CHILD NEGLECT: THE ENVIRONMENTAL ASPECTS

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The author criticizes the vague statutes governing child neglect trials and the simultaneous delegation of power to the judiciary which allows the courts to impose their individual notions of child care and morality on parents. He suggests an alternative approach to neglect cases which focuses on the casual relationship between parental behavior and harm to the child and gives weight to the rights of parents. He concludes that significant progress is not probable until careful legislation materializes and the courts supplement it with other professional assistance.

In the exercise of the parens patriae power, every state in the union has enacted statutes designed to protect neglected children.[1]

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[1] These are sometimes called "dependency" statutes, a term frequently used as a synonym for "neglect." When a state has statutes defining both terms, the dependency sections usually deal with nonculpable parental behavior, as when a child is medically neglected because of the parent's poverty.

The following sections of statutes define the terms "dependent" and "neglected" child either directly or by setting out the jurisdiction of the juvenile courts:

ALA. CODE tit. 13, § 350 (1959); ALASKA STAT. § 47.10.010 (1962); ARIZ. REV. STAT. ANN. § 8-201 (1956); ARK. STAT. ANN. § 45-203 (Supp. 1965); CAL. WELFARE & INST'NS CODE § 600 (West 1966) (jurisdiction); COL. REV. STAT. ANN. § 22-1-1 (1963); CONN. GEN. STAT. ANN. § 17-53 (1960); DEL. CODE ANN. tit. 10, § 1101 (1953); D.C. CODE ANN. § 11-906 (1961) (jurisdiction); FLA. STAT. ANN. § 39.01 (1961); GA. CODE ANN. § 24-2408 (1959) (jurisdiction); REV. LAWS HAWAII § 333-8 (Supp. 1965); IDAHO CODE ANN. § 16-1625 -26 (Supp. 1967) (jurisdiction); ILL. ANN. STAT. ch. 23, § 2001 (Smith-Hurd Supp. 1966); IND. ANN. STAT. § 9-3206 (1956); IOWA CODE ANN. § 232.2 (Supp. 1966); KAN. STAT. ANN. § 38-802 (Supp. 1965); KY. REV. STAT. ANN. § 199.011 (1963); LA. REV. STAT. § 13:1570 (1951); ME. REV. STAT. ANN. ch. 22, § 3792 (1964) (jurisdiction); MD. ANN. CODE art. 26, § 52 (1966); MASS. ANN. LAWS ch. 119, § 24 (1965) (jurisdiction); MICH. STAT. ANN. § 27.3178 (598.2) (1962) (jurisdiction); MINN. STAT. ANN. § 260.015 (Supp. 1966); MISS. CODE ANN. § 7185-02 (Supp. 1942); MO. ANN. STAT. § 211.031 (1962) (jurisdiction); MONT. REV. CODE ANN. § 10-501 (1957); NEB. REV. STAT. § 43-201 (1960); NEV. REV. STAT. § 62.040 (1963) (jurisdiction); N. H. REV. STAT. ANN. § 169:2 (1964); N.J. STAT. ANN. § 9:6-1 (1960); N.M. STAT. ANN. § 13-9-2 (1953); N.Y. FAMILY CT. ACT § 312, N.Y. SOC. WELFARE LAW § 371; N.C. GEN. STAT. § § 110-21, 110-39 (1966); N.D. CENT. CODE § 27-16-08 (1960) (jurisdiction); OHIO REV. CODE ANN. §§ 2151.03, .05 (1954); OKLA. STAT. ANN. tit. 10, § 101 (1966); ORE. REV. STAT. § 419. 476 (1965) (jurisdiction); PA. STAT. ANN. tit. 11, § 243 (1965); R.I. GEN. LAWS ANN. § 14-1-3 (1956); S.C. CODE ANN. § § 15-1103; 15-1334 (1962); S.D. CODE § 43.0301 (1939); TENN. CODE ANN. 37-242 (Supp. 1966); TEX. REV. CIV. STAT. ANN. art. 2330 (1964); UTAH CODE ANN. § 55-10-64 (Supp. 1967); VT. STAT. ANN. tit. 33, § 602 (Supp. 1967); VA. CODE ANN. § 16.1-158

Once a court finds that a child comes within the statutory definition of a "neglected child," its jurisdiction attaches for the duration of the child's minority and the court has power to issue orders to the child's parents or to take physical custody of the child temporarily or until he reaches majority.[2] In some states a finding of neglect may also be a basis for criminal prosecution of the parents[3] or for a complete termination of parental rights.[4]

In all of these neglect statutes the legislatures, through the use of extremely broad and vague phraseology in the definitional sections, have almost completely delegated to the judiciary the power to determine its jurisdiction over allegedly neglected children. Typical provisions define a neglected child as one who has not "proper care" or "proper parental care,"[5] "whose parent fails to provide other care necessary for his well being,"[6] "whose home is unfit by reason of neglect, cruelty or depravity,"[7] "who lacks proper

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(1960) (jurisdiction); WASH. REV. CODE § 13.04.010 (1962); W. VA. CODE ANN. § 49-1-3 (1966); WIS. STAT. ANN. § 48.13 (Supp. 1967); and WYO. STAT. ANN. § 14-40 (1965).

[2] *See, e.g.*, ALA. CODE tit. 13, § 351 (1959); ARIZ. REV. STAT. ANN. § 8-231 (Supp. 1967); ARK. STAT. ANN. § 45-221 (1964); CONN. GEN. STAT. ANN. § 17-68 (1960).

[3] *See* Levy, *Criminal Liability for the Punishment of Children: An Evaluation of Means and Ends*, 43 J. CRIM. L.C. & P.S. 719 (1953). *See, e.g.*, ARK. STAT. ANN. § 41-1105 (1964); N.J. STAT. ANN. § 9:6-3 (1960); VT. STAT. ANN. tit. 13 § 1303 (1958).

[4] *See* Simpson, *The Unfit Parent: Conditions Under Which a Child May be Adopted Without the Consent of His Parent*, 39 U. DET. L. J. 347, 361 (1961). *See, e.g.*, CAL. CIVIL CODE § 323 (b) (Supp. 1966); CONN. GEN. STAT. ANN. § 17-43a (1960).

[5] There are no explicit requirements as to the cause or effect in Alabama, Arkansas, Colorado, Florida, Hawaii, Indiana, Iowa, Kansas, Louisiana, Maryland, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, West Virginia, Utah, Virginia and Wyoming. In some states, a vague cause for the lack of care must be shown; for example, "by reason of the faults or habits of his parents" is the rule in Alaska, Minnesota, Nebraska, Ohio, Pennsylvania, Utah, and Wisconsin. In other states, an effect of the lack of care must be shown, such as endangering the welfare of the child or others, or that the child is supported by or is in the custody of a state agency as the result of the lack of care. (Arkansas, Colorado, Florida, Idaho, and Kansas.)

[6] Alabama, Arizona, Arkansas, Delaware, District of Columbia (welfare, not well being), Florida, Georgia, Idaho, Illinois, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, Tennessee, Utah, Virginia, and Wisconsin.

[7] Alabama, California, Colorado, Connecticut, Florida, Hawaii, Indiana, Iowa, Michigan, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, Vermont, Washington, and West Virginia.

attention,"[8] or who is "neglected."[9] Iowa declares that a child is neglected "who is living under such other unfit surroundings as bring such child, in the opinion of the court, within the spirit of this chapter." Many other states compound ambiguities by including more than one extremely broad provision in the statutory definition.

This broad delegation has been applauded because of the need for flexibility in this area of law and because of the wide range of consequences a given form of parental misconduct can have on different children in different environments.[10] Moreover, a search of the cases reveals no judicial acceptance of constitutional challenges on a void-for-vagueness theory.[11] Still, serious problems are raised if clear standards are not enunciated. Trial judges with disparate viewpoints may be given license to impose their theories of child rearing and causation on the community and to implement these theories with a great freedom of disposition in the individual case. These problems are accentuated by the lack of instruction from appellate courts and meager outside assistance. Only a small proportion of the cases are appealed or otherwise reach the reports;[12] in those that do, there is relatively little articulation and supervision of standards which are applied. Furthermore, in most states neglect cases are tried without a jury,[13] a body which might be responsive to a wider range of norms bearing on child-rearing than would a single judge.

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[8] Massachusetts.

[9] North Carolina (neglected being undefined).

[10] *See* Gill, *The Legal Nature of Neglect*, 6 N.P.P.A.J. 1, 5-6 (1960).

[11] In *In re* Black, 3 Utah 2d 315, 283 P.2d 887 (1955), the court summarily dismissed appellant's contention that the neglect statute was unconstitutional in that it was vague and uncertain, saying that there was no merit to this complaint. *Id.* at 900. *But see* the judicial impatience manifested in People v. Chiafreddo, 381 Ill. 214, 44 N.E.2d 888 (1942), a criminal case in which defendant was charged with contributing to the dependency and neglect of a child. The court held that an indictment charging "failure to give proper parental care and guardianship" was wholly insufficient because of lack of specificity. It then refused to judge the propriety of the parental act in question.

[12] Financially disadvantaged parents are not likely to appeal a lower court decision because of the cost involved. In a study of neglect referrals in the Minneapolis-St. Paul area over a two month period, Boehm found that "the preponderance of the families referred for neglect came from the lower socio-economic strata of the community . . . ." While three % of the total population of the area received public assistance, 42% of the referral families did. Boehm, *The Community and the Social Agency Define Neglect*, 43 CHILD WELFARE 453 (1964).

[13] Nomikun, Problems of the American Juvenile Court 77, 1964 (unpublished dissertation on file in the University of Chicago Law Library).

