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BEFORE IT'S TOO LATE: NEUROPSYCHOLOGICAL CONSEQUENCES OF CHILD NEGLECT AND THEIR IMPLICATIONS FOR LAW AND SOCIAL POLICY

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Recent developments in the neurosciences have led to dramatic breakthroughs in the area of brain development and the understanding of consequences of neglect. Because this process was heretofore not understood, legislators have been wary of drafting child protection statutes that afforded the possibility for arbitrary interference with families. Strict statutory standards have been adopted that allow coercive intervention only in cases where the child is at substantial risk of imminent physical harm, or after some of the most severe consequences of neglect have been identified. These laws do not consider developmental harm because it does not present an imminent danger of physical injury, yet such harm will affect a child throughout life.

Current understanding of brain development demonstrates the need for proper nutrition and stimulation during the first three years of life in order for the brain to develop the crucial neurological networks that are foundational to the functioning of an individual. The inadequacy of early brain development has permanent and irreversible consequences, leading to problems in physical, cognitive, emotional, and social domains. Costs to individuals and society as a result of these consequences are generally overlooked.

Public policy should be based on current knowledge of brain development and its significant impact on adult functioning. Major preventive efforts must be applied and made available to every child. The focus of these efforts must be child-centered and seen as a basic form of education.

INTRODUCTION

Child neglect may be the most pernicious form of child maltreatment.¹ While neglect has been recognized as a problem

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1. See, e.g., James Garbarino & Cyleste C. Collins, *Child Neglect: The Family With a Hole in the Middle*, in *NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY* 1, 2 (Howard

throughout child maltreatment literature, the full extent of its consequences have not been recognized by the law. Although child neglect may result in biological damage that will determine the child's potential as an adult, the legal response to neglect is anemic at best.²

An increased understanding of how the brain works and its development from conception has begun to engender appropriate concern for this major societal dilemma. It is now known that early developmental experiences, particularly through age three years, are significant determinants of a child's future functioning.³ This crucial fact has been acknowledged in the relatively recent expansion in the United States of the Head Start and Early Head Start programs and in increased funding for infancy and early childhood programs, a phenomenon already widespread in other countries.⁴ Most recently, the National Institute of Health released a Request For Applications for research grants specifically focusing on child neglect.⁵ However, the law, particularly child welfare law,

Dubowitz ed., 1999) (asserting that the effects of neglect are more severe than those from abuse (citing Isabel Wolock & Bernard Horowitz, *Child Maltreatment as a Social Problem: The Neglect of Neglect*, 54 AM. J. ORTHOPSYCHIATRY 530, 535 (1984) (arguing that historical factors and the association between neglect and poverty are major reasons child neglect receives less attention than child abuse))); Bruce D. Perry et al., *Childhood Trauma, Neurobiology of Adaptation, and "Use-Dependent" Development of the Brain: How "States" Become "Traits"*, 16 INFANT MENTAL HEALTH J. 271, 271-89 (1995) (documenting that effects of early deprivation on brain development are greater than those associated with trauma); see also, DEPARTMENT OF HEALTH AND HUMAN SERVICES, BLENDING PERSPECTIVES AND BUILDING COMMON GROUND: A REPORT TO CONGRESS ON SUBSTANCE ABUSE AND CHILD PROTECTION ix (1999) [hereinafter BLENDING PERSPECTIVES] (showing that sixty-one percent of child protection reports in 1996 involved neglect of children).

2. See discussion *infra* Part II.

3. See discussion *infra* Part III.

4. See, e.g., S.S. Boocock & M.B. Lerner, *Long-Term Outcomes in Other Nations in Early Care and Education for Children*, in POVERTY: PROMISES, PROGRAMS, AND LONG-TERM RESULTS 45 (W. Steven Barnett & Sarane Spence Boocock eds., 1998) (discussing early childhood education and research in a number of countries).

