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Child Neglect Proceedings—A New Focus

ELLEN K. THOMAS†

[Former] Mothers in the aid to families with dependent children (AFDC) program receive on the average less than $1 a day for each child. If we find that the home is inadequate . . ., we remove the child to the home of a stranger . . . paying from public funds up to $7 a day . . . . If the child is removed to an institution, the institution is paid up to $14 a day. Finally, if the child becomes emotionally disturbed, payments from public funds may range from $10 to $25 a day. Thus, the further the child is removed from his family, the more we are ready to pay for his support.

INTRODUCTION

The bizarre state of affairs described by Judge Polier has been the subject of surprisingly little direct attack in the courts. Recently, however, in Ramos v. Montgomery, welfare mothers sought to compel payments to natural parents in the same amount as is paid for care of children in foster homes. One plaintiff received $48 a month for one child; in foster care the payment would have been $105. The mothers alleged that the differential violated federal law in that it tended to

† B.A. 1955, Oberlin College; J.D. 1973, Indiana University School of Law, Bloomington; Member, Indiana Bar. My gratitude and appreciation to the staff of the National Juvenile Law Center, St Louis, Mo., are boundless for advice and encouragement, as well as for research assistance and materials. A portion of this material will appear in altered form as a chapter in the manual, Law and Tactics in Juvenile Cases, scheduled for publication in 1975 by the National Juvenile Law Center.

1 Polier, The Invisible Legal Rights of the Poor, 12 CHILDREN 215, 218 (1965), quoted in Kay & Philips, Poverty and the Law of Child Custody, 54 CALIF. L. REV. 717, 736 n.85 (1966). Any illusions that the expenditures described solve problems for the child are rapidly dispelled by consideration of the quality of institutional and foster care frequently provided.

2 Presently pending is Winston v. Scott, Civil No. 72C-1112 (N.D. Ill., filed May 5, 1972) in which plaintiffs challenge the constitutionality of the state's child neglect statute, ILL. REV. STAT. ch. 37, § 702-4 (1971), including inter alia the factual allegations that foster parents receive approximately $120 per month per child . . . along with clothing, medical and other small incidental allowances. When a child is placed in an institution such as Sunny Ridge, that institution might receive from $324 . . . up to $400 or $500 a month. Moreover, the Department of Children and Family Services employs caseworkers and social workers to assist foster parents and institutions in caring for its wards. Plaintiffs . . . as parents cannot receive pecuniary and social work care and assistance from the State of Illinois in order to rear their children in home environments, but are forced to hand over their children to the State because they cannot afford to provide the care and treatment often demanded.

Complaint at 11-12, allegation 23, Winston v. Scott, supra. 3

break up families and induce placement of children in direct contravention of the policy of the Social Security Act and in violation of the equal protection clause. In dismissing the complaint, the court observed,

Some children must of necessity be placed in foster homes due to the financial inability of the parents to provide a suitable home. If such parents were to receive the same aid per child as foster parents receive there is no doubt that they could do a better job in supporting their children. Nevertheless, to give them that additional aid . . . would result in an overall reduction in money available for foster home care.\(^5\)

Despite the court’s casual observation that some children must “of necessity” be placed due to financial inability, the law of no state permits removal of a child from its parents because of poverty alone; indeed, any statute purporting to allow deprivation of parental custody on such grounds would be subject to severe constitutional objection. Juvenile courts have repeatedly said their neglect jurisdiction was not aimed at poverty.

The welfare of many children might be served by taking them from their homes and placing them in what officials may consider a better home. But the Juvenile Court Law was not intended to provide a procedure to take the children of the poor and give them to the rich, nor to take the children of the illiterate and give them to the educated . . . nor to take the children of the weak and sickly and give them to the strong and healthy.\(^6\)

Nevertheless, children doubtless are, in practice, removed from their homes because the parents are poor. One Assistant Public Defender assigned to represent parents in at least 90 percent of the 5,022 dependency and neglect cases filed in Cook County, Illinois in 1971 has testified that while poverty was never alleged in the neglect petitions, it was the underlying cause in the overwhelming majority of cases, with only 5 to 10 percent of proceedings being based on physical abuse.\(^7\) She

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\(^5\) 313 F. Supp. at 1183.
\(^7\) Affidavit of Assistant Public Defender, Cook County, Ill., filed with complaint in Winston v. Scott, Civil No. 72C-1112 (N.D. Ill., filed May 5, 1972), reported in 6 CLEARINGHOUSE Rev. 358 (1972).

A useful classification of the types of factual situations giving rise to neglect proceedings may be found in Sullivan, Child Neglect: The Environmental Aspects, 29 OHIO ST. L.J. 85 (1968). He suggests five types of cases: parental nonconformity, parental failure to supervise, excessive discipline or cruelty, parental immorality, and mentally disturbed or disturbing behavior on the part of a parent.

Each of these poses somewhat different problems. Sullivan refers in the first class largely to cases involving deviant religious sects; however, the rationale of these cases is
further indicated that most people charged were on AFDC or in the lowest economic bracket, that the conditions complained of as neglect would not have occurred had there been sufficient funds, that the store of information available to caseworkers made all the families potential respondents if they failed to "cooperate" with a caseworker, and that findings of neglect were frequently consented to by families desperately seeking to obtain child welfare or social work services for a child.

This article surveys the nature and legal status of the various interests involved in child neglect proceedings, the test governing disposition, and approaches to some legal bases which might be used at the dispositional stage to reverse the curious order of priorities reflected

also clearly applicable to deviant lifestyles based on political views, e.g., to children being raised in communes or group families, or as Black Panthers.

The second class of cases, being based on actions of the child, overlaps with the jurisdiction of the court over "status delinquency." There is evidence, in fact, that the decision as to whether proceedings are brought as delinquency ("beyond control," "incorrigible," etc.) or neglect, or even brought at all in such cases, may depend on quite arbitrary factors such as social and economic class, the person or agency making the initial referral, available resources, and the "attitude" of the child or parent in responding to the initial contact. See generally H. James, Children in Trouble: A National Scandal 9-10 (paperbound ed. 1971).