This article will discuss some of the problems raised by the broad delegation, particularly focusing on that less settled and expanding area of the law of neglect which may be termed "environmental neglect."[14] This phrase may be defined as parental[15] condition, action or inaction, which adversely affects the child's mind, morals, or mores. Adjudications in this area are a response to the policy question of the extent to which the state should control the psychological environment in which a child matures. A considered answer to this question is vitally important[16] in a nation which takes seriously both the strength of the parental relationship and the welfare of children. For purposes of analysis, five particular classes of environmental neglect will be discussed separately in light of a theory proposed in this section dealing with parental nonconformity. These classes are parental nonconformity, failure to discipline, excessive discipline and cruelty, parental immorality, and mentally disturbing parental conduct.

I. Judicial Treatment of Parental Nonconformity as Neglect

Society has always found it difficult to accommodate itself to the dissenter, and the religious dissenter particularly evokes strong feelings. Thus it is not surprising to find that most of the neglect cases involving parental nonconformity deal with parents who hold unpopular religious persuasions. In the first part of this century neglect statutes were not used to "protect" children from religious ideas which ran counter to the prevailing mores.[17] In the last two decades, however, an increasing intolerance of religious fanaticism

[14] This type of neglect may be contrasted with the more settled areas such as physical, medical, educational, and financial neglect in which the state has a strong and justifiable interest and a long history of intervention. There the interest of the state in having its future citizens educated and in having them live in reasonably fit physical condition provides the court with a fairly well-defined objective standard in determining whether neglect exists.

[15] "Parent," as used in connection with neglect theories or statutes shall mean: parent, guardian or other person in whose care the child may be.

[16] In 1950 over a quarter of a million children were in institutions or foster homes as a result of a finding of neglect or dependency. Simpson, *The Unfit Parent: Conditions Under Which A Child May Be Adopted Without the Consent of His Parent*, 39 U. Det. L.J. 347, 392 n. 302 (1961). In 1957 there were over 115,000 dependency or neglect cases before the court. Juvenile Court Statistics—1957, U. S. Children's Bureau, Statistical Series, No. 52 (1959).

[17] *See* Lindsay v. Lindsay, 257 Ill. 328, 100 N.E. 892 (1913), which held that a 12 year old boy was not dependent and that his mother was not an improper guardian because she was an ardent member of the Mazdaznan religious society and allowed the boy to travel with another member who wrote a religious book which "certainly cannot be commended for perusal by any one." *In re* Sisson, 152 Misc. 806, 274 N.Y.S. 857

has been manifested in neglect law[18] and many findings of neglect have been predicated on parental action flowing from unpopular church teaching. This may be brought out by reference to three fairly recent cases.

In *In re Watson*[19] three children were declared neglected because their mother was "incapable by reason of her emotional status, her mental condition and her allegedly deeply religious (?) feelings amounting to fanaticism to properly care, provide and look after these children."[20] The mother in the case was a follower of a self-anointed prophet claiming Godhood. In performing her religious obligations, she left the children unsupervised for a portion of the day, took them to religious banquets nightly from 6:00 to 9:30 p.m. and planned to place them in some sort of communal living establishment. In finding the children neglected, the court discussed at length the children's lack of basis for an ability to adjust "to the conventions and the mores of the community in which they are to live."[21] It also emphasized the obligation of the parent to help the child develop into a community-respecting human being.

Hunter v. Powers[22] involved a ten year old child whose mother, an ardent Jehovah's Witness, left the child alone while she attended

(Child Ct. 1934), held that an eight year old girl was not neglected whose father inculcated the Megiddo religion, objecting to radio listening and other pleasures, requiring that all clothing cover limbs, enforcing the study and memorization of religious texts, and forbidding laughter. The case demonstrates that parentally imposed religious restrictions on a child's daily activity was not actionable.

[18] This shortage of patience may be reflected indirectly in the rather strict application of educational neglect provisions in statutes to children of religious nonconformists. The court in *In re* Currence, 42 Misc. 2d 418, 248 N.Y.S.2d 251 (Fam. Ct. 1963), found neglected a child who was kept out of school from Wednesday noon to Thursday noon to observe the sabbath of his parent's sect. *See* State v. Lefebvre, 91 N.H. 382, 20 A.2d 185 (1941), reversing a lower court ruling that three children were neglected who were suspended from school for failing to salute the flag for religious reasons. *Compare In re* Skipwith, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Dom. Rel. Ct. 1958), which held that a political dissentor's withdrawal of his child from school because of de facto segregation was not unlawful and that the child was not neglected because of the withdrawal.

[19] 95 N.Y.S.2d 798 (Dom. Rel. Ct. 1950).

[20] *Id.* at 799. The opinion cites no evidence of mental disturbance other than this religious fanaticism.

[21] *Id.* at 799.

[22] 206 Misc. 784, 135 N.Y.S.2d 371 (Dom. Rel. Ct. 1954). The *Hunter* Court seemed little affected by a higher court ruling two years previous, People *ex. rel.* Portnoy v. Strasser, 303 N.Y. 539, 104 N.E.2d 895 (1952), held that religious training was within the parent's sole control and that there could be no finding of neglect based on the mother's alleged activities in Communist front organizations unless there was a showing that this in some way made her unfit to rear her six year old child.

Bible discussions and compelled the child to distribute religious literature on the streets during parts of the day and night. To the extent that the court based is findings of neglect on the fact that the child might have been endangered when alone on the streets, it used an acceptable standard. However, the court's language indicated that its decision was based also on the belief that the child should be engaged in some other activity, such as playing or studying, rather than distributing religious literature. This is, of course, a judicial dictation to the parents of the proper occupations of a child reinforced by the sanction of a neglect finding, rather than a finding that a particular occupation encouraged by the parent is dangerous to the child.[23]

The final case is *In re Black*[24] in which eight children were declared neglected and taken from their home because their parents believed plural marriage to be a law of God and practiced and taught it. The court grounded its decision on the theory that the children were living in an immoral environment.

These cases are representative of the recent judicial response to the legislative delegation of authority to define neglect. Some characteristics present here and found in most cases dealing with environmental neglect may be noted. First, these three courts looked primarily to the actions of the parent and not to the effects these actions have on the child. No distinction was made between those parental actions and beliefs which can have little effect on the child and those which will affect the child detrimentally. At times, indeed, the finding of neglect seemed aimed at punishing the parent rather than protecting the child. Second, like most courts, these three did not attempt to isolate those general circumstances in which neglect should be found. Nor did they present or discuss a cohesive theory of neglect responsive to the policy question of when state intervention into the life of the family is justified. In the typical case, a court may merely set forth the facts of the case[25] and conclude that these facts present a situation of "neglect."

Commentators on the law of neglect also appear to have had little success in deriving general standards for the application of the

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[23] As in the *Watson* case, the court here does not state on what provision of the neglect statute its decision is based, a fairly common occurrence in cases of this type.

[24] 3 Utah 2d 315, 283 P.2d 887 (1955).

[25] Some extremely fastidious courts refuse to even examine or discuss the facts in moral neglect cases and say only that they have examined the record and found neglect to be present.

neglect concept.[26] But at least some general standards are available which are both analytically defensible and amenable to practical application. The application of these standards may be termed the "minimum standards test." Parents have a natural right to bring up their children, which right is a liberty protected by the fourteenth amendment to the Constitution.[27] The basis for state intervention in the family and state assumption of guardianship over the children is the parens patriae power.[28] The exercise of this power is grounded on the social need that gave rise to the power, *i.e.*, the need of helpless children for protection. The ultimate policy basis supporting the parens patriae power is the state's self-interest in perpetuating itself by providing responsible future

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[25] Gill states:

> No more objective or workable concept of neglect has been set by the courts than that contained in People v. Labrenz . . . . *Neglect, however is the failure to exercise the care that the circumstances justly demand.* It embraces willful as well as unintentional disregard of duty. It is not a term of fixed and measured meaning. It takes its context always from specific circumstances and its meaning varies as the context of surrounding circumstances changes.

Gill, *supra* note 10 at 6.

> Young quotes with approval the American Jurisprudence statement that:
> No cut-and-dried rule can be laid down to serve as a yardstick for the determination of where neglect of a child begins and where it ends, where it harms and where it does not harm. Each case involving neglected children must be determined on the facts as they were developed.

Young, *The Problem of Neglect—The Legal Aspects*, 4 J. FAMILY LAW 29 (1964).

[27] *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399, (1923); Odell v. Lutz, 78 Cal. App. 104, 104-5, 177 P.2d 628, 628-9 (Dist. Ct. App. 1947); People *ex rel* O'Connell v. Turner, 55 Ill. 280, 284, 8 Am. Rep. 645 (1870); Denton v. James, 107 Kan. 729, 193 P. 307, 310 (1920); Sinquefield v. Valentine, 159 Miss. 144, 132 So. 81 (1931); People v. Somma, 127 N.Y.S.2d 169, 173 (Sup. Ct. 1953); State v. Williams, 253 N.C. 337, 117 S.E.2d 444 (1960).

[28] *See, e.g., In re* Pratt, 219 Minn. 414, 18 N.W.2d 147, 152 (1945); Johnson v. State, 18 N.J. 422, 426, 114 A.2d 1, 5 (1955); *Ex parte* Walters, 92 Okla. Crim. 1, 221 P.2d 659, 666-67 (1950); *In re* Hudson, 13 Wash.2d 293, 126 P.2d 765, 777 (1942).

