. Only with the development of aid to dependent children and the new awareness of the special needs of children did the neglect process cease being primarily a welfare program and become instead the chief public arbiter of acceptable parental behavior. The survey also presents a rather discouraging history of practices under which children are removed from their families only to languish in institutions or in

parents of children in long term foster care were receiving little or no agency treatment. See supra note 145, at 331.

Some juvenile courts undoubtedly have hesitated to pressure the child welfare agencies because they are uncertain whether they have power to act. Compare Denver v. Juvenile Court, 511 P.2d 898, 901-02 (Colo. 1973) (court has jurisdiction to order Department of Welfare to place a child in need of supervision in a group facility) with State ex rel. Juvenile Dept. v. Richardson, 13 Ore. App. 259, 262, 508 P.2d 476, 477 (1973) (court can recommend visitation with parents to Children’s Service Division, but cannot compel Division to take particular action); cf. State ex rel. Weinstein v. St. Louis County, 451 S.W.2d 99, 101-02 (Mo. 1970) (juvenile court has inherent authority to do all that is necessary to assure the administration of justice).


168. See supra note 167, at 167, 193.

a series of temporary foster homes. Current social science evidence suggests that the separation of children from their parents can be harmful to the emotional development of the children, whatever the faults of the parents.\textsuperscript{170} Legislatures, agencies, and courts therefore must exercise caution at three critical stages in the neglect process: the authorization of standards for state intervention to protect children, the application of standards to individual families, and the design of dispositions for the families and their children. In general, family ties ought to be enhanced, not only because parents have legal claims to their children, but also because history and social science indicate that the enhancement of family ties is normally the best way to protect the best interests of the children.\textsuperscript{171}

The following principles embody an approach balancing the interests of child, parent, and state at the three critical stages:

1. Standards for court intervention in a family should focus on the emotional and physical needs of the children rather than on parental fault.
2. Decisions on whether and how to intervene in a family should serve to enhance the social and emotional bonds of that family.
3. Courts should require a permanent placement for any child who has been removed from his family and who cannot be returned safely within a period of time that is reasonable in view of the age and needs of the child.

The focus of principle one on the needs of children rather than on parental fault\textsuperscript{172} should enhance family autonomy by reducing the

\textsuperscript{170} See note 9, \textit{supra}.

\textsuperscript{171} S. \textsc{White}, \textit{3 Federal Programs for Young Children: Review and Recommendations} 86-87 (1973). Predictions about future relations in any family or about the development of any child are uncertain at best. Even Anna Freud, an ardent defender of the emotional needs of children, warned that in spite of advances, "there remain a number of factors which make clinical foresight, i.e., prediction [of the development of a child] difficult and hazardous." \textit{Freud, Child Observation and Prediction of Development—A Memorial Lecture in Honor of Ernst Kris}, reprinted in J. \textsc{Goldstein} \& J. \textsc{Katz}, \textit{supra} note 16, at 953-54.

\textsuperscript{172} Judge Gill of Connecticut has long argued for a focus on the needs of each child:

\begin{quote}

The neglect statutes are concerned with parental behavior not as behavior per se, but only and solely as it adversely affects the child in those areas of the child's life about which the statutes have expressed concern. Each child embodies his own unique combination of physical, psychological, and social components; no child has quite the same strengths or weaknesses as another or exactly the same relationship with his family. The parental failure which markedly damages one child might leave another quite untouched. This interaction between the child and his family is the essence of a neglect situation, the imponderable which defies statutory constraint.

\textit{Gill, The Legal Nature of Neglect, 6 Nat. Parole \& Probation Ass'n. J.} \textit{1, 5} (1960); \textit{accord, Cheney, Safeguarding Legal Rights in Providing Protective Services, 13 Children}.
\end{quote}
number of families brought to court.\textsuperscript{173} Parental misconduct should justify state intervention only if it has a negative impact on the children. Similarly, principle one should help to avert application of the intervention process to families who have only dirty houses\textsuperscript{174} or unconventional life styles because it will focus the decisionmakers, at each stage of the process, on the children rather than on the behavior of the parents or the physical nature of the home environment.\textsuperscript{175}

In keeping with the modern judicial and scientific recognition of the importance of early emotional development, principle one also authorizes intervention to protect children from emotional injury. But when read in conjunction with principle two, the interventionist potential of principle one is tempered by a strong prejudice against intervention. The application of \textit{parens patriae} power traditionally has involved a balancing process that takes into account the unique characteristics of a particular family and child, as well as predictions about the benefits and costs of intervention. The second principle of enhancement of family bonds is intended to weight the balance against intervention or, if intervention is necessary, to promote the least disruptive form of intervention. For example, unless it is probable rather than merely possible that a parent will again beat a child, and that adequate