The third class deals with the special problem of the "abused" or "battered" child; the fourth for the most part with parental behavior involving sex, alcohol and drugs; and the fifth with situations where a parent is, has been, or is about to be committed.

8 Threats of neglect proceedings are a powerful coercive device. One Eastern Kentucky mother was informed by a welfare worker that unless she gave up her participation in an antistripmine campaign and ceased making speeches in the area that she would be chargeable with neglecting her children. Phillips, Three Lives in Appalachia, Ms., July 1972, at 99, 105. In another instance, at a sit-in protesting welfare department refusal to give emergency aid to a mother of two facing eviction, the agency threatened to take away the children of participating AFDC mothers. Investigators were sent to their homes in the hope of finding children left unattended. None were, although the mothers had by then been arrested for trespass. F. Piven & R. Cloward, Regulating the Poor 299 (1971). See also E. Jarmel, Problems in the Legal Representation of the Poor 21 (1972); Piven & Cloward, supra, at 159, 291.

9 It is by no means unusual for parents to agree to a finding of neglect, sometimes on agency advice, in order to obtain the help of psychiatrists and social workers, only to find themselves deprived of custody. Winston v. Scott, Civil No. 72C-1112 (N.D. Ill., filed May 5, 1972), reported in 6 Clearinghouse Rev. 358 (1972); Wesley v. Weaver, Civil No. 71C-794 (N.D. Ill., filed ), reported in 5 Clearinghouse Rev. 265 (1971). Disputing parents are also sometimes advised to file neglect petitions against the custodial parent, with similar results. Weiss, The Poor Kid, 9 Duq. L. Rev. 590, 606 n.69 (1971).

10 The neglect jurisdiction is something of a stepchild in juvenile court. Fear of crime, emphasis upon law and order and general dissatisfaction with the behavior of young people perhaps have combined to focus public attention on delinquency rather than on neglected children who tend in any case to be less visible to society at large. Too, the only cases directly involving juvenile court proceedings which have been considered by the Supreme Court have dealt with delinquent rather than neglected children. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); In re Winship, 397 U.S. 358 (1970); In re Gault, 387 U.S. 1 (1966); Kent v. United States, 383 U.S. 531 (1966).
in the statistics cited by Judge Polier. Consideration of the adjudicatory stage is thus entirely omitted and the finding of neglect assumed.\textsuperscript{11}

\textbf{THE NATURE AND STATUS OF THE RIGHTS INVOLVED}

The scope of parental rights is nowhere exhaustively defined; however, those rights are frequently (but not exclusively) recognized as including the right to the care, custody and control of the child, the right to discipline the child, and the right to control his religious and moral education. These rights are not to be disturbed by the state so long as the parent discharges certain obligations to provide for the child’s support, maintain his health, and ensure his education and welfare.\textsuperscript{12}

The Constitution does not provide specific protection for the rights of parents to raise their children without interference from the state. Nevertheless, parental rights have been constitutionally recognized in a variety of contexts and on various grounds.\textsuperscript{13} Parental rights over

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\textsuperscript{13} In \textit{Meyer v. Nebraska}, 262 U.S. 390 (1923), the Supreme Court found that the liberty clause of the fourteenth amendment protected the right to marry, establish a home and bring up children; thus a statute forbidding the teaching of the German language infringed not only the right of the teacher to practice his occupation, but also the rights of parents to have their children taught German if they should so desire. In dictum, the Court considered the practice (endorsed by Plato and others) of removing children from their homes for training to challenge competently a given dispositional recommendation.

Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution. \textit{Id.} at 402.

Relying upon \textit{Meyer}, the Court later struck down an Oregon statute requiring children to attend public schools as unduly interfering with the rights of parents to select private or parochial schools for their children and as lacking a reasonable relation to
children, however, are not absolute and are subject to reasonable regulation by the state. Even at common law, the authority of the parent over the child was limited by the criminal law and was not a life-or-death power. The state may intervene for the protection of the child or in the interest of society.

The weapons available to enforce state regulation of the family include not only the coercive sanctions of the criminal law, but also the

The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children . . . . The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Id. at 535.
Where religious matters are concerned, the Court has more recently ruled that the requirement of school attendance through age sixteen, while furthering a state's legitimate interest in universal education, must yield to the first amendment claims of Amish parents to free exercise of their religious beliefs which forbid sending their children to high school. Wisconsin v. Yoder, 406 U.S. 205 (1972).

Family privacy has also found protection as a "penumbral right" emanating from the Bill of Rights, and in the ninth amendment. While Griswold v. Connecticut, 381 U.S. 479 (1965) raised the specific issue of the right of married couples to use birth control devices, the Court spoke broadly of family integrity. Mr. Justice Goldberg, concurring, stated:
The entire fabric of the Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the rights to marital privacy and to marry and raise a family are of similar order and magnitude as the fundamental rights specifically protected.

Id. at 495.
Moreover, when a parent's right to his child is called into question, due process requires that he have notice and an opportunity to be heard. Armstrong v. Manzo, 380 U.S. 545 (1965). The state may not dispense with these requirements solely because the parent in question is an unwed father. The interest to be protected thus arises from the parental, not the marital, relationship. Stanley v. Illinois, 405 U.S. 645 (1972).


In Prince v. Massachusetts, 321 U.S. 158 (1944), Mr. Justice Rutledge said, It is cardinal with us that the custody, care and nurture of the child reside first in the parents . . . . And it is in recognition of this that . . . decisions have respected the private realm of family life which the state cannot enter.

But the family itself is not beyond regulation in the public interest . . . . Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor and in many other ways. Its authority is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience. Thus, he cannot claim freedom from compulsory vaccination . . . . The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death. . . . The catalogue need not be lengthened. It is sufficient to show . . . that the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare; and that this includes, to some extent, matters of conscience . . . .

Id. at 166-67 (footnotes omitted). There is then, in effect, a strong presumption that the parent is the best custodian for his child.
power to remove the child from the custody of parents found to be unfit and, acting in loco parentis, to delegate parental rights and duties to others. In Stanley v. Illinois, the Supreme Court distinguished between two statutory methods by which the State of Illinois might make children its wards:

In a dependency proceeding it may demonstrate that the children are wards of the State because they have no surviving parent or guardian. . . . In a neglect proceeding it may show that children should be wards of the State because the present parent(s) or guardian does not provide suitable care.