A few early cases describe juvenile court laws as "administrative police regulation" perhaps implying an exercise of the police power. *See* State v. Marmouget, 111 La. 529, 35 So. 529, 533 (1903); *Ex parte* Januszewski, 196 F. 123, 127 (C.C.S.D. Ohio 1911). However, juvenile court laws grant an unreasonable amount of power to the courts because, unlike other exercises of the police power, they place no precise limitations on the power they grant. Thus their justification under the police power is untenable. Note, *Misapplication of the Parens Patriae Power in Delinquency Proceedings*, 29 IND. L.J. 475, 479 (1954).

citizens.[29] Accepting this, it is manifest that the power should be exercised only when children need this protection in order to develop properly into responsible citizens.

In deciding to invoke this power, by finding that a child is neglected, the court's sole focus should be whether the child is being hurt or impaired by his parent's actions and whether he is likely to be impaired if these actions continue. If the child is coming to no harm, the state has no right to intervene in the parent-child relationship through the use of neglect statutes, regardless of how despicable a character the parent may be outside of this relationship. To look at parental behavior except as it constitutes a danger to the child is to grossly abuse the parens patriae power which should look toward the salvation of the child, not the damnation of the parent.

What effects on the child justify the use of the parens patriae power? There are two concepts to be examined in answering this question. First, is the effect on the child one which conflicts with

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[29] *See* Wilson v. Mitchell, 48 Colo. 454, 458-9, 111 P. 21, 25-6 (1910):

> In controversies affecting the custody of an infant, the interest and welfare of the child is the primary and controlling question by which the court must be guided. This rule is based upon the theory that the state must perpetuate itself, and good citizenship is essential to that end. Though nature gives to parents the right to custody of their own children, and such right is scarcely less sacred than the right to life and liberty, . . . the necessity for government has forced the recognition of the rule that the perpetuity of the state is the first consideration, and parental authority itself is subject to this supreme power . . . But as government should never interfere with the natural rights of man, except only when it is essential to the good of society, the state recognizes and enforces, the right which nature gives to parents to the custody of their own children, and only supervenes with its sovereign power when the necessities of the case require it.

See In re Zerick, 74 Ohio L.Abs. 525, 129 N.E.2d 661, 665 (Juv. Ct. 1955):

> The state may not abrogate the parents' natural right to the custody and society of the child except when the interest of society requires it.

Other justifications for state intervention in the family have been presented. "Sometimes it is declared that the rearing of children is a function which the state delegates to parents . . . ." Denton v. James, 107 Kan. 729, 732, 193 P. 307, 310 (1920). But "[t]he child is not the mere creature of the state," Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); this view conflicts with the existence of a constitutionally protected natural right to custody which has been held to exist in the parents. *See supra* note 27.

It has also been suggested that a child, as a citizen, is entitled to protection from the government and that this right justifies intervention. *See Ex parte* Walters, 92 Okla. Crim. 1, 221 P.2d 659 (1950). This rationale justifies the enforcement of criminal statutes against those who direct their criminal actions against children but does not explain the extra protection the courts give children under the parens patriae doctrine over and above that to which ordinary citizens are entitled.

the interest of the state in perpetuating itself? The answer to this question can be found by reference to the laws and constitution of the state which set out the kinds of behavior which the state cannot tolerate from its citizens and those which it can. Particularly relevant to environmental neglect are those statutes making certain kinds of immoral behavior felonies and providing for the commitment of psychotics and, on the other side, those constitutional guarantees of freedom of speech and religion. Supplementation of these guidelines can be found in the norms of society where there is near universal accord that some effects on children are not to be tolerated in a civilized society. So long as parochialism and subjectivity are avoided, this may well be a good supplementary criterion in determining whether a child is neglected. Second, is the child helpless against the effect of the parent's behavior? Our legal system is based upon the theory that man has a free will, and the parens patriae doctrine postulates the child's helplessness. If other forces are present in the child's environment which negative the undesirable effect of the parents' act, then the child does not need the protection of the state in order to develop into a responsible citizen and neglect should not be found. In summary, the court should find neglect only when parental action or condition has or is likely to have an effect on the child which conflicts with the self-perpetuating interest of the state and which effect the child is not likely to overcome without the protection of the state.

The courts in the three cases previously discussed did not apply the analytic framework just proposed. In the *Watson* case, three effects could reasonably be predicted from the mother's actions. First, the children might be bored for three and a half hours every evening as a result of attending religious banquets. Second, they might be unhappy in the communal living establishment, just as many children are who are sent away to private school. These two effects are, of course, states of mind, the causes for which the child can remove when he reaches his majority by simply removing himself physically. Third, they might be inculcated with their mother's religious persuasions. Although this effect is more permanent, it can hardly conflict with the self-perpetuating interest of a state which has as one of its basic tenents freedom of religion. Moreover, even the permanence of this effect is arguable as the children are open to other ideas through their daily attendance at school and will discover even more competing beliefs as they grow older and less attached to the home.

To the extent that the *Hunter* case is grounded on the court's belief that the child should be doing something other than distributing religious literature, it is also open to criticism under a minimum standards approach. The state may be areligious, but it is certainly not antireligious and no threat is posed to the state by a child or an adult doing religious works instead of playing. Moreover, it is completely repugnant to a minimum standards approach for a court to dictate to parents the proper occupations of a child. Courts can properly protect the child from harm but cannot insure that he spend his time in the most socially acceptable and "beneficial" manner.

The *Black* case presents a situation where a finding of neglect is justified under a minimum standards analysis. The facts show that there was a likelihood that the parents' actions would have the effect of leading the children to practice polygamy,[30] a felony. Furthermore, the children probably could not cure the effect before adulthood, isolated as they were from opposing ideas of marriage. It is not clear, however, that the court accepted a minimum standards analysis in reaching its decision. The majority chose to ground the decision on a broad finding of parental immorality,[31] although probable effects on the children were discussed. More seriously, the prosecutor was not rebuked for failing to make the children of the first marriage parties to the action. Certainly there was a possibility that they too would be affected by the parental actions, especially as the parents refused to cease teaching that polygamy was a law of God. The failure to make these children parties would suggest that the court was more concerned with levying a punishment to fit the crime on the parents than protecting all of the children involved.

In these cases we see that the courts usually do not have a workable theory but only an approach. This approach would often seem to consist of looking mainly at the parental action or condition

[30] The likelihood that the parental teachings would lead to the practice of polygamy by the children was increased because (1) the parents ascribed supernatural origin to the sanction for these teachings, (2) the teachings were backed by parental example, and (3) the beliefs of the whole community accorded with the teachings. Additionally, older siblings of the children involved practiced polygamy, showing that the teachings had had this effect in the past.

[31] One justice concurred in the result but hesitated to brand his great grandfather's polygamous beliefs as immoral; he would have found neglect on the grounds of teaching children to commit a felony, although unfortunately the statute is not framed in such objective terms.

and finding neglect on the basis of a sense of revulsion or disapproval. Another framework exists, however, which does have some theoretical underpinning—the best interests analysis.

The best interests theory is explicit in a few decisions[32] and appears implicit[33] in a great many others. The court using this theory looks at all of the factors in the case, including the possible disposition of the child, in deciding whether neglect is present. The neglect finding is made if, in the opinion of the court, such a finding would be in the best interests of the child. This approach is to be contrasted with the standard procedure in a neglect hearing where the best interest of the child is considered in deciding on the disposition of the child *only after* he has been found to be neglected,[34] the neglect finding establishing the court's jurisdiction over the child. While the best interests test may be an admirable tool of analysis in deciding the custody of a child in a divorce case where the court already has jurisdiction over the child and where both parties have an equal legal right to custody, it is suggested that the concept is unsuited for making a jurisdictional finding that neglect exists.

First, this theory is analytically indefensible if our previous discussion is sound. If a favorable disposition of the child is available, the best interests test may be used to justify a finding of neglect even though the effect of the parent's actions on the child is mild, is not a threat to the state and is curable by the child. For example, the child might be merely unhappy with an unaffectionate father and would be happy with an affectionate grandparent who makes the complaint. It would seem a perversion of the parens patriae concept to say that the power could be used in a situation like this

[32] *See, e.g., In re* Anonymous, 37 Misc. 2d 411, 238 N.Y.S.2d 422 (Fam. Ct. 1962) (best interests of girls not served by living with mother); *In re* Dake, 87 Ohio L. Abs. 483, 180 N. E. 2d 646 (Juv. Ct. 1961) (where court asks whether children's welfare will be advanced by leaving them in mother's home); Long v. O'Mary, 270 Ala. 99, 116 So. 2d 563 (1959) (affirming lower court which it says acted in best interests of infant); and State v. Bacon, 249 Iowa 1233, 91 N.W.2d 395 (1959) (major question said to be what is for the best interest of the child).

[33] Another standard which deals only with parental action and inaction and which is more applicable to nonenvironmental neglect is the "tort" test of whether the parent acted as a reasonable person would under the circumstances. Like the best interests test, this gives the court greater power to intervene since it requires only that a parental action be somewhat below par. It is advocated by Judge Gill. *See* Gill, *supra* note 10 at 6.

[34] *See* Gill, *supra note* 10 at 14. In *In re Mathers,* 371 Mich. 516, 124 N.W.2d 878 (1963), it was held patent error to allow proofs before a neglect jury on what disposition of the child ought to be made. The court also instructed that even where the case is tried before a judge these two parts should be kept procedurally separate.

when all of the policy reasons for its existence are absent. Moreover, the best interests approach of looking at dispositional alternatives prevents the court from focusing squarely on the parental behavior and its effect and thus obfuscates the real purpose of the neglect hearing.