\begin{itemize}
\item \textsuperscript{173} See M. Rein, Child Protective Services in Massachusetts, An Analysis of the Network of Community Agencies 36 (1963) (unpublished paper prepared for the Florence Heller Graduate School for Advanced Studies in Social Welfare of Brandeis University). Martin Rein found that 60 percent of a random sample of cases in which public intervention was undertaken in 1960 involved parental misconduct in the form of marital conflict, overt fighting between the parents, immorality in the home, excessive drinking, or excessive profanity. Rein concluded that "only between 5 and 15 percent of the [public child protective service agency cases] reflect conditions of extreme neglect or abuse . . . . The majority . . . reflect what might be termed an unwholesome home atmosphere, under which heading might be included situations ranging from parental immorality through general bad housekeeping. These are conditions which may well be detrimental to the well-being of the child, but which are not what is commonly understood as neglect or abuse." \textit{Id.} at 139.
\item \textsuperscript{174} But see \textit{In re Gibson}, No. 40391 (Cal. Ct. App. June 29, 1973). The \textit{Gibson} court upheld the removal of four children from their parents on the ground that their house was "very filthy," despite testimony that the children were happy, in good health, and not dirtier than ordinary children. The court specifically held that the government did not have to prove that the home conditions had resulted in disease of mind or body in order to establish neglect. \textit{Id.} at 3-5.
\item \textsuperscript{175} Recent opinions have recognized the danger that the neglect process can be directed against bad housekeepers or those having unconventional life styles. See \textit{State v. McMaster}, 486 P.2d 567, 572-73 (Ore. 1971) (fact that child's home surroundings did not maximize her potential insufficient to enable a court to sever parental rights).
\end{itemize}
protection other than removal cannot be devised, principle two encourages the court to provide a homemaker or lay therapist to the family rather than to remove the child. Where removal is necessary because it is the only reasonable way to protect the physical well-being of the child, the second principle dictates that aid continue to go to the family and reasonable efforts be made to reunite the child and family.

The third principle carries the goal of enhancement of family bonds one step further. Where events over a reasonable period of time confirm a judgment that enhancement of the original family ties is not possible, a new permanent placement should be arranged. For older children, this new placement might be with a small group home or a permanent foster family, rather than with the more traditional nuclear adoptive family. In any case, the child's new home should be selected as a permanent family environment for that child, not a temporary one subject to disruption because of travel, divorce, or death.

B. ANALYSIS OF CURRENT STANDARDS AND DISPOSITIONS

1. Standards. Few neglect decisions are ever appealed, perhaps because until recently few states provided counsel to parents involved in these proceedings. The appeals that are taken rarely result in reversals because appellate courts generally sustain trial court decisions absent a clear abuse of discretion. As a result, the language of neglect statutes rather than of judicial decisions remains the primary source of law in this area. Four categories of statutory grounds for taking children from their parents currently are in force in the United States: abandonment and voluntary relinquishment; physical abuse; technical neglect; and general neglect.


177. One study in New York found that where the parents did not have counsel, only 19 percent of the neglect petitions brought to court were dismissed, and 79.5 percent resulted in a finding of neglect. Of the cases in which the parents were represented by counsel, 25 percent were dismissed and only 62.5 percent resulted in a finding of neglect. Note, Representation in Child Neglect Cases: Are Parents Neglected?, 4 Colum. Law & Soc. Probs. 230, 241 (1968).

178. See In re Jewish Child Care Ass'n, 5 N.Y.2d 222, 228, 156 N.E.2d 700, 703, 183 N.Y.S.2d 65, 69 (1959); note 146 supra and accompanying text.

179. Unfortunately, many lawyers and judges ignore the importance of the statutes when they cite authority from other jurisdictions. Cases from other states frequently are cited even when the neglect statutes of the other states differ substantially from the statute of the citing jurisdiction.

180. Several states that do not list abandonment specifically as a basis for a neglect finding have other provisions apparently broad enough to cover abandonment situations. See, e.g., CALIF. WELF. & INSTNS CODE § 600 (a), (b) (West 1972) ("has no
Abandonment and Voluntary Relinquishment.

Of the four statutory categories, abandonment and voluntary relinquishment proceedings raise the fewest conceptual issues since, by definition, there is no parental interest to be weighed in the balance. In practice, however, the authorities must attempt to locate the parents. Locating the parents can be difficult, and may be complicated by Stanley v. Illinois, which suggests that notice of pending neglect actions in some cases must be given to the natural father of the child even if the parents never married and the father never officially acknowledged the child as his.

A more difficult issue is presented when parents are known but are unwilling to provide complete care for their child. To deal with this problem, most states have provided that after a specified time partial abandonment creates a presumption of intent to abandon that is sufficient to justify a neglect finding. A better procedure to follow, consistent with principle two, would involve working with the family to make reunion possible before as well as after the child is declared neglected.

Provisions which specify that children are legally neglected when voluntarily relinquished by their parents seem intended primarily to formalize a procedure that has taken place informally for years without any regular judicial involvement. In many areas of the country, as many as fifty percent of the children in the custody of


Abandonment should not be found, for example, when the failure to maintain a parental relationship resulted from public regulations that made it difficult if not impossible for parents to arrange visits with their children who were temporarily placed in foster homes. See C.S. v. Smith, 483 S.W.2d 790 (Mo. App. 1972).