5. On March 16, 1999, the National Institute of Health announced a five-year research grant program

to enhance [the] understanding of the etiology, extent, services, treatment, management, and prevention of child neglect. . . . [The grant] is intended to stimulate the development of programs of child neglect research at institutions that currently have strong research programs in related areas . . . but are not engaged in extensive research focusing on child neglect. A second goal of this [grant] is to bring the expertise of researchers from the child health, education, and juvenile justice fields into the child neglect research field and to promote their collaborations with each other and with child neglect and child abuse researchers.

National Institute of Health, *Research on Child Neglect*, at <http://grants.nih.gov/grants/guide/rfa-files/RFA-OD-99-006.html> (last visited Dec. 30, 1999) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter *Research on Child Neglect*].

which determines whether and how the government intervenes in cases of child maltreatment, fails to recognize the magnitude of the damages caused by child neglect and to protect the majority of neglected children.⁶ Even so, the largest group of children found within the child welfare system is there because of neglect;⁷ the number of children who languish in neglectful homes with inadequate or no intervention is likely far greater.⁸ By the time intervention occurs, many children have passed critical developmental points and will suffer from deficiencies that affect their performance throughout life.⁹

Child welfare practice over the past two decades has focused on rehabilitation of the parents,¹⁰ a focus that is in compliance with federal and state law preferences for family preservation.¹¹ Although the Adoption and Safe Families Act of 1997 (ASFA)¹² clarified the focus, stressing the importance of child safety in child welfare decision making, "fixing" the parents is the goal reflected in the typical boilerplate approach to the provision of services for neglectful parents.¹³ Often missing from this approach are services for neglected children aimed at treating the harm caused by

6. See *infra* Parts I.C, II. The law has not been alone in its neglect of neglect. This phenomenon has been recognized and discussed by others. See, e.g., Garbarino & Collins, *supra* note 1, at 2 (claiming it is commonplace knowledge that neglect is neglected). See generally Wolock & Horowitz, *supra* note 1.

7. See Andrea J. Sedlak & Diane D. Broadhurst, *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect*, at <http://www.calib.com/nccanch/pubs/statinfo/nis3.htm> (last visited Mar. 2, 2000) (on file with the *University of Michigan Journal of Law Reform*) (showing the overall rate for neglect where actual harm has occurred to be higher than the rate for child abuse, with the rate of neglect increasing more rapidly than that of abuse). It is important to keep in mind that the figures presented in the *Third National Incidence Study* represent the number of children in whom harm has already been detected. *Id.* As discussed in this Article, that method of counting neglected children is problematic because many times the harm does not become evident until long after it has been inflicted. See also Martin Guggenheim, *The Foster Care Dilemma and What To Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141, 147 (1999) (showing only about ten percent of the children in foster care are there because of serious abuse—the majority are there because of neglect).

8. Although statistics are not available for obvious reasons, the discussion in this Article demonstrates this supposition. See *infra* Parts I.C, II.

9. See discussion *infra* Part IV.

10. Child welfare practice has become synonymous with the practice of protecting children from abuse rather than encompassing the provision of services to all needy children. DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* (1994) 155, 157–83. When children are maltreated, and particularly when they are removed from their homes or are at risk of being removed, the focus is on correcting parental behavior that generates those risks.

11. See discussion of relevant law *infra* Part II.

12. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of the Social Security Act of 42 U.S.C.).

13. See discussion *infra* Part I.B.

neglect and preventing further harm.¹⁴ Most neglectful parents require long-term services to make any substantial changes in their parenting abilities.¹⁵ In the meantime, the development of the children lies at the mercy of interventions that fail to directly address these treatment needs. This Article proposes that interventions primarily focus on providing developmentally appropriate educational, rehabilitative, and protective services *to the children*, and that these services be viewed as the most fundamental and necessary form of education. These services should be viewed as a mandatory component of child welfare practice. This proposal would channel societal resources to where they can do the most good, to the healthy development of future generations.