Second, it is often said that the benefit of the child remaining with his parents is to be considered in deciding what the best interests of the child are. Yet this test does give less weight to the parent-child relationship than does the minimum standards test in that it may operate to remove the child, even though the parent has not fallen below a prescribed standard of care.[35] In so doing, the best interests approach runs the risk of failing on its own terms by sadly underestimating a potent force favoring the child's welfare. It is difficult to see how the court can correctly gauge the beneficial effect even a "bad" parent-child relationship can have in terms of the child's sense of identity as part of a biological family unit, or his relationship with other relatives and membership in a community. A finding of neglect may destroy all of these relationships as well as the "bad" parent-child relationship, and it would seem that conservatism would be the better part of valor in taking so drastic a step.

Finally, the best interests test focuses solely on the interests of the child and neglects the interests of the parent.[36] Parents have a natural right to raise children. To impair that right in the absence of egregious misbehavior threatens the foundations of a society which believes that children are not creatures of the state but of the family.

Having proposed a theory of the neglect concept and criticized the alternative approaches, other particular classes of environmental neglect will now be examined in light of the proposed theory.

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[35] The recent case of Painter v. Bannister, 140 N.W.2d 152 (Iowa 1966), shows the kinds of considerations which can enter into a best interests test decision. In this habeas corpus proceeding the court, relying on a child psychologist's testimony rejected at the trial level, held that it was in the best interests of a seven year old boy to give his custody to grandparents who provided a "stable, dependable, conventional, middle-class, middlewest background." *Id.* at 153. The court noted that there was no proof the father was not a fit or proper person but believed that it was not in the boy's best interest to expose him to a household which would be "unstable, unconventional, arty, Bohemian, and probably intellectually stimulating." *Id.* at 153. Under the best interests test this evidence was sufficient to overcome the "presumption of parental preference, which though weakened in the past several years, exists by statute." *Id.* at 156.

[36] *See* Sayre, *Awarding Custody of Children*, 9 U. CHI. L. REV. 672 (1942).

II. Failure to Discipline

The self-perpetuating interest of the state demands that children not adopt a behavior pattern that will lead to juvenile or adult criminality. To the extent that lack of parental discipline may have this effect, the state is justified in interfering in the parent-child relationship to protect itself. Those states whose neglect statutes have provisions bearing directly on the problem generally suggest the need for both a finding that the child's conduct is, or will be harmful, and a finding that there is a causal link between the child's behavior and parental failure to discipline properly. Yet the degree of harm necessary for a finding of neglect is left vague.[37] The cases in the area, however, suggest an independent judicial approach.

This is one of the few areas in the law of neglect in which the judiciary focuses its attention mainly on the child. In so doing, however, the courts generally look at the child's actions in a vacuum, failing to explore whether these actions were caused by some failure of the parent or by some other influence.[38] This restrictive

[37] Six states declare a child neglected if he is under such improper control as to endanger the morals or health or welfare of himself or others (Alabama, Kansas, Maryland, North Carolina, South Carolina, Tennessee). Wisconsin and Minnesota declare neglected a child who comes within the section of the statute defining delinquent children but whose conduct results at least partially from parental neglect. The New York statute provides that a child is neglected "who suffers or is likely to suffer serious harm from the improper guardianship including lack of moral supervision or guidance of his parents and requires the aid of the court." Somewhat more vague are the California and Massachusetts statutes which require that the child be in need of proper and effective control or be without necessary and proper discipline before the state may intervene.

But see Alaska, Arizona, Washington and Wyoming statutes which do not require that a likely harmful effect on the child or on society be shown in order to find neglect on the basis of a lack of proper control by the parent. In other states failure to discipline properly is dealt with under broad provisions such as "lack of proper parental care." *See supra* notes 5-9 and accompanying text.

[38] In *In re* Minor, 250 F.2d 419, (D. C. Cir. 1957), the only evidence of inadequate parental care was the thefts of the youth. This was sufficient for the court to find neglect. In State *ex rel.* Wiley v. Richards, 253 Iowa 679, 113 N.W.2d 285 (1962), evidence showed that eight and twelve year old girls roamed the streets at night and were addicted to vile language. Although it found the girls neglected, the court stated there was nothing in the record showing that the mother was not a morally fit person to care for them. In Nelson v. Clifton, 202 S.W.2d 471 (Ct. Civ. App. Tex. 1947), neglect was also found, the sole evidence being the destructive vandalism of children under nine years of age. In *Ex parte* Hunter. 45 Cal. App. 505, 188 P. 63 (1920), 17 year old girls traveling in automobiles with two Hindu men and attending picture shows were found neglected as lacking parental control. *See also In re* Carstairs, 115 N.Y.S.2d 314 (Dom. Rel. Ct. 1952), demonstrating that neglect might be found because of a

focus of attention suggests two tacit assumptions which courts may be making.[39] First, they may be assuming that a neglect finding really has nothing to do with the parent's actions but is a limited finding of juvenile delinquency that will not seriously stigmatize the child. The fact that in all but one case the children either did nothing definitely illegal or were of tender years would support this interpretation. Second, the courts may be working under a theory similar to res ipsa loquitur, considering serious misbehavior on the part of the child to be proof of lack of proper parental control. The finding of improper parental control in turn generates the prediction that the children will act criminally in the future unless the state intervenes.

Both of these analyses can be criticized. In answer to the modified juvenile delinquency theory, it need hardly be urged that the task of broadening the coverage of juvenile delinquency statutes or decreasing their stigmatizing effect is one properly in the hands of the legislature, not the courts. This view gains even more cogency if the state provides separate institutions for the maintenance of the delinquent and the neglected child when they are removed from the home.

Serious problems of causality and prediction are ignored in the application of a res ipsa loquitur theory of neglect. The child's misbehavior might be caused by lack of parental control, but it is equally probable that the misbehavior is caused by the child's neighborhood environment, peer group associations or any number of other influences. In fact, parental influence may be one of the few forces promoting moral conduct on the part of the child. Unlike the tort situation where the res ipsa loquitur doctrine is applied, there can be no isolation of the child from extra-parental influences,[40] and the court which stops short of an inquiry into the cause of the misbehavior may do both parent and child a serious

failure to correct misconduct of the child or because of a psychological condition of which misconduct was a symptom.

[39] Of course, it may be that the trial court is taking a much less restrictive approach which shows in the unreported trial record. Still, it cannot be said that the appellate courts are doing a proper job of instruction if all that is mentioned in their opinion is the child's act followed by an affirmance of the neglect finding.

[40] This is not to say there is no place for the res ipsa loquitur doctrine in the law of neglect. In *In re* S. 46 Misc.2d 161, 259 N.Y.S.2d 164 (Family Ct. 1965), it was held that a prima facie case of neglect was established when a one month old infant showed the battered child syndrome. Here there was good reason to apply the doctrine since at this early age an infant is almost completely isolated from extra-parental influences which could produce the result in question.

injustice.[41] Moreover, the question of whether the effect on the child of the parent's actions is serious enough to call for state intervention cannot be adequately answered by reference only to the child's act of misconduct. The seriousness of the act of misconduct the court focuses on is only one measure of how serious future misconduct will be. The present approach of the courts may preclude looking at other relevant predictive measures such as history of misconduct, behavior of other siblings,[42] and objective tests.[43]

III. Excessive Discipline and Cruelty

Twenty-nine states have neglect statutes with provisions dealing specifically with parental cruelty,[44] the others relying on broad provisions such as "lack of proper care." The cases in this area often

[41] These courts may be acting ultra viresly if the question of causation is not considered. *See* Mill v. Brown, 31 Utah 473, 482-84, 88 P. 609, 613 (1907), which states:

> [A]ll the decisions [upholding juvenile legislation] rest upon the proposition that the state . . . has the right . . . to substitute itself as guardian . . . of the child for that of the parent . . . and thus to educate and save the child from a criminal career . . . In other words, . . . [the state must] do that which it is the duty of the father . . . to do, and which the law assumes he will do . . . The duty thus rests upon the father first . . . . Before the state can be substituted to the right of parent it must affirmatively be made to appear that the parent has forfeited his natural . . . right to the custody . . . of the child by reason of his failure . . . or incompetency to discharge the duty.

[42] It must be noted that in State v. Richards the court mentioned that the girls had two brothers in the reformatory. This is the kind of fact that deserves emphasis in an opinion as bearing on the seriousness of possible future misconduct.

[43] The Glueck Social Prediction Scale, an easily administered questionnaire which uses the variables of cohesiveness of family, affection of mother, supervision by mother, affection of father and discipline by father is said to provide 90% accuracy in predicting future delinquency. *See* Ludwig, *Delinquent Parents and the Criminal Law,* 5 VAND. L. REV. 719, 720 (1952). This claim has been validated. *See* Thompson, *Glueck Social Prediction Scale Validity,* 43 J. CRIM. L. C. & P. S. 451 (1953). However, it has come under some statistical criticism. *See* Grygier, *The Concept of the "State of Delinquency" And Its Consequences for Treatment of Young Offenders,* 11 WAYNE L. REV. 627, 651 (1965). As long as tests such as this do not have unchallenged predictive validity of a very high order they should not control the court; however, even at this stage they are probably a better guide to judicial action than are the folk maxims so frequently applied.

