

STATE INTERVENTION TO PROTECT CHILDREN: NEW YORK'S DEFINITIONS OF "CHILD ABUSE" AND "CHILD NEGLECT"

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In our society, parents have the prime responsibility of caring for their children.¹ Their right to be free from state interference in child-rearing, to exercise parental judgment about how best to raise a child, is constitutionally protected.² However, if parents fail to "adequately" care for their children,³ then, in the words of the New York Family Court Act, "the state . . . may intervene against the wishes of a parent on behalf of a child so that his needs are properly met."⁴

In New York, the grounds for state intervention into private family relationships are established by the Family Court Act's definitions of the "abused child" and the "neglected child."⁵ If the family court determines that a child has been abused or neglected, it is authorized to make a wide array of dispositional orders, ranging from court supervision of the parents to placement of the child in foster care.⁶ In addition, the New York Penal Law's definition of the crime of endangering the welfare of a child incorporates, by reference, the Family Court Act's definitions of "abused child" and "neglected child."⁷ But the importance of the Act's definitions reaches beyond formal court action. Agencies quickly sense what types of cases the court will accept and they tailor their own intake policies and treatment procedures accordingly. Moreover, the

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1. Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN L. REV. 985, 993 (1975) [hereinafter cited as Wald].

2. See *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

3. As this article will describe, this seemingly simple statement goes to the heart of definitional ambiguities.

4. N.Y. FAM. CT. ACT § 1011 (McKinney 1975).

5. *Id.* §§ 1012(e)(i)-1012(f)(ii).

6. See *id.* §§ 1051-1055 (McKinney 1975 & Supp. 1980).

7. N.Y. PENAL LAW § 260.10(2) (McKinney 1979). The statute reads, in pertinent part: Being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten and seven of the family court act.

Id.

state's Child Protective Services Act mandates the reporting of "child abuse" and "child neglect" as defined by the Family Court Act, and it structures the state's entire child protective system around them.⁸ In 1979, 92,000 cases of known or suspected child abuse or child neglect were reported.⁹ This is a forty-five fold increase over 1969, when 2,169 cases were reported.¹⁰ The gravity of this statistic—and the concomitant need for social action—depends on the meaning of the terms "child abuse" and "child neglect."

The central importance of the Family Court Act's definitions of the "abused child" and "neglected child" makes it essential that their meaning be clear and widely understood. Unfortunately, the multiple functions they must perform, and the give and take of the drafting process from which the terms emerged, resulted in complicated definitions whose subtle nuances are not always easily recognized. This article seeks to describe how the Family Court Act, and the judges who interpret it, define the terms "abused child" and "neglected child."

I. THE ABUSED CHILD

A. *The Policy Context*

Despite our idealized view of family life, parents can be violently assaultive to their children. Accounts of physical battering are found throughout recorded history.¹¹ Organized efforts to protect endangered children are likewise not of recent origin. The first Society for the Prevention of Cruelty to Children, for example, was incorporated under the laws of New York in 1875.¹² However,

8. N.Y. SOC. SERV. LAW §§ 411-413 (McKinney Supp. 1980).

9. [1979] N.Y. STATE DEPT OF SOC. SERV. ANN. REP., CHILD PROTECTIVE SERVICES IN N.Y. STATE 19.

10. N.Y. STATE ASSEMBLY SELECT COMMITTEE ON CHILD ABUSE REP. 22 (1972), reprinted in THE BATTERED CHILD 229 (2d ed. R.E. Helfer and C.H. Kempe 1974) [hereinafter cited as CHILD ABUSE REPORT]. Many people ask whether this increased reporting signals a rise in the incident of child maltreatment. Unfortunately, no one knows for sure because so many children previously went unreported and, in fact, still remain unreported. There is no reliable baseline against which to make comparisons. In 1969, many cases were informally reported to social service agencies and the police, who handled these reports in an *ad hoc* and often haphazard manner. Thus, some of the new cases are merely the result of the shift of investigative responsibilities from the police, welfare agencies, and the court to specialized child protective agencies. In any event, the great majority of these reports are new cases that probably would not have come to the attention of any responsible authority but for the passage of new state laws in 1969 and 1973. *Id.*

11. See, e.g., Radbill, *A History of Child Abuse and Infanticide*, in THE BATTERED CHILD 3 (R. Helfer & C.H. Kempe 1974).

12. An Act for the Incorporation of Society's for the Prevention of Cruelty to Children, 1875 N.Y. Laws 114, ch. 130.

until the late 1960's there was a tendency to assume that child battering was a minor problem that did not require sustained or focused attention.¹³

In New York State, complacency over the plight of the physically abused child came to an abrupt end in 1969, when the brutal murder of a young girl by her parents gained intensive media coverage.¹⁴ For more than a month, New York newspapers ran numerous front page stories about Roxanne Felumero's death, and the tragic mistakes of social service agencies and the family court that made it possible.¹⁵ An Appellate Division Committee investigated the case and identified many weaknesses in the handling of child protection cases.¹⁶ But the most important effect of Roxanne's death was the addition of Article 10 to the Family Court Act,¹⁷ which the popular press dubbed the "Children's Bill of Rights."¹⁸

Passed unanimously by the legislature, and promptly signed by the governor, the new Article 10 removed the handling of child abuse cases from the provisions of Article 3, child abuse being a

13. V. FONTANA & D. BESHAROV, *THE MALTREATED CHILD* 6 (4th ed. 1979) [hereinafter cited as *THE MALTREATED CHILD*]. The authors state:

[H]is maltreatment has been hidden medically and socially for many years, and in view of the obvious ignorance about the subject, it has also been hidden statistically until recently. The maltreatment of children had not been considered important enough to be included in the curricula of medical schools; it had not been given notice in any of the major pediatric textbooks; and it had been ignored by both society and physicians for many years. This seems to be a result of society's disbelief that such inhuman cruelties could willfully be inflicted upon children. The physician has been deficient in his recognition and diagnosis of these cases due to a lack of information and/or a desire to protect his patient from embarrassment based on little evidence or mere suspicion. There are also physicians who have not reported such cases, since they have feared involvement in court action or legal entanglements which could even lead to suits of malpractice. In the last decade, however, medical schools, pediatric texts and physicians have shown more awareness of the problem of child abuse.

Id.

14. *N.Y. Times*, March 29, 1969, at 36, col. 3.

15. According to the news media, Roxanne was returned from a foster home to her parents even though she had been brutally beaten while with them, and despite the objections to her return by her foster parents. Dembitz, *Child Abuse in the Law—Fact and Fiction*, 24 REC. A.B. CITY OF N.Y. 613, 615 (1969) [hereinafter cited as Dembitz].

16. The Judiciary Relations Committee of the Appellate Division, First Department, investigated and issued a report containing both criticisms and recommendations. The committee concluded that "[i]f the Family Court and the complex of public and private agencies operating within it had functioned more effectively, Roxanne Felumero would probably not have met her tragic death." N.Y.L.J., June 30, 1969, at 1, col. 4.

17. 1969 N.Y. Laws, ch. 264, § 2 (current version at N.Y. FAM. CT. ACT art. 10 (McKinney 1975)).

18. Dembitz, *supra* note 15, at 615.

form of serious neglect under the original Article 3;¹⁹ prior to the enactment of Article 10, the concept of the abused child was mentioned nowhere in the Family Court Act,²⁰ even though cases of serious injury to children were an important part of the court's jurisdiction and caseload.²¹ Under Article 3, cases of "child abuse" were treated as simply a form of "neglect" as was the intent of the drafters of the original Act. The death of Roxanne Felumero convinced the legislature that cases of child abuse were not receiving the prompt and careful consideration they required. In the words of the Assembly Select Committee on Child Abuse: "No problem facing the urban Family Courts . . . is more deplorable than that of overburdened and overcrowded court facilities. The backlogs, delays, and rushed proceedings this causes can have tragic consequences, if, as a result, an adequate inquiry into a child's safety is postponed or precluded."²²

Thus, in establishing the definitional category of the abused child, the legislature did not seek to enlarge the court's substantive definition; rather, it sought to identify those children (previously handled as "neglected children") who were in greatest immediate danger and to accord to their cases the needed priority. Among the special procedures that the legislature mandated in child abuse cases was the establishment of a separate part of the court, the child abuse part, for expeditious and expert handling.²³

19. 1962 N.Y. Laws, ch. 686, § 312(b) (repealed 1970). Article 3 empowered the family court to adjudicate cases of alleged neglect of children. Section 312(b) included in the definition of "neglected" child one who "suffers or is likely to suffer serious harm from the improper guardianship, including lack of moral supervision or guidance, of his parents or other person legally responsible for his care and requires the aid of the court." Physical abuse was treated as being covered by this definition. Comment, *New York's Child Abuse Laws: Inadequacies in the Present Statutory Structure*, 55 CORNELL L. REV. 298, 299 n.9 (1970).

20. A report by the Joint Legislative Committee on Court Reorganization summarizes the major provisions of the 1962 statute. It states that "[t]he Family Court is given exclusive original jurisdiction over neglect, support, paternity, juvenile delinquency, person-in-need-of-supervision, and family offense proceedings." JOINT LEGISLATIVE COMMITTEE ON COURT REORGANIZATION, COURT REORGANIZATION: THE NEW FAMILY COURT ACT, 1962 N.Y. LAWS 3694, 3695 [hereinafter cited as COURT REORGANIZATION REPORT II].

21. See, e.g., *In re S.*, 46 Misc. 2d 161, 259 N.Y.S.2d 164 (Fam. Ct. Kings County 1965) (inference of neglect may be drawn from proof of child's age (one month) and battered condition, since proof of abuse occurring in the privacy of the home is difficult and the problem of battered children has become "increasingly critical"); *In re Young*, 50 Misc. 2d 271, 270 N.Y.S.2d 250 (Fam. Ct. Westchester County 1966) (overall pattern of injuries sustained over a two-month period by infant while in mother's custody constituted *prima facie* case which, in absence of satisfactory explanation, compelled finding of neglect).

22. CHILD ABUSE REPORT, *supra* note 10, at 256.

23. Family Court Act of 1962, 1970 N.Y. Laws, ch. 962, § 9 (current version at N.Y. FAM. CT. ACT § 117 (a) (McKinney 1975)). For a further discussion of this provision and its implementation, see Besharov, *Practice Commentary*, in N.Y. FAM. CT. ACT § 117 (McKinney 1975).

However, the original Article 10 contained only a skeletal outline of court proceedings, developed as a needed but hasty response to the weaknesses revealed by the Felumero case.²⁴ Hence, a number of questions and difficulties arose in its application, especially in relation to the more extensive procedures established under Article 3.²⁵ Therefore, in 1970, the legislature enacted a substantially fleshed-out Article 10, resolving the difficulties previously encountered, and including provisions for the handling of child neglect, previously found in Article 3. Article 3 was therefore repealed.²⁶

In consolidating and coordinating child protective proceedings, the legislature retained and actually increased the special or priority procedures required in child abuse cases. For example, in child abuse cases, besides the special child abuse part, the revised Article 10 requires the more rapid service of summonses and warrants and closer judicial scrutiny of unserved summonses and warrants;²⁷ a preliminary hearing to determine if the child's safety requires that he be removed from the home pending trial;²⁸ and calendaring preferences in the scheduling of hearings.²⁹

B. *The Forms of Child Abuse*

Thus, the purpose of the definition of an "abused child" is to identify cases in which children are in imminent danger of serious harm in order to accord priority to them. There are three separate definitional categories within the concept of abused child: (1) the seriously injured child, (2) the child in danger of serious injury, and (3) the sexually maltreated child.³⁰

1. The "Seriously" Injured Child

A physical assault by a parent can be either abuse or neglect, depending upon the degree of harm or threatened harm that results. To constitute abuse under subsection 1012(e)(i) of the Family Court Act, the harm must be "death or serious or protracted

24. See notes 14 & 15 and accompanying text *supra*.

25. Committee on the Family Court and Family Law, *The Enactment of the Abused Child Law and Committee Findings as to Defects in the Law*, 24 REC. A.B. CITY OF N.Y. 347, 354-55 (1969). See *In re Three John Children*, 61 Misc. 2d 347, 306 N.Y.S.2d 797 (Fam. Ct. 1969); Comment, *New York's Child Abuse Laws: Inadequacies in the Present Statutory Structure*, 55 CORNELL L. REV. 298 (1970); Dembitz, *supra* note 15, at 613.

26. 1970 N.Y. Laws, ch. 962, §8.

27. N.Y. FAM. CT. ACT §§ 1035(a), 1036(a), 1037(c) (McKinney 1975).

28. *Id.* §§ 1027(a), 1027(g).

29. *Id.* § 1049.

30. *Id.* § 1012(e)(i)-(iii).

disfigurement, or protracted impairment of physical or emotional health or protracted loss or impairment of the functions of any bodily organ."³¹ Because of this high threshold of harm needed to label an assault as abusive, excessive corporal punishment, which does not result in serious injury or the substantial risk thereof, becomes a form of neglect.³²

The phraseology of this section was derived from the Penal Law's definition of "serious physical injury,"³³ and, for convenience, this article tends to use the phrase "serious physical injury" in referring to this form of abuse. The phrase, however, is slightly misleading because it suggests that the injury itself must be serious when, in fact, the seriousness of the injury is gauged by its potential as well as its actual effect on the child. To satisfy this subsection, the physical injury need not have caused "death or serious" injury, if it "creates a substantial risk" thereof.³⁴ For example, a parent may have attempted to harm a child but somehow failed. Or the parent may have been interrupted in the act of assaulting the child before serious harm occurred. This subsection's definition of "serious physical injury" also makes an important departure from that of the Penal Law. Although, under both, a physical injury is a condition precedent, the Family Court Act gauges the seriousness of the injury by its effect or probable effect on the child's *emotional* as well as physical health.³⁵

Unfortunately, there is almost no discussion in the case law interpreting this definition of "serious physical injury."³⁶ The case law under the Penal Law is almost as sparse.³⁷ Moreover, neither

31. The definition of child neglect, however, requires an "impairment" of the child's physical, mental or emotional condition. *Id.* § 1012(f)(i).

32. *Id.* § 1012(f)(i)(B). See *In re Rodney C.*, 91 Misc. 2d 677, 682, 398 N.Y.S.2d 511, 516 (Fam. Ct. Onondaga County 1977) (child "neglected" rather than "abused" because the court did not find that the punishment was "excessive as to be life threatening or likely to cause permanent disfigurement"). However, not every abuse case can be "reduced" to neglect. See notes 93-99 and accompanying text *infra*.

33. N.Y. PENAL LAW § 10.00(10) (McKinney 1975). " 'Serious physical injury' means physical injury which creates a substantial risk of death, or which causes death or serious and protracted disfigurement, protracted impairment of health or protracted loss or impairment of the function of any bodily organ." *Id.*

34. N.Y. FAM CT. ACT § 1012(e)(i) (McKinney 1975).

35. *Id.*

36. See, e.g., *In re Iris C.*, 46 A.D.2d 910, 910, 363 N.Y.S.2d 7, 8 (2d Dep't 1974) (suggesting that "two black eyes, numerous bruises all over the body, and a swollen lump on the forehead" amounted to serious physical injuries).