Several cases have challenged agency procedures that make a parent's voluntary relinquishment of a child irrevocable, though adoption has not yet occurred. Perhaps the most famous recent challenge concerned the relinquishment of "Baby Lenore." See Foster, Adoption and Child Custody, 22 Buff. L. Rev. 1, 7-14 (1972).
public or private agencies have been voluntarily relinquished by their parents, either temporarily or permanently, without a hearing or judicial review of any sort.\textsuperscript{186} Judicial review of these relinquishments would ensure that the parents have been fully informed of their rights and have not been coerced into relinquishment by threats of financial or legal retribution.\textsuperscript{186}

**Physical Abuse.** Physical abuse provisions, unlike the abandonment provisions, suffer from several serious conceptual problems. First, the issue of where to draw the line between acceptable parental discipline and abuse must be faced. The parent or parents may admit causing the injury that triggered the court appearance but will object to state intervention on the ground that the action was a reasonable exercise of their power to discipline the child. Different philosophies of proper child discipline may clash in this situation. Some commentators have suggested that juries or similar citizens groups might offset class or cultural bias in these cases,\textsuperscript{187} but offsetting class or cultural bias is needed only if parental fault and the

\textsuperscript{185} Conversation with Sherill Rudy, Court Liaison of the Social Rehabilitation Administration of the Dep't of Human Resources for the District of Columbia, in Washington, D.C., April 16, 1974. See also California State Social Welfare Board, Report on Foster Care, Children Waiting (1972), cited in Mnookin, supra note 2, at 601 & n.4 (estimate of 50 percent for California); Polier & McDonald, The Family Court in an Urban Setting, in Helping the Battered Child and His Family 215 (1972) (similar figure for New York City).

\textsuperscript{186} The hearing could be modeled on the procedures applicable when a person charged with a crime makes a guilty plea. The protections would outweigh the emotional strain of the proceeding to the parent giving up his child. In addition, the hearing would alert the court to the fact that the child is in public custody and thereby increase the chance of future judicial supervision of what the agency does with the child.

\textsuperscript{187} Rodham recommends entrusting the evaluation of a child's needs and the intervention determinations to the discretion of boards representative of the family's community:

- Boards composed of citizens representing identifiable constituencies—racial, religious, ethnic, geographical—could make the initial decision regarding intervention or review judicial decisions. Additionally, they should be responsible for periodically reviewing placements and making recommendations about terminating parental rights. The board membership should include parent and professional representatives, perhaps children as well. Decisions to intervene and to terminate parental rights should require a three-fourths vote to overcome the presumption against intervention. Membership might be elected and should rotate often to avoid institutional classification.

Rodham, Children Under the Law, 43 Harv. Educ. Rev. 487, 514 (1973). Citizens' boards have been used in Scandinavia for some time. Specialists in child development in Denmark revealed that under their system, which relies almost totally on negotiation and never on coercion, the boards almost never remove children from their homes, even when they should, because the boards fear that removal will undermine the future negotiating power of the board. Conversations with Vidil Peterson, Danish Social Research Institute in Copenhagen, June 12, 1973 and with Ib Ydebo, Kontorchef of Copenhagen, June 13, 1973. Ultimately there may be something useful about the American system that interposes the court as the decision maker with coercive powers.
presence or absence of religious or philosophic justifications for the parental action constitute the bases for decisions. Principle one suggests that the decision to take jurisdiction should be based on whether the child is seriously injured physically or emotionally, and not on the blameworthiness of the parent.\textsuperscript{188}

The abuse area poses a second problem—the need for a standard that will allow intervention when there are no witnesses to a child beating and the child is unable or unwilling to testify against the parent. To meet this problem many jurisdictions have drafted standards based on the tort principle of res ipsa loquitur.\textsuperscript{189} While the application of a res ipsa standard probably is justified when a court is deciding whether it should assume jurisdiction, a court should not use res ipsa to determine the nature of intervention. The fact that a parent beat his child once does not necessarily mean he will do so again. Unless a repetition of the beating is probable,\textsuperscript{190} a court should not automatically remove the child from home. Other less drastic protective measures, such as homemaker services or child protective services, may suffice.\textsuperscript{191}

\textsuperscript{188} Bronfenbrenner in 1958 reported "[i]n matters of discipline, working class parents are consistently more likely to employ physical punishment, while middle-class families rely more on reasoning, isolation, appeals to guilt and other methods involving the threat of less love." Bronfenbrenner, \textit{Socialisation and Social Class Through Time and Space in Readings in Social Psychology} (E. Maccoby, T. Newcomb, & E. Hartley eds. 1958). A later study did not show this difference, however. \textit{See} Kohn, \textit{Social Class and Parent-Child Relationships}, 63 \textit{Am. J. of Soc.} 471 (1963). Efforts to compensate for imagined class differences may result in inadequate protection for certain children. \textit{See} Dumpson v. Daniel M., \textit{N.Y.L.J.}, Oct. 6, 1974, at 1 (parental discipline believed appropriate in Nigeria was nonetheless held excessive corporal punishment in New York).

\textsuperscript{189} \textit{IdaHO Code} § 16-1625(m) (Supp. 1974). Idaho defines an abused child as one who:

- exhibits evidence of skin bruising, bleeding, malnutrition, sexual molestation, lumps, burns, fractures of any bone, subdural hematomas, soft tissue swelling, failure to thrive or death, and such condition or death is not justifiably explained, or where the history given concerning such condition or death is at variance with the degree or type of such condition or death, or the circumstances indicate that such condition or death may not be the product of an accidental occurrence.