[44] The differences are mainly semantic: home is unfit by reason of cruelty (Alabama, California, Colorado, Connecticut, Florida, Hawaii, Indiana, Iowa, Michigan, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, Vermont, Washington, and West Virginia); subjected to parental cruelty or depravity (Oregon); mistreated (Arkansas and Kansas); cruelly treated (Maine); abused (Idaho); cruelly abused (Delaware); or subjected to mistreatment or abuse (Utah). The Arizona statute is unique in declaring a child neglected "who is subjected to cruel and inhuman treatment and shows the effect of being physically mistreated."

deal with purely physical abuse and therefore do not come under the heading of environmental neglect. There are some cases, however, in which stringent discipline or cruelty appear to be grounds for the neglect finding because of their effect on the child's mental development.

In *In re Carl*[45] a twelve year old child who lied about playing hookey was beaten with a broomstick by her father which left black and blue marks. Although the court found that the father was unnecessarily assaultive, the opinion did not discuss the physical extent of the beating but rather the court's theory of child guidance, which entailed instruction in and use of the "golden rule" as a viable alternative to corporal correction.

In *In re Diaz*[46] a three and a half month old infant cried in a doctor's office. In response to the doctor's demand for silence, the upset mother spanked the child until its buttocks were red and then she refused to leave. The doctor called the police and the lower court found the child neglected for "not having proper guardianship." The court apparently proceeded on the theory that the undeserved spanking of the child showed mental instability in the mother since the only other evidence supporting the finding was the mother's failure to submit to a court ordered psychiatric examination.[47] After eighteen months,[48] the trial court was reversed on the grounds of lack of evidence to support its finding, and the child was returned.

In *In re J. O.*[49] the court did not base its decision on the severity of the discipline which consisted of whipping with hands, belt or peach stick but on the fact that the whippings were administered once a week and without cause, according to the child.[50] In reaching its decision, the appellate court seemed influenced by the best interests test, deeming it important that the child was not happy and ran away from home. The trial court decision was defended on the ground that the judge was motivated by what he believed was best for the child.

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[45] 174 Misc. 985, 22 N.Y.S.2d 782 (1940).

[46] 212 La. 700, 33 So.2d 201 (1947).

[47] She was unable to afford this examination and submitted a general practitioner's favorable report instead.

[48] *See In re* Diaz, 211 La. 1015, 31 So.2d 195 (1947), in which the court held that the mother was not prevented from appealing by reason of laches.

[49] 372 S.W.2d 512 (Mo. Ct. App. 1963).

[50] Other proven grounds were the failure on one occasion to prepare a proper school lunch and the fact that the parents quarrelled frequently.

In the above cases, assuming the child was not seriously harmed physically, one looks in vain for evidence of irremedial harm to the child threatening the state's self-perpetuating interest. In none of the cases is there any discussion of the possibility of the child being seriously physically or mentally harmed in the future. Rather it would seem that there existed a difference of opinion between the court and the parents on the question of how best to discipline the child or a judicial sentiment that capricious punishment deserves censure.[51] It is not in the best interests of a child that he be punished without cause. Yet all parents from time to time may punish children illogically and in response to pressure outside the child's behavior. Under a minimum standards theory the task of the court is to decide when a parent's theory of discipline or lack of control in disciplining is such as to threaten the development of the child into a responsible citizen. This point would certainly be reached if it appeared that the child were in danger of severe physical maiming or mental crippling. The better view would be that this point is not reached simply because the child is unhappy or the parental discipline fails to conform with that suggested by Dr. Spock.

In these excessive discipline or cruelty situations, courts frequently make the cruelty by one parent grounds for a finding that

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[51] This is not the only area in the law of neglect in which the opinion and sentiment of the court may be decisive. How old a child must be before it is no longer neglectful to leave him alone at night is a very hazy issue in this area. Although this is a contributory ground for a neglect finding in many cases and the sole ground in a few, the courts have never set a standard and sometimes do not even mention the age of the child who is before the court. *See, e.g.*, Walker v. State, 238 Miss. 532, 119 So. 2d 277 (1960); *In re* Linda, 362 S.W.2d 782 (Mo. Ct. App. 1962).

There is a great variance in subcultural norms dealing with the giving of independence and responsibility to children. This variance gives the judiciary the opportunity to set reasonable standards through its decisions or the option of leaving the decision to the parent's discretion.

In this area *In re* O'Donnell, 61 N.Y.S.2d 822 (Child. Ct. 1946), shows how emotional considerations may influence a legal judgment. In that case, a grandmother and mother were found guilty of neglect for leaving five children alone in an apartment until 3:00 a.m. The two oldest children were 11 and 13, ages at which many people in society believe a child is ready for babysitting responsibility. However, a fire broke out in the house killing two of the children. With the benefit of hindsight the trial court sentenced the grandmother to three months in the workhouse for her dereliction. Yet it would appear that absent the tragedy no more than a stern rebuke would be in order, if even that. This would appear to be one area in which the legislature could set definite standards by statute without sacrificing needs for flexibility. Such an action might eliminate the kind of ex post facto criminality that the court found here.

the other parent neglected the child as well, either on the theory that the passive parent failed to give the child necessary care and protection[52] or that failure to intercede on the child's behalf is itself cruelty.[53] This would appear to prejudice unnecessarily[54] the passive parent's chances for custody in a later proceeding if the parent should choose to leave the neglectful spouse.

In this area one also finds acceptance for the proposition that the parent's cruelty as manifested by abusing one child is sufficient grounds for taking away another child.[55] This would seem a valid position provided the court examines the total situation in order to establish the probability that cruelty to one child will lead to a sufficiently harmful effect on the other. Certainly the acts of cruelty toward the first child should not be the sole focus of the hearing, although it may be the principal one.

There are two questions that should be asked in this connection. First, what are the probabilities that the child alleged to be neglected will be subject to physical abuse as others were? To answer this the court must explore the duration and severity of the parental cruelty; the cause for the abuse of the beaten child, if it was a single occurrence; and, differences between the beaten child and the allegedly neglected child in their relationship with the parent (biological and psychological). Second, what are the probabilities that the parent's actions will cause the allegedly neglected child to become emotionally disturbed in a serious manner? The type and duration of parental abuse, the age of the child, his present psychological state and the psychological state of older siblings who have lived under the same conditions are all relevant to this question and should be looked into.

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[52] *See In re* J.O., 372 S.W.2d 512 (Mo. Ct. App. 1963).

[53] *See In re* Halamuda, 85 Cal. App.2d 219, 192 P.2d 781 (1948) (termination of parental rights proceeding).

[54] It is unnecessarily prejudicial because the child can be found neglected on the basis of only one parent's actions.

[55] In *In re* Phelps, 145 Mont. 557, 402 P.2d 593 (1965), the court held that evidence that parents severely beat their adopted son of 11 years established their unfitness to retain custody of their adopted daughter of four years who had not been abused. In *In re* O'Beirne, 194 Ore. 389, 241 P.2d 874 (1952), the court went even further. There it appeared that an adoptive mother had been cruel to her nursery charges and there was some evidence that her adopted son had been abused (he was bruised). But the court chose to rest its holding on broader grounds. It said that the charge of maintaining a home which is an unfit place by reason of cruelty comprehends more than subjecting a child to physical violence. *Id.* at 392, 241 P.2d 874.

The *O'Beirne* court would seem to add a third question: what are the probabilities that the allegedly neglected child will become a cruel person because of what he has experienced? This poses a policy problem. If we do not want a child to grow up to be cruel (pathological cruelty is of course covered by question two), neither do we want him to become a liar, shiftless, a breaker of promises or overly aggressive. Yet parental action can bring about all of these results without justifying the state's intervention. It would seem arbitrary at best to condemn action which brings about the first result and not condemn action which brings about the other results.

IV. Parental Immorality

There is little consensus on the question of what constitutes moral neglect. The statutes are little guide to the courts because they are framed in general terms.[56] As noted earlier, general standards and theories have not been enunciated. Consequently, decisions will reflect the value given by individual courts to the parent-child relationship, the court's tolerance of accepting assumptions about causality, and whether it views neglect statutes as primarily performing a parent stigmatization function or a society protecting function. On one end of the theoretical continuum, the court may decide that parental immorality is grounds for a neglect finding only if it causes the parent to physically neglect or abuse the child. On the other end, parental immorality may be considered conclusive proof of the parent's inability to care properly for the child regardless of its effect in the present or future. Courts in the middle of the spectrum might find neglect if the child is likely to be subject to immoral temptations, to become an immoral adult, to become

[56] In addition to the usual catch-all clauses, general moral catch-all clauses are found in 40 state statutes, and many states have more than one. Under these a child is neglected who is in a situation or environment injurious to his morals (Alabama, Alaska, Arizona, Georgia, Indiana, Minnesota, Missouri, Nebraska, New Hampshire, North Carolina, North Dakota, Ohio and Pennsylvania); whose home by reason of depravity on the part of the parent is an unfit place (Alabama, California, Colorado, Florida, Hawaii, Indiana, Michigan, Montana, New Hampshire, New Mexico, North Dakota, Oklahoma, Rhode Island, South Dakota, Texas, Vermont, and Washington); whose parent is unfit, by reason of immorality or depravity, to care properly for him (Maryland, South Carolina, and Tennessee); who is without proper moral care (Connecticut, Idaho, Kansas, Massachusetts, Minnesota, Mississippi, New York, and Wisconsin); whose parents are immoral or depraved (Connecticut, South Dakota, Texas, and Vermont); who is found in a disreputable place (Arizona, Delaware, Mississippi, New Hampshire, Ohio, and Oklahoma); or who is found living with vicious, immoral or disreputable people (Alaska, Arizona, Colorado, Delaware, District of Columbia, Iowa, Mississippi, New Hampshire, New Mexico, and Ohio).

psychologically disturbed or to be socially disadvantaged because of the parent's action, in that order of seriousness of effect.