The exercise of such power is usually justified on the basis of the state's role as parens patriae, a doctrine which the Court has viewed with some skepticism in connection with delinquency proceedings.

More recent commentary suggests that the historical antecedents for the juvenile court's power to remove neglected children from their homes lie not in the ancient equitable power over wardships, but rather in the authorization of the Elizabethan poor laws for the removal of children from pauper parents by churchwardens and overseers in order to bind them out as apprentices, and in the generally hostile administration of public assistance. The thesis that entitlement to public aid subjects parents to public control received recent support from the Supreme Court in Wyman v. James. Mrs. James, an AFDC recipient, challenged the right of New York authorities to condition receipt of benefits upon acceptance of home visits in the absence of a search warrant. A three judge district court upheld the recipient's claims. A majority of the Supreme Court reversed. The defendant,
the Commissioner of Social Services, had argued that the visits were required not only for determining eligibility but also to ensure that the child was receiving proper care in view of the fact that

[t]he AFDC child is peculiarly susceptible to the hazards of life, to neglect and even abuse, not necessarily for want of love, but for want of means.... [There] are built-in factors for the creation of serious physical and emotional problems. Thus, the recently much discussed problems of child neglect and abuse are inherently more prevalent in assistance households. ... 28

The Court did not explicitly rely upon this contention in upholding the right of the state so to condition benefits. Mrs. James argued that the visits "would create two classes of parents... [t]he distinction... based solely upon the poverty of one class... "24 That the children of the poor constitute the vast majority of persons coming to the attention of the juvenile court (whether for dependency, neglect or delinquency) has been well documented and may at least in part be attributed to the greater degree of official scrutiny to which the lives of the poor are subjected. 28 Mr. Justice Marshall, dissenting in Wyman, did reach this issue, stating:

[It] is argued that the home visit is justified to protect dependent children from "abuse" and "exploitation." These are heinous crimes, but they are not confined to indigent households. Would the majority sanction, in the absence of probable cause, compulsory visits to all American homes for the purpose of discovering child abuse? Or is this Court prepared to hold as a matter of constitutional law that a mother, merely because she is poor, is substantially more likely to injure or exploit her children? Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy. 28

One commentator has, in this connection, documented the thesis that there exist two systems of family law, one derived from the civil courts and one from the Elizabethan poor laws, and that the presumption in favor of the parents does not exist in the second. 27 The result in

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28 400 U.S. at 341-42.
27 See generally ten Broek, California's Dual System of Family Law: Its Origin,
Wyman would appear to support such a theory.

The Emerging Rights of the Child

Until In re Gault, 28 it was often stated in juvenile proceedings that the child’s right was to the care of his parents and that if the parents did not provide such care, the state, for benevolent reasons, would do so.

The right of the state, as parens patriae, to deny to the child procedural rights available to his elders was elaborated by the assertion that a child, unlike an adult, has a right “not to liberty but to custody.” He can be made to attorn to his parents, go to school, etc. If his parents default in effectively performing their custodial functions . . . the state may intervene. In doing so, it does not deprive the child of any rights, because he has none. It merely provides the “custody” to which the child is entitled. 29

The question of the child’s rights was directly before the Court inasmuch as the original proceedings were based not on allegations of parental default, but rather on allegations that the child himself had committed a delinquent act. The Court pointed out the potential for abuse inherent in the right-to-custody approach, however benevolently motivated, and stated that “neither the Fourteenth Amendment nor the Bill of Rights is for adults alone.” 30

When the interests of children have arisen less directly, they have received minimal attention. Thus the majority of the Court in Wisconsin v. Yoder 31 thought that since the children were not parties to the action no rights of theirs were presented by the record. Mr. Justice Douglas, dissenting in part, urged that the actual interests of the children be considered. 32
There is no reason why it should be prima facie assumed that either the state or the parent will necessarily represent the interests of the child in an adequate manner. Nevertheless, it appears that the parent is initially presumed to do so; if there is suspicion that he does not, then the state is assumed to do so. It was on this basis, inter alia, that the state's benevolent purpose was assumed to override the interest of the parent in Wyman v. James, without any finding that the individual child was in need of protective visits. No specific finding was made as to the needs of the child, who was too young to have spoken for himself. No guardian ad litem was appointed. In fact, the Social Services Employees Union, as amicus curiae, argued on behalf of the appellees that the visits served no useful purpose either in ensuring the welfare of the child or in determining eligibility. Since the Union members were themselves the persons designated by the state to carry out its benevolent purpose of protecting the child, the Court might have paid some attention to their views as to whether or not the interests of the child were being served. It did not do so, but instead rejected the Union's arguments flatly:

Despite this astonishing description by the union of the lack of qualification of its own members for the work they are employed to do, we must assume that the caseworker possesses at least some qualifications and some dedication to duty.

The Court's deference to government "benevolence" seems incompatible with the approach in Gault and the cases cited by Mr. Justice Douglas in his dissent in Yoder.

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Id. at 243-44 (citations omitted). Thus, he would have remanded for inquiry as to the children's views.

Where the child is mature enough to express potentially conflicting desires, it would be an invasion of the child's rights to permit such an imposition without canvassing his views. As the child has no other effective forum, it is in this litigation that his rights should be considered.

Id. at 242.


34 Cf. Brief for the Social Services Employees Union Local 371, AFSCME, AFL-CIO, as Amicus Curiae at 4, 5, Wyman v. James, 400 U.S. 309 (1971).

35 400 U.S. at 322-23 n.11.