\textit{Id.}

\textsuperscript{190} Expert psychiatric testimony seems appropriate to the determination of whether repetition is probable. \textit{Cf.} Gill, supra note 172, at 12. Gill believed that "[a] child should be found to be emotionally neglected without a psychiatric or psychological evaluation of his emotional condition." \textit{Id.}

\textsuperscript{191} The application of res ipsa to find emotional neglect is even less valid. No presumption of emotional neglect can be drawn from proof of physical conditions. Three specialists in child development recently warned that "the problem is that some workers in the child care services have learned the lesson of environmental influence too well. Consequently, they view the child as a mere adjunct to the adult world, a passive recipient of parental impact. They tend to ignore that children interact with the environment on the basis of their individual innate characteristics. It is this interaction,
Technical Neglect. There are four types of technical neglect provisions, which predicate a neglect finding not on any proof of physical or emotional injury to the child, but on legal transgressions that are at best tangentially related to the condition of the child. In one type of provision, many states provide that a child who has been placed in unlicensed facilities may be declared neglected. Such provisions clearly are designed more to enforce state adoption or licensing statutes than to meet the needs of children. The conceptual clarity of the neglect statutes would be increased if more direct enforcement that did not burden the neglect process were provided.

A second type of technical neglect provision, currently in force in nine states, applies to children who require special medical or educational services because of physical or mental disability. Like the first type of technical neglect provision, this type apparently is a tool for the effectuation of another policy—aid to handicapped children. Again, the provision of direct relief would be preferable because it would reduce confusion in the neglect area, and would avoid the forcible removal of children and the attachment of stigma to the family where only financial aid instead of separation is needed.

not mere response, which accounts for the countless variations in character and personality.” J. GoLSTEIn, A. FREUD, & A. SOLNIT, supra note 9, at 10-11.

Even in physical abuse cases, the res ipsa doctrine has been confused with the so-called battered child syndrome. Some lawyers and judges have come to view the syndrome as a tangible disease. One judge reportedly refused to find two injured siblings to be abused because he knew that a parent with the battered child syndrome beats only one child at a time. See generally Gelles, Child Abuse as Psychopathology, 43 Am. J. ORTHOPSychATRY 611 (1973) (critique of child abuse syndrome).


193. See Alaska Stat. § 47.10.010(9) (1971); Conn. Gen. Stat. Ann. § 17-53. (Supp. 1974); Iowa Code § 232.2(14)(b) (1971); Minn. Stat. § 260.015, subd. 10(d) (Supp. 1974); Miss. Code Ann. § 43-21-5(h) (1973); Neb. Rev. Stat. § 43-201(3)(d) (1974); Ohio Rev. Code Ann. § 2151.03(D) (Page Supp. 1974); Okla. Stat. Ann. tit. 10, § 1101(d) (Supp. 1974); Wis. Stat. Ann. § 48.13(1)(e) (1957). Alaska, for example, authorizes the judiciary to declare any child who “is in need of special care or training” neglected. Alaska Stat. § 47.10.010(9) (1971); cf. Conn. Gen. Stat. Ann. § 17-53 (Supp. 1974) (a deprived child is one “whose home is a suitable one for him save for the financial inability of his parent or guardian or other person maintaining such home, to provide the specialized care his condition requires”). Minnesota’s provision differs from Alaska’s in that it requires a showing that the parent has “neglected” or “refused” to provide the special care made necessary by the physical or mental condition of the child. Minn. Stat. § 260.015, subd. 10(d) (Supp. 1974). The Minnesota provision, therefore, actually is a special example of the general neglect provisions which require “proper” parental care. The fact that the legislature listed this provision separately illustrates the extent to which many neglect statutes focus more on parental fault than the needs of the child. If the focus were on the child, by contrast, proper parental care presumably would be measured in terms of the special needs of children, so that a separate provision like that of Minnesota would be redundant.
A third variety of technical neglect provisions applies to children who commit delinquent or unruly acts. Declaring such children neglected rather than delinquent or unruly may subject them to less punitive treatment, but this label change may not be in the best interests of children who are truly neglected; one consequence may be a commingling of neglected children with delinquents. This commingling not only may harm the neglected children directly but also may result in the spread of the stigma that attaches to delinquent children to neglected children. This stigma, in turn, may lead to harsher treatment of all neglected children by police, social workers or judges. Similarly, unruly child statutes have been criticized because state intervention often does not decrease, but rather encourages delinquent behavior through the exposure of young offenders to older, more experienced lawbreakers. Unruly child statutes have been criticized on many grounds. The practice of state intervention designed to correct the deviant behavior of juveniles who have not yet committed a crime, therefore, must not be allowed to slip in the back door disguised as a neglect intervention.

A final category of technical neglect provisions relates to the enforcement of state child labor provisions. In South Dakota, for example, playing music on the street was grounds for being declared neglected until 1968. Like the illegal placement provisions, the child labor neglect provisions should be eliminated, and direct enforcement against employers should be instituted. Child labor provisions should not distort the already troubled neglect procedure.