Neither the minimum standards test nor any other test of neglect requires intent to neglect or harm the child on the part of the parent. Consequently it would not be expected that an affirmative act of immorality by the parent would be a necessary precondition to an adjudication of neglect. The cases demonstrate that it is not; the fact that the child is living in an immoral environment, even though it may not be created by the parent, is sufficient to invoke the court's jurisdiction.[57]

[57] *See In re* Williams Welfare, 10 Wash.2d 542, 117 P.2d 202 (1941), in which a child living with her adoptive mother was declared neglected in a suit instituted by her natural mother. The court stated that the adoptive mother was adequate in all respects except that she ran a rooming house which was overcrowded with tenants who drank and engaged in boisterous conduct.

In *In re* Snyder, 328 Mich. 277, 43 N.W.2d 849 (1950), a six year old child was held neglected as being without proper custody or guardianship. One ground of the holding was that the child was living in an immoral environment as evidenced by the facts that her guardian was separated from her husband, received welfare, had an older daughter who had become pregnant while unmarried and that the six year old shared a bedroom with an adult male boarder.

In Sumner v. Superior Court, 19 Wash.2d 5, 140 P.2d 784 (1943), a 16 year old girl was found dependent as having no parent able or capable of exercising proper parental control. The girl in question was a school drop out and the mother allowed frequent parties lasting into the night with much drinking and attended by boys in trouble with the law. But there was no evidence that the girl had ever had more than a couple of glasses of beer or that mother or daughter had ever committed an immoral act. Moreover, there was much good reputation evidence presented. The court stated that the girl's welfare required that she be placed in a different environment.

In all of these cases a standard is used to find neglect which, if applied universally, would result in plucking all but a handful of children from the slums that pepper our larger cities. In none of these cases is the child subject to serious present immoral temptation. In none is it likely that the child will become an immoral person unless the court assumes either that things will get worse or that substantially equivalent conditions will prevail over a prolonged period of time. The fragility of these assumptions would not justify a finding of neglect under a minimum standards test since the welfare of the community is not endangered by the situation as it stands. A finding of neglect would be justified under a best interests test since it is not the best of all possible worlds for a child to have a permissive parent or to live in a slum. This appears to have been the standard applied.

There are, however, cases in which an immoral environment alone should be sufficient reason to invoke the court's jurisdiction. *Cf.* State v. Visser, 249 Iowa 763, 88 N.W.2d 925 (1958) (18 year old son of man living with girls' mother shared bedroom with the 11 and 16 year old girls and their brother moved into the living room); Winner v. Brice, 212 N.C. 294, 193 S.E. 400 (1937) (children aged four through ten are in legal custody of unobjectionable grandparents, but imbecile son is also in home and home is managed by daughter who lived with a series of men, was convicted of moral turpitude and is presently a fugitive from the law).

Although environmental conditions alone may cause a court to take jurisdiction, in the vast majority of cases there is some triggering act or series of acts by the parent which leads the court to examine his fitness and the child's environment. Of these cases, the majority deal with sexual immorality during marriage and excessive drinking. But there are two other kinds of parental action examined by the court and found oprobrious: the commission of a felony and the mothering of an illegitimate child.

There is some conflict about the effect that conviction of a felony should have in a neglect hearing. The better view under a minimum standards test is that "it is not one of the punishments prescribed by law that conviction of a felony works also for forfeiture of parental rights."[58] To hold otherwise would be to force the court to focus on a single parental act and not on the important question of the effect of all the parents' actions on the child and the threat to the state's interest in self-perpetuation posed by this effect. This is not to say that the parents' criminal record should not be considered. At times a criminal record may necessitate a finding of neglect, as when the felony is such as to brand the parent as unfit (for example, an incest conviction) or when the term of imprisonment is so long that the children will be deprived of adequate family life for many years.[59] Nevertheless, some statutes and cases would seem to demand much harsher treatment of the criminal parent than that proposed.[60]

[58] Diernfeld v. People, 137 Colo. 238, 244, 323 P.2d 628, 631 (1958). In this case the court reversed a lower court ruling and allowed the mother of a one year old illegitimate child to retain her parental rights until she finished serving her second term for the felony of forgery, the child being under the care of its grandmother at the time. *See also* Ziemer v. Wheeler, 89 Colo. 242, 1 P.2d 579 (1931) (saying father's violation of prohibition laws would not justify deprivation of custody) (dicta); State v. Grady, 231 Ore. 65, 371 P.2d 68 (1962) (termination of parental rights not justified by mother's jail sentence for forgery and parole violation); Fronk v. State, 7 Utah 2d 245, 322 P.2d 397 (1958) (custody case) (conviction of forging ration cards not to be used to bar father from having custody).

[59] These criteria have been adopted in California. CAL. CIVIL CODE § 232(d) (Supp. 1965). *See In re* Melkonian, 152 Cal. App. 2d 250, 313 P.2d 52 (Cal. 1957); *In re* Kapelis, 147 Cal. App. 2d 801, 305 P.2d 968, (Dist. Ct. 1957).

[60] The South Dakota statute declares neglected any child whose parent or guardian has been sentenced to imprisonment for crime. In Michigan, a home may be declared unfit by reason of criminality on the part of the parent and the child declared neglected.

In Long v. O'Mary, 270 Ala. 99, 116 So. 2d 563 (1959), a one year old adopted child was declared neglected because he was under improper and insufficient guardianship. One main ground for the holding was that the adoptive father had more than once served in the federal penitentiary and had recently been convicted of lottery operations. It was said that the trial court acted in the best interest of the infant.

A few statutes[61] and a large number of cases on the subject of parental immorality deal with the birth to the parent of an illegitimate child. Logically, each illegitimate child is proof of only one immoral act which occurred more than nine months prior to the neglect hearing. Mothering an illegitimate child must be viewed as evidence of parental character and not as an affirmative neglectful act directed toward the illegitimate child, since there was no child in being to neglect at the time the immoral act occurred.[62] The courts, however, do not work in so rarified an atmosphere. A psychology of outrage seems to prevail. A look at the cases clarifies this statement. In four cases having similar fact patterns,[63] the courts held that neglect was not established by showing that the child in question was illegitimate. In each of these cases the parent gave birh to only one illegitimate child, and in one the parents were happily married at the time of the hearing. In another case,[64] the mother bore two illegitimate children, but both were by the same man with whom the mother had broken off relations at the time of the hearing.[65]

The situation in those cases in which neglect was found were quite different. In *Herman v. McIver*[66] the mother had had two other illegitimate children by different fathers and was then living with, among others, an illegitimate brother and an illegitimate

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[61] The Michigan statute declares a child neglected whose mother is unmarried and without adequate provision for care and support. Maryland declares neglected one who is living in a home which fails to provide a stable moral environment. In deciding this, the judge is commanded to consider whether the parent is pregnant with an illegitimate child or has within a period of 12 months either been pregnant with or given birth to another child to whose putative father she was not legally married at the time of conception or has not married thereafter. A Kansas statute dealing with termination of parental rights provides that giving birth to a second illegitimate child is prima facie proof of unfitness.

[62] *But see* Raleigh Fithin-Paul Morgan Memorial Hospital v. Anders, 42 N.J. 421, 201 A.2d 537 (1964), declaring an unborn child neglected, in order that a blood transfusion could be administered after birth.

[63] *See In re* Shady, 118 N.W.2d 449 (Minn. 1962); *In re* Larson, 252 Minn. 490, 91 N.W.2d 448 (1958); *In re* Hock, 55 Ohio L. Abs. 73, 88 N.E.2d 597 (Ct. App. 1947); State *ex rel* Mattes v. Juvenile Court, 147 Minn. 222, 179 N.W. 1006 (1920).

[64] *In re* Kronjaeger, 166 Ohio St. 172, 140 N.E.2d 773 (1957).

[65] *But see* the amazing result in State *ex rel* Smith v. Superior Court, 23 Wash.2d 357, 161 P.2d 188 (1945). In this case the court declared two children, aged three and five, dependent because their father lived with the deceased mother for six years without marrying her. Both parents were afraid that the neighbors would learn of the marriage and know they had been living in sin for years.

[66] 66 N.M. 36, 341 P.2d 457 (1959).

niece or nephew. In *In re Three Minors*[67] three illegitimate children by two different men were involved and the mother was living entirely on public assistance. In *In re Duke*[68] the twenty-five year old mother had had four illegitimate children and received public assistance.[69]

Illegitimate children present a situation of highly visible immorality. Unlike an immoral incident, they cannot be hidden from the public eye and quickly forgotten. Consequently, it is here more than anywhere that we see the court making moral judgments focused on the parent and not on the effect[70] on the child, complete with credits for staying with the same man and only "straying" once and demerits for taking the public monies and not learning one's lesson. This is not to minimize the point that a succession of illegitimate children speaks ill for a future life of morality. But if the court were really concerned with the effect of the parent's act on the child, one would expect to see much more consideration of the age of the child and the present home environment in the decisions. Illegitimacy is on the increase,[71] and the issue of whether it is grounds for a finding of neglect will have to be faced more and more frequently. Hopefully it will not be dealt with by courts whose decisions could be interpreted as vehicles for legislating against Aid to Dependent Children programs and punishing the parents of illegitimate children.

By far the greatest number of cases dealing with parental immorality are concerned with drinking and sexual promiscuity which

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[67] 50 Wash.2d 653, 314 P.2d 423 (1957).

[68] 87 Ohio L.Abs. 483, 180 N.E.2d 646 (Juv. Ct. 1961).