37. See, e.g., *People v. Salisbury*, 64 A.D.2d 763, 764, 407 N.Y.S.2d 263, 263 (3d Dep't 1978) (the "fractures as described" were a serious physical injury); *People v. Rumaner*, 45 A.D.2d 290, 291, 357 N.Y.S.2d 735, 736 (3d Dep't 1974) ("a fracture [below the] left eye which caused the eye to sink below its normal level and required complicated corrective surgery" was a serious physical injury). Cf. *In re Taylor*, 62 Misc. 2d 529, 531, 309 N.Y.S.2d 368, 372 (Fam. Ct. Dutchess County 1970) ("a cut in the back of [the] head as a result of

the statute nor the case law suggest what is meant by the phrase "substantial risk" of injury.³⁸

The definition of "abused child" includes the phrases "allows to be inflicted," "allows to be created," and "allows to be committed" to cover situations where the parent or other person legally responsible for the child's care is not the perpetrator but is present or knows about the abuse and does nothing to prevent or stop it—either because of fear, negligence, incompetence, or lack of concern.³⁹ The failure of custodial parents to protect children from abuse from their spouses is frequently discussed. In fact some experts believe that the nonabusing parent plays a crucial role in the family dynamics that leads the other parent to maltreat a child.⁴⁰ The custodial parent may also "allow" a third party such as a paramour, a babysitter, or even a sibling, to abuse a child. Although such third parties might be made respondents pursuant to the statutory definition of "person legally responsible,"⁴¹ the court would be unable to fashion an adequate treatment plan without jurisdiction over the technically nonabusive parent. For example, the parent's past behavior is strong evidence that he or she might again allow some third person to abuse the child and therefore demonstrates the need for court jurisdiction over that parent as well as that parent's need for treatment, even if the perpetrator of the abuse is removed from the household.

Although this aspect of the court's child protective jurisdiction is usually exercised when a custodial parent "allows" the abuse to occur, the court also has jurisdiction over a *noncustodial* parent, if he has "sufficient contact" with the child.⁴² Two recent cases

being struck by a rock thrown by respondent and requiring medical attention, including sutures" was not a serious physical injury).

38. Compare with OHIO REV. CODE ANN. tit. 29, § 2901.01(H)(Page 1975), " 'Substantial risk' means a strong possibility as contrasted with a remote or significant possibility"

39. N.Y. FAM. CT. ACT § 1012(e)(i)-(iii) (McKinney 1970). See also *id.* § 1012(f)(i) (B). See, e.g., *In re Trina Marie H.*, 48 N.Y.2d 742, 397 N.E.2d 1327, 422 N.Y.S.2d 659 (1979), holding that the mother's "toleration of her present husband's beating of the infant child . . . will not readily yield to reformation," and constituted a basis for a limited order of removal. *Id.* at 743, 397 N.E.2d at 1327, 422 N.Y.S.2d at 660.

40. Steele & Pollock, *A Psychiatric Study of Parents Who Abuse Infants and Small Children*, in *THE BATTERED CHILD* 114 (R. Helfer & C.H. Kempe eds. 1974).

41. N.Y.FAM. CT. ACT § 1012(g) (McKinney 1970). The § defines "person legally responsible" as:

The child's custodian, guardian, any other person responsible for the child's care at the relevant time. Custodian may include any person continually or at regular intervals found in the same household as the child when the conduct of such person causes or contributes to the abuse or neglect of the child.

Id.

42. *Id.* See, e.g., *In re the J. Children*, 57 A.D.2d 568, 568, 393 N.Y.S.2d 449, 450 (2d Dep't 1977).

illustrate how this might happen. In the first case,⁴³ the father had moved out of the family home and left his three-month-old child in the mother's custody. The court held that jurisdiction over the father would be established if it was proved that he knew of the mother's "inclination" to maltreat the child.⁴⁴ How the petitioner planned to establish such knowledge is not explained in the opinion. In the second case,⁴⁵ the mother was found responsible for the death of her two-month-old child from malnutrition and dehydration. Her other child was held to be neglected based on the younger child's death.⁴⁶ The petition also named the noncustodial father as a respondent. The father claimed that he could not be held responsible for the maltreatment of his children because he did not have custody of them.⁴⁷ Rejecting the father's argument, the court held that "[i]t is only necessary that petitioner prove that the separated parent had sufficient contact with the child so as to make his action or inaction responsible for the child's injuries."⁴⁸ Because the facts of this case are common to many that raise the issue of the noncustodial parent's responsibility, the court's description of the situation bears repeating here.

The Court is convinced that this father knew or should have known that his son's health, and, ultimately, his very life, was in jeopardy. In the face of this awesome fact, he did nothing. Instead, having left his estranged nineteen (19) year old wife, unsupported, to care for a toddler and a new-born infant, he merely looked in on them occasionally, putting himself on notice as to their situation, and then walked away. He saw or should have seen a child dying, and offered no help, made no complaint, sounded no alarm. Although this inaction may not have hastened David's death, it certainly did not prevent it. And it is by this omission that

43. *In re C.B.*, 81 Misc. 2d 1017, 367 N.Y.S.2d 382 (Fam. Ct. Monroe County 1975).

44. *Id.* at 1018, 367 N.Y.S.2d at 383.

45. *In re Maureen G.*, 103 Misc. 2d 109, 426 N.Y.S.2d 384 (Fam. Ct. Richmond County 1980).

46. *Id.* at 111-12, N.Y.S.2d at 386. Although the older child was not found to be neglected, but actually well-fed, healthy and happy, the court held that the abuse and subsequent death of the younger child constituted "proof of danger to [the older child] of future harm due to a lack of parental capacity on the part of her primary caretaker." *Id.*, 426 N.Y.S.2d at 386.

47. *Id.* at 113, 426 N.Y.S.2d at 387. The father argued "that the parent sought to be charged with neglect must have *custody, care* and *control* of the child during the period when neglect charges are alleged against the parent." *Id.*, 426 N.Y.S.2d at 387. (quoting *In re Karr*, 66 Misc. 2d 912, 914, 323 N.Y.S.2d 122, 124 (Fam. Ct. Richmond County 1971) (emphasis in original)).

48. *Id.* at 114, 426 N.Y.S.2d at 389.

Michael G. violated his parental obligation to protect his child from recognizable harm.⁴⁹

Neither of these cases, however, explains why the petitioners wanted to name the noncustodial parents as a respondent. After all, the family court has no power to punish a parent, no matter how egregious the parent's behavior. Perhaps the petitioner (and the court) were looking ahead to the possibility that the fathers would later gain, or seek, custody of their children.⁵⁰

If the parent has inflicted or allowed to be inflicted a "serious" physical injury, there is generally no defense to an allegation of child abuse.⁵¹ For example, the defense of reasonable corporal punishment will not succeed since, if the child's injuries were serious, the punishment was by definition unreasonable. Only if the injury was not "serious," or not potentially serious, is there a possibility of a successful assertion of the defense of reasonable corporal punishment.⁵² On the other hand, no matter how serious the allegations against them, parents are not obligated to cooperate with the child protective agency investigating them, especially if they believe the investigation will be traumatic to their children.⁵³

2. The Child in Danger of Serious Injury

Subsection 1012(e)(ii) dispenses with the requirement discussed above that there actually have been a physical injury. A child may be considered abused if the parent "creates a substantial risk" of a *physical* injury, which in turn "would be likely to cause death or serious" injury. Again, the phrase "substantial risk" is not defined.

Under this provision, the court need not wait until a child is injured before taking appropriate action. No prior overt parental behavior is required, making this a *proactive* authorization for state intervention. On this point, the terminology of the Family Court

49. *Id.* at 117, 426 N.Y.S.2d at 389-90.

50. For a discussion of the status and rights of nonrespondent parents, see Besharov, *Supplementary Practice Commentary*, in N.Y. FAM. CT. ACT § 1041 (McKinney Supp. 1976-1980).

51. *See, e.g., In re Edwards*, 70 Misc. 2d 858, 335 N.Y.S.2d 575 (Fam. Ct. Richmond County 1972) (lack of intent to harm the child no defense where the respondent had picked the child up in a rough and angry fashion).

52. Such facts would remove the case from the category of abused child and place it under § 1012(f)(i)(B) which deals with neglected children. *See* note 93 and accompanying text *infra*.

53. *In re the Vulon Children*, 56 Misc. 2d 19, 288 N.Y.S.2d 203 (Fam. Ct. Bronx County 1968)(refusal of parents to allow social workers to conduct investigation into child's injury not considered neglect where there is no evidence that parents contributed to such injury).

Act is somewhat misleading. Calling a child an "abused child" suggests that the abuse has already happened, whereas, under this subsection, all that needs to be established is that the child is sufficiently endangered. That is why reform efforts have proposed that this entire area of court jurisdiction be relabeled "child endangerment."⁵⁴

Examples of situations in which a parent may have created a substantial risk of serious physical injury include: (1) when a parent is interrupted in the act of assaulting a child, but before actual injury occurs; (2) when a parent exposes a child to a physically dangerous environment, but the child is discovered before actual injury occurs; and (3) when it is predicted that a parent will abuse a child, based, for example, on the abuse of another child.⁵⁵

Such jurisdiction is a logical extension of the court's mission to protect endangered children.⁵⁶ Nevertheless, decisions under this subsection must be recognized for what they are—*predictions*. The question before the court is whether the parent's *future* behavior is likely to be sufficiently harmful to the child to justify taking preventive action. Such predictions are no more than probabilistic assessments based on our admittedly uncertain ability to understand the forces that shape future human behavior, and they add to the subjectivity of the court's decisionmaking process. Thus, this uncertain area must be entered with great care, lest concern over the welfare of children result in the unjustified violation of parental rights. The need to focus the parties' and the court's critical attention on the fact that such predictions are being made was the prime reason that this proactive jurisdiction was placed in a separate subsection.⁵⁷

54. IJA/ABA JUVENILE JUSTICE STANDARDS, CHILD ABUSE AND NEGLECT 48 (Tentative Draft 1977) [hereinafter cited as ABA STANDARDS]. N.Y. PENAL LAW § 260.10 (McKinney 1980) is entitled "Endangering the welfare of a child," and deals with conduct which is "likely to be injurious" to the welfare of a child.

55. See N.Y. FAM. CT. ACT § 1046(a)(i) (McKinney 1975), which provides that "proof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent."

56. *Id.* § 1011 states that the purpose of the article is to establish procedures to help protect children from injury or mistreatment and to help safeguard their physical, mental, and emotional well-being. It is designed to provide a due process of law for determining when the state, through its family court, may intervene against the wishes of a parent on behalf of a child so that his needs are properly met.

Id.

57. *Id.*

3. The Sexually Maltreated Child

Subsection 1012(e)(iii) adds sex offenses, as defined by the Penal Law, to the definition of child abuse. Under the Penal Law, a "sexual offense" includes sexual misconduct,⁵⁸ rape,⁵⁹ consensual sodomy,⁶⁰ sodomy,⁶¹ and sexual abuse.⁶²

Although referencing the Penal Law definitions of sex offenses, this subsection of the Family Court Act abrogates the corroboration requirements contained in the Penal Law.⁶³ As an evidentiary rule, this provision might have been more appropriately placed in the section of Article 10 dealing with rules of evidence.⁶⁴ Other requirements of corroboration remain in effect. For example, if the proof relied up on is a child's out-of-court statement concerning the abuse, the statement would have to be corroborated.⁶⁵

II. THE NEGLECTED CHILD

A. *The Policy Context*

In 1970, those who were revising the original Article 10 became convinced that the existing definition of the "neglected child" was overbroad.⁶⁶ The original Article 3 definition of the "neglected child" was satisfied if the parent failed to "adequately supply" the child with food, clothing, shelter, education, or medi-

58. N.Y. PENAL LAW § 130.20 (McKinney 1975).

59. *Id.* §§ 130.25-.35.

60. *Id.* § 130.38.

61. *Id.* §§ 130.40-.50.

62. *Id.* §§ 130.60-.65.

63. *Id.* §§ 130.16, 260.11 (McKinney 1980). Section 130.16, entitled "Sex offenses; corroboration," provides in pertinent part that "[a]person shall not be convicted . . . of any offense defined in this article of which lack of consent is an element but results solely from incapacity to consent because of the alleged victim's age . . . solely on the testimony of the alleged victim, unsupported by other evidence." *Id.* § 130.16 Section 260.11 also requires corroboration where the offense charged is "Endangering the welfare of a child."

A person shall not be convicted of endangering the welfare of a child, or of an attempt to commit the same, upon the testimony of the alleged victim as to conduct that constitutes an offense or an attempt to commit an offense referred to in section 130.16, without additional evidence sufficient . . . to sustain a conviction of an offense referred to in section 130.16.

Id. § 260.11.

64. N.Y. FAM. CT. ACT § 1046 (McKinney 1975).

65. *Id.* § 1046(a)(vi). *See, e.g., In re Hawkins*, 76 Misc. 2d 738, 351 N.Y.S.2d 574 (Fam. Ct. N.Y. County 1974) (son's sworn testimony that he observed his father commit an act of sodomy on the daughter supplied required corroboration of the daughter's extrajudicial statement and supported a finding of abuse).

66. *See* Besharov, *Supplementary Practice Commentary*, in N.Y. FAM. CT. ACT § 1012 (McKinney Supp. 1976-1980).

cal or surgical care.⁶⁷ It was not necessary to show that the parent's conduct or omission had actually harmed or endangered the child.⁶⁸ In keeping with current reform proposals of that time,⁶⁹ the drafters sought to narrow the definition by making the impairment of the child's "physical, mental or emotional condition" or the "imminent danger" of such impairment the absolute prerequisite of a finding of neglect.⁷⁰

The drafters added the requirement of impairment or imminent danger of impairment because they were convinced that definitions which focus solely on parental conduct increase the likelihood that intervention "may be prompted by a social worker's repugnance with regard to dirty homes or may entail substituting a judge's view of child rearing for that of the parents, for example, regarding the age at which a child may be left alone safely or at which an older child can care for a younger sibling."⁷¹ By adding the explicit requirement of harm or threatened harm to the child, they sought to direct the court's attention toward an assessment of the danger to the child and away from a social judgment of parental lifestyles which might not enjoy the judge's approval.⁷² They were thus affirming the view that "diversity" of practices and beliefs as to how to raise a child is "not a proper matter of governmental regulation so long as certain basic standards [are] not violated."⁷³

There are only three exceptions to the requirement that harm or threatened harm to the child be proven before the court can

67. 1962 N.Y. Laws, ch. 686, § 312 (repealed 1970).

68. See, e.g., *In re Anonymous*, 37 Misc. 2d 411, 238 N.Y.S.2d 422 (Fam. Ct. Rensselaer County 1962); *In re Watson*, 95 N.Y.S.2d 798 (Dom. Rel. Ct. 1962). The part of the original definition of neglect which related to improper guardianship required that the child suffer harm, but it was also satisfied if the child was "likely" to suffer harm. The present definition imposes a "substantial risk" test, which establishes a somewhat higher burden. On the other hand, it is broader because, in that portion of the original definition which referred to harm, the harm was required to be "serious," while the present definition is not limited in that way.

69. See, e.g., Wald, *supra* note 1, at 985 ("During the past 10 years, the juvenile justice system has been subjected to searching criticism and reappraisal"). See also ABA STANDARDS, *supra* note 54, at 38. The Commentary states that "most state statutes define the grounds for intervention in terms of parental behavior or home conditions without requiring any showing that the child is being harmed by the behavior of the parent or conditions in the home." *Id.*

70. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1975). The definition of the "neglected child" was also narrowed by deleting the reference to "lack of moral supervision," thereby suggesting that such situations were no longer a matter of court jurisdiction, unless the harm to the child is established. 1962 N.Y. Laws, ch. 686, § 312(b) (repealed 1970). See text accompanying notes 172-256 *infra*.

71. Wald, *supra* note 1, at 1013-14.

72. See ABA STANDARDS, *supra* note 54, at 41; Besharov, *Supplementary Practice Commentary*, in N.Y. FAM. CT. ACT § 1012 (McKinney Supp. 1976-1980).