Part I of this Article briefly discusses the history of attitudes and responses to neglect in the United States. Part II describes the state of the law allowing for intervention in neglect cases. Part III examines current knowledge of brain development, particularly from a neuropsychological perspective. Part IV then discusses the difficulties of addressing this problem after-the-fact. Finally, the Article presents proposals for the reform of law and practice, suggesting that the penumbra of "education" encompass education for newborn children. The interventions discussed fall within the realm of education, as they are intended to develop the basic potentials, foundations, and skills needed for future education and for life.

I. HISTORY OF ATTITUDE AND RESPONSE TO NEGLECT IN THE U.S.

While professionals have recognized that children are neglected and that this neglect results in consequences for the children, they disagree about how society should respond.¹⁶ The disagreement stems from a number of factors.

A. Ambivalence

Ambivalence best describes the attitude reflected in the social and legal responses to child neglect in the United States. The reasons for this ambivalence are examined below.

14. See discussion *infra* Part II.B.

15. See discussion *infra* Part I.B.

16. See discussion *infra* Part I.A.

1. *The Definition of Neglect is Vague*¹⁷—The lack of a clear definition of neglect creates problems for researchers and clinicians and for those attempting to guide policy and program development.¹⁸ The difficulty in defining neglect has created a particular problem for the law, and a barrier for those who would protect neglected children, as a vague definition leaves too much discretion in the hands of social workers and judges and may be deemed unenforceable.¹⁹ Definitional problems reflect confusion about what constitutes neglect.²⁰ At least in the law, neglect has not been defined by a positive statement about the needs of children. Neglect statutes generally refer to failure to provide necessary food, clothing, shelter, education, and medical care; however, “necessary” is left undefined and thus these statutes leave too much discretion to the personal standards of those who would enforce the law.²¹ Such statutory definitions tend to focus on physical neglect although psychological neglect may be equally, or even more, harmful to long-term development.²² Furthermore, defining neglect by the

17. See, e.g., Howard Dubowitz et al., *A Conceptual Definition of Child Neglect*, 20 CRIM. JUST. & BEHAV. 8, 22 (1993) (presenting a conceptual definition based on an ecological model and focusing on basic unmet needs of children rather than intentions or behavior of parents); Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1748 (1987) (arguing that a broad definition of neglect would protect children from a broad array of circumstances that can cause serious harm); Susan J. Rose & William Meezan, *Defining Child Neglect: Evolution, Influences, and Issues*, 67 SOC. SERV. REV. 279, 279 (1993) (describing the history and many variations of neglect definitions). See generally Susan J. Zuravin, *Child Neglect: A Review of Definitions and Measurement of Research*, in NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY 24 (Howard Dubowitz ed., 1999) (discussing inconsistent definitions and lack of research focused on neglect).

18. See, e.g., Sana Loue, *Legal and Epidemiological Aspects of Child Maltreatment: Toward an Integrated Approach*, 19 J. LEGAL MED. 471, 484–85 (1998) (describing various definitions and the different requirements for action depending upon the definition used).

19. E.g., *City of Chicago v. Morales*, 527 U.S. 41 (1999) (concluding a government enactment may be attacked on its face as impermissibly vague if, *inter alia*, it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). As a statutory enactment upon which coercive action will be based, the definition of neglect must be clear enough to withstand a vagueness challenge.

20. See, e.g., Leonard John Baglow, *A Multidimensional Model for Treatment of Child Abuse: A Framework for Cooperation*, 14 CHILD ABUSE & NEGLECT 387, 390 (1996) (discussing how vague definitions create problems for cross-referral of cases between professionals); Dubowitz et al., *supra* note 17, at 8 (presenting a conceptual definition of neglect based on an ecological model and focusing on basic unmet needs of children rather than intentions or behavior of parents). See generally Elizabeth D. Hutchison, *Child Maltreatment: Can It Be Defined?* 61 SOC. SERV. REV. 60 (1990) (analyzing competing theoretical perspectives underlying definitions of neglect).

21. See, e.g., Michael Wald, *State Intervention on Behalf of “Neglected” Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 1001 (1975) [hereinafter Wald, *Realistic Standards*] (finding decisions about interventions “often reflect personal values about childrearing”).