General Neglect. Three types of general neglect provisions deserve special comment: those that authorize intervention because the family is poor, those that authorize intervention because of “immoral” or “depraved” behavior by the parent or child, and those that focus solely on the “environment” or “surroundings” of the child. All three types violate principle one, and they may violate state or federal constitutional standards, yet they remain surprisingly widespread.


195. See Note, supra note 130, at 1397-1402.


197. S.D. Compiled Laws Ann. § 26-8-6(a) (1967), repealed, id. § 26-8-6 (Supp. 1974).

198. See notes 218-29 infra and accompanying text.
Sixteen states still allow poverty to be an explicit basis for declaring a child neglected.\footnote{199} The word poverty is rarely used, however; "destitution" is the favored phrase.\footnote{200} A few statutes list begging for alms as the catalyst for state intervention, as if this were sixteenth century England.\footnote{201} In addition, fourteen states indirectly authorize intervention on the basis of family poverty because they list failure to provide support, education, or medical care as a basis for a neglect finding and do not provide that lack of financial means may serve as a defense to any state intervention or to removal of the child.\footnote{202}

Sixteen states allow parental "immorality" to trigger a neglect finding.\footnote{203} Finally, thirty-one states link an unfit "environment" or "surroundings" to neglect declarations.\footnote{204}

\begin{enumerate}


\item \footnote{201} See, e.g., Ala. Code tit. 13, § 350(2) \footnote{198} (1958).


A fourth category of general neglect provisions are statutes focusing on the emotional or physical needs of children. Unfortunately such provisions often use terms, such as “failure to thrive,” that have technical meanings understood by certain professionals but not by the average parent or lawyer.205 Other terms, such as “emotional health,” mean as little to professionals as they mean to lay persons. Consequently, some commentators and judges have argued that the neglect process should not extend to emotional dangers, or have tried to find principles in the law to chart judicial decisions in such cases.206 Courts have not had a very sophisticated understanding of the needs of children, however, and have paid little attention to their emotional needs.207 Case law therefore is not a fruitful source for guidelines.
and the aid of knowledgeable professionals from related disciplines—social workers, psychologists, psychiatrists, and therapists—should be sought to identify characteristics that will describe emotional injury or potential for future injury. Their involvement in the process of developing more precise terms in turn should provide these professionals with guidance on the law and the factors relevant in neglect proceedings so they can prepare more useful testimony for the courts on the issues of whether and how to intervene.

2. Current Intervention Practice. Separation of a child from his parents is the most common result of a declaration that a child is neglected. In most states, statutes authorize other dispositions, but courts generally avoid these alternatives, either because the fear of the publicity which might result if a child is returned and injured outweighs concern about the drawbacks of removal, or because resources to protect the child if removal is not effected are not available. In addition, when separation is effected, present legal standards often block permanent placement, the preferred disposition where no suitable arrangement in the child's own home can be devised. They block permanent placement because they require the consent of the natural parents before a child may be placed for adoption. Unfortunately, some parents who are unwilling to assume the care of their own children also are unwilling to consent to their adoption; other parents cannot be located.

States have devised three ways to overcome these problems. Thirty states provide that parental consent can be waived at the adoption hearing if the child has been abandoned, or if such a waiver appears to be in the best interests of the child. Eleven provide that all parental rights, including the power to veto adoption, may be ter-

208. See Tamilia, Neglect Proceedings and the Conflict Between Law and Social Work, 9 Duquesne L. Rev. 579, 586 (1971). Tamilia argued: "Lawyers must become aware that the psychology of normal and abnormal child development is the only adequate source of a viable concept of legal neglect that can be sustained in court." Id. at 587.
209. See notes 2, 8 supra and accompanying text.
210. See Burt, supra note 10, at 1274 (discussion of reaction to the murder of three year old Roxanne Felumero, which occurred after she was returned home by a family court judge).
minated at the hearing in which a child is declared to be neglected.212 A third group of states provides for a separate hearing on the issue of terminating parental rights, which may be called only after a child has been declared neglected and placed temporarily in the custody of the state.213

Waiving the requirement of parental consent at the adoption hearing generally is not a very satisfactory approach. Most prospective adoptive parents are understandably reluctant to proceed as far as the adoption hearing without a prior guarantee that the child will be declared eligible for adoption. Moreover, many agencies believe it best to keep the natural and adoptive parents from meeting so the parents can preserve their privacy.214 If termination and adoption occur at the same hearing, a meeting of the parents is usually inevitable. Finally, having the prospective adoptive parents at the hearing on consent may weight the balance against the natural parents by encouraging the court to use the more lenient best interests test instead of the parental unfitness test, which is more appropriate in this context.215

§ 60.6 (Supp. 1974); R.I. GEN. LAWS ANN. § 15-7-7 (Supp. 1973); S.D. COMPIL. LAWS ANN. § 25-6-4 (1967); id. (Supp. 1974); TEX. FAMILY CODE § 16.05(d) (1973); VT. STAT. ANN. tit. 15, § 455 (Supp. 1972); VA. CODE ANN. § 63.351. (Supp. 1973); WASH. REV. CODE ANN. § 13.04.110 (1962); WIS. STAT. ANN. § 48.85 (Supp. 1973); WYO. STAT. ANN. § 1-709 (Supp. 1973).