73. JOINT LEGISLATIVE COMMITTEE ON COURT REORGANIZATION: THE FAMILY COURT ACT, 1962 N.Y. LAWS, 3428, 3441.

obtain jurisdiction. The first two exceptions relate to situations in which the harm or threat of harm is assumed by the nature of the parental conduct. Thus, cases involving sexually maltreated children and cases involving abandoned children are not subject to this general requirement.⁷⁴ Thirdly, proof of parental drug addiction is *prima facie* evidence of neglect, thereby obviating the need to actually prove harm to the child.⁷⁵

Thus, the drafters of the revised Article 10 placed great importance on the definitional requirement of subsection 1012(f)(i) that a "neglected child" be a child "whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired." On the basis of this history one would expect that the term "impairment" would be fully and carefully defined. There are many different degrees of "impairment," many of which are not of sufficient magnitude to justify court intervention. In the statute, however, only the phrase "impairment of mental or emotional condition" is further defined to include "a state of substantially diminished psychological or intellectual functioning"⁷⁶ Although the phrase "substantially diminished" leaves room for differing interpretation, it at least provides some guidance for courts and practitioners. There is no definition, however, for the concept of "impairment of physical condition;" and the case law is also silent on its meaning.⁷⁷ At the present time, the only guidance to the practitioner and the court seems to be the definition of "impairment of mental or emotional condition." Using that as a model, "impairment of physical condition" might be defined as a state of substantially diminished physical growth, freedom from disease, and physical functioning in relation to, but not limited to, fine and gross motor development and organic brain development. The Family Court Act also provides no definition of the phrase "imminent danger of becoming impaired," although it presumably means just that. The danger must be near, or impending, and not merely possible. Given the centrality of these concepts to the court's child protective jurisdiction, their incomplete definition in the Family Court Act must be viewed as a serious shortcoming.

74. N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney 1975).

75. *Id.* § 1046(a)(iii).

76. *Id.* § 1012(h). The subsection further specifies that "such impairment must be clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child."*Id.*

77. *Id.*

B. The Forms of Child Neglect

The definition of the "neglected child" has two separate parts. Under subsection 1012(f)(i), a child is neglected if its condition is "impaired or in imminent danger of becoming impaired" as a "result of the failure of his parent . . . to exercise a minimum degree of care." Under subsection 1012(f)(ii), a child is neglected if he/she is abandoned.⁷⁸ A careful reading of the definition, however, reveals that, besides "impairment," its second fundamental element is the parental "failure . . . to exercise a minimum degree of care." Although the definition's structure suggests that the parental "failure" must fall within one or more of the specific clauses in subparagraphs (A) or (B) of subsection 1012(f)(i), the last clause of (B), by including "any other acts of a similarly serious nature requiring the aid of the court," is an open-ended statement of court jurisdiction.⁷⁹ Hence, the forms of parental behavior enumerated in subparagraphs (A) and (B) are merely specific examples of the broader concept of a parent's "failure . . . to exercise a minimum degree of care."⁸⁰ Jurisdiction exists over any other serious situation which endangers a child *if* there has been a parental "failure . . . to exercise a minimum degree of care" toward the child.

Such residual provisions reflect the view that it is "unwise, if not impossible, to catalogue all the various kinds of abuse and maltreatment that occur; even a long list of specific examples might overlook many situations that are unusual or unique, yet harmful to children. It is imperative that protective workers be able to take action when the facts warrant it."⁸¹ Based on the popularity of such catch-all provisions, which appear in the laws of all states, they seem to have a legitimate place in statutory construction.⁸² Indeed, many reported decisions take the position that since neglect is a failure to exercise the care that a child needs, and since such

78. N.Y. Soc. SERV. LAW § 384-b(5)(a) (McKinney 1980). "[A] child is 'abandoned' by his parent if such parent evinces an intent to forego his or her parental rights and obligations as manifested by his or her failure to visit the child and communicate with the child or agency, although able to do so and not prevented or discouraged from doing so by the agency." *Id.*

79. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 1975).

80. The phrase "failure . . . to exercise a minimum degree of care," also includes situations in which the parent allows the child to be impaired. *See In re Trina Marie H.*, 48 N.Y.2d 742, 743, 397 N.E.2d 1327, 1328, 422 N.Y.S.2d 659, 660 (1979) (mother's toleration of her husband's beating of infant child cited as factor supporting family court's adjudication of neglect).

81. U.S. NATIONAL CENTER ON CHILD ABUSE AND NEGLECT, DEP'T OF HEALTH, EDUCATION AND WELFARE, MODEL CHILD PROTECTION ACT, Commentary to § 4(b)(v), at 9 (Draft Aug. 1977).

82. Such catchall provisions must be read and administered in light of the goals of the Act as set forth in § 1011, *see* note 56 *supra*. It should be noted that such a provision authorizes but does not require the court to intervene. *Id.*

care must vary by the circumstances, neglect can have no fixed or measured meaning. Instead, "each case must be decided on its own particular facts."⁸³ One is reminded of the preacher who began a sermon by saying that there were fifteen sins. In his sermon, he described fourteen. After the service, a parishioner asked him what the fifteenth sin was. The preacher replied, "Miscellaneous."

Recognizing the potential for arbitrary application of such catch-all phrases, the drafters sought to limit the reach of the "miscellaneous" clause by confining it to "acts of a similarly serious nature requiring the aid of the court." Furthermore, as described above, the introductory provision of the definition requires proof that the parental conduct impairs the child's condition, or endangers it.⁸⁴

Unfortunately, ingrafting these restrictions onto the concept of the parental "failure . . . to exercise a minimum degree of care," while at the same time retaining the previous bifurcated structure of the failure to supply food, etc., and the failure to provide proper supervision, etc., has resulted in a cumbersome and confusing definitional structure. Anyone who has ever gone through the process will recognize this as the product of a divided committee's tortured compromise. Therefore, to understand the definition's meaning, it will be helpful to discuss its provisions within the context of the eight major types of cases that reach the court:

- . Excessive physical assaults;
- . Failure to provide adequate food, clothing, and shelter;
- . Failure to provide adequate medical care;
- . Failure to provide adequate education;
- . Failure to provide proper supervision;
- . Failure to provide proper ethical guidance;
- . Emotional maltreatment; and
- . Parental incapacity.

1. Excessive Physical Assaults

It may be useful to begin a discussion of the definition of the "neglected child" with its most unlikely component, excessive physical assaults. Despite the fact that the word "neglect" suggests an act of omission rather than an act of commission, and despite the existence of a separate definitional category called the "abused child," under the Family Court Act, a "neglected child" includes a

83. *In re Hofbauer*, 47 N.Y.2d 648, 655, 393 N.E.2d 1009, 1013, 419 N.Y.S.2d 936, 940 (1979).

84. N.Y. FAM. Ct. Act § 1012(f)(i) (McKinney 1975).

child whose parents "unreasonably [inflict or allow] to be inflicted, harm or a substantial risk thereof, including the infliction of excessive corporal punishment."⁸⁵ In the area of *physical assaults*, therefore, the difference between abuse and neglect is not the type of parental conduct, but, rather, the degree of harm or potential harm to the child and hence the degree of need for priority handling within the family court.⁸⁶ Abuse is "death or serious" injury and neglect is only an "impairment."⁸⁷

Because the most striking difference between the definitions of "child abuse" and "child neglect" is the degree of injury to the child, child neglect is often viewed as somewhat akin to a lesser included offense within the definition of "child abuse."⁸⁸ Judges frequently make a finding of neglect when the proof is not sufficient to establish child abuse.⁸⁹ Even when the proof establishes child abuse, judges sometimes make a finding of neglect to spare the parents the trauma of being labeled as "child abusers."⁹⁰

However, every abused child is not also a neglected child. While the neglect definition establishes a lower threshold of harm, it also requires that there already has been harmful or potentially harmful parental behavior. It requires a prior parental "failure . . . to exercise a minimum degree of care."⁹¹ There is no such requirement of an overt act or a past omission to satisfy the definition of

85. *Id.* § 1012(f)(i)(B). For a discussion of the meaning of the phrase "allows to be inflicted" see notes 39-42 and accompanying text *supra*.

86. N.Y. FAM. CT. ACT §§ 1024, 1027 (McKinney 1975).

87. Compare *id.* § 1012(e)(i) with *id.* § 1012(f)(i).

88. *Id.* § 1031(c).

89. See, e.g., *In re Edwards*, 70 Misc. 2d 858, 864, 335 N.Y.S.2d 575, 580 (Fam. Ct. Richmond County 1972) ("charge of child abuse against [mother] is *reduced* to neglect," for lack of direct evidence that mother committed any act resulting in serious injury to child) (emphasis in original). Cf. *In re Iris C.*, 46 A.D.2d 910, 363 N.Y.S.2d 7, 8 (2d Dep't 1974) (child held to be neglected rather than abused because her injuries were not sufficient to determine if they were the result of abuse); *In re Maureen G.*, 103 Misc. 2d 109, 111, 426 N.Y.S.2d 384, 386 (Fam. Ct. Richmond County 1980) (sister of abused child who died of malnutrition held to be neglected rather than abused because mother's lack of parental capacity placed her in imminent danger of future harm).

90. For a discussion of how petitions of "child neglect" can be substituted for petitions of "child abuse," see Besharov, *Practice Commentary*, in N.Y. FAM. CT. ACT § 1031(c) (McKinney Supp. 1976-1980).

91. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1975). See *In re Daryl Raymond L.*, 67 A.D.2d 948, 949, 413 N.Y.S.2d 216, 217 (2d Dep't 1979), holding that, although there was some evidence of possible future neglect by the mother, § 1012(f) was not satisfied because there was "no evidence of *past* physical or emotional injury to the child." *Id.* (emphasis added). See also *In re Millar*, 40 A.D.2d 637, 336 N.Y.S.2d 144 (1st Dep't 1972). "Some connection must be shown between the conduct of the parent and the injury, or impending injury, to the child. It is not sufficient to merely show the mother's deficiencies without also establishing that the child is suffering or likely to suffer from neglect." *Id.* at 638, 336 N.Y.S.2d at 146 (Murphy, J., dissenting).

the "abused child." A child is considered abused if a parent creates a substantial risk of death or serious physical injury.⁹² Hence, in those cases in which the court makes a finding of neglect instead of abuse, unless the respondent consents, the court must be sure to have found that there was an actual failure to exercise parental care, not just the danger thereof.⁹³

By expressly mentioning "excessive corporal punishment," this clause implicitly authorizes *reasonable* corporal punishment.⁹⁴ Thus, the Family Court Act recognizes the parent's common law privilege of using reasonable physical force to discipline a child.

Determining whether a particular case of corporal punishment was reasonable requires a full assessment of the parent's behavior and the surrounding circumstances. The factors that must be considered were dispositively described in *In re Rodney C.*⁹⁵ As that case explains, corporal punishment by a parent falls within the privilege when:

(1) it is used for the training or education of the child or the preservation of discipline;

(2) the child has the capacity to understand or appreciate the corrective value of the training, education, or discipline;

(3) the method of punishment is not extreme;

(4) there is not available a less severe method which would be equally effective;

(5) the punishment is not unnecessarily degrading, nor brutal nor beastly in character nor protracted beyond the child's power of endurance; and

(6) the force administered is not for the gratification or caused by the rage of the parent.⁹⁶

In addition, the child's age, sex, and physical and mental condition are also factors which must be considered.⁹⁷ Taking these factors into account, the court held that twenty-six marks on the back of a seven-year-old boy with emotional difficulties, marks which were visible three days after the beating was administered,

92. See text accompanying notes 54-57 *supra*.

93. Parental neglect or abuse need not have been directed at or affected the subject child. See N.Y. FAM. CT. ACT §§ 1013, 1031, 1046(a) (McKinney 1975).

94. See N.Y. PENAL LAW § 35.10(1) (McKinney 1975), which allows a parent to "use physical force, but not deadly force, upon [his child] when and to the extent that he reasonably believes it necessary to maintain discipline or to promote the welfare of such person." See generally *Sindle v. New York City Transit Authority*, 33 N.Y.2d 393, 307 N.E.2d 245, 352 N.Y.S.2d 183 (1973).

95. 91 Misc. 2d 677, 398 N.Y.S.2d 511 (Fam. Ct. Onondaga County 1977).

96. *Id.* at 679-81, 398 N.Y.S.2d at 514-16.

97. *Id.* at 680, 398 N.Y.S.2d at 515.

were evidence of immoderate and unreasonable corporal punishment.⁹⁸ The court also held that "punishment administered to an eleven-year-old boy who is undergoing [emotional] therapy[,]. . . punishment which requires him to hold his ankles and keep his knees straight for variable lengths of time; punishment which causes him to scream [and to vomit], is a punishment beyond the child's endurance and a punishment beyond his capacity to understand as correction . . . [and] a degrading punishment as well."⁹⁹

While this part of the definition of the "neglected child" expressly refers to "excessive corporal punishment," it covers all unreasonable assaults, including those that are irrational or unprovoked.

2. Failure to Provide Adequate Food, Clothing and Shelter

A neglected child includes a child whose parents fail to provide the basic necessities of life: "adequate food, clothing, [and] shelter."¹⁰⁰ An absolute defense to charges of neglect on this ground is established if the parents are not "financially able" to provide such necessities or are not "offered financial or other reasonable means to do so."¹⁰¹ This provision is meant to ensure that parents are not labeled as neglectful merely because they are poor.¹⁰² The phrase, "or offered . . . other reasonable means to do so," is a recognition that many forms of nutrition, shelter, education and health assistance are offered on a noncash basis. Such forms of noncash assistance satisfy this section if they are "reasonable," meaning that such assistance must be appropriate to the family's situation and not be unnecessarily demeaning. If the court learns that the family is not "financially able" to meet the demands of a child and has not been offered the means to do so, the petition, or that portion of it that relates to allegations under this subparagraph, should be dismissed "without prejudice" to the subsequent filing of a new petition. Many people feel that public assistance budgets are woefully insufficient to allow parents to adequately care for their children, and have argued that this insufficiency should automatically trigger this defense.¹⁰³ Unfortunately, this avenue of advocacy has proven

98. *Id.* at 682, 398 N.Y.S.2d at 516.

99. *Id.*, 398 N.Y.S.2d at 516.

100. N.Y. FAM. CT. ACT § 1012(f)(i)(A).

101. *Id.*

102. *See, e.g., In re Tangen*, 277 A.D. 827, 827, 97 N.Y.S.2d 429, 430 (3d Dep't 1950) (in a proceeding in which a husband sought custody of the children, mother was not neglectful merely because she applied for public assistance after she left her husband).

103. *Cf. ABA STANDARDS*, *supra* note 54, at 54.

[C]oercive intervention is not appropriate under this standard if the child is endangered due to "community neglect," where the parents are willing to correct

unsuccessful, as courts have consistently held that receiving public assistance is *prima facie* evidence that parents are financially able to care for their children.¹⁰⁴ Nevertheless, in individual cases, it may be possible to show that the public assistance grant is insufficient because of particular circumstances.¹⁰⁵

What is "adequate food, clothing, [or] shelter"? All would probably agree that not feeding a child for days at a time, sending a child out in freezing temperatures with nothing but underwear on, and living in a home with numerous physical hazards are all examples of inadequate food, clothing and shelter which would constitute child neglect, if the parents previously had been offered "financial or other reasonable means" to adequately care for the child. But these are obviously extreme cases. How close to them must parental behavior come before it is considered neglectful? There is no answer in the case law, perhaps because such situations tend to be relatively clear cut and because they represent a problem readily dealt with through the offer of financial or other assistance.