22. See Michael Rutter & English and Romanian Adoptees (ERA) Study Team, *Developmental Catch-up, and Deficit, Following Adoption After Severe Global Early Privation*, 39 J. CHILD

actions of the parents is problematic because similar parental behaviors can result in different outcomes for different children.²³

2. *Family Autonomy and Privacy*—Our strong societal preferences for family autonomy and privacy²⁴ are in conflict with our interest in protecting children.²⁵ The problem in defining neglect, with the inherent danger of leaving too much discretion to individual caseworkers, creates the potential for disrupting families based on personal and cultural differences in beliefs and values. When weighed against the strong value our society places on family privacy, a vague definition and understanding of neglect make it difficult to defend intrusion into a family's life. However, intrusion may be defended in the most serious cases, where the child's immediate physical safety is seriously endangered, or where the consequences of neglect are already affecting the child's life in ways which cause problems for others, such as in school.²⁶

3. *Effects Not Immediately Apparent*—The effects of neglect are apparent at an early stage only in the most extreme cases.²⁷ In those cases, Nonorganic Failure to Thrive Syndrome, psychological dwarfism, or starvation may occur.²⁸ In most cases, though, the consequences of neglect are cumulative and often appear only after significant damage has occurred, when the costs of treatment are great and the efficacy of treatment is small.²⁹ In a government system with limited resources, attention focuses on the most pressing, immediate problems. Compared to other forms of child

PSYCHOL. & PSYCHIATRY 465, 475 (1998) (finding total privation during first two years of life likely will be more damaging to cognitive development than subnutrition).

23. As Marsha Garrison explains: "One of the few points on which [the experts] do generally agree is the present difficulty of predicting adult personality on the basis of childhood experiences." Garrison, *supra* note 17, at 1766. Current knowledge of the neuropsychological effects of neglect have made this generalization at least partially obsolete. See *infra* Part III.

24. See, e.g., *Pierce v. Society of Sisters*, 268 U.S. 510, 518–20 (1925) (holding the right to rear and educate children lies with parents and is protected by the Fourteenth Amendment); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (ruling that the right to bring up children is protected by the Fourteenth Amendment).

25. See generally Barbara Bennett Woodhouse, *Who Owns the Child? Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995 (1992).

26. See *infra* Part II.

27. See, e.g., *Parental Substance Abuse: Picking up All Possible Impacts on Children Takes Some Time*, CHILD PROTECTION REP., Nov. 25, 1999, at 185, 186 (citing a study by public health nurse, Coleen Saylor, referring to parental substance abuse and child maltreatment: "Services may not be provided long enough to adequately assess language delays not present in the first year."); Garbarino & Collins, *supra* note 1, at 2 (finding neglected children have more insidious problems that are not as easy to detect as those of abused children).

28. CYNTHIA CROSSON-TOWER, UNDERSTANDING CHILD ABUSE AND NEGLECT 71 (4th ed. 1999) (discussing consequences of neglect).

29. See discussion *infra* Part IV.

maltreatment, such as physical and sexual abuse, neglect facially appears to be less threatening to the well-being of a child. Thus, less media attention and effort is spent on responding to the problem.³⁰ Physical and sexual abuse arouse the sympathy of the general public, legislators, and those who have direct contact with children—law enforcement and social workers—in a way that neglect does not.³¹ Additionally, neglected children may be dirty, lethargic, and lackluster; they may have acting-out problems that disrupt classroom activities and arouse aversion in others.³²

4. *Correlation Between Child Neglect and Poverty*—The significant correlation between child neglect and poverty cannot be ignored.³³ It is sometimes difficult to draw the line between the consequences of poverty alone and those of poverty and neglect.³⁴ Services that aim at providing help to poor families have

30. See Wolock & Horowitz, *supra* note 1, at 536 (observing that abuse seems to be more visible and newsworthy than neglect).

31. See, e.g., Garbarino & Collins, *supra* note 1, at 2 (discussing society's fascination with violence and the fact that stopping abuse may be seen as "an act of protection" while the task of addressing neglect more clearly involves a process of fixing the family).