36 Wisconsin v. Yoder, 406 U.S. 205, 241 (1972). A few lower courts have been more attentive to the wishes or needs of the child rather than treating a dispute as being solely between the parent and the state. In Green Appeal, 448 Pa. 338, 292 A.2d 387 (1972), neglect proceedings were brought to obtain spinal surgery for a sixteen-year-old boy whose life was not in danger and whose parents objected on religious grounds. The court did not regard inquiry as limited to the interests of the parent and the state and thought it would be anomalous to ignore the child in this situation when the preference of an intelligent child of sufficient maturity is usually considered in custody matters. The court noted that children of similar age can waive constitutional rights, receive life sentences, and bring personal injury actions against parents; and remanded for an evi-
Disposition of the Neglected Child: The "Best Interest"

Where neglect proceedings are based on medical necessity (e.g., unwillingness to allow the child to be operated on, to receive a blood transfusion, etc.) the usual judicial response to a finding of neglect is to appoint a guardian for the sole purpose of consenting to the performance of the needed care. The state does not normally assume in such a case that it has the right to remove the child from his parents' custody in order to turn him over to a government agency. Rather, it adopts narrow and specific remedial measures designed to correct the particular problem.

In other classes of neglect cases, however, once the court finds neglect and assumes jurisdiction, a wide range of dispositional alternatives is open which is not necessarily limited to measures designed to alleviate the home problem. Rather, with few exceptions, courts dutifully incant that the governing test for disposition in a neglect case is the "best interest" of the child. The phrase, derived from divorce litigation, finds no difficulty of application there, since it involves weighing two competing home environments offered by separating parents, one of whose claims must necessarily yield to the other. The state acts as arbiter between the parties. Neglect proceedings differ in that the rights of the competing parties are not equal, that the parents have not voluntarily submitted themselves to the court's jurisdiction for determination of the child's custody, and that the state is now a party to the proceedings.

Some courts have expressed doubt as to the wisdom of the "best interest" test in custody disputes where parties other than competing parents are involved. The argument applies a fortiori where the state is the third party. Thus, a New Jersey court noted in a dispute between a parent and the Bureau of Children's Services that it was:

\[\text{dentary hearing to determine the child's wishes.} \quad \text{Id. at 349-50. Three judges dissenting thought this an inadequate solution and that the boy, having been under the exclusive control of his parents all his life, could not make an independent decision.} \quad \text{Id. at 355.} \]

In In re Smith, 16 Md. App. 209, 295 A.2d 238 (1972), the court found that despite a juvenile code which seemed to authorize the court to do anything it deemed fit for a child, the juvenile court was without power to order an abortion for a sixteen-year-old notwithstanding the fact that the parents of the girl wanted it. The girl had run away from home to avoid abortion. She and the child's father wished to marry but their parents had refused permission. The court indicated that in its opinion, statutes giving juveniles the right to obtain medical advice and treatment in sexual and drug matters without parental consent necessarily implied the converse right of nonconsent.

\[\text{37 "Opinions written in divorce suits, where the only issue before the court was the welfare of the children, are not necessarily relevant authority in a custody contest between a parent and a third party." Parmele v. Mathews, 233 Ore. 616, 379 P.2d 869 (1963).} \]
incumbent upon the Bureau . . . to show more than that it will pro-
vide a better home for the child. It must demonstrate affirmatively
that the child's "best interests" will be substantially prejudiced if he
is permitted to remain with his parent . . . .

This standard is similar to the requirement of the Oklahoma court that
removal must be shown to be "imperative."

To justify the courts in depriving parents of the care and custody
of their own children, the parents' special unfitness must be shown
by evidence that is . . . sufficient to make it appear that the necessity
for doing so is imperative. And, in attempting to prove the
"special unfitness" referred to, it is not enough to show that the
parents have bad habits of character.

In addition to the objection that the "best interest" test is inap-
propriate to controversies in which the state is a party, there are several
other criticisms which may be made of the test. First, the test is
improper as being too subjective and providing no standards what-
ever for the determination of dispositional issues. Notwithstanding a
finding of neglect, ascertainable objective standards must be developed
as to which conditions justify removal from the home and which do not.
Since appellate courts will normally reverse on this issue solely for
abuse of discretion, it is incumbent upon trial courts to develop and
articulate rational and objective standards. One commentator observes:

Conspicuously lacking in the reports are cases discussing the
proper disposition in neglect cases . . . . Typically, the dispositional
part of a neglect proceeding drags on for years, with the court en-
gaging in constant reappraisal . . . . Appellate tribunals have
given no guidance to juvenile courts . . . .

Second, because ascertainable standards are lacking, the "best
interest" test permits the court to award custody of neglected children
by weighing the advantages of competing environments. As a result,
some neglected children may be removed from their homes because of
poverty merely because a "better" home is available, while other
neglected children are allowed to remain in their homes.

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89 In re Sweet, 317 P.2d 231, 236 (Okla. 1957).
40 Glen, Developments in Juvenile and Family Court Law, 17 CRIME & DELINQUENCY
41 State v. McMaster, 259 Ore. 291, 486 P.2d 567 (1971). The Oregon Court
was aware of equal protection problems when it refused to sever parental rights despite
a family's transience, poor housing, poverty and instability (conditions, the court noted,
duplicated in "hundreds of thousands of American families"), id. at 303, 486 P.2d at
572. The court refused to terminate the parents' rights when
many thousands of children are being raised under basically the same circum-
Finally, the routine application of the "best interest" test after a finding of neglect is at odds with express statutory mandates for preference in favor of care in the child's own home. Unless the test is construed to include a presumption that the "best interests" of a neglected child are served by remaining in his home, the statute in effect is ignored.

A more satisfactory standard than the "best interest" test should be developed which would stress, first, evidence that the particular neglect alleged actually has had some adverse effect on the child and will continue to do so, and second, that the situation cannot be corrected by the provision of supportive and rehabilitative services by an agency or by other community resources. The latter requirement would give content to the statutory preference for home care; it would also put the burden on the agency to show why rehabilitative efforts have failed or have not been made.

THE RIGHT TO REMEDIAL SERVICES

There are several broad sources of support for the proposition that parents charged with neglect are entitled to remedial and supportive services designed to ameliorate the conditions constituting neglect rather than the quasi-punitive response of removing the child.

State Statutes and Policy

The various state statutes as well as the Model Acts include construction clauses in their Juvenile Codes which indicate a decided preference for the care of children in their own homes. The Standard Juvenile Court Act is typical.