In less extreme cases that do reach court, the often overlooked introductory provisions of subsection 1012(f)(i) provide some guidance.¹⁰⁶ They establish a two-part test to determine whether the food, clothing or shelter is "adequate." The first question is: Does the care fall below commonly accepted community standards, *i.e.*, a "minimum degree of care"? Generally, to justify court action, the deviation from community standards must be clear and unambiguous, and should not be the product of reasonable differences in culture and lifestyle. Children, for example, must be fed nutritionally adequate meals, regardless of their parent's adoption of an unusual "health" diet. The second question is: Has the child's physi-

the situation but lack the resources to do so. . . . [T]here are some children who are endangered because of the poverty of their parents and the consequent inability of their parents to provide them basic protection and necessities. . . . Coercive intervention should not be a way of remedying societal neglect of the poor.

Id.

104. See, *e.g.*, *In re John W.*, 63 A.D.2d 750, 751, 404 N.Y.S.2d 717, 718 (3d Dep't 1978), which states that "absent evidence that a parent is receiving an inadequate amount of public assistance, the fact that a parent is receiving public assistance does not automatically excuse that parent from substantially planning for the future of a child."

105. See, *e.g.*, *In re Wayne T.D.*, 70 A.D.2d 617, 618, 416 N.Y.S.2d 318, 320 (2d Dep't 1979) (mother's parental rights could not be terminated for her failure to maintain contact with her child because the mother, who was on public assistance, was denied additional funds to visit the child who was in another county).

106. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1975). Section 1012 provides in relevant part that

(f) "Neglected child" means a child less than eighteen years of age

(i) whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of the failure of his parents or other person legally responsible for his care to exercise a minimum degree of care.

Id.

cal, mental or emotional condition been "impaired" or is it in "imminent danger of becoming impaired" as a result? Again using nutrition as an example, if the diet, no matter how faddish or unusual, meets the child's minimum daily requirements, then there is no basis for a finding of neglect.

Are *noncustodial* parents who do not provide financial support for a child "neglectful"? Under the predecessor Children's Court Act, they were.¹⁰⁷ In *Sanderson v. Sanderson*,¹⁰⁸ the court held:

When a father refuses, neglects, or willfully fails to provide for the support of his child, and the wife is entirely without means, the child immediately finds himself in a state of want and his health is endangered. The fact that the child is fortunate enough to find refuge with neighbors or friends does not alter the legal effect of the parents' neglect. Such support might be withdrawn at any moment.¹⁰⁹

However, such cases are rarely, if ever, brought under Article 10 of the Family Court Act, because Article 4 deals comprehensively with the issues involved.¹¹⁰

3. Failure to Provide Adequate Medical Care

"Initially a parent has the duty and obligation to provide medical care for a child, but if he neglects that duty the State is authorized to act in his stead."¹¹¹ Nevertheless, the Family Court Act does not require a parent to "beckon the assistance of a physician for every trifling affliction which a child may suffer for everyday experience teaches us that many of a child's ills may be overcome by simple household nursing."¹¹² When, then, must a parent "beckon" medical assistance? Or, in the terminology of the definition of the "neglected child," under what circumstances will a parent be deemed to have failed to provide "adequate" medical care? In regard to immunizations, the answer is reasonably clear.

107. See Children's Court Act of 1922, ch. 547, §§ 2(4), 5, 1922 N.Y. Laws, as amended by ch. 393, §§ 2(4), 6(2)(a), N.Y. Laws (repealed 1962), providing the Children's Court with jurisdiction over parents who willfully fail to provide the proper support for a wife or child.

108. 149 Misc. 88, 267 N.Y.S. 410 (Children's Ct. Westchester County 1933).

109. *Id.* at 90, 267 N.Y.S. at 413.

110. N.Y. FAM. CT. ACT art. 4 (McKinney 1975) (giving family court exclusive original jurisdiction over proceedings for support and maintenance).

111. *In re Sampson*, 37 A.D.2d 668, 669, 323 N.Y.S.2d 253, 255 (3d Dep't 1971), *aff'd*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972).

112. *In re Hofbauer*, 47 N.Y.2d 648, 655, 393 N.E.2d 1009, 1013, 419 N.Y.S.2d 936, 940 (1979). See note 115 and accompanying text *infra*.

The Public Health Law requires every parent or guardian to see that their child receives "an adequate dose or doses of an immunizing agent against poliomyelitis, mumps, measles, diphtheria [*sic*] and rubella" ¹¹³ Exceptions based on religious beliefs to this mandate are discussed below. Beyond required immunizations, "[w]hat constitutes adequate medical care . . . cannot be judged in a vacuum free from external influences, but rather, each case must be decided on its own particular facts." ¹¹⁴ Thus, allegations of medical neglect must be judged against subsection 1012(f)(i)'s dual requirement of a parental failure to provide needed care coupled with a resultant impairment or threatened impairment of the child's condition.

Consequently, the first requirement for a finding of medical neglect is a finding that the parents did not seek or accept needed "medical, dental, optometrical [or] surgical care." ¹¹⁵ Needed care can include preventive care, such as immunizations and post-natal check-ups, as well as remedial care, such as treatment for birth defects, accidental injuries and parentally inflicted injuries. Medical care is not limited to treatment for physical ailments, and may include psychiatric or psychological services. ¹¹⁶

As in the case of the failure to provide food, clothing, shelter and education, a parent cannot be found to have neglected a child for failure to provide medical care unless he is "financially able to do so" or "was offered financial or other reasonable means to do so." ¹¹⁷

Often the parent's failure to obtain medical care is part of a general pattern of parental unwillingness or inability to properly care for a child. ¹¹⁸ For example, one court described how a two and one-half-year-old had "a swelling upon upper part of the forehead, blood on his head, deep scratches and bruises on the nose and face, but no fractures." The court found that "the mother did not

113. N.Y. PUB. HEALTH LAW § 2164(2) (McKinney 1977).

114. 47 N.Y.2d at 655, 393 N.E.2d at 1013, 419 N.Y.S.2d at 940.

115. N.Y. FAM. CT. ACT § 1012(f)(i)(A) (McKinney 1975). *See, e.g., In re Iris C.*, 46 A.D.2d 910, 363 N.Y.S.2d 7 (2d Dep't 1974) (parents did not promptly obtain obviously necessary medical care); *In re Jerry M.*, 78 Misc. 2d 407, 357 N.Y.S.2d 354 (Fam. Ct. N.Y. County 1974) (mother who did not physically assault child but, allowed unqualified babysitters in home to watch child and who delayed 12 hours before taking injured child to hospital was guilty of neglect).

116. *In re Laura Ray*, 95 Misc. 2d 1026, 408 N.Y.S.2d 737 (Fam. Ct. Kings County 1978) (mother's failure to follow through on plans for obtaining psychological help for child, as recommended by guidance counselor, social worker and psychiatrist, constituted neglect). *See ABA STANDARDS, supra* note 54, at 56-58.

117. *See* notes 101-05 and accompanying text *supra*.

118. *In re Jerry M.*, 78 Misc. 2d 407, 411, 357 N.Y.S.2d 354, 358 (Fam. Ct. N.Y. County 1974).

act promptly when she first discovered the baby was injured Some twelve hours later, a delay that could have been fatal, she rushed the baby to a hospital, presumably, having suffered pangs of remorse."¹¹⁹ With such parents, the need to take child protective action is relatively clear.

However, sometimes a parent will seek out qualified medical advice and then make a deliberate decision to forego some or all of the recommended treatment. Depending on the reasonableness of the parent's decision, courts will often protect this exercise of parental discretion.¹²⁰ As the court of appeals stated in *In re Hofbauer*:

It surely cannot be disputed that every parent has a fundamental right to rear its child [G]reat deference must be accorded a parent's choice as to the mode of medical treatment to be undertaken and the physician selected to administer the same. . . .

. . .

Ultimately, . . . the most significant factor in determining whether a child is being deprived of adequate medical care, and thus, a neglected child within the meaning of the statute, is whether the parents have provided an acceptable course of medical treatment for their child in light of all the surrounding circumstances. This inquiry cannot be posed in terms of whether the parent has made a "right" or a "wrong" decision, for the present state of the practice of medicine, despite its vast advances, very seldom permits such definite conclusions. Nor can a court assume the role of a surrogate parent and establish as an objective criteria with which to evaluate a parent's decision its own judgment as to the exact method or degree of medical treatment which should be provided, for such standard is fraught with subjectivity.¹²¹

In *Hofbauer*, the court held that the parents had not failed to provide a minimum degree of care because they had sought and had accepted medical assistance from a duly licensed physician, and therefore they could not be considered neglectful. The court stated that the physician's approach does not have to be in accord

119. *Id.*, 357 N.Y.S.2d at 358.

120. *In re Hofbauer*, 47 N.Y.2d 648, 655-56, 393 N.E.2d 1009, 1014, 419 N.Y.S.2d 936, 940-41 (1979).

121. *Id.* at 656, 393 N.E.2d at 1014, 419 N.Y.S.2d at 941.

with standard medical practices so long as it "has not been *totally* rejected by *all* responsible medical authority."¹²²

The second requirement for a finding of medical neglect is that the parent's failure to obtain medical assistance must result in the impairment of the child's condition, or the imminent danger thereof.¹²³ The harm to the child need not "threaten the physical life or health of the subject or raise the risk of contagion to the public."¹²⁴ Indeed, as pointed out above, the harm may be emotional or psychological in nature. Nevertheless, the failure to obtain medical care must impair or threaten to impair the child. In *Hofbauer*, in refusing to hold that the parents were neglectful, the court emphasized "that there is medical proof that the nutritional treatment being administered [to the child] was controlling his condition and that such treatment is not as toxic as is the conventional treatment; and that conventional treatments will be administered to the child if his condition so warrants."¹²⁵

Surprisingly, the existing case law is not nearly as protective of parental rights when the failure to obtain medical care is caused by deeply held religious beliefs.¹²⁶ New York courts usually sweep aside parental claims that their religious beliefs proscribe all or certain medical procedures. In affirming the family court's decision to order cosmetic surgery over the mother's religious objections, the court of appeals in *In re Sampson* stated:

The holding by this court in *Matter of Seiferth* . . . did not limit to drastic or mortal circumstances the statutory power of the Family Court or like court in neglect proceedings to order necessary surgery. In the *Seiferth* case the court was obliged to choose . . . how best to exercise a court's *discretionary* powers in the circumstances. There was no disagreement over power, and that case, like this, involved a serious physiological impairment which did not threaten the physical life or health of the subject or raise

122. *Id.*, 393 N.E.2d at 1014, 419 N.Y.S.2d at 941 (emphasis added).

123. N.Y. FAM. CT. ACT § 1012(f)(i)(McKinney 1975). *See, e.g., In re Cicero*, 101 Misc. 2d 699, 700, 421 N.Y.S.2d 965, 966 (Sup. Ct. Spec. Term Bronx County 1979) (failure to repair spinal disorder presented "a danger of perforation, highly probable infection, such as spinal meningitis, and death").

124. *In re Sampson*, 29 N.Y.2d 900, 901, 278 N.E.2d 918, 919, 328 N.Y.S.2d 686, 687 (1972).

125. 47 N.Y.2d at 657, 393 N.E.2d at 1014, 419 N.Y.S.2d at 941. *See also In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 820 (1955) (no neglect found where child's harelip and cleft palate did not seem to affect his emotional well-being).

126. *Compare In re Sampson*, 29 N.Y.2d 900, 278 N.E.2d 918, 328 N.Y.S.2d 686 (1972) with *In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 820 (1955). *See also* note 140 *infra*.

the risk of contagion to the public. . . . Nor does the religious objection to blood transfusion present a bar at least where the transfusion is necessary to the success of required surgery.¹²⁷

However, to the extent that this passage suggests that parental objections to medical treatment based on religious beliefs have no weight, it may overstate the court's power. Although the United States Supreme Court has repeatedly held that, when there is a conflict between a parent's religious convictions and the child's health or welfare, the child's needs must prevail,¹²⁸ its recent decisions suggest that the state's power to order medical treatment may not be absolute.¹²⁹ In *Wisconsin v. Yoder*,¹³⁰ discussing compulsory education laws, the Court said that "a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment. . . . It follows that . . . there [must be] a state interest of sufficient magnitude to override the interest claiming protection under the Free Exercise Clause."¹³¹

To some degree, New York's statutory law already recognizes and respects the rights of parents to refuse medical care for a child based on religious beliefs.¹³² For example, the Public Health Law relieves parents of the obligation to obtain required immunizations if they are "bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required."¹³³ "[F]ormal church membership is not a requirement as long as the family honestly believes and practices the tenets of a religious group."¹³⁴ However, the exemption does not apply when

127. 29 N.Y.2d at 901, 278 N.E.2d at 918-19, 328 N.Y.S.2d at 687 (emphasis added) (citations omitted).

128. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944) ("[T]he right to practice religion freely does not include liberty to expose . . . the child . . . to . . . ill health or death").

129. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Court upheld Amish parents' refusal to abide by the state's compulsory education laws beyond the eighth grade, based on the parents' first amendment claim of free exercise of religion. The Court recognized, however, that "[t]o be sure, the power of the parent, even when linked to a free exercise claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child." *Id.* at 233-34.

130. *Id.* at 205.

131. *Id.* at 214.

132. N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 1977).

133. *Id.*

134. *In re Maria R.*, 81 Misc. 2d 286, 288, 366 N.Y.S.2d 309, 311 (Fam. Ct. N.Y. County 1975) (citation omitted); See also *Maier v. Besser*, 73 Misc. 2d 241, 341 N.Y.S.2d 411 (Sup. Ct. Onondaga County 1972). The court in *Maier* stated that "[t]o deny the exemption

the parent's "objections do not appear to be more than their personal opinions, fears unsupported by any competent medical proof, and a purported exercise of their own consciences which would not interfere with their free exercise of the tenets of [their religion]." ¹³⁵

Similarly, the Penal Law gives a parent an affirmative defense to a charge of endangering the welfare of a child based on an alleged failure to provide proper medical care if the parent "is a member or adherent of an organized church or religious group the tenets of which prescribe prayer as the principle treatment for illness," and the child is "treated in accordance with such tenets." ¹³⁶

If New York courts were to pursue the implications of such statutory provisions and apply the kind of balancing process described in *Wisconsin v. Yoder* ¹³⁷ to medical neglect cases, the issue would be whether the harm (or threatened harm) to the child outweighs the parent's first amendment right to freely exercise his religion. Such a balancing test would focus the inquiry where it should be, on the need for the medical treatment, and not on whether the parent's consent was being unreasonably withheld. The result might well be in favor of the parent's first amendment rights in cases where responsible medical opinion is mixed, ¹³⁸ cases in which the child's ailments are minor, ¹³⁹ and cases involving cosmetic surgery, at least if the proof of psychological harm to the child is weak. ¹⁴⁰ Furthermore, in cases of elective surgery, espe-

[to a state compelled immunization program] to a child whose parent conscientiously and honestly believes and practices the teachings and tenets of the Christian Science faith, notwithstanding lack of formal membership in the Church, would require a holding that the exemption provision of the statute is unconstitutional." *Id.* at 242, 341 N.Y.S.2d at 413.

135. *In re Elwell*, 55 Misc. 2d 252, 259, 284 N.Y.S.2d 924, 932 (Fam. Ct. Dutchess County 1967).

136. N.Y. PENAL LAW § 260.15 (McKinney 1980).

137. 406 U.S. 205 (1972).

138. *See In re Sampson*, 29 N.Y.2d 900, 901, 278 N.E.2d 918, 919, 328 N.Y.S.2d 686, 687 (1972).