32. *Id.* at 19–20 ("Children . . . who had been neglected often appeared unkempt. The combination of their poor physical appearance and their deviant behavior was a recipe for disaster with the children's peers, as well as the teachers.") (citations omitted).

33. NAT'L RESEARCH COUNCIL, UNDERSTANDING CHILD ABUSE AND NEGLECT 133 (1993) ("[C]hild maltreatment—especially child neglect—is not simply concentrated among the poor, but among the poorest of the poor.") (citations omitted); Dubowitz et al., *supra* note 17, at 10 ("When the impact of poverty is considered, the poorest of the poor have the highest risk of neglect.") (citations omitted); Barbara Hanna Wasik, *Implications for Child Abuse and Neglect Interventions from Early Educational Interventions*, in HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 519 (John R. Lutzker ed., 1998) ("Family impoverishment as evidenced by low income, low educational levels, and unemployment is the strongest predictor of poor developmental outcomes for children."); Sedlak & Broadhurst, *supra* note 7, at 3 ("Children from families with annual incomes below \$15,000 as compared to children from families with annual incomes above \$30,000 per year were over 22 times more likely to experience some [sic] form of maltreatment that fit the Harm Standard and over 25 times more likely to suffer some form of maltreatment as defined by the Endangerment Standard."); see also Garbarino & Collins, *supra* note 1, at 2 ("This lack of interest in poverty—except as an indicator of the moral failures of poor people—contributes to the neglect of neglect").

34. For a discussion of the complex relationship between poverty and neglect, see Patricia McKinsey Crittenden, *Child Neglect: Causes and Contributors*, in NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY 47, 47 (Howard Dubowitz ed., 1999). Crittenden discusses how the same factors contribute to both poverty and neglect and that poor information processing skills, in particular, can be seen across three different kinds of neglect—disorganized, emotional, and depressed. *Id.* Crittenden points out that the majority of poor people in the world do not neglect their children and then narrows the probable causal factors of neglect to three: being unemployed, unmarried, and socially isolated. *Id.* at 50. All three of these factors are related to "the failure of individuals to successfully establish enduring and productive social relationships." *Id.* She then examines this factor from the perspective of current knowledge about information processing. *Id.* See generally LINDSEY, *supra* note 10 (discussing the relationship between poverty, neglect and the child welfare system).

been politically unpopular in the United States for some time.³⁵ The Personal Responsibility and Work Opportunities Reconciliation Act of 1996³⁶ (PRWORA), popularly known as "Welfare Reform," is the prime example of our national attitude toward the poor.³⁷ The limitations on assistance for poor families with children, the denial of benefits to families in a wide variety of circumstances,³⁸ and the basic disregard of the consequences of

35. See generally Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993). Prejudice, lack of empathy, and lack of political clout result in failure to fund social welfare programs. *Id.* at 1336-40. But see, *Contra Voters Endorse Reducing Child Poverty Using Federal Budget Surplus*, CHILD. & YOUTH FUNDING REP., Mar. 15, 2000, at 7 (finding two out of three voters surveyed are in support of investing at least ten percent of projected surplus in efforts to reduce child poverty).

Additionally, the relation of poverty and race cannot be overlooked. A significantly disproportionate number of children who are permanently removed from their parents are black. See Guggenheim, *supra* note 7, at 144-45 (stating a high percentage of parents who lose custody of their children are black); Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112, 125 (1999) ("In 1998, black children made up 45% of the foster care population while comprising only 15% of the general population under age eighteen.").

36. Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of Title 42 U.S.C.); see also Peter Edelman, *The Worst Thing Bill Clinton Has Done*, ATLANTIC MONTHLY, Mar. 1997, at 43 ("It does not promote work effectively, and it will hurt millions of poor children by the time it is fully implemented"); Daniela Kraiem & Jennifer Reich, *Writing Wrongs in Welfare: Why Legislating Morality Will Not Solve the Crisis of Poverty*, U.C. DAVIS J. JUV. L. & POL'Y., Spring 1997, at 6, 7 ("[T]he act is really a misdirected and vindictive attack on single mothers, teenagers and non-citizens.").