214. See Gordon, supra note 158, at 230.

215. See id. at 229. This article of course takes the position that the traditional parental unfitness test used in neglect proceedings should be replaced with a standard that is both more child-focused and designed to enhance family ties when possible. This proposed standard is not the equivalent of the traditional best interests standard. The traditional best interests test is appropriate only when a change of custody is inevitable, as when a divorce occurs, and the determination must be of which parent is "best."
Providing for termination of parental rights at the initial neglect hearing seems equally unsatisfactory in most cases. Judges are understandably reluctant to cut off all possibility of reunion of the child with his natural family at that early stage, since temporary placement and the provision of supportive and therapeutic services to the family may alleviate the causes of neglect and abuse. An increasing number of states, therefore, have recognized that the preferable approach is to provide for termination of parental power to consent to adoption subsequent to the neglect finding but prior to the adoption hearing. 

Unfortunately, not all states use the same standards to justify a finding of neglect as to terminate parental rights. Consequently, many children are unnecessarily consigned to spending years in one foster care setting after another.

C. A CONSTITUTIONAL CAVEAT

While this article has critiqued present neglect statutes primarily in terms of their failure to implement the generally accepted goals of the neglect process, some of the statutes also may be subject to constitutional challenge on at least three grounds. First, statutory provisions that make poverty a basis for state intervention between parent and child may violate the equal protection clause. In San Antonio Independent School District v. Rodriguez Justice Powell stressed two characteristics that a group discriminated against on the basis of poverty must possess if its classification is to be deemed suspect: lack of resources must have made the members of the group unable to pay for some deserved benefit, and they must have sustained as a consequence an absolute deprivation of a meaningful opportunity to enjoy that benefit. Poverty intervention provisions authorize, at

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216. See note 213 supra. When a child is already living with the prospective adoptive parents, however, as when a child has been placed in foster care after a finding of neglect and the foster parents wish to adopt, the reasons for terminating parental rights prior to the beginning of the adoption process no longer exist. Indeed, it might violate the best interests standard to seek a termination in such a case if the foster parents are not already approved to adopt, since termination will probably cause an additional change of placement for the child who might otherwise remain with the foster parents. Yet, in the District of Columbia, the Social Rehabilitation Agency will not investigate adoptive homes for a child until termination is completed. Conversation with Wallace Mlyniec, Co-Director, Georgetown Juvenile Justice Clinic, in Washington, D.C., Feb. 14, 1975.


219. Id. at 20. The Court in Rodriguez declined to hold the challenged Texas school finance statutes unconstitutional because the deprivation was not total even if the statutes discriminated against the poor. The poor were not being denied schooling entirely, although their schools might have been less adequate. Id. at 23-24.
least in cases which end in termination of parental rights, the absolute loss of children because of family poverty and thus may deprive poor parents of equal protection of the law. Even if such provisions do not involve a suspect classification, the parent-child relationship might be labeled a fundamental interest, and the state would be forced to show a compelling governmental interest for its statutory scheme. Whether a suspect classification or a fundamental interest is involved, the statutory provisions could fail the strict scrutiny test. Alternatively, if the renovated rational basis test is applied, judicial scrutiny may well overturn the legislative decision to equate poverty with neglect, particularly because a less drastic alternative is available.

Second, provisions that focus exclusively on parental characteristics, whether poverty or immorality, may violate the due process clause because they establish an irrebuttable presumption that possession of the characteristic is equivalent to neglect. In Stanley v. Illinois the Supreme Court invalidated a state statute that in effect established a presumption that all unwed fathers were unfit parents. The Court in Stanley underscored the importance of parental rights:

The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection. It is plain that the interest of a parent in the care, custody and management of his or her children come[s] to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements. [citation omitted] The Court has frequently emphasized the importance of the family. The rights to conceive and to raise one’s children have been deemed essential.

The Court acknowledged the power of Illinois to separate neglectful parents from their children, but objected that the presumption involved in the case might separate fit parents from their children. The Court added that even if a majority of unwed fathers were in fact unfit, a presumption that all were unfit was unconstitutional.

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220. See note 20 supra. But see San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (fundamental rights are only those guaranteed explicitly or implicitly by Constitution).
222. See note 167 supra and accompanying text.
223. 405 U.S. 645 (1972).
224. Id. at 651.
225. Id. at 652.
Similarly, a statute which equates parental immorality and neglect apparently ignores the determinative issues of competence and care and therefore has no rational foundation.

Finally, the parental immorality neglect provisions may be unconstitutionally vague. In *Papachristou v. City of Jacksonville* 227 the Supreme Court invalidated a Jacksonville, Florida ordinance which declared that "rogues, vagabonds, lewd, wanton and lascivious persons [and] persons habitually spending their time by frequenting houses of ill fame, gaming houses or places where alcoholic beverages are sold," among others, were vagrants and therefore subject to 90 days imprisonment or a $500 fine or both.228 If such labels as "lewd," "lascivious" or "wanton" are too vague a standard for the imposition of a $500 fine, surely they are also too vague a standard for losing one's children.229

IV. TOWARD A MODEL NEGLECT STATUTE

The following provisions are presented to illustrate an approach to the implementation of the three principles developed and discussed in preceding sections. The provisions do not constitute a complete model statute because, for example, they do not cover such procedural matters as emergency custody procedures, rights to counsel, burdens of proof, and evidentiary standards. Hopefully, however, they will encourage and stimulate others to consider solutions that balance the interests of child, parent, and state in modern neglect proceedings.