This Act shall be liberally construed to the end that each child coming within the jurisdiction of the Court shall receive, preferably in his own home, the care, guidance, and control that will conduci to his welfare . . . .

stances as this child. The legislature had in mind conduct substantially departing from the norm and unfortunately for our children the McMaster's conduct is not such a departure. Id. at 304, 486 P.2d at 573 (emphasis added). Neither is poverty a sufficient reason to remove children from their homes. Rinker Appeal, 180 Pa. Super. 143, 117 A.2d 780 (1955). The "best interest" test is arguably doubly discriminatory in that it permits both discrimination among parents on the basis of poverty, and discrimination among neglected children on the arbitrary basis of whether or not a "better" home happens to be available.

See text accompanying notes 43-59 infra.

In *In re Barron,* Justice Rogosheske found similar language declarative of the state's policy.

Implicit in the statutes is the policy that whenever possible the family relationship should be strengthened and preserved.

When dependency or neglect has been found, the policy of the statute requires, and the welfare of the child demands, that the social agencies make a reasonable effort to aid the parent to understand and meet his responsibilities to the child.

In addition to strong statutory preferences for home care, the statutes typically also state that when a child is removed "the Court shall secure for him care as nearly as possible equivalent to that which [his parents] should have given him." To the extent that the state fails to provide for facilities meeting statutory standards, the court may decline to use substandard and inadequate facilities and require the appropriate agencies to perform their assigned function in providing social service. There is increasing recognition that placement is not social service and that it may itself be damaging to a child.

Psychiatric and psychological authority suggests that even with ideal placement (which is seldom available), separation from the family...
is itself sufficiently traumatic to be justified only under the most extreme of conditions. Given the extraordinary attachment of children even to unsatisfactory parents, agencies should bear a heavy burden in justifying a separation which, as one authority notes, a child experiences as “the ultimate in rejection” which “crystallizes feelings of inferiority.” Rehabilitation services are thus more in accord with social work theories.

The statutory argument is not foreclosed even where the case involves outright abuse, at least in those states where the Child Abuse Reporting Laws contain intent clauses defining the intent in terms of providing social services rather than involving law enforcement mechanisms. Even in those states without intent clauses in the statutes, the argument may be made that such intent is evidenced by their designating agencies, rather than law enforcement officials, to receive reports.

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50 Table 1 shows the pattern of reporting in states having a declaration of intent, while Table 2 shows the pattern in states without such declaration.

**Table 1**

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<tr>
<th>Purpose</th>
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<td>“to invoke protective social services”</td>
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<td>Protective service agency, if none, to police</td>
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<td>“to cause the protective services of the State—to protect the health and welfare—prevent further abuse.”</td>
<td>New Hampshire</td>
<td>Bureau of Child Welfare</td>
</tr>
<tr>
<td></td>
<td>Vermont</td>
<td>Department of Social Welfare</td>
</tr>
<tr>
<td></td>
<td>Indiana</td>
<td>County Dep’t of Welfare or law enforcement</td>
</tr>
<tr>
<td></td>
<td>Kentucky</td>
<td>Oral to police, written to State Child Welfare</td>
</tr>
<tr>
<td></td>
<td>Arkansas</td>
<td>Police Authority</td>
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<td></td>
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<tr>
<td>“to provide for protection of children who may be further threatened by the conduct of</td>
<td>Iowa</td>
<td>County Department of Welfare, police in emergency</td>
</tr>
<tr>
<td></td>
<td>Delaware</td>
<td>Family Court</td>
</tr>
</tbody>
</table>

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those responsible for their care."

<table>
<thead>
<tr>
<th>State</th>
<th>Entity/Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kansas</td>
<td>Juvenile Court</td>
</tr>
<tr>
<td>Oklahoma</td>
<td>Public child protective agency, public welfare official, sheriff, County Attorney, police</td>
</tr>
<tr>
<td>Minnesota</td>
<td>Police authority and County Welfare Department</td>
</tr>
<tr>
<td>Montana</td>
<td>County Attorney</td>
</tr>
<tr>
<td>New Jersey</td>
<td>County Prosecutor</td>
</tr>
<tr>
<td>West Virginia</td>
<td>Prosecuting Attorney</td>
</tr>
<tr>
<td>Nevada</td>
<td>Police or sheriff</td>
</tr>
</tbody>
</table>

Table 2

<table>
<thead>
<tr>
<th>Implied Purpose</th>
<th>State</th>
<th>Report to:</th>
</tr>
</thead>
<tbody>
<tr>
<td>To invoke protective social services</td>
<td>Alaska</td>
<td>Dep't of Welfare, if none, to police services</td>
</tr>
<tr>
<td></td>
<td>Illinois</td>
<td>State Department of Welfare</td>
</tr>
<tr>
<td></td>
<td>Massachusetts</td>
<td>State Department of Welfare</td>
</tr>
<tr>
<td></td>
<td>North Dakota</td>
<td>Director, Division of Child Welfare-emergency to Juvenile Commissioner or State's Attorney</td>
</tr>
<tr>
<td></td>
<td>New York</td>
<td>SPCC or Dep't of Public Welfare</td>
</tr>
<tr>
<td></td>
<td>North Carolina</td>
<td>County Director of Welfare</td>
</tr>
<tr>
<td></td>
<td>Wyoming</td>
<td>County Dep't of Welfare</td>
</tr>
<tr>
<td></td>
<td>Pennsylvania</td>
<td>Judge, Juv. Court or child protective service</td>
</tr>
<tr>
<td></td>
<td>South Carolina</td>
<td>Juvenile Court (proper authority with jurisdiction over minors)</td>
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<tr>
<td></td>
<td>South Dakota</td>
<td>Judge of the County Court</td>
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<tr>
<td></td>
<td>Ohio</td>
<td>Municipal or county peace officer</td>
</tr>
<tr>
<td></td>
<td>Wisconsin</td>
<td>County Dep't of Welfare or sheriff</td>
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May invoke protective social services, if reporter chooses, or law enforcement

<table>
<thead>
<tr>
<th>State</th>
<th>Entity/Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Alabama</td>
<td>Police, sheriff or nearest child protective agency</td>
</tr>
<tr>
<td>Connecticut</td>
<td>Commissioner of Health, Commissioner of Welfare, local police, state police</td>
</tr>
<tr>
<td>Michigan</td>
<td>Prosecuting Attorney, County Dep't of Welfare, state office of State Dep't of Welfare</td>
</tr>
<tr>
<td>Texas</td>
<td>Juvenile Court, Court Attorney, law enforcement, county probation officer</td>
</tr>
</tbody>
</table>