37. See Garbarino & Collins, *supra* note 1, at 20-21, stating

[t]he specific legislation and the larger social movement known as "welfare reform" necessarily evoke a broad discussion of societal neglect. In its hard-line form, welfare reform can lead to further deterioration in the care of at-risk children if it means increasing reliance on the income-generating capacity of parents as the basis for a child's access to what is needed to meet basic developmental needs. The United States already has the biggest gap in incomes between rich and poor (after taxes and income transfers). Anything that exacerbates this gap will probably increase neglect among children at the bottom of the socioeconomic ladder. All this makes for increasing social toxicity for poor children, as the vulnerabilities of high-risk parents are exploited by a market-economy-driven social policy (Garbarino, 1995). If things deteriorate far enough, we may see ever more clearly that the neglect experienced by children in families flows from the larger social environment through the parents. Neglect, then, reflects not just the family with the hole in the middle but the society with a similar hole in its moral core.

See also Kraiem & Reich, *supra* note 36, at 9 ("[AFDC/TANF] [Aid to Families with Dependent Children/Temporary Assistance for Needy Families] programs are based on our national conviction that society has a moral duty to help out its least fortunate citizens. People who disagree with this philosophy often perceive AFDC/TANF programs as 'hand-outs,' which are consequently subjected to intrusive monitoring); Alexia Pappas, Note, *Welfare Reform: Child Welfare or the Rhetoric of Responsibility?*, 45 DUKE L.J. 1301, 1301-02 (1996) (criticizing Welfare Reform for its likely harm to poor children).

38. As Kraiem and Reich note, "[s]tates may deny TANF funding to unmarried minor parents, legal immigrants, and children born to aid recipients." Kraiem & Reich, *supra* note

expecting families to survive on minimum wages all reflect this contempt.³⁹ Meanwhile, the number of children living in poverty continues to increase, with an estimated one-quarter of children under age six falling in that category.⁴⁰ In some ways, the appearance and behavior of these poor and neglected children arouse the antipathy reflected by current child welfare practice.⁴¹

5. *The Magnitude of the Problem*—The problem of neglect is overwhelming.⁴² The number of neglected children is so large, that the idea of attempting to intervene with all neglecting families seems ridiculous—the system would be overrun.⁴³ When

36, at 7. Additionally, work requirements under PRWORA seem to result in increased abuse and neglect. See *As Single, Poor Moms Go to Work, Abuse and Neglect Rates Increase*, CHILD PROTECTION REP., Feb. 15, 2000, at 25.

39. Policies that place caps on the amount of welfare a family may receive have denied welfare benefits to 83,000 children in sixteen states. Shelley Stark & Jodie Levin-Epstein, *Excluded Children: Family Caps in a New Era*, CLASP, 3 (Feb. 1999), available at http://www.clasp.org/pubs/teens/excluded_children.htm (on file with the University of Michigan Journal of Law Reform); *Welfare Reform About to Spark Influx of New Cases into Child Welfare*, CHILD PROTECTION REP., Feb. 3, 2000, at 17 [hereinafter *Influx*]. The Children's Defense Fund, the nation's largest child advocacy organization, predicted at the time of its passage that PRWORA would "push an additional one million children into poverty." Kraiem & Reich, *supra* note 36, at 8 (citing *Need for State Advocacy Intensifies*, CDF REP. (Children's Defense Fund, Wash. D.C.), Sept. 1996, at 1, 2)); see also Daan Bravemen & Sarah Ramsey, *When Welfare Ends: Removing Children from the Home for Poverty Alone*, 70 TEMP. L. REV. 447 (1997) (arguing that welfare reform removed the safety net for children).