139. *See, e.g., In re Gregory S.*, 85 Misc. 2d 846, 380 N.Y.S.2d 620 (Fam. Ct. Kings County 1976). The court held that the mother's neglect was not excused when her adolescent child had "an umbilical hernia, cavities, and 'fractured teeth.'" *Id.* at 847, 380 N.Y.S.2d at 621.

140. *Compare In re Seiferth*, 309 N.Y. 80, 127 N.E.2d 820 (1955). In refusing to order surgery, the court noted that "[e]veryone testified that the boy is likeable, he has a newspaper route, and his marks in school were all over 90 during the last year." *Id.* at 82, 127 N.E.2d at 822 with *In re Sampson*, 37 A.D.2d 668, 323 N.Y.S.2d 253 (3d Dep't 1971). In *Sampson*, the psychological harm to the child was more significant. In ordering the surgery, the court noted that the child was "virtually illiterate and [was] excused from school because of this facial disfigurement" for seven years, and that the "overwhelming opinion" was that the operation should be performed if the child was "to have anything resembling a normal life." *Id.* at 670, 323 N.Y.S. 2d at 255.

cially cosmetic surgery, the views of the child should be considered if he is of sufficient maturity.¹⁴¹

When the failure to obtain medical care is part of a general pattern of parental neglect, the court will see that the child gets the needed medical care¹⁴² and then, through its dispositional order, seek to improve the overall level of the parent's care for the child.¹⁴³ When the parent's failure to obtain treatment is based on religious beliefs, courts generally dismiss the case as soon as the child gets the needed medical care. Moreover, in order to protect parental sensitivities in such cases, courts are often careful to state that they are using "the word 'neglected' in its limited legal sense within the meaning of the Family Court Act and not that [the parent] has failed in [his or her duty to the child] in any other respect."¹⁴⁴

The Family Court Act empowers the court to authorize "medical or surgical procedures if such procedures are necessary to safeguard the child's life or health."¹⁴⁵ In cases where an emergency order is made under this provision, and the parent's failure to obtain medical treatment is not part of a general pattern of parental neglect but rather a consequence of religious beliefs, no finding of neglect need be made,¹⁴⁶ hence most courts will dismiss the petition after the completion of treatment on the ground that it is moot.

Finally, a parent need not be found to have medically neglected a child in order for the state to gain authority to provide medical care. The Social Services Law authorizes both the local commissioner of social services and the local commissioner of health to "give effective consent for medical, dental and hospital services for any child who has been found by the family court to be an

141. See, e.g., 309 N.Y. at 82, 127 N.E.2d at 823 (court gave weight to child's fear of surgery stating that "in order to benefit from the operation . . . it will almost certainly be necessary to enlist [the child's] co-operation . . . [and therefore the court must] view the case from the psychological viewpoint of this misguided youth").

142. N.Y. FAM. CT. ACT § 1027(e) (McKinney 1975).

143. *Id.* §§ 1054, 1056, 1057.

144. *In re Sampson*, 37 A.D.2d 668, 669, 323 N.Y.S.2d 253, 256 (3d Dep't 1971); *Santos v. Goldstein*, 16 A.D.2d 755, 756, 227 N.Y.S.2d 450, 450-51 (1st Dep't 1962); *In re Gregory S.*, 85 Misc. 2d 846, 380 N.Y.S.2d 620, 622 (Fam. Ct. Kings County 1976).

145. N.Y. FAM. CT. ACT § 1027(e) (McKinney 1975).

146. *Santos v. Goldstein*, 16 A.D.2d 755, 227 N.Y.S.2d 450 (1st Dep't 1962). Although the child in *Santos* was adjudicated neglected in order to permit a necessary blood transfusion over his parents' objections, the court emphasized that "neglect" as used in its legal sense "in no way imports a finding that these parents failed in their duty to the child in any other respect." *Id.*, 227 N.Y.S.2d at 451. See also *In re Sampson*, 37 A.D.2d 668, 323 N.Y.S.2d 253 (3d Dep't 1971); *In re Gregory S.*, 85 Misc. 2d 846, 380 N.Y.S.2d 620 (Fam. Ct. Kings County 1976).

abused child or a neglected child, or who has been taken into or kept in protective custody or removed from the place where he is residing."¹⁴⁷

4. Failure to Provide Adequate Education

Children need a basic education to succeed in contemporary society. At a minimum, they need to know how to read and to perform basic arithmetic, and they need a basic knowledge of their community and political environment. Although parents play an important role in all aspects of their children's education, the only specific educational requirement placed on them by the laws of New York is to send their children to school.¹⁴⁸ Subsection 1012(f)(i)(A) of the Family Court Act includes in its definition of the neglected child a child whose parents fail to supply "adequate . . . education in accordance with . . . the education law."

What is adequate education?¹⁴⁹ The Education Law seems to prohibit even one day's unexcused absence.¹⁵⁰ Hence, as is the case for each element of child neglect, guidance in determining what is or is not adequate must again be sought from the two-part test in the introductory provisions to this subsection.¹⁵¹ First, the child's absence from school must be due to the parent's failure to exercise a minimum degree of care in encouraging and facilitating school attendance. For example, it cannot be caused by the child's own ungovernability.¹⁵² Second, the child's unexcused absence must exceed commonly accepted community standards. A two-month absence would certainly exceed community standards, just as a one-day absence would not. Where is the line to be drawn? Conveniently, most absences are of sufficient length that the issue does not arise. Where it does arise, the issue is best resolved by focusing on the second part of the introductory provisions of this subsection.

147. N.Y. SOC. SERV. LAW § 383-b (McKinney 1976). *But see In re R. Children*, 85 Misc. 2d 19, 379 N.Y.S.2d 369 (Fam. Ct. Kings County 1976) (although statute properly authorizes Commissioner of Social Services to authorize surgery without court approval prior to a filing of petition or after finding of neglect, it omits instance where petition filed but finding not yet made).

148. N.Y. EDUC. LAW § 3205(1)(a) (McKinney 1970).

149. *See, e.g., Doe v. Downey*, 74 N.J. 196, 198, 377 A.2d 626, 627 (1977) (refusing to broaden the statutory term "education" to include the "process of nourishing or rearing a child or young person").

150. N.Y. EDUC. LAW § 3210 (McKinney 1970).

151. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1975).

152. *Cf. Ossant v. Millard*, 72 Misc. 2d 384, 388, 339 N.Y.S.2d 163, 168 (Fam. Ct. Yates County 1972) (to find a child to be a "person in need of supervision" under Article 7 of the Family Court Act, the truancy must be "by virtue of his own will and personal intent" and not because he "is prevented by parental authority or for that matter, any other authority, from attending school").

Is the child's condition impaired or in danger of becoming impaired by the absence? The proof on this issue is relatively straightforward. Is the child missing instruction to the degree that his academic abilities will be substantially impaired?

This latter definitional element gives rise to the majority of the cases under this provision, namely, granting that the parents have failed to comply with the Education Law, have they nevertheless provided a satisfactory alternative to formal schooling? As far back as 1950, the Appellate Division of the Fourth Department held:

The object of a compulsory law is to see that children are not left in ignorance, that from some source they will receive instruction that will fit them for their place in society. Provided the instruction given is adequate and the sole purpose of non-attendance at school is not to evade the statute, instruction given to a child at home by its parent, who is competent to teach, should satisfy the requirements of the compulsory education law.¹⁵³

The alternate education the child receives must be "at least substantially equivalent to the instruction given to minors of like age and attainments at public school of the district where the minor resides."¹⁵⁴ Theoretically, the quality of the alternate education could be gauged by administering a standardized test to determine the child's performance, but the case law does not reflect such a procedure, perhaps because the result is not clear when it is used. Instead, reported cases focus on the kind, quality and quantity of alternate instruction provided.¹⁵⁵ Guidance on what would constitute "substantially equivalent" instruction was provided in the *Thomas H.* case, and was quoted approvingly in *In re Franz*:

The proof here shows a lack of consistent quality in subject instruction, if not an absence of instruction in some areas and it shows the absence of a systematic approach to the course of study of the branches specified in the statute and regulations.

. . .

153. *People v. Turner*, 277 A.D. 317, 319, 98 N.Y.S. 886, 888 (4th Dep't 1950). *See also In re Naima C. and Suzette C.*, 39 A.D.2d 964, 333 N.Y.S.2d 630 (2d Dep't 1972) (finding that the parents were giving the children a qualified, quality education at home); *Walker v. Foster*, 69 Misc. 2d 400, 330 N.Y.S.2d 8 (Fam. Ct. Kings County 1972) ("It is settled law that a parent need not avail himself of formal educational facilities . . . it being sufficient that a systematic course of study be undertaken at home and that the parent render qualified instruction"). *Id.* at 403, 330 N.Y.S.2d at 12.

154. *In re Thomas H.*, 78 Misc. 2d 412, 418, 357 N.Y.S.2d 384, 390-91 (Fam. Ct. Yates County 1974).

155. *Id.*, 357 N.Y.S.2d at 390-91.

Nor does the proof show their compliance with . . . the daily hours of attendance required under section 3210 (subd. 2, par. a) of the Education Law.¹⁵⁶

Generally speaking if no substitute education is provided, parents cannot rely on religious beliefs as a defense for failing to send a child to school.¹⁵⁷ Thus, a parent was not permitted to keep a child out of school during the hours of religious observation and training.¹⁵⁸

Under extraordinary circumstances, though, parents may be justified in keeping a child out of school. For example, they may have a legitimate basis for concluding that "to send the child to school would, in the circumstances, imperil the health or safety of the child."¹⁵⁹ Parents may also be justified in keeping a child out of school if they have a legitimate objection to the quality or mode of education.¹⁶⁰ If the court finds that the parents are justified in refusing to send their child to school, it appears that they are under

156. *In re Franz*, 55 A.D.2d 424, 428-29, 390 N.Y.S.2d 940, 943 (3d Dep't 1977) (quoting *In re Thomas*, 78 Misc. 2d 412, 418-19, 357 N.Y.S.2d 384, 391 (Fam. Ct. Yates County 1974)).

157. See generally *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (parents not required to send children to public school where an acceptable alternative education was provided); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (withholding children from public school based on religious belief not an adequate defense before completion of eighth grade).

158. *In re Currence*, 42 Misc. 2d 418, 248 N.Y.S.2d 251 (Fam. Ct. Kings County 1963). Cf. *Zorach v. Clauson*, 303 N.Y.2d 161, 100 N.E.2d 463, *aff'd*, 343 U.S. 306 (1952) (sustaining New York's program which permitted its public schools to release students during school hours, on written request of their parents, to enable them to attend religious instruction).

159. *In re Baum*, 61 A.D.2d 123, 401 N.Y.S.2d 514 (2d Dep't 1978) (dicta); *In re Richards*, 255 A.D. 922, 7 N.Y.S.2d 722 (3d Dep't 1938) described such circumstances.

It was one and a quarter miles from the home of the defendant to the place where the school bus passed. The road was lonely, poorly cared for, unfenced. The judge of the children's court found as a fact that it was not unreasonable to refuse to permit this child, of tender age, to walk this distance along a lonely and poorly kept road.

Id. at 923, 7 N.Y.S.2d at 723. See also *Oliver v. Donovan*, 32 A.D.2d 1036, 303 N.Y.S.2d 779 (2d Dep't 1969). In a proceeding brought by parents to compel disciplinary proceedings against a school principal, the court stated that the "[p]etitioner has the duty to send her children to the public schools and the concomitant right to expect that they will not be subject to physical abuse and danger at the hands of the very school officials to whom petitioner has entrusted her children." *Id.* at 1037, 303 N.Y.S.2d at 782 (citing N.Y. Educ. Law §§ 3205 (1), 3212(2)(b), 3228 (McKinney 1975)).

160. See, e.g., *In re Skipwith*, 14 Misc. 2d 325, 180 N.Y.S.2d 852 (Fam. Ct. N.Y. County 1958) (the fact that New York City schools were racially segregated and clearly educationally inferior to other schools in the system was a valid defense to neglect charges); *In re Baum*, 61 A.D.2d 123, 401 N.Y.S.2d 514 (2d Dep't 1978) (denying a mother's claim that she was justified in keeping her child out of school because of the teacher's derogatory comments about American Indians, though indicating that although the defense failed because the comments were "isolated incidents," in an appropriate case a valid defense might be established).

no obligation to provide alternate schooling and, instead, the school system is obliged to take corrective action.¹⁶¹

Nevertheless, situations in which a parent may be justified in keeping a child out of school are rare. Absent extreme circumstances, courts look with disfavor on this avenue of redress for parental dissatisfaction with school conditions.¹⁶²

While every right thinking person must deplore any use of racial stereotyping by a teacher, there are legitimate ways of stopping such conduct. Taking the law into one's own hands to remedy such a wrong is not, however, the right or proper way. We cannot approve or sanction a parent's defiance of our compulsory school attendance law as a means of compelling a school system to change the kind of education made available to its students, provided its procedures comply with the applicable law. . . . Before a parent may use the device of removing a child from public school in defiance of the compulsory school attendance law in order to compel the public school system to accept some alteration the parent may believe necessary in the operation of the school system, the parent should be certain that he or she can establish that the child will receive alternate schooling which meets the requirements of the State Education Law or that to send the child to school would, in the circumstances, imperil the health or safety of the child. A child may not be used as a pawn in a battle with public school authorities.¹⁶³

5. Failure to Provide Proper Supervision

Leaving a child at home alone or inadequately supervised is another aspect of child neglect. Subsection 1012(f)(i)(B) defines a "neglected child" to include a child whose parents fail to provide "proper supervision or guardianship." The most common cases that

161. In *Skipwith*, the schools were conceded to be racially segregated and educationally inferior, and the court stated:

These parents have the constitutionally guaranteed right to elect no education for their children rather than to subject them to discriminatorily inferior education. I am wholly satisfied from their testimony and demeanor that this is not a case where parents have chosen to make such a choice without regard to the welfare of their children.

Id. See also *Oliver v. Donovan*, 32 A.D.2d 1036, 303 N.Y.S.2d 779 (2d Dep't 1969).

162. *In re Baum*, 61 A.D.2d 123, 130-31, 401 N.Y.S.2d 514,519-20 (2d Dep't 1978).

163. *Id.* at 131, 401 N.Y.S.2d at 520.

arise under this provision involve those in which a young child is left alone at home. However, agencies and courts disagree about the age at which a child may be left unattended as well as how long the child may be left alone.¹⁶⁴

Not only must young children be supervised, they must be adequately supervised. Findings of neglect have been made for allowing a three-year-old to play outside after dark and with teenage children;¹⁶⁵ using "shady characters and barflies" as babysitters;¹⁶⁶ and making haphazard and irresponsible plans for a child's future.¹⁶⁷

To make a finding of neglect based on improper supervision, as in all other areas of child neglect, the court must also find that the child's condition is impaired or is in imminent danger of becoming impaired, a factor often not reflected in the case law.¹⁶⁸

6. Failure to Provide Proper Ethical Supervision

Parents also have the responsibility of imparting ethical and behavioral values to their child. Thus, the definition of the "neglected child" includes the failure to provide "proper supervision or guardianship." In order to distinguish this form of neglect from inadequate physical supervision (leaving alone, etc.), this paper adopts the phrase improper *ethical guidance*. Although this form of child neglect might be considered a form of emotional maltreatment, it is usually categorized and treated separately because of the very different parental behavior involved.