Invoke law enforcement machinery

<table>
<thead>
<tr>
<th>State</th>
<th>Entity/Agency</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arizona</td>
<td>Municipal or county peace officer</td>
</tr>
<tr>
<td>California</td>
<td>Head of police, sheriff or District Attorney</td>
</tr>
<tr>
<td>Louisiana</td>
<td>Municipal police or nearest law enforcement</td>
</tr>
<tr>
<td>Maryland</td>
<td>City or county police, state police</td>
</tr>
<tr>
<td>Missouri</td>
<td>Appropriate law enforcement agency</td>
</tr>
<tr>
<td>Nebraska</td>
<td>County Attorney</td>
</tr>
<tr>
<td>Oregon</td>
<td>Medical Investigator</td>
</tr>
</tbody>
</table>

Federal Statutes and Policy

In addition to the state statutory preferences for rehabilitating inadequate families, the AFDC provisions of the Social Security Act\(^\text{51}\) have given strong emphasis to the importance of providing essential services to families with dependent children in order to maintain and strengthen family life.\(^\text{52}\)

These provisions indicate a clear commitment to the rights of each AFDC child and his relative to needed services and to the eventual development of services to all children. States wishing to receive maximum reimbursement under the plan must develop additional services and better methods of organizing and delivering them as well as make a showing that they are

extending the provision of child-welfare services in the State, with priority being given to communities with the greatest need ... with a view to making available by July 1, 1975, in all political subdivisions of the State, for all children in need thereof, child-welfare services ... . \(^\text{63}\)


\(^{52}\)42 U.S.C. § 602(a) (14) (1970) (emphasis added). This subsection requires participating states to provide for the development and application of a program for such family services, as defined in section 606(d) ... and child-welfare services, as defined in section 625 ... for each child and relative who receives aid to families with dependent children ... as may be necessary ... in order to maintain and strengthen family life ... .

The "family services" referred to are defined in 42 U.S.C. § 606(d) (1970) as "services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family ... ." The "child welfare services" are defined in 42 U.S.C. § 625 (1970) as public social services which supplement, or substitute for, parental care and supervision for the purpose of (1) preventing or remedying, or assisting in the solution of problems which may result in, the neglect, abuse, exploitation, or delinquency of children ... . (4) otherwise protecting and promoting the welfare of children, including the strengthening of their own homes where possible ... .


While 42 U.S.C. § 608(a) (1) (1970) makes provision for payments on behalf of otherwise eligible children in foster care or institutions as a result of judicial determination "to the effect that continuation [in the home] would be contrary to the welfare of such child," the section also requires development of a plan for each such child (including periodic review of the necessity for the child's being in a foster family home or child-care institution) to assure that he receives proper care and that services are provided which are designed to improve the conditions in the home from which he was removed ... . \(^{64}\)

\(^{64}\)42 U.S.C. § 608(f) (1970) (emphasis added). It does not appear that the designation of children in foster care or institutions for whom payments may be made was intended to alter the substantive state law regarding removal of children. 42 U.S.C. § 604(b) (1970) specifically states that funds shall not be withheld from states denying aid pursuant to a state statute to a family because of unsuitable home conditions as long as "provision is
The Department of Health, Education and Welfare has promulgated rules and guidelines for use by state agencies with which they must comply. AFDC recipients are to be referred to juvenile courts under the same criteria as nonrecipients, and the agency must continue efforts to improve the home even after removal of the child.

Additionally, HEW has issued a pamphlet for state agency use which discusses criteria and standards for dealing with neglect. It notes that throughout the nation there is increasing concern about the number of children separated from their families, many by court action. Too often these separations occur before parents have had any reasonable opportunity to make use of social services or other community resources to help them solve their problems. In many communities, especially in urban areas, the resources for sound placement of children are quite insufficient to meet the steady demand. This very fact ought to stimulate renewed effort to preserve family homes and spare children the risks and burdens of living separately from their own families.

Federal law and regulations thus compel the conclusion that the statutory policy favors continued home placement with supportive services being provided.

Constitutional Rights

A considerable literature has been generated in recent years dealing with the constitutional "right to treatment." Originally, the constitution...
cept was applied to the mental health field;\textsuperscript{60} however, it has been extended to other areas of noncriminal custody as well.\textsuperscript{61} It has variously found support under the rationale of due process,\textsuperscript{12} equal protection,\textsuperscript{63} and the eighth amendment ban against cruel and unusual punishment.\textsuperscript{64} The basic premise of the theory is that, since noncriminal confinement can be justified only by the provision of treatment, where adequate treatment is not provided the authority for state intervention is vitiated and the state may not restrain the individual.\textsuperscript{65}

Application of the theory in juvenile law has focused thus far on children in an institutional setting. Such an approach is unnecessarily grudging. Attacks on the conditions of confinement, however desirable, emphasize the negative, rather than the positive, in that they establish only the minimal standard which may be tolerated rather than attempting to give shape and content to an affirmative right. Moreover, with respect to the neglected child, the focus is misplaced since the conditions and acts relied upon for a finding of neglect are not conditions and acts attributable to handicaps on the part of the child. Unlike the mentally ill or the delinquent, the neglected child is not himself the source of the problem. Indeed, if the right to treatment means a right to treatment

\begin{itemize}
  \item \textit{Implementing the Juvenile's Right to Treatment}, 6 \textit{Clearinghouse Rev.} 256 (1972);
  \item Katz, \textit{The Right to Treatment—An Enchanting Legal Fiction}, 36 U. Chi. L. Rev. 755 (1969);
  \item Kittrie, \textit{Can the Right to Treatment Remedy the Ills of the Juvenile Process?}, 57 Geo. L.J. 848 (1969);
  \item Malmquist, \textit{The Delinquent and the Insane: Right and Adequacy of Treatment}, 40 Am. J. Orthopsychiatry 388 (1970);
  \item Penegar, \textit{The Emerging “Right to Treatment”—Elaborating the Processes of Decision in Sanctioning Systems of the Criminal Law}, 44 Den. L.J. 163 (1967);
  \item Pyfer, \textit{The Juvenile's Right to Receive Treatment}, 6 Fam. L.Q. 279 (1972);
  \item Note, \textit{The Courts, the Constitution and Juvenile Institutional Reform}, 52 Boston U.L. Rev. 33 (1972);
  \item Note, \textit{Involuntary Civil Commitment—A Constitutional Right to Treatment}, 23 Syracuse L. Rev. 125 (1972);
  \item Note, \textit{The Nascent Right to Treatment}, 53 Va. L. Rev. 1134 (1967);
  \item Note, \textit{Civil Restraint, Mental Illness, and the Right to Treatment}, 77 Yale L.J. 87 (1967).
\end{itemize}

\textsuperscript{60} Commentators in general agree that the seminal article in the area was Birnbaum, \textit{The Right to Treatment}, 46 A.B.A.J. 499 (1960).