[69] *See also In re* Shultz, 99 Cal. App. 134, 277 P. 1049 (Dist. Ct. 1929) (illegitimacy plus questionable associations); *In re* Marsh, 344 S.W.2d 251 (Tex. Ct. Civ. App. 1961) (illegitimacy plus mother's incestuous relationship with her stepfather).

[70] In Long v. O'Mary, 270 Ala. 99, 116 So.2d 563 (1959), the court appears to focus on the effect, but certainly not on a valid minimum standards effect. One ground of the neglect holding was that if the child were allowed to stay with his foster parents, he would be brought up in a community in which facts concerning his illegitimate birth were known. If the possibility of future feelings of shame is sufficient justification for a finding of neglect, it is difficult to imagine what effect would be too insubstantial for such a finding.

[71] Between 1938 and 1958 births out of wedlock increased from less than 100,000 to more than 200,000. Herzug, *Unmarried Mothers and Some Questions to Be Answered and Some Answers to be Questioned*, 41 CHILD WELFARE 339-49 (1962).

occurs after the birth of the children.[72] Many of these cases present clear cut situations where the parent's actions endanger the child or result in physical neglect.[73] Others, however, present situations where if any harm is occurring to the child it is acting upon his mind and character, not his body. In this latter group of cases we again see the court centering its attention upon the relative moral repugnance of the parent's act. Perhaps most indicative of this concentration on the parental act to the exclusion of an examination of the effect on the child is the absence of a discussion of factors bearing on the effect. The age of the child is usually not discussed in the opinion and occasionally not even mentioned.[74] Frequently infants who could scarcely be aware of the implications of their parent's conduct are declared neglected.[75] Very rarely discussed are factors which might mitigate the effect of the parental immorality. For example, parental church going, the guidance of other relatives and the good offices of friends of the family and of the child are apparently given little attention. But one exception to this attitude may be noted. Some courts are more likely to declare a child neglected if the immorality takes place in the home rather than surreptitiously.[76] Open immorality is more likely to influence the child than immorality he does not know of, but the courts' taking notice of this may often be explained by the fact that open immorality is more morally repugnant in our society than

[72] In a study of neglect referrals in the Minneapolis-St. Paul area over a two month period Boehm found that the problems most frequently cited in neglect complaints in order of frequency were: excessive drinking, inadequate housekeeping, illicit sex relations of parents and leaving children unattended. Usually these problems were found in clusters, each occurring in more than one-third of the complaints. Boehm, *The Community and the Social Agency Define Neglect*, 43 CHILD WELFARE 453, 460 (1964).

[73] *See, e.g., In re* Corrigan, 134 Cal. App.2d 286 P.2d 32 (1955); State v. Farrell, 241 Mo.App. 234, 237 S.W.2d 493 (1951); *In re* Van Vlack, 81 Cal. App.2d 838, 185 P.2d 436 (1947); Rogers v. Commonwealth, 170 Va. 355, 11 S.E.2d 584 (1940).

[74] *See* McNatt v. State, 330 P.2d 600 (Okl. 1958).

[75] *See, e.g., In re* Holt, 121 Cal. App.2d 276, 263 P.2d 50 (1953) (two years old); Winner v. Brice, 212 N.C. 294, 193 S.E. 400 (1937) (youngest was four); *In re* Decker, 28 Ohio N.P. (N.S.) 433 (Juv. Ct. 1930) (one year old).

[76] When immorality takes place in the vicinity of the child, neglect is always found. *See, e.g.*, Watson v. Department of Public Welfare, 130 Ind. App. 659, 165 N.E.2d 770 (1960); *In re* Anonymous, 37 Misc. 2d 411, 238 N.Y.S.2d 422 (Fam. Ct. 1962); McNatt v. State, 330 P.2d 600 (Okl. 1958). But decisions go both ways when the immorality takes place outside the home. No neglect was found in *In re* Knight, 212 La. 357, 31 So.2d 825 (1947) and *In re* Rinker, 180 Pa. Super. 204, 117 A.2d 780 (1955). Neglect was found in *In re* M-L-J-, 356 S.W.2d 508 (Mo.Ct. App. 1962) and *In re* Decker, 28 Ohio N.P. (N.S.) 433 (Juv. Ct. 1930).

covert immorality and hence provides an additional reason to "punish" the parent.

Finally, the courts do not grapple seriously with the question of whether the effect on the child of the parent's immorality is sufficiently serious to justify state intervention. In the final analysis neglect is a question of the normative pattern of society: yesterday's stern school master is today's child abuser, yesterday's parental hater of idleness is today's Fagin. To aggravate the problem, codified law in this area is often one or more generations out of step with the general beliefs of society, a condition which is reflected in the enforcement of penal laws directed against sexual immorality and which should be reflected in the law of neglect. No better advice to the courts can be found than that given in 1894:

> There is such a diversity of religious and social opinion, and of social standing and of intellectual and of moral responsibility, in society at large, that courts must exercise great charity and forebearance for the opinions, methods, and practices of all different classes of society; and a case should be made out which is sufficiently extravagant and singular and wrong to meet the condemnation of all decent and law-abiding people, without regard to religious belief or social standing, before a parent should be deprived of the comfort or custody of a child.[77]

This is not to say that penal laws dealing with immorality are not to be considered in deciding what effect on the child threatens the self-perpetuating interest of the state. In making this decision the court should take judicial cognizance of patterns of enforcement of these laws and of the standards of morality to which society adheres.[78] Certainly under this approach a child would not be declared neglected if the effect of his parent's actions were such as to lead him to act as the majority of his peer group acts, as for example, engaging in premarital intercourse in the later teenage years. On the other hand, the likely effect of leading a child

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[77] Lovel v. House of the Good Shepherd, 9 Wash. 419, 422, 37 P. 660, 662 (1894).

[78] It might be argued that this approach constitutes a judicial abdication of moral responsibility for the community, but consider the alternative. When a court declares neglected children whose parents are "guilty of conduct unbecoming parents trying to raise children according to the Christian standard," *In re* Decker, 28 Ohio N.P. (N.S.) 433, 435 (Juv. Ct. 1930), or promises that it "will never succumb to the 'Hollywood' type of morality so popular today," *In re* Anonymous, 37 Misc. 2d 411, 412, 238 N.Y.2d 422, 423 (Family Ct. 1962), it sets itself an impossible task in light of available judicial and social resources. If nothing else, Prohibition should have shown the futility of trying to enforce standards of morality which are not generally accepted.

to experiment with sex at an early age, to engage in prostitution or to engage in sexual practices our society defines as unnatural would justify a neglect finding. Needless to say, the less repugnant the effect on the child, the greater the proof of likelihood of effect the court should demand.

V. Mentally Disturbed or Disturbing Parental Conduct

While eleven states have specific statutory provisions requiring parents to give help to a mentally disturbed or defective child,[79] only six have specific provisions which might be construed so as to lay on the parents the burden of protecting the mental health of the child.[80] Idaho has the most ambitious statute in this area. Apparently trying to incorporate into the statute a psychologist's definition of an incipient autistic, the 1963 Child Protective Act defines emotional maladjustment as "The condition of a child who has been denied proper parental love or adequate affectionate parental association, and who behaves unnaturally and unrealistically in relation to normal situations, objects and other persons." The juvenile court is then given jurisdiction over a child whose "behavior indicates social or emotional maladjustment." This approach would seem doubly promising in that it attempts to reach the child with psychological problems before the state of tragedy is reached and it simultaneously offers sound and specific guidance to prevent judicial overreaching. The paucity of similar statutes cannot be explained by looking at the prevalence of the psychological neglect problem in society, nor by looking at the threat to

[79] In most jurisdictions, a child is declared neglected "whose parent neglects or refuses to provide special care made necessary by its mental condition." (Arizona, District of Columbia, Minnesota, Mississippi, Nebraska, Ohio, Pennsylvania and Wisconsin.) The Mississippi Statute expressly provides that the mental condition may be either "mentally defective or mentally disturbed." In Florida and Georgia a child is neglected "who is neglected as to . . . psychiatric, psychological or other care necessary for his well being."

While there are no published cases in this area, there would seem to be no reason for the courts to depart from the balancing test used in applying medical neglect statutes. In those cases, the court balances the danger to the child's health (here mental health) against the parents' natural right to the child and the danger the child will face as a result of the court's order. *See* State v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962).

[80] Three statutes denote mental incapacity as one reason why a parent may be unfit to care properly for a child. (Maryland, South Carolina and Tennessee.) Minnesota provides both that a child is neglected "who is without proper parental care because of the emotional, mental or physical disability or state of immaturity of the parent" and also that one is neglected who "is without . . . care necessary for his . . . mental health . . . because his parent . . . neglects or refuses to provide it." The Connecticut statute declares neglected one "who is denied proper care and attention . . . mentally . . . ."

society entailed in the existence of thousands of mentally disturbed and unproductive children and adults. It may, however, be a response to the problem of deciding what kinds of parental action are productive of this sad result, a predictive problem which finds reflection in the cases. These cases fall into two main categories: those in which the parent's mental condition in itself justifies a finding of neglect and those in which the parent's actions are such as to endanger the child's mental health.