In its most extreme form, improper ethical guidance constitutes the crime of contributing to the delinquency of a minor.¹⁶⁹

164. Compare 18 NYCRR § 7.6(f), which, in setting standards for foster care, requires adult supervision of children left at home until they are age ten, *with* *Augustine v. Berger*, 88 Misc. 2d 487, 388 N.Y.S.2d 537 (Sup. Ct. Spec. Term, Suffolk County 1976), holding that a mother's one time leaving of two children, ages one and two, at home and unattended for half an hour while going to a nearby supermarket was not neglect. See also *In re O'Donnell*, 61 N.Y.S.2d 822 (Children's Ct. N.Y. County 1946) (mother was found guilty of neglect when children, left alone, died in an ensuing fire).

165. *In re Iris C.*, 46 A.D.2d 910, 363 N.Y.S.2d 7 (2d Dep't 1974).

166. *In re Jerry M.*, 78 Misc. 2d 407, 410, 357 N.Y.S.2d 354, 357 (Fam. Ct. N.Y. County 1974).

167. *In re Anderson*, 187 Misc. 740, 65 N.Y.S.2d 169 (Children's Ct. Westchester County 1946) (mother surrendered child to strangers because of desire to shield it from her husband).

168. See, e.g., *Hunter v. Powers*, 206 Misc. 2d 784, 135 N.Y.S.2d 371 (Children's Ct. Bronx County 1954) (held to be neglected a ten year old child whose mother, an ardent Jehovah's Witness, left child alone while she attended Bible discussion and compelled child to distribute religious literature on the streets during parts of the day and night).

169. ABA STANDARDS, *supra* note 54, at 62, specifically and narrowly covers this situation. Under § 2.1 which lists statutory grounds for intervention, subsection F provides that coercive intervention should be authorized when a "child is committing delinquent acts as a result of parental encouragement, guidance, or approval." *Id.* The Commentary states that

To give rise to court jurisdiction, the parent's criminal behavior need not be directed at the child. For example, the Third Department affirmed a finding of neglect based on the parent's "anti-social" behavior, including "the offenses of harassment, criminal solicitation and public intoxication, as well as such physical abuse of the child as putting beer in his baby bottle."¹⁷⁰ However, the parental conduct must have a specific effect on the child or pose a specific threat to the child's ethical development before court intervention is authorized. Thus, although proof of a particularly unsavory criminal lifestyle might well establish court jurisdiction, proof of one or more convictions would not by itself do so. Moreover, unusual lifestyles or religious beliefs, even when imposed on a child, are not grounds for a finding of neglect absent proof that the child is thereby harmed or threatened with harm.¹⁷¹

Perhaps the most controversial cases in the area of improper ethical guidance involve those in which a parent's sexual behavior is deemed detrimental to a child's moral and emotional development, hence the term "moral neglect." The original Article 3 defined a "neglected child" to include a child "who suffers or is likely to suffer serious harm from the improper guardianship, including lack of *moral supervision or guidance*, of his parents."¹⁷² The wording of the definition seemed to require that the parent's "lack of moral supervision" *cause* serious harm to the child or threaten the child with such harm. But the case law never went that far. Instead, it tended to focus on two issues: (1) the amount of "immorality," usually the number of actual instances of sexual misconduct,¹⁷³ and (2) whether the children knew about the parent's behavior.¹⁷⁴

this is not intended "to cover situations where it is thought that the child's delinquent behavior is related to poor home conditions if there is no evidence that the parents either encouraged or approved of the child's actions." *Id.* This provision does not cover unlawful or criminal behavior by the parents.

170. *In re Michael J.M.*, 61 A.D.2d 1056, 1056, 402 N.Y.S.2d 473, 473 (3d Dep't 1978).

171. *See, e.g., In re Karr*, 66 Misc. 2d 912, 917, 323 N.Y.S.2d 122, 127-28 (Fam. Ct. Richmond County 1971) (a father's intention to bring up his child in the Krishna movement was not in itself sufficient ground for a finding of neglect). *See* notes 73-75 and accompanying text *supra*.

172. The Family Court Act of 1962, ch. 686, § 312(b), 1962 N.Y. Laws (repealed 1970).

173. *Compare Bunim v. Bunim*, 298 N.Y. 391, 393, 93 N.E.2d 848, 849 (1949), in which the court reversed an award of custody to the mother because she "admitted numerous deliberate adulteries," *with Sheil v. Sheil*, 29 A.D.2d 950, 950, 289 N.Y.S.2d 86, 87 (2d Dep't 1968), where, in a determination of custody rights, the court stated that "one act of adultery is not a justiciable basis upon which the mother may be denied custody," *and Kruczek v. Kruczek*, 29 N.Y.S.2d 385, 386 (Sup. Ct. 1941) where a "single moral lapse" was held insufficient to deny continued custody.

174. *See, e.g., In re Darlene T.*, 28 N.Y.2d 391, 393, 271 N.E.2d 215, 216, 322 N.Y.S.2d 231, 232 (1971) (citing lower court findings that the mother "did entertain men in her apartment and in the presence of Darlene"); *In re Anonymous*, 37 Misc. 2d 411, 413, 238

While these cases could be viewed as an indirect process of deciding whether the parent's conduct was actually harmful to the child, the drafters of the revised Article 10 were concerned that the real cause for intervention was disapproval of the mother's conduct—particularly since intervention did tend to occur when the conduct of separated and divorced *women*, rather than men, was at issue.¹⁷⁵ For example, in 1962, a New York judge wrote:

It therefore has devolved upon the courts to establish the moral standards to be followed by persons to whom is entrusted the care and custody of children. And never has there been a greater need for the courts to maintain a high level of moral conduct than exists today. This court intends to give more than lip service to the principle that the fabric of our society is composed of the family unit and when the family unit is damaged, the fabric of society suffers. Our courts will continue to insist upon a high level of moral conduct on the part of custodians of children, and will never succumb to the "Hollywood" type of morality so popular today, which seems to condone and encourage the dropping of our moral guard. We have not yet reached the point where, when parents who have tired of each other's company, may be free to seek other companionship with complete disregard of the moral examples they are setting for their children. This is the crux of the case at bar.¹⁷⁶

To the drafters of Article 10, it appeared that by 1969, for better or for worse, social mores had so changed that the family court could no longer be asked to enforce the "moral" values of the past. They believed that the mere fact that a parent was having sexual relations with someone should not in itself, constitute child neglect.¹⁷⁷ A 1974 opinion mirrors this change.

N.Y.S.2d 422, 423-24 (Fam. Ct. Rensselaer County 1962) (where the mother "frequently entertained male companions in the apartment and in the presence of the children. In fact, on occasion, these male companions not only spent considerable parts of the day there but ate meals with her and the children and, on at least one occasion, one of them spent the night with the respondent and, in fact, slept with her, to the knowledge of the children").

175. Cf. *Feldman v. Feldman*, 45 A.D.2d 320, 323, 358 N.Y.S.2d 507, 511 (2d Dep't 1974).

176. 37 Misc. 2d at 412, 238 N.Y.S.2d at 423.

177. "The courts have on occasion recognized the right of an unmarried male to engage in extramarital sexual relations without being branded a 'social leper,' and there appears to be no rational basis to impose a more stringent standard upon a divorced woman." 45 A.D.2d at 323, 358 N.Y.S.2d at 511.

In my opinion, amorality, immorality, sexual deviation and what we conveniently consider aberrant sexual practices do not ipso facto constitute unfitness for custody. In the instant case, assuming arguendo the complete truth of the father's petition, the total evidence of exposure of the children to the "swinging" practices of the mother is the inadvertent presence on two tables of letters in answer to the above-mentioned advertisement. By its decision herein the trial court stated, in effect, that all fathers and mothers who participate in this culture of "free sex" are unfit parents. The logical extension of the rationale of the trial court's position is to place the children of "swinging" couples in foster homes or orphanages. I cannot subscribe to such a proposition.

In my opinion the right of a divorced woman to engage in private sexual activities, which in no way involve or affect her minor children, is within the penumbra of that yet ill-defined area of privacy mandated by the specific guarantees of the Bill of Rights.¹⁷⁸

The drafters concluded that the phrase "moral supervision" found in Article 3, though qualified by the requirement of serious harm to the child, was a misleading signal to the court and agencies about the importance of a parent's sexual behavior. Therefore, the word "moral" was deleted from the new Article 10 definition of "neglected child."¹⁷⁹

The deletion of the word "moral" does not mean that a parent's sexual behavior cannot be the basis of a finding of child neglect. For example, if the parent's behavior is open and notorious, if the child witnesses sexual acts, if the child is led to take part in them, or if the child observes a variety of unrelated adults spending the night with his parent, then it might be an act "of a similarly serious nature requiring the aid of the court." But to establish that the sexual conduct satisfies this clause, the petitioner needs to prove specifically how the child's condition is impaired or is in imminent danger of becoming impaired. Only then can the court's child protective jurisdiction be invoked. As one court held:

As for appellant's moral conduct, while there was proof that men on occasion remained overnight in appellant's

178. *Id.* at 322-23, 358 N.Y.S.2d at 510-11.

179. See Besharov, *Supplementary Practice Commentary*, in N.Y. FAM. CT. ACT § 1012 (McKinney Supp. 1976-1980).

apartment while [the eight year old child] was present and with his apparent knowledge, there is no showing that appellant was guilty of such gross moral turpitude as would render her unfit for custody particularly since there is no showing that such conduct was actually affecting [the child's] upbringing.¹⁸⁰

Hence, courts now generally subscribe to the proposition that a "finding of neglect is justified when there is a direct relationship between the mother's adultery and her children's welfare so that her immoral behavior would be directly detrimental to their best interest if the condition persists unabated."¹⁸¹ On the other hand, it is sometimes easier to convince a judge that children will "suffer detrimental damage attributable to the adulterous act of their mother"¹⁸² than one might ordinarily suppose. For example, in a 1970 case, five minor children were found to be neglected because their separated mother lived with them and a paramour in the same house, even though the paramour supported the family and the mother and paramour planned to marry once her divorce was granted.¹⁸³

7. Emotional Maltreatment

Although the subjectivity of definitions of emotional maltreatment is widely recognized, most practitioners and standard setting organizations reluctantly conclude that state intervention is necessary when parents emotionally abuse or neglect their children.¹⁸⁴

Subsection 1012(f)(i)(B) defines a "neglected child" to include a child whose parents unreasonably inflict or allow to be inflicted "harm or a substantial risk thereof." Under the definition of the "abused child," the seriousness of a physical injury is gauged by its *emotional* as well as physical impact so that it too provides a ground for intervention in cases of emotional maltreatment—if the emotional maltreatment included a physical assault.¹⁸⁵ Since the harm inflicted is not specifically limited to physical harm, and since

180. In *In re Rodolfo CC v. Susan CC*, 37 A.D.2d 657, 322 N.Y.S.2d 388, 390 (3d Dep't 1971). See also *In re Tesch*, 66 Misc. 2d 900, 901, 322 N.Y.S.2d 538, 539 (Fam. Ct. Wayne County 1971) in which the court stated that "the children cannot help but be aware of what is transpiring. The respondent admitted that the children were upset and could not understand the situation." *Id.*, 322, N.Y.S.2d 539.

181. *In re H. Children*, 65 Misc. 2d 187, 189, 317 N.Y.S.2d 535, 538 (Fam. Ct. Queens County 1970).

182. *Id.* at 189, 317 N.Y.S.2d at 537-38.

183. *Id.* at 187, 317 N.Y.S.2d at 536.

184. See, e.g., ABA STANDARDS, *supra* note 54, at 56-58.

185. See text accompanying note 35 *supra*.

the introductory passage to this provision speaks of the impairment of either the child's "physical, *mental* or *emotional* condition,"¹⁸⁶ it seems reasonable to conclude that this provision includes emotional assaults against a child. Such emotional assaults include locking in a closet, tying and other forms of close confinement, as well as taunting, belittling and other forms of verbal abuse.¹⁸⁷

As in the case of corporal punishment, disciplining a child through verbal or emotional punishment is permitted, but only if it is not excessive.¹⁸⁸ Hence, locking a child in a closet for days at a time would be excessive and therefore proscribed, while the withholding of privileges ordinarily would not be excessive. Although such issues are seldom discussed in the case law or statutes, South Carolina has codified the concept of reasonable withholding of privileges.

Provided, nothing herein shall be construed as prohibiting a person responsible for a child's welfare from imposing reasonable restrictions deemed necessary by such person for the intellectual, psychological or emotional well-being of the child by any of the following means or methods: (1) restrictions relating to attendance at amusements, concerts, social events or activities, or theaters; (2) restrictions on amount of exposure to secular activities such as television, extra-curricular school activities or community recreational activities; (3) instructions, directions, or mandates relating to public or private elementary or secondary education or attendance at churches or other places of religious worship.¹⁸⁹

Although emotional assaults are rarely mentioned as a specific ground for intervention in any but the most extreme cases, the court's concern over the effects of emotional assaults has led to intervention when the child was repeatedly hospitalized by the

186. N.Y. FAM. CT. ACT § 1012(f)(i) (McKinney 1975). The definition of the phrase "impairment of mental or emotional condition" is discussed in the text accompanying notes 69-76 *supra*.

187. [C]hildren can be severely damaged psychologically as well as physically. Often the impairments are crippling and permanent. An increasing body of evidence shows that children who suffer early emotional disturbances often display later mental illness or antisocial behavior. As adults they may be incapable of caring for themselves or their own children. If severely disturbed children are not receiving treatment, the reasons for intervening are little different from those justifying protecting children from physical injury.

Wald, *supra* note 1, at 1015 (footnotes omitted).

188. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 1975).

189. Child Protection Act of 1977, S.C. CODE § 20-10-20(G)(1)-(3) (Supp. 1980).

parents when there was no medical necessity,¹⁹⁰ and when there was "intense antagonism" between separated spouses, with each parent seeking to turn the child against the other through constant vilification of the other parent.¹⁹¹

The most common form of emotional maltreatment that reaches the family court, though, is emotional *neglect*. A child needs consistent emotional support and nurturance in order to develop into a secure, well-functioning adult. Jurisdiction over the failure to meet a child's emotional needs is found in the previously discussed "miscellaneous" clause of the definition of the "neglected child."¹⁹² Sometimes, the emotional neglect involves the parent's failure to fulfill a concrete, easily describable responsibility, such as the failure to pursue a course of psychotherapy recommended by qualified mental health professionals.¹⁹³ More often, though, it involves an amorphous atmosphere of disregard for the child's emotional and cognitive needs.

Before leaving the subject of "emotional maltreatment," a few points about the proof of "impairment of mental or emotional condition" should be made. The causes of mental or emotional disturbances are often unclear and it would be unfair to blame parents automatically for a child's mental or emotional condition. Thus, subsection 1012(h) requires that the child's mental or emotional impairment be "clearly attributable to the unwillingness or inability of the respondent to exercise a minimum degree of care toward the child." To establish this connection, the *res ipsa loquitur* rule can be used if the child's condition is "of such a nature as would ordinarily not exist except by reason of the acts or omissions of the parent."¹⁹⁴ In addition, the Family Court Act expressly permits "competent opinion or expert testimony . . . that such impairment lessened during a period when the child was in the care, custody or supervision of a person or agency other than the respondent."¹⁹⁵ In the absence of eyewitness testimony about the parent's behavior, these rules may be the only way to establish the

190. *In re Ella Mae H.*, 54 A.D.2d 774, 774, 387 N.Y.S.2d 303, 304 (3d Dep't 1976).

191. *In re Dubin*, 201 Misc. 621, 621-23, 112 N.Y.S.2d 267, 268-69 (Children's Ct. Queens County 1952).

192. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 1975). See text accompanying notes 79-84 *supra*.

193. *In re Ray*, 95 Misc. 2d 1026, 1029, 408 N.Y.S.2d 737, 739 (Fam. Ct. Kings County 1978).