\textsuperscript{61} See articles and notes cited note 59 supra.


\textsuperscript{64} Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972). It has additionally been suggested that the ninth amendment may provide support for the right although no case appears to have relied upon this rationale. Pyfer, \textit{The Juvenile's Right to Receive Treatment}, 6 Fam. L.Q. 279, 315-18 (1972).

\textsuperscript{65} Judge Ketcham terms this the "mutual compact" theory of \textit{parens patriae}. The relationship between the state and the child and parent is such that the family forfeits certain rights in exchange for care and treatment enhancing the welfare of the child. If such care is not forthcoming, or if the state substitutes governmental for parental neglect, the state no longer has moral or legal justification for asserting control and parent and child should consider the agreement broken. Ketcham, \textit{The Unfulfilled Promise of the American Juvenile Court}, in \textit{Justice for the Child} 22, 25-27 (M. Rosenheim ed. 1962).
adapted to correcting the conditions complained of, it would seem that the right in a neglect case is necessarily one belonging to the family as a whole; that is, to say, a right to obtain rehabilitation and supportive services designed to alleviate the problem.

Professor Gough has suggested a similar approach with respect to the child who is adjudicated as being beyond the control of his parents. He argues, first, that in view of the growing evidence that therapy in family disruption cases must be oriented to the family as a whole, a beyond-control child may have the "right not to be removed from that setting in which the corrective therapy must be carried out—the family." Additionally, and most pertinent to the neglect situation, he suggests that the effectuation of the right to treatment of a beyond-control child logically extends to treatment outside of confinement as well as in it.

If there is a legally enforceable right to psychiatric treatment when the state has authoritatively intervened in the life of a mentally ill adult, there ought by parity of reasoning to be a legally enforceable right to effective casework services and the attention of a competent worker with a reasonable caseload when it assumes jurisdiction over an unruly child.

It does not appear that any cases have challenged the adequacy of casework or probation services on constitutional grounds.

**Avenues to Reform**

Courts have varied in their willingness to undertake a supervisory role after a child has been adjudicated neglected. As the concept of a right to treatment becomes better established, however, it would appear inevitable that the courts will become more willing to accept the concomitant duty of ensuring that whenever an individual is in the custody of the state, that custody must meet certain minimal standards. The doctrinal basis for such a requirement already exists.

While an occasional court has reacted sua sponte to what it has regarded as inadequate performance by a social welfare agency, the

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66 The Beyond-Control Child and the Right to Treatment: An Exercise in the Synthesis of Paradox, 16 St. Louis U.L.J. 182 (1971). The "beyond-control" child is variously termed "incorrigible," a "wayward minor," or a "person in need of supervision" (PINS). The term refers to a child who has come to the attention of the court because of acts of his own (hence not a "neglected" child) but whose acts would not constitute a crime if done by an adult (hence not a "delinquent" child).

67 Id. at 195.

68 Id. at 196.

69 In Chandler v. State, 230 Ore. 452, 370 P.2d 626 (1962) the Oregon Supreme Court, for instance, stated,
burden of bringing postdispositional developments to the attention of the courts remains that of the practicing bar. There are a number of procedural devices in addition to habeas corpus proceedings by which this may be accomplished. Motions to stay, modify, set aside, or vacate orders are available, as are petitions for rehearing. Conditions of custody may also be raised in independent proceedings for declaratory and injunctive relief in federal or state courts. Neglect petitions may be filed, in an appropriate case, against welfare departments or commissioners of social services. Neither should the possibility of money

We have been concerned, if not shocked, by the showing in this record that those people in the Welfare Department who have been responsible for this girl had not made the slightest effort at any time to . . . attempt any adjustment which may be necessary to successfully return this girl to her home. . . . For all that appears in the record, it is the intent of the Welfare Department to keep this girl away from her home until she reaches maturity.

Id. at 459, 370 P.2d at 630. In remanding the case for another hearing below, the supreme court instructed the trial court to particularly inquire as to any effort being made to satisfactorily return the girl to her home. If it develops that no attempt has yet been made, the court should, by appropriate order, require it.

Id. at 460, 370 P.2d at 630 (emphasis added).

70 In Martarella v. Kelley, 349 F. Supp. 575 (S.D.N.Y. 1972) such technique was employed successfully on behalf of boys and girls adjudicated in need of supervision and confined in state institutions. The suit was brought under 42 U.S.C. § 1983 (1970) alleging denial of the constitutional right of persons held in noncriminal custody to "effective treatment." In examining whether the institutions met the requirements, Judge Lasker relied on the analysis of Rouse v. Cameron, 373 F.2d 451 (D.C. App. 1966) providing that continued failure to provide suitable adequate treatment cannot be justified by lack of staff or facilities, since, as the Supreme Court stated in Watson v. City of Memphis, 373 U.S. 526, 533 . . . (1963), "The rights here asserted are . . . present rights . . . and, unless there is an overwhelmingly compelling reason, they are to be promptly fulfilled."

349 F. Supp. at 601 (emphasis in original).

Because of the novelty and delicacy of the issues, the court instructed the parties to prepare for a conference before determination of the full scope and content of injunctive relief. However, with respect to one facility, the court found conditions so squalid and the facility so outdated as to require, pursuant to the eighth amendment prohibition against cruel and inhuman punishment, that the center be permanently closed.