40. JILL DUERR BERRICK ET AL., *THE TENDER YEARS: TOWARD DEVELOPMENTALLY SENSITIVE CHILD WELFARE SERVICES FOR VERY YOUNG CHILDREN* 3 (1998). Duerr Berrick asserts that "[t]he longer young children live in poverty, the greater the deterioration in their home life and the worse their developmental outcomes." *Id.* (citations omitted); see also URBAN INST., *AMERICA'S HOMELESS II*, available at <http://www.urban.org/housing/homeless/numbers/sld011.htm> (last visited Sept. 1, 2000) (finding almost 1.3 million children are likely to be homeless at some point in a year).

41. See, e.g., Sandra T. Azar et al., *The Current Status of Etiological Theories in Intrafamilial Child Maltreatment*, in HANDBOOK OF CHILD ABUSE RESEARCH AND TREATMENT 3, 14 (John R. Lutzker ed., 1998) (explaining that the sparse research on neglect may be due to neglect's link to poverty, adding "a sociopolitical element that may be less palatable to a scientific community that attempts to be apolitical"); Wolock & Horowitz, *supra* note 1, at 536 ("[T]he low priority accorded to neglect may be understood in terms of the link between neglect and poverty, reflecting in essence the low priority accorded to the alleviation of poverty").

42. See, e.g., Loue, *supra* note 18, at 485 ("Neglect, however it is defined, is thought to be the most common of all forms of child maltreatment. . .").

43. Reported maltreatment of children was 2.81 million in 1993. Sedlak & Broadhurst, *supra* note 7, at 6 (showing physical neglect was measured at 1,335,100 and emotional neglect at 585,100—both significant increases from the *Second National Incidence Study of Child Abuse and Neglect* of 1982). Neglect constitutes the majority of all reported cases. See Azar et al., *supra* note 41, at 15 ("[N]eglected children typically outnumber those who have encountered the other forms of maltreatment" and "neglect may have the most far-reaching implications for children's social, emotional, and physical outcomes."); Judith Burke et al., *The Parental Environment Cluster Model of Child Neglect: An Integrative Conceptual Model*, 77 CHILD WELFARE 389, 390 (1998).

intervention occurs, the temptation is to offer the parents services to make them better parents rather than to take their children away from them. If we took the children away, where would we put them? What would we do with them?⁴⁴ Expending resources on neglected children could overwhelm the system, making it impossible for the system to respond effectively, and thereby placing in danger children who are at immediate risk of serious harm.

6. *The Chronic Nature of Child Neglect*—Neglect is the most chronic form of child maltreatment. Some believe neglect is passed on intergenerationally and is thereby difficult to treat.⁴⁵ Parents who neglect often come from neglecting families;⁴⁶ their parenting styles are learned behaviors, and they themselves might not have the capabilities to do much better than they are doing. The outcome measures for treating neglecting parents are not

44. Studies indicate that child protective service workers may define neglect based on factors such as worker caseloads, juvenile court expectations, and services available. Dubowitz et al., *supra* note 17; see also *Influx*, *supra* note 39, at 17 (“[L]ocal systems should avoid the temptation to degrade the definition of ‘neglect’ . . . [This has happened] in New York, where a system straining under burgeoning referrals seeks to raise the bar for what is considered ‘neglect’ in order to reduce caseloads.”); Brett Drake & Melissa Jonson-Reid, *Substantiation and Early Decision Points in Public Child Welfare: A Conceptual Reconsideration*, 5 CHILD MALTREATMENT 227, 229 (2000) (noting that social workers will not pursue cases that they fear cannot meet operative requirements for level of proof of risk).