194. Codified by N.Y. FAM. CT. ACT § 1046(a)(ii) (McKinney 1975).

195. *Id.* § 1046(a)(viii). This provision provides an independent specification of the definitional phrase "substantially diminished psychological or intellectual functioning," *id.* § 1012(h), since, to be successful, the proof of lessened impairment would have to be based on an observable and measurable improvement.

parent's responsibility for the child's impaired mental or emotional condition.¹⁹⁶

8. Parental Incapacity

Because of *severe* mental illness or mental retardation, some parents are incapable of caring for their children.¹⁹⁷ A number of states have legislation making "parental incapacity" a specific ground for an adjudication of child neglect or dependency.¹⁹⁸ In most states, though, cases of parental incapacity fall within general statutory clauses concerning children who "lack proper parental care."¹⁹⁹ Under such specific or general provisions, courts sometimes authorize foster care or even termination of parental rights before the parent (or parents) have had the child in their custody.²⁰⁰

a. Mental Illness or Retardation

In New York, however, under the Family Court Act's definition of the "neglected child," no such jurisdiction exists except in cases of parental drug addiction. According to the court of appeals, parental incapacity, even severe mental illness or retardation, is "not a *per se* basis for a finding of neglect."²⁰¹ For, although the

196. THE MALTREATED CHILD, *supra* note 13, at 92.

Because most acts of abuse or neglect happen in the privacy of the home without any witnesses, gathering information on what happened can be exceedingly difficult. If the parents are looking for help, they may tell the worker what happened, but often they deny everything the worker has learned from others. Protective caseworkers have great difficulty in getting genuine information about families, and often they are unsure of their role and responsibilities in protecting children.

Id.

197. For a useful discussion of various studies done on the presence of physical and mental disabilities among abusive parents, see NATIONAL INSTITUTE OF MENTAL HEALTH, U.S. DEP'T OF HEALTH, EDUCATION AND WELFARE, CHILD ABUSE AND NEGLECT PROGRAMS: PRACTICE AND THEORY 137-39 (1977) [hereinafter cited as NIMH STUDY].

198. See, e.g., ARK. STAT. ANN. § 45-403(4) (1977); TENN. CODE ANN. § 37-202(6)(ii) (Supp. 1980); WYO. STAT. § 14.6-201(a)(xvi)(C) (1977).

199. See, e.g., *In re Wedige*, 205 Neb. 687, 289 N.W.2d 538 (1980) (minor children of alcoholic mother were found to be "neglected" or lacking in proper parental care within Nebraska statute and mother's parental rights were terminated).

200. See, e.g., *Roberts v. State*, 141 Ga. App. 268, 233 S.E.2d 224 (1977) (baby born to mentally retarded, fourteen-year-old mother was placed in foster home immediately after birth; despite any "history of deprivation" in the circumstances, court held parental rights terminated on ground deprivation would occur in future if mother given custody).

201. *In re Trina Marie H.*, 48 N.Y.2d 742, 743, 397 N.E.2d 1327, 1327, 422 N.Y.S.2d 659, 660 (1979); *In re Daniel C.*, 47 A.D.2d 160, 365 N.Y.S.2d 535 (1st Dep't 1975). The *Daniel C.* court held that the mother's various hospitalizations for psychiatric treatment "did not establish neglect or unfitness *per se*," especially since there was

no evidence of maltreatment of the children by the petitioner or that in the past they suffered harm at her hands. Whenever she felt a possible recurrence of her disabil-

definition of neglect contains the same sort of general phrase—"proper supervision or guidance"²⁰²—which gives such jurisdiction in other states, it also contains the express requirement that there have been a "failure of [the] parent . . . to exercise a minimum degree of care" toward the child.²⁰³ At a minimum, this provision would seem to require some specific act or omission that impairs the child's condition or threatens to do so.

Nevertheless, when faced with clear mental illness or retardation, courts sometimes seem to ignore the requirement that the parent must actually fail to exercise a minimum of care toward the child. For example, in one case, the child was removed from the mother twenty days after birth, the court holding that, in the face of many past instances of poor judgment and untoward behavior, though there had been no actual failure to adequately care for the child, the child "would be in danger of becoming a 'neglected child' if she were returned to the mother because of the mother's 'mental illness.'"²⁰⁴ And, like courts in other states, the family court sometimes will authorize intervention even before the parent or parents have had the child in their custody.²⁰⁵

Furthermore, although most courts are careful to require that the parent's mental or emotional disability be a present one,²⁰⁶ they frequently fail to make an explicit connection between the parent's condition and any potential harm to the child. The family court's handling of *In re Millar*²⁰⁷ illustrates this tendency:

ity, petitioner would voluntarily sign herself into a hospital facility for treatment, apparently after first arranging for the care of the children.

Id. at 164-65, 365 N.Y.S.2d at 539.

202. N.Y. FAM. CT. ACT § 1012(f)(i)(B) (McKinney 1975).

203. *Id.* § 1012(f)(i).

204. *In re Hime Y.*, 73 A.D.2d 154, 160, 425 N.Y.S.2d 336, 340 (1st Dep't 1980). *See also* Dep't of Social Servs. v. Joan R., 61 A.D.2d 1108, 403 N.Y.S.2d 368 (3d Dep't 1978). The *Joan R.* court noted:

Expert testimony at the trial by . . . a psychiatrist, establishes by clear and convincing evidence that appellant suffers from mental illness, i.e., schizophrenia chronic undifferentiated type, and that, as a result of said illness, she is unable now and will likely remain unable in the future to properly care for a child.

Id., 403 N.Y.S.2d at 369.

205. *See, e.g., In re Carlton*, Karen and Joseph W., N.Y.L.J., Feb. 11, 1976, at 12, cols. 1-2, in which a psychiatrist testified that the mother's "schizophrenia of a chronic paranoid type" raised potential hazards such as "impaired judgment relative to such crucial factors as one's financial matters, and inability to feed and tend the infant, and a real and serious possibility of leaving an infant unattended." *Id.*

206. *See, e.g., In re Karr*, 66 Misc. 2d 912, 915, 323 N.Y.S.2d 122, 125 (Fam. Ct. Richmond County 1971) ("[t]he fact that the respondent had a previous history of mental and emotional illness and had been confined at one time in a State Hospital is not conclusive as to whether the respondent father is now suffering from mental or emotional illness at the time of the hearing"). *Id.* at 915, 323 N.Y.S.2d at 125 (emphasis in original).

207. 40 A.D.2d 637, 336 N.Y.S.2d 144 (1st Dep't 1972), *aff'd*, 35 N.Y.2d 767, 320 N.E.2d 865, 362 N.Y.S.2d 149 (1974).

No evidence was adduced to connect [the mother's mental "condition" with the strong probability of future neglect. On the contrary, appellant's conduct in refusing to go to the hospital until she was assured that her child would be adequately cared for by a neighbor, and in calling the neighbor every night during her 13-day hospital confinement, evinces an overriding concern for the welfare of her child.

...

No psychiatric testimony was introduced [concerning the mother's ability to care for her children] although the Court below stated that such testimony was necessary and the Jacobi Hospital psychiatrist who interviewed the appellant was subpoenaed. The Family Court finding was predicated, therefore, solely on testimony of law witnesses and several letters disclosing that [the mother] had been hospitalized for 6 months in 1962 (several years before her child was born), received out-patient care intermittently thereafter, was hospitalized for some 13 days in 1970 and that her condition was diagnosed as ["chronically delusional," "poorly organized," "chronic paranoid schizophrenia" and "severely psychotic"].²⁰⁸

And yet, on this basis, the appellate division concluded that the "record amply supports the finding of neglect . . . in that the child, although not already impaired, is 'in imminent danger of becoming impaired.' A child living alone with a chronic paranoid and severely psychotic schizophrenic mother is in imminent danger of becoming physically and emotionally impaired."²⁰⁹ While the court of appeals affirmed, it noted:

A majority of the Court would have preferred that before the final adjudication of neglect there would have been testimonial evidence of a psychological expert of the potential risks to the child while in the care of the purportedly ill mother. All the Court agree that the staleness of the appeal makes incongruous any suggestion that the matter be submitted for further proceedings and would be detrimental to the welfare of the child.²¹⁰

208. *Id.* at 638, 336 N.Y.S.2d at 146 (Murphy, J., dissenting).

209. *Id.* at 637, 336 N.Y.S.2d at 145 (Murphy, J., dissenting).

210. *In re Millar*, 35 N.Y.2d 767, 768, 320 N.E.2d 865, 865, 362 N.Y.S.2d 149, 149 (1974).

While the desire to protect children from harm is understandable, one must be troubled by labeling as "abusive" or "neglectful" parents who have not yet failed in their obligation to care for a child, especially if they have never had the child in their custody. For example, if a parent suffers a total and complete mental incapacity as a result of an automobile accident, and no suitable arrangements are made for the child, a threat of harm to the child might be proven, but certainly there has not yet been parental conduct adverse to the child. Insisting on a specific adverse act or omission would require that the child be left in the parents' care until the inevitable occurred. Clearly this would be socially unacceptable and, if forced, most agencies and courts would seek to assert child protective jurisdiction. In the name of basic fairness and in the absence of statutory authority to intervene, the better practice would be to offer to such parents assistance in meeting their responsibilities toward their children—even if, in the extreme, this meant foster care.²¹¹ While the acceptance of such offers of assistance from a child protective agency or a court may be far from voluntary, at least it permits the parents to reassert their rights after they recover, without facing the obstacle of a previous adjudication of "neglect." If the parents refuse to cooperate, court action may be necessary, but then it can be based on the parents' refusal of a reasonable offer of aid, rather than on the parents' condition.²¹²

b. Drug and Alcohol Abuse

Parental incapacity because of the use of a "drug or drugs,"²¹³ however, is a ground for a finding of neglect under subsection 1012(f)(i)(B).²¹⁴ Ordinarily, by operation of the intro-

211. [P]ersonality disorders which are found in many of these abusive parents, including immaturity, mental deficiency and other physical, mental, emotional and moral inadequacies, must be exposed and treated by appropriate means in order to treat the true cause of this disease and not just the symptoms. These victims of modern frustrations and antisocial living, triggered by economic and environmental, moral and emotional tensions, must receive the necessary help to make them better citizens and better parents. One source of help may be to provide a homemaker. This individual can serve as a lay therapist, can serve as a maternal figure to "mother" the mother, and can assist the immature mother in childrearing and housekeeping practices.

THE MALTREATED CHILD, *supra* note 13, at 44-45.

212. N.Y. FAM. CT. ACT §§ 1071-1072 (McKinney 1975).

213. A drug is defined as "any substance defined as a controlled substance in section three hundred six of the public health law." *Id.* § 1012(d).

214. *See, e.g., In re Male R.*, 102 Misc. 2d 1, 422 N.Y.S.2d 819 (Fam. Ct. Kings County 1979) (neglect of child may be found despite fact that he has never been in his parent's custody, since the substantial risk of impairment is established *prima facie* by proof of his mother's drug use).

ductory provisions, the child cannot be found neglected because of parental drug use unless it results in (1) the parent's failure "to exercise a minimum degree of care" which, in turn, (2) caused the child's condition to be impaired or in imminent danger of becoming impaired.²¹⁵ However, regarding drug abuse this requirement, or at least its *prima facie* proof, is waived by the Family Court Act which provides that

proof that a person repeatedly uses a drug, to the extent that it has or would ordinarily have the effect of producing in the use thereof a substantial state of stupor, unconsciousness, intoxication, hallucination, disorientation, or incompetence, or a substantial impairment of judgment, or a substantial manifestation of irrationality, shall be *prima facie* evidence that a child of or who is the legal responsibility of such person is a neglected child.²¹⁶

The rationale of this provision is simple. Almost by definition, a parent evidencing the specified degree of addiction suffers impaired judgment and coping ability from which the child must almost inevitably suffer.²¹⁷ Nevertheless, there can be exceptions to this broad generalization. For example, in one case, the court described how an addict's "15-year-old son was devoted to his mother, was conducting himself in an exemplary manner . . . [and] was doing well in school and in planning his pre-dental school education." It should be noted, however, that the addict mother's two daughters lived with their maternal grandmother.²¹⁸ In order to allow flexibility in such cases, proof of addiction is made *prima facie* evidence of neglect rather than presumptive evidence.²¹⁹

Sometimes, direct proof of the parent's drug addiction is not available. To fill this gap, courts have judicially constructed another rule of evidence, *i.e.*, "a new-born baby having withdrawal symptoms is *prima facie* a neglected baby" The reasoning behind such a case is:

To give rise to such symptoms, the mother must have been regularly using large quantities of heroin (as she substantiated by her history) for considerable time before [the

215. This is in accordance with the introductory provisions of § 1012(f)(i).

216. N.Y. FAM. CT. ACT § 1046(a)(iii) (McKinney 1975).

217. The legislature had an additional reason for adding this provision. Both of Roxanne Felumero's parents were drug addicts. See note 15 and accompanying text *supra*.

218. *In re John Children*, 61 Misc. 2d 347, 361, 306 N.Y.S.2d 797, 812 (Fam. Ct. N.Y. County 1969).

219. *Prima facie* evidence not only may be rebutted by contrary credible evidence, but it may be disregarded by the fact-finder even in the absence of contradicting evidence.

child's birth]; the placenta permits ready transfer of heroin from mother to fetus. Had she injected heroin not habitually but only shortly before child's birth, massive doses may have killed her and the new-born child, or the baby would have been sedated instead of hyperactive and suffering withdrawal. Only a high tolerance (a strong and perhaps sufficient basis for a finding of narcotic addiction without additional history) for both mother and baby would cause the medically observed course of events found here.²²⁰

Actually, a newborn suffering from withdrawal symptoms might well be considered to be an "abused child." Assuming that the court would be willing to hold the mother responsible for her drug use while the fetus was *in utero* (many addicts suspend or curtail their drug use during pregnancy),²²¹ the elements of child abuse would be established since withdrawal symptoms are certainly a "serious physical injury." Untreated neonatal addiction can be fatal. The dangers encountered by babies born addicted to drugs are described in *In re John Children*.²²²

[The] baby was born normally and without apparent symptoms until 24 hours after birth, when the baby began to exhibit the unmistakable narcotic withdrawal symptoms; preconvulsive tremors, hyperactivity, incessant crying, [and] ravenousness alternating with vomiting Sedatives (phenobarbitol), dark and quiet were required for seven days before the child became physically well. Without careful therapy, the child might have suffered convulsions and death.²²³

Finally, proof of drug use, both under subsection 1012(f)(i)(B) and under subsection 1046(a)(iii), must establish present drug use, and not drug use in the remote past.²²⁴ Past drug addiction, like past mental illness, cannot be the basis of a finding of present

220. See, e.g., *In re John Children*, 61 Misc. 2d at 354, 306 N.Y.S.2d at 805. *In re Vanesa F.*, 76 Misc. 2d 617, 619, 351 N.Y.S.2d 337, 340 (Sur. Ct. N.Y. County 1974).

221. See *In re Male R.*, 102 Misc. 2d at 9-10, 422 N.Y.S.2d at 824-25 (allegation that actual impairment at birth of infant's condition, based on mother's prenatal drug use, provides an independent basis for a finding of neglect discussed, but not made basis of court's decision).

222. 61 Misc. 2d 347, 306 N.Y.S.2d 797 (Fam. Ct. N.Y. County 1969).

223. *Id.* at 353-54, 306 N.Y.S.2d at 805.