Similarly, in D.C. Family Welfare Rights Org. v. Thompson, Civil No. 71-1150-J (Family Division, D.C. Super. Ct, June 18, 1971) (unpublished opinion), the organization sought as a class to remove neglected children from a state home, to obtain a declaration that it was not an acceptable home substitute, and to enjoin further placements there. They alleged, inter alia,

[T]hat the staff . . . has proved itself . . . to be incompetent to provide a safe, sanitary, and healthy home substitute . . . thereby violating Petitioner's constitutional, statutory and contractual rights . . . [T]hat . . . conditions have long been known, or should have been known to the responsible officials of the S.S.A. but that no significant action has been taken to correct the conditions . . . despite this knowledge. Accordingly, it is claimed that SSA has failed to provide Petitioners and their class with adequate care, custody and discipline, and has caused these children to endure unnecessary suffering that may result in permanent physical and emotional injury to them.


71 In In re R., 61 Misc. 2d 20, 304 N.Y.S.2d 473 (Fam. Ct. Bronx County 1969), three
damages be overlooked as a potent weapon by which an agency may be coerced into better performance\textsuperscript{72} or into a consent decree.\textsuperscript{78} Finally, the right to appropriate treatment may be raised in a defensive as well as an affirmative posture, in response to a neglect petition.\textsuperscript{74}

petitions were filed against the New York Commissioner of Social Services alleging neglect in that he failed to provide adequate food, shelter and school clothing to the children of the petitioning families. The Commissioner is required by law to provide for those unable to provide for themselves, including, but not limited to, children adjudicated neglected. Relief was denied on jurisdictional grounds because the court determined that the legislation setting up the Family Court did not contemplate that the Commissioner be amenable to suit in the Juvenile Court for child neglect. Thus the merits were not reached. On similar jurisdictional grounds, petitions were "most regretfully" dismissed in an action filed by the Society for Prevention of Cruelty to Children against the New York State Department of Mental Hygiene and others alleging state neglect of retarded children at Willowbrook State School. \textit{In re D.}, 70 Misc. 2d 953, 335 N.Y.S.2d 638 (Fam. Ct. Richmond County 1972). Despite the dismissal of this case, its filing had considerable impact. Judge Cory noted in his opinion that, while the court lacked jurisdiction to provide a remedy, it could not help but express its feelings regarding the horrible conditions at Willowbrook . . . .

Such conditions are a blot on the conscience of New York State. The shocking apathy of the public was rudely awakened by the newspaper and other media, spotlighting the dreadful conditions at Willowbrook where the most helpless and defenseless of our citizens were left living "on a thread of life, human vegetables rotting in inadequate warehouses." . . . . \textit{Id.} at 963, 335 N.Y.S.2d at 649. After the dismissal of this case, a class action suit was subsequently brought in federal court on constitutional grounds, \textit{New York St. Ass'n for Retarded Children v. Rockefeller}, 357 F. Supp. 752 (E.D.N.Y. 1972).

\textsuperscript{72} In \textit{Elton v. County of Orange}, 3 Cal. App. 3d 1053, 84 Cal. Rptr. 27 (1970), for instance, the minor plaintiff sought damages against the defendant county and its Departments of Social Welfare and Probation. She had been placed in a foster home where she was beaten and mistreated. The trial court sustained a demurrer to her complaint on the ground that acts or omissions of public employees in placing children were discretionary acts and thus immune from suit. On appeal, the court stated that prior decisions made it clear that only basic policy decisions, as opposed to subsequent ministerial acts in carrying out those decisions, were protected and that both counts stated a good cause of action against the county. Count one was for general negligence in placement; count two had alleged failure to enforce specific regulations governing dependent children and foster home licensing which had been enacted by the State Department of Public Welfare.

\textsuperscript{73} In \textit{Frederick ex rel. Skiver v. Sipprell} (N.Y. Sup. Ct., Erie County, settled Mar. 3, 1972), \textit{reported in 6 CLEARINGHOUSE REV. 283-84 (1972)} a 13-year-old neglected child who had been in the legal custody of the Commissioner of Social Services for five years filed suit against the Commissioner and other state officials alleging that he was receiving inadequate treatment, that placement in eight separate foster homes in two years had aggravated his emotional and behavioral problems, and that each of the respondents arbitrarily and capriciously failed or refused to provide or arrange for the provision of essential care, treatment and mental health services for him. \textit{Id.} Verified Petition. The court issued a show cause order directing the respondents to submit within fifteen days a temporary plan for Skiver's care, and within sixty days, a five year plan. The suit was subsequently discontinued upon a memorandum of understanding and stipulation by the parties to a five year plan, but without prejudice to Skiver's right to initiate new action in the event of breakdown of the plan. \textit{Id.} Stipulation of Discontinuance.

\textsuperscript{74} The issue is squarely posed in a recent California appeal. Mrs. Quinonez, a mildly retarded mother of five, was deprived of her children when it was found that two of them suffered from malnutrition. At no time had her caseworker offered nutritional counselling, explained the use of food stamps, provided a homemaker, or attempted to
These legal strategies can hasten the development of judicial concern with postdispositional problems only when employed in the context of the particular case. Here the attitudes of the practicing bar are most significant. So long as such matters remain the virtually exclusive province of overworked legal services organizations, fulfillment of the promise seems quite distant. What is needed is a willingness of the entire bar to work for such long overdue changes.

determine whether or not Mrs. Quinonez was aware of the problem. On appeal, she pointed out the obligation of the State, through one of its social agencies, to furnish a parent with the support she requires so that she may learn how to function as an acceptable parent within the norms imposed by our society. Most directly, the question posed here is whether a juvenile Court may properly declare such a parent's five children "dependent children of the Court" and remove them from a parent's custody when there is every reason to believe that protective services, if offered, would have been speedily accepted by the mother and would have enabled her to function in an effective and thoroughly acceptable manner.

Brief for Appellant at 5, People v. Quinonez, Civil Misc. No. 72-13 (Cal. Ct. App., filed June 9, 1972). Mrs. Quinonez alleges that the removal of her children without initially attempting to correct the situation violates her rights under the ninth and fourteenth amendments. Id. at 23.