45. See Marianne Berry, *The Relative Effectiveness of Family Preservation Services with Neglectful Families*, in *ADVANCING FAMILY PRESERVATION PRACTICE* 70, 89–90 (E. Susan Morton & R. Kevin Grigsby eds., 1993) (asserting that, “neglect was the most difficult presenting problem for this program to treat,” and noting that, “[t]he In-Home Family Care program was not very successful with neglect families.”) (emphasis added); see also James M. Gaudin, Jr., *Effective Intervention with Neglectful Families*, 20 CRIM. JUST. & BEHAV. 66, 69 (1993); Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 102–09 (1999) (finding little evidence that treatment is successful in improving parenting behavior); John R. Lutzker, *Behavioral Treatment of Child Neglect*, 14 BEHAV. MODIFICATION 301, 302 (1990) (“[C]hildren who have been neglected are likely to become neglectful parents, because they lack models for healthy developmental caretaking.”); Robert Pianta et al., *The Antecedents of Maltreatment: Results of the Mother-Child Interaction Research Project*, in *CHILD MALTREATMENT: THEORY AND RESEARCH ON THE CAUSES AND CONSEQUENCES OF CHILD ABUSE AND NEGLECT* 203, 247 (Dante Cicchetti & Vicki Carlson eds., 1989) [hereinafter *CHILD MALTREATMENT*] (discussing studies that suggest intergenerational transmission of abuse). But see Joan Kaufman & Edward Zigler, *The Intergenerational Transmission of Child Abuse*, in *CHILD MALTREATMENT*, *supra*, at 134 (stating that intergenerational transmission of abuse occurs in approximately thirty-five percent of cases, but that the majority of parents who were abused do not abuse their children).

46. See NORMAN A. POLANSKY ET AL., *DAMAGED PARENTS: AN ANATOMY OF CHILD NEGLECT* 152–53 (1981) (“Perhaps most serious of all is the fact that children who have experienced poor parental care, deprivation and lack of opportunity, are likely themselves to spawn another generation of deprived, neglected or mistreated children.”) (citations omitted).

good.⁴⁷ Neglect is a pernicious form of maltreatment. Neglect tends to be chronic and is often influenced by substance abuse⁴⁸ and/or mental illness.⁴⁹ The cases are difficult because the behavior of the parents may be borderline acceptable, given the very low standard the law has established as adequate parenting as discussed in Part II. Because we have not fully understood the consequences of neglect, such borderline parenting behavior has become the minimum standard required to avoid involuntary intervention. This minimum standard operates to the detriment of the children and, ultimately, the welfare of our country.

47. See Anne Harris Cohn & Deborah Daro, *Is Treatment Too Late: What Ten Years of Evaluative Research Tell Us*, 11 CHILD ABUSE & NEGLECT 433, 440 (1987).

The studies also provide some cause for concern: Treatment efforts in general are not very successful. Child abuse and neglect continue despite early, thoughtful, and often costly intervention. Treatment programs have been relatively ineffective in initially halting abusive and neglectful behavior or in reducing the future likelihood of maltreatment in the most severe cases of physical abuse, chronic neglect, and emotional maltreatment. One-third or more of the parents served by these intensive demonstration efforts maltreated their children while in treatment, and over one-half of the families served continued to be judged by staff as likely to mistreat their children following termination. Whether one views this level of success as notable or disappointing is largely a function of personal perspective and professional choice.

Id. In addition to suggesting clear treatment paths, the collective findings of these national program evaluations identify clear limitations on strategies that serve families only after abusive and neglectful patterns have surfaced. See Garrison, *supra* note 17, at 1793 ("[E]vidence suggests that only a minority of parents show significant improvement as a result of intervention programs"). But see Martha Morrison Dore & Joan M. Doris, *Preventing Child Placement in Substance-Abusing Families: Research-Informed Practice*, 77 CHILD WELFARE 407, 408 (1998) (describing a successful intervention for substance-abusing mothers).

48. *E.g.*, BLENDING PERSPECTIVES, *supra* note 1, at 41 (finding substance abuse is most likely a factor in cases when young children have been the victims of neglect); Dore & Doris, *supra* note 47, at 408 ("Informed estimates indicate that from fifty percent to eighty percent of families brought to the attention of child welfare authorities are involved with alcohol or other drugs.") (citations omitted). See generally Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Policy Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243 (1999).

49. High rates of maternal depression are correlated with child abuse and neglect. See Dore & Doris, *supra* note 47, at 412.

Research in child abuse and neglect indicates that maltreating parents are likely