In the first group of cases we can define some hazy boundaries. A child will be declared neglected if the parent is an institutionalized psychotic,[81] but he will not be so declared if the only evidence of mental disturbance in the parent is a layman's opinion combined with some slight circumstancial affirmation.[82] One of the few cases in the reports that falls between these two poles shows the creative use a perceptive court can make of neglect statutes.[83] In this case both parent and child were examined by psychiatrists. The court discussed the mother's mental condition (severe emotional disturbance diagnosed as psychoneurosis with conversion hysteria), the son's mental condition (inability to hold his own with other children), the mother's reaction to the son (ranging from oversolicitude to hostility) and the son's reaction to the mother (an obsession with health and medical matters because of the mother's constant dwelling on them). Examples were given of these reactions so that the discussion was not purely theoretical. The child was found neglected under the statutory provisions dealing with lack of proper parental control, California having no specific mental health provisions. When, as here, the mentally disturbed parent is not ill enough to justify commitment at the time of the hearing, it would seem incumbent upon the court to examine the effect of the parent's illness on the child both in terms of seriousness and directness of relationship before making the finding of

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[81] *See In re* Dehart, 114 So.2d 13 (Dist.Ct.Fla. 1959) (parents mental health so dissipated through use of alcohol and drugs that she was declared mentally incompetent and forcibly committed).

[82] *See* Sutter v. Yutz, 223 S.W.2d 554 (Ct. of Civ. App. Texas 1949), in which the following evidence was held insufficient to deprive mother of custody on ground that she was mentally ill: (1) layman's opinion that she was mentally ill; (2) the fact that she suffered from shingles, a nervous disease; (3) the occurrence of an unfortunate love affair after divorce; and (4) the fact that she tied child to bed while she went downtown.

[83] People *ex rel* Furley v. Furley, 162 Cal. App. 2d 474, 328 P.2d 230 (1958).

neglect.[84] The sole focus should not be the seriousness of the parental disorder, a proposition which this court seemed to accept and act on.[85]

In the second group of cases a neglect finding is sought on the ground that the parent's actions are such as to endanger the child's mental health. The most frequent fact situation involves quarrelling parents,[86] although subjecting a child to a sense of rejection[87]

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[84] *In re* Stuart, 114 F.2d 825 (D.C. Cir. 1940), presented a case where the parent's illness had a direct effect on the child but not an effect serious enough to justify a finding of neglect. The evidence was that the divorced mother, given her financial means, had taken good care of her teenage daughter and provided an excellent education for her. The argument was made that the mother was mentally incompetent to provide adequate parental care. Supporting this argument was the fact that the mother believed her divorced husband had shown sexual interest in the girl when she was less than a year old because of the sound of the child's screams heard from another room; also, there was testimony of lay witnesses that the mother was distraught and that the mother believed the father exercised hypnotic influence through thought transference whenever he was in the child's vicinity. The effect on the child of the mother's neurotic beliefs was that she hated the father whom she had never seen and believed in his hypnotic influence. The court held there was no neglect as neither the welfare of the child nor the best interests of the state were threatened. A minimum standards theory would lead to the same result. Here we have an effect on the child which may be irremediable. But the effect is not one which would prevent the child from becoming a useful and productive member of society. In addition, if long association with the mother has produced only this effect it is unlikely that a more serious effect would develop in the future, *e.g.*, a hatred of all males, a persecution complex. The court cannot declare neglected all children who hate their fathers and should not do so merely because the hatred has a pathological foundation unless this pathological foundation will lead to more socially threatening effects.

[85] A corollary problem with this class of case inheres in the fact that the court often asks the parent to be tested by a psychiatrist to determine mental stability and intelligence. *See, e.g.*, Mitchell v. State, 142 So. 2d 740 (Fla. Dist. Ct. (1962); *In re* Work, 119 N.Y.S.2d 35 (1952); Cardenas v. Rogers, 15 Cal. Reptr. 238 (Cal. Dist. Ct. App. 1961). The psychiatrist's opinion on parental fitness is often accepted without enunciating either the psychological basis for this opinion or the legal basis for the court's acceptance of it.

[86] *See, e.g., In re* Dubin, 112 N.Y.S.2d 267 (Dom.Rel.Ct. 1952), in which two separated parents lied about each other to the children and argued about the mother's alleged membership in the Communist Party. People v. Phipps, 97 N.Y.S.2d 845 (Dom. Rel. Ct. 1950), in which the father repeatedly asked the young child who the mother was sleeping with and who her boyfriend was. Kennedy v. State Dept. of Pensions and Security, 277 Ala. 5, 166 So.2d 736 (1964), in which the parents engaged in violent arguments in front of the children based on petty and insignificant causes which sometimes reached the point of physical violence.

[87] *See In re* Schwartz, 35 N.Y.S.2d 930 (Dom. Rel. Ct. 1942), where a finding of neglect was premised in part on a finding that the child was resented and made to feel that she was unwanted and an unfair burden on the family purse.

or insecurity[88] have also been used as a basis for a neglect finding. In none of these cases does it appear that the court has a professional report on the mental health of the children.[89] In none does the court cite any psychology treatise for the proposition that the parental action involved will probably lead to mental disturbance on the part of the children. In all cases the court appears to rely on common sense notions or upon cursory examination of the children to establish the harmful effect of the parental action. Furthermore, in many of the cases the harmful effect referred to appears to mean any deleterious effect. It is impossible to argue with the contention that children will suffer more deleterious effects having parents who quarrel than those who have optimally compatible parents. This approach, however, focuses on the wrong question. The court is not to decide which of two courses of parental action is best but to decide whether a course of action is sufficiently harmful to justify the stern sanction of a neglect finding.

Using a minimum standards analysis, mentally disturbing parental action would be harmful enough to justify a finding of negelct if there were a probability that such continued behavior would lead to the child's having a severe mental disturbance, *i.e.*, pyschosis or severe and debilitating neurosis. This effect is certainly as threatening to a society which wants responsible and productive citizens as is the prospect of a child coming into adulthood maimed

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[88] *See* State v. Bacon, 429 Iowa 1233, 91 N.W.2d 395 (1958), where the court admitted that a seven year old boy had food, clothing, shelter, love and affection. Yet the court found him neglected and took custody from the person who had been his guardian since the age of three weeks because of an older child's possible unfavorable influence and because of the insecurity a proposed move might have generated, saying, "this nomadic existence must surely be harmful to a small child." *See also In re* Roe, 196 Misc. 830, 831, 92 N.Y.S.2d 882, 884 (Dom. Rel.Ct. 1949).

> It is my opinion, and I find it to be the law, that to subject a child to a sense of insecurity, either by way of rejection or ill treatment or by precept, which will result in the development in children of agressive tendencies and delinquent conduct, is neglect of a child and neglect of a very serious nature. Chlidren are entitled to guidance, advice, counsel and affection, understanding and sympathy, and when these are not accorded them, either because of inability to love or understand and sympathize, or by reason of whipping them, that would constitute serious and severe neglect of the children.

[89] This is more likely to be the fault of the legislature than of the courts. In a recent poll of over 1,500 juvenile court judges, 83% reported they did not have the help of any psychologists or psychiatrists. McCune & Skeler, *Juvenile Court Judges in the United States, Part I, A National Profile,* 11 CRIME & DELINQUENCY 121, 128 (1965). Given this statistic, it is no wonder that folk maxims rather than science are applied by the courts in determining the effect of parental behavior on the child.

or in serious and permanent bad health. There is no more cause to find childern neglected who are made unhappy by their parents mentally disturbing conduct than to find children neglected who are made unhappy by their parent's impoverished but subsistence level economic condition.

The major problem in this area is determining what parental action will in fact lead to serious mental disturbance in the children. One answer is to require that the child involved be examined by a psychiatrist in order to discover possible symptoms pointing toward later mental disturbance. Another is for the court to have older siblings who have been subjected to the same "laboratory conditions" examined in order to find what the result of the parental actions has been in the past. A third answer is found in a recent Arizona decision which, however debatable its result, blazes a new and possibly rewarding trail.

Caruso v. Superior Court[90] involved a petition for a writ of prohibition on a dependency charge lodged against the putative father of an illegitimate infant. If awarded custody he planned to leave the child with a babysitter while he worked. In refusing the writ, the court held that the body of knowledge on infant care is sufficiently well established that a court can take judicial notice of the fact that there are emotional needs of infants which if not satisfied may lead to permanent damage. One of these needs is to be cared for by someone who loves it. The court suggests that a criterion for a judicial notice of findings in the behavioral sciences be found in a major encyclopedia.[91] The court notes that by taking notice of these findings the courts will have power to deal with the causes of emotional disturbance and delinquency, and not simply the results. A widespread acceptance of the view that judicial notice should be taken of the findings of social scientists would give the courts a beneficial and much needed supplement to "common sense" and folk theory in deciding cases of this sort. Also, it would have the effect of focusing judicial attention on the effects of the parental actions, not on the actions themselves.

VI. Conclusion

Neglect law, particularly the law of environmental neglect, if haphazardly applied represents a threat to some of our most closely

[90] 2 Ariz. App. 134, 406 P.2d 852 (1965).

[91] A less enthusiastic but more valid criteria would be a finding that a large majority of the accepted authorities in the field agree with a proposition and that it is supported by empirical studies.

held values. A temptation to use it loosely exists since it is one of the few areas of the law in which the court can enforce its own moral values and theories of child rearing with very serious sanctions, and these are two areas in which everyone usually has strong opinions. This temptation can be curbed by both the legislature and the judiciary if strong positive actions are taken.

The legislature, although it must give the trial court flexibility, can mold the approach taken by the judiciary by drafting statutes which define neglect in terms of the effect on the child — and by emphasizing the seriousness of the effect which must be found in order to justify such stern sanctions. In the final analysis, however, the success or failure of neglect law lies with the court. Their success can best be insured by submerging subjective values, by closely studying causal interpretations put forth, and above all by using the full power of the decisional process to develop sound approaches and theories that will meet the needs of society without sacrificing the values of society.