Section 1. Definitions.

(A) An "abused" child is one whose parent, guardian, or primary caretaker inflicts serious physical injuries upon such child; or who is seriously physically injured while in the care of his parent, guardian,

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227. 405 U.S. 156 (1972).
228. *Id.* at 162.
229. *But see In re Cager*, 251 Md. 473, 481, 488 A.2d 384, 389 (1986); Guardianship of Minor, 298 N.E.2d 890 (Mass. App. 1973) (statute which permits appointment of guardian if mother is found to be unfit held constitutional); State v. McMaster, 486 P.2d 567, 571 (Ore. 1971); *In re Black*, 3 Utah 2d 315, 333, 283 P.2d 887, 900 (1955). In *Guardianship of Minor* the court explained:
The unfit standard has been in our laws since 1873. . . . Through the process of judicial decision making, the standard has been defined with as much precision as the subject is capable of. . . . Violence of temper, indifference or vacillation of feelings toward the child, or inability or indisposition to control unpainful traits of character or conduct, might constitute unfitness. So, also, incapacity to appreciate and perform the obligations resting upon parents might render them unfit, apart from moral defects.
298 N.E.2d at 892-93. While the court was correct in deciding that absolute precision cannot be achieved in neglect statutes, adherence to principle one would go far to eliminate vagueness in such statutes.
or primary caretaker and the explanation provided is at variance with the type or degree of injury.

(B) A "neglected" child is one whose physical or emotional health is significantly impaired, or is in danger of being significantly impaired, as a result of the action or inaction of his parent, guardian, or primary caretaker.

(C) An "abandoned" child is one whose parents or guardians are not identifiable, or, if known, have made no reasonable effort to care for or to arrange adequate substitute care for the child for a period of six months or more, and who fail to appear at the hearing provided for in section 3.

Commentary

The definition proposed for neglect is broad enough to cover emotional as well as physical injury to a child, as long as the injury is serious. The full parens patriae role of the state thus may be fulfilled but will not be invoked for trivial injuries. While the abuse definition logically might be subsumed within the definition of neglect, a separate label was adopted for abuse in order to make use of the res ipsa loquitur presumption, applicable in cases of physical injury. In addition, a separate provision may be needed so that reporting of abuse may be made mandatory, in order to protect children from clear physical danger, while the reporting of neglect is made discretionary because of its more subjective nature. Without such a distinction police might be overwhelmed with complaints based on nothing more than philosophic disagreements about how children should be reared.

In the future it may be possible to provide more descriptive content to the phrase "emotional health." Professor Michael Wald, for example, has proposed that intervention be authorized only when emotional damage is "evidenced by severe anxiety, depression or withdrawal, or unfoward aggressive behavior or hostility towards others." Until the experts in child behavior reach greater consensus, however, a general phrase is most appropriate. Expert testimony in court or legislative hearings should in time provide a suitable list of signs and symptoms. Until that occurs, legislatures should adopt a statute that will at least focus the attention of both experts and lay decisionmakers on the condition of the child rather than on parental fault. Failure to provide appropriate treatment could constitute inaction within the meaning of the statute so that in emotional neglect cases intervention

would be permissible either when parental action demonstrably caused the emotional problem, or when parents refused to obtain treatment.

Section 2. Intervention Hearing.

A family may be declared “in need of intervention” if any minor child in the family is found to be “abused” or “neglected,” as defined in section 1, after a full court hearing.

Commentary

The decision to intervene under this section is permissive rather than mandatory so the court, in keeping with its interest in preserving family autonomy, may decide against any state intervention even though a child is abused or neglected. In making its decision, the court should balance the benefits of available disposition alternatives against the costs of intervention. If the benefits of homemaker services would outweigh costs, for example, but homemaker services were in fact not presently available, the court should not authorize intervention unless the benefits of some available disposition also would outweigh costs. Cost assessment should include consideration of both the financial costs incurred by the state and the stigma or disruption costs borne by the family. While the judge at this stage would not need to make a final selection of disposition, family autonomy would be honored if no existing disposition were preferable to the status quo. This practice would contrast with the present practice in which a court declares a child neglected without first considering the available public alternatives.

If intervention is to be undertaken, the label attaches to the family rather than to the child. This should serve as a reminder to all participants, including the court and social workers, that the decision involves an entire family, not just one child. Moreover, if they conceive of an intervention decision as the Jones family case rather than as In re Johnny Jones, social workers should become more sensitive and responsive to the entire family system and thereby more likely to strengthen family bonds where appropriate.

The decision of whether or how to intervene is vested in a judge rather than in a panel of “experts” because the behavioral sciences are not developed to the point that an assessment of good parenting is a technical decision. Judges are free to gather expert advice, of course, but in the end the decision seems best left in the hands of someone who is trained in factfinding rather than of someone who believes he has special knowledge of the traits of a good parent. The use of juries might in some communities offset the class or cultural bias of judges, but in general juries are unlikely to be any more sympathetic to the child rearing philosophy of families charged with neglect or
abuse, and they may well be less informed about the range of disposi-
tions. Because a decision to intervene should involve consideration
of the consequences of potential dispositions, the decision on balance
seems best left in the hands of the court.