224. For a discussion of the admissibility of drug treatment agency records to prove drug use, see Besharov, *Practice Commentary*, in N.Y. FAM. CT. ACT § 1038 (McKinney Supp. 1976-1980).

neglect.²²⁵ Proof of drug use at or about the time the petition was filed is sufficient to create a rebuttable presumption that the condition, once established, may be presumed to continue. Similarly, participation in a Methadone Maintenance Program does not, in itself, establish parental unfitness.²²⁶

Alcohol abuse, on the other hand, is not, by itself, child neglect. Although the third example of parental failure to provide "proper supervision or guardianship" in subsection 1012(f)(i)(B) is parental use of "alcoholic beverages to the extent that he loses self-control of his actions," unlike the case of drug use, the Family Court Act does not establish a rule of evidence that proof of the abuse of alcoholic beverages is *prima facie* evidence of neglect. Hence, proof of alcohol abuse would only be the first step in satisfying the introductory clause's requirements of a parental failure "to exercise a minimum degree of care" and a resultant impairment or threatened impairment of the child. The phrase, then, does not expand the court's jurisdiction but, rather, seeks to focus agency and judicial attention on a particular family problem that may lead to neglect. It also provides a practical, and all too common, specification of the phrase "proper supervision or guardianship."²²⁷ As in the case of drug abuse, the proof of alcohol abuse must relate to reasonably contemporaneous abuse, and not long past or cured alcoholism.²²⁸

III. CONCLUSION

The Family Court Act's definitions of the "abused child" and the "neglected child" were enacted in 1970, when Article 10 was

225. Cf. *In re Karr*, 66 Misc. 2d 912, 915, 323 N.Y.S.2d 122, 125 (Fam. Ct. Richmond County 1971) (fact that father seeking custody of daughter had once been confined in state mental hospital held not conclusive as to his fitness at the time of hearing).

226. *In re Catherine S.*, 74 Misc. 2d 154, 347 N.Y.S.2d 470 (Fam. Ct. Kings County 1973). See also *Beazer v. New York City Transit Authority*, 399 F. Supp. 1032 (S.D.N.Y. 1975) (transit authority's blanket ban from employment of former heroin addicts and present participants in methadone maintenance programs was a violation of due process and equal protection because substantial numbers of them would be capable of performing many of the jobs involved).

227. See, e.g., *In re Dixon*, 53 A.D.2d 1014, 386 N.Y.S.2d 484 (4th Dep't 1976) (physical condition of children in imminent danger of becoming impaired as a result of mother's failure to exercise minimum degree of care in providing them with proper supervision and guardianship due to over use of alcoholic beverages); *In re Jerry M.*, 78 Misc. 2d 407, 357 N.Y.S.2d 354 (Fam. Ct. N.Y. County 1974) (mother found guilty of gross neglect based on injuries sustained by infant child while mother spent the evening in a tavern).

228. *In re Foreman*, 75 Misc. 2d 348, 347 N.Y.S.2d 319 (Fam. Ct. Queens County 1973) (investigation several years after filing of neglect proceeding based on mother's excessive use of alcohol established mother was fully rehabilitated and child was returned to mother's custody).

revised and expanded. Since then, they have not been substantively altered.²²⁹ Throughout this period, Article 10 has met with general approval.²³⁰

Nevertheless, the definitions of the "abused child" and the "neglected child" are now over ten-years-old. Hence, it is valid to ask whether they should be modified in light of the past ten years experience.²³¹ Two specific questions arise: (1) Should the priority accorded child abuse cases be continued? and (2) Can the definition of child neglect be made more precise?

A. Should the Priority Accorded Child Abuse Cases be Continued?

As this article has described, the separate definition of the "abused child" was created to identify those cases in which the danger to the child requires that they be given priority handling. "[T]he earmarking of a case as child abuse, by putting it in a special part, and by noting on the summons, warrant and petition that it is a 'child abuse case,' acts as a red flag to indicate a case requiring immediate and careful consideration."²³² Unfortunately, there is no reason to believe that the conditions that led the legislature to impose this priority to child abuse cases²³³ have in any way improved. If anything, court backlogs and concomitantly rushed proceedings have worsened in the last ten years. Moreover, there is strong evidence that this admittedly shortcut solution to a "more deepseated problem"²³⁴ has worked. Within two years of the passage of the revised Article 10, the number of children who died while their cases were pending before the family court dropped

229. In 1973, a number of important changes were made in Article 10 to reflect the passage of the Child Protective Services Act of 1973, N.Y. SOC. SERV. LAW §§ 411-428 (McKinney 1973), but the definitions were not affected.

230. See, e.g., Comment, *An Appraisal of New York's Statutory Response to the Problem of Child Abuse*, 7 COLUM. J.L. AND SOC. PROB. 51 (1971); Legislative Notes, *Child Protection Proceedings Under Article 10 of the New York Family Court Act*, 20 BUFF. L. REV. 561 (1971).

231. At this writing, the recently formed Temporary State Commission to Recodify the Family Court Act has begun its multi-year review of the entire Act.

232. CHILD ABUSE REPORT, *supra* note 10, at 249.

233. See text accompanying notes 9 & 10.

234. CHILD ABUSE REPORT, *supra* note 10, at 257. The N.Y. State Assembly Select Committee summed up its report as follows.

We in New York have the nation's most extensive child abuse laws. We like to think they are also some of the best. Indeed, most commentators have said so. But we acknowledge that laws are only the beginning. They provide a legal and institutional framework for professional and community people to act. No set of laws—no matter how well intentioned and no matter how well drafted—can succeed without the understanding, cooperation, and active assistance of professionals and the public. A law lives in the manner in which it is used.

Id.

eighty percent, from about twenty a year to less than five a year.²³⁵ Given this reality, abandoning the priority now accorded "child abuse cases" seems ill-advised and potentially dangerous to the children most in need of protection.

B. Can the Definition of Child Neglect be Made More Precise?

As this paper also has described, a major purpose of the 1970 revision of the definition of the "neglected child" was to make it more precise. This was accomplished by adding the requirement that the parental behavior impair the child's condition or threaten to do so. Even though the definition is now one of the most specific in the nation, if not the most specific, it still suffers from residual imprecision.²³⁶ As was described, it speaks in terms of "adequate" food, clothing, shelter, education, and medical care and "proper" supervision or guidance, while providing only limited direction about what is or is not "adequate" or "proper." Similarly, the central concept of "impairment of physical condition" is not even defined.²³⁷

Some observers have asserted that the failure to define such terms "delegates to administrators, prosecutors, and judges the power to invade privacy almost at will."²³⁸ At least in regard to the Family Court Act's definitions, this is a somewhat exaggerated statement because, if nothing else, the Act's requirement that the child be harmed or threatened with harm provides an important limitation on its application. The fact of the matter is that, in ten years of application, the definition has not yet been cited as the reason for unwarranted intervention into family life. Indeed, one reviewer called it a "very specific standard."²³⁹ Another called it an example of "the most rational of jurisdictional bases."²⁴⁰

235. *Id.*

236. See NIMH STUDY, *supra* note 197, at 115-19, discussing criteria and definitions of child abuse and neglect.

The existence of an adequate definition of abuse and/or neglect is central to the entire system of service delivery to abusive and neglectful families. Legal definitions delineate the range of cases and issues to which programs can be addressed. . . . However, child abuse and neglect laws do not specify what is or is not acceptable in operational terms; hence there is no objective point of demarcation between punishment and abuse or between minimal acceptable care and neglect.

Id. at 115.

237. See text accompanying note 76 *supra*.

238. A. FREUD, J. GOLDSTEIN & A. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 16 (1980).

239. Note, *The Right To Family Integrity: A Substantive Due Process Approach To State Removal And Termination Proceedings*, 68 *Geo. L.J.* 213, 227 (1979).

240. Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 *COLUM. L. REV.* 719, 722 (1979).

Nevertheless, because of the Act's residual imprecision, in less than clear-cut cases on the borderline of social consensus, its definitions, like all other existing definitions, allow individual decision-makers great latitude in applying their personal interpretations and values to the child rearing situations they must judge.²⁴¹ Certainly it would be helpful to have a statutory definition of the phrase "impairment of physical condition," perhaps along the lines proposed in this article.²⁴² But beyond that, at the present time there does not seem to be any way to prevent such residual imprecision. The only solution that critics of such provisions have offered is the additional requirement that the harm to the child be "serious." But "'serious' can mean anything from a slight bruise to death; its ultimate meaning depends on the circumstances of individual cases, such as the age of the child (the younger the child, the more serious the same injury) or the location of the injury (injury to the head and the genitalia being ordinarily more serious than to an extremity)."²⁴³ Without a further definition of the word "serious," an injury that one person may consider "serious," another person may consider "minor." As Fitzgerald concludes: "Terms such as 'appropriate,' 'serious,' 'imminently,' and 'substantial' are not self-defining. There is still enormous room for judicial discretion."²⁴⁴ Similarly, Wald, one of those who has proposed that intervention be limited to cases where "a child has suffered or is likely to suffer serious physical injury as a result of abuse or inadequate care . . .

241. NIMH STUDY, *supra* note 197, at 115.

Legal definitions of abuse and neglect fall far short of providing the operating definitions necessary for intervention decisions, particularly because, as a function of cultural values and personal history, one man's abuse is another man's discipline. On a broader level, community standards differ in terms of the sociocultural definitions of acceptable discipline and of the relative weight given to children's rights in contrast to parental rights.

Id.

242. See text accompanying note 76 *supra*. The Model Child Protection Act of 1975 speaks only of "physical or mental injury" and defines the former as "death, or permanent or temporary disfigurement or impairment of any bodily organ." MODEL CHILD PROTECTION ACT OF 1975 § 4(f) in THE MALTREATED CHILD, *supra* note 13, at 102.

243. NIMH STUDY, *supra* note 197, at 115.

In some communities the use of any object which leaves marks on a child's body is considered abuse; in other communities this depends on the age of the child, so that the strapping of a 12-year-old may be defined as nonabusive whereas the strapping of an infant is ipso facto evidence of abuse. Similarly, some programs take into account the location of the injury and are more likely to apply the label "abuse" in cases of physical marks to the face and genitalia than to marks on other areas of the body.

Id.

244. Fitzgerald, *Rights of Neglected Children and Attempts by the State to Regulate Family Relationships*, in CHILD WELFARE STRATEGY IN THE COMING YEARS 371, 381 (U.S. Children's Bureau, Dep't of Health, Education and Welfare 1978).

[or] severe emotional damage . . ."²⁴⁵ acknowledged the extent of this residual imprecision when he warned that "intervention [would be] inappropriate in many cases which fall under the proposed definition."²⁴⁶ Consequently, efforts to narrow the concept of child maltreatment by adding the one-word qualifier of "serious" are at best a partial solution to a more fundamental problem and, at worst, a cosmetic change that gives the illusion of greater specificity while in reality merely substituting one imprecise term for another. Therefore, while the residual imprecision of the "neglected child" definition is a legitimate concern, substantial improvement does not seem presently possible.

Moreover, altering the "neglected child" definition would require a massive retooling of the state's child protection system. The present definition has been in use for over ten years; the case precedents and administrative procedures it has spawned are widely accepted and relied upon. Hence, the marginal increase in specificity that a revision might bring about would not justify the turmoil that would result.

* * *

The foregoing is not meant to suggest that all is well in regard to state intervention to protect children under the Family Court Act. Grave excesses in intervention still plague the system. However, the problem is not with the Act's definitions of the "abused child" and the "neglected child." They adequately describe those situations in which most people would expect government to intervene to protect children. The problem facing New York and most other states is not unwarranted intervention generally. It is, rather, the overuse and unjustified use of one particular form of intervention—foster care.²⁴⁷

At this writing, there are about 40,000 New York children in foster care.²⁴⁸ The unavoidable traumas of separation and substitute care can tear already tenuous family ties without providing help to either the child or the parent—the purpose of intervention in the first place. Moreover, the lamentable conditions of many foster care placements can make the situation even worse. Over

245. Wald, *supra* note 1, at 1008.

246. *Id.* at 988.

247. ABA STANDARDS, *supra* note 54, at 119-20. Standard 6.4C forbids removal of the child from the home unless the child cannot be protected by any other means. *Id.* at 120. "Evidence from several states indicates that children are often placed in inadequate institutions or foster homes. . . . Too often we merely substitute inadequate state care for inadequate parental care." *Id.* at 119.

248. [1980] N.Y. STATE DEP'T OF SOC. SERV. Q. REP., CHILD CARE REVIEW SYSTEM Table 8 (Dec. 30, 1980).

fifty percent of the children in foster care have been in this "temporary" status for more than two years; over thirty percent for more than five years.²⁴⁹ During this time, many children are placed in a sequence of ill-suited foster homes, denying them the consistent support and nurturing that they so desperately need.²⁵⁰

Of course, foster care is necessary to protect some children from irremediable harm or even death. But for too many others, the plain truth is that they would be better off if society left them home with their parents.²⁵¹ On balance, however, foster care is often not justified by the harmfulness of the parental conduct.

Although there are multiple causes of the overuse of foster care, many of which find their roots in the inadequacy of treatment services,²⁵² a major contributing factor is the absence of statutory guidance about what family situations are or are not appropriately resolved through foster care.²⁵³ The Family Court Act, like the juvenile court acts of all other states, gives judges open-ended dispositional authority. Once initial court jurisdiction is established, they can suspend judgement, release the child to the parents, issue an order of protection, require counseling or supervision, or order the child placed in foster care.²⁵⁴ In deciding what disposition to impose, the judge must weigh the danger the child faces from his parents against the degree and possible harmful effects of the contemplated intervention.²⁵⁵ The notion that child protective inter-

249. *Id.*

250. NIMH STUDY, *supra* note 197, at 169-70. The study observes:

All too often, even in the absence of crisis, a crisis atmosphere prevails and children are removed from their homes without adequate discussion or support. Inadequate preparation of children, of the foster home, and of consideration of the mix between the two, leads to multiple foster home placements for children who have already experienced considerable trauma. While every program seeks to avoid such multiple placements, it is not at all uncommon for children to be placed in three or four different foster homes.

Id.

251. "Foster home placement is seen by some as therapeutic and by others as a necessary evil to be used only in life-threatening situations. Some staffs seem to feel that all but the most physically brutal biologic parents are better than even the best of foster parents; others disagree." *Id.* at 169.

252. See CHILD ABUSE REPORT, *supra* note 10, at 242-47.

253. See *In re Evelyn Q.*, 100 Misc. 2d 1008, 420 N.Y.S.2d 468 (Fam. Ct. Bronx County 1979). The court stated that

[i]n order to determine whether this particular child is in need of its protection, the Court must look to all relevant and material factors involved. Only by looking at the total mosaic relating to both the child and its parent can this Court be reasonably expected to determine whether this particular child's welfare is in need of its protection.

Id. at 1014, 420 N.Y.S.2d at 472 (citations omitted).

254. N.Y. FAM. CT. ACT § 1052 (McKinney 1975).

255. See Wald, *supra* note 1, at 1007.

vention should be authorized only when it will “do more good than harm”²⁵⁶ is not a new one. However, by failing to codify this principle in statutory law, the dispositional structure of the Family Court Act de-emphasizes its importance and allows judges and other decisionmakers to lose sight of it.

Therefore, saying that the Family Court Act’s definitions of the “abused child” and the “neglected child” are best left alone does not mean that nothing can be done to prevent unwarranted state intervention. It just means that the path of reform leads elsewhere. There is a pressing need for expanded dispositional provisions that recognize: (1) that there are different levels of harmful parental conduct falling within the overall labels of “child abuse” and “child neglect,” and (2) that not all levels of harmfulness justify removing the child from the home. Future reforms should be directed toward building dispositional standards into the Family Court Act which will help guide judges to decide which family situations require and justify removal—and which do not.

256. ABA STANDARDS, *supra* note 54, at 40.