Section 3. Abandonment and Voluntary Relinquishments.

(A) Within thirty days after a child alleged to be abandoned comes
into the custody of the local social service agency, the agency must
demonstrate to the satisfaction of the court that the child in fact is
abandoned.

(B) Within thirty days after any child more than one month of
age is voluntarily relinquished to the custody of the agency, the
agency must demonstrate to the satisfaction of the court that the
relinquishment was knowing and voluntary.

Commentary

The one month exception of section (B), included to avoid inter-
fering with existing relinquishment procedures established for pregnant
women who decide to give up their children at birth, is premised on
the theory that a decision not to be a parent from the beginning is
distinguishable from a decision to stop being a parent at a later time.
The reasons against a court appearance may be more compelling in
such cases. For other relinquishments, however, this statute requires
a hearing to confirm that the relinquishment was voluntary rather
than coerced by fear of welfare cutoffs or even by fear of a court
proceeding. Similarly, courts will review abandonment cases to assess
the diligence of efforts to locate missing parents or the extent of the
failure of the parents, if known, to provide care. If the parent, guard-
ian, or primary caretaker appears at the section 3 hearing, however,
a child cannot be declared abandoned, although he might otherwise
fit the standards for a finding of neglect.

Section 4. Dispositions.

(A) When a family is found to be in need of intervention pursuant
to section 2 of this Act, the court shall fashion an order providing to
the family whatever available social services appear necessary to
alleviate the conditions which precipitated the intervention, including,
but not limited to:

(1) day care services;
(2) individual, group or family therapy;
(3) homemaker services; and
(4) counseling designed to inform the family fully about (a)
available services both public and private, (b) how to make
arrangements to receive them, and (c) the scope of the court order.

(B) Only if

(1) the services provided in subsection (A) do not within a reasonable time adequately reduce the probability of further neglect or abuse, or

(2) there is no other way to protect the child from the risk of serious physical injury,

shall the child be placed in the care of a suitable relative, or if no suitable relative is available, in foster care. If siblings are removed, they should be placed together whenever possible.

Commentary

This section is designed to discourage removal of the child when less intrusive measures might suffice. The provision of counseling services to explain, among other things, the entire process to the families might itself serve as a critical first step toward reunion, even when removal is at least temporarily necessary. Services are to be provided to the entire family; accordingly, if day care for a younger sibling of an abused child will lessen family tension enough to reduce the probability of future abuse, such care may be provided. If removal is required, both extended family and sibling ties are to be preserved whenever possible.

Section 5. Planning.

Once services are provided to a family pursuant to section 4(A), or a child is placed with a relative or in foster care pursuant to section 4(B) or section 3, the social service agency shall within one month devise a plan, which may be amended when circumstances require, for helping the family end the abuse or neglect or, in the case of placement, for reuniting the child with his family.

Commentary

A major objection frequently made to the present procedures for delivery of social services is their lack of coherence, direction, or sensitivity to individual situations. This section is intended to stimulate not only the agency, but the court, to work toward a more final solution for a neglected child than is provided by endless renewals of “temporary” placements.

Section 6. Progress Reports.

Every three months a progress report on all relevant members of the family and the progress being made toward the goals of the section
5 social service plan as amended shall be submitted to the court by the social service agency.

Commentary

These reports will keep the court informed, and should remind the agency to consider the progress that all family members are making toward the plan goals.

Section 7. Transfer of Power to Consent to Adoption.

(A) In the case of an abandoned child the power to consent to adoption shall vest in the state at the abandonment hearing.

(B) The power to consent to adoption in the case of a child who is voluntarily relinquished or involuntarily placed in foster care pursuant to section 4(B) of this Act shall vest in the state after a full court hearing, which must occur within six months after such placement if the child is two years of age or less, or within one year if the child is over two years of age unless a reasonable probability that the child will be reunited with his natural parents within a reasonable time is demonstrated to the court. The agency shall report at this hearing on all efforts it has made to reunite the original family unit.

Commentary

Section 7 is designed to implement principle three. The selection of the periods of six months and one year was based on current studies of the damage caused by the separation of children from their parents. These periods are considered most likely to strike an appropriate balance between the interests of the child and his parents. It seems unwise to draft a statute providing only a "reasonable" time limit, in view of the clearly demonstrated reluctance of agencies and courts to hold hearings to terminate parental rights. The term "transfer of power to consent to adoption" is used in lieu of "termination of parental rights" to acknowledge on the one hand that some important parental rights such as custody have already been terminated, and on the other hand that the emotional ties need not be severed. Even if a child is adopted, for example, the biological parents may still be able to visit and thus become almost an extended family for the child.

Section 8.

Once the power to consent to adoption has vested in the state, the agency shall be responsible for seeking prompt adoptive placement of the child and shall report to the court every three months on its progress.

Commentary

This section is intended to ensure that children are not left in the limbo of foster care after parental rights have been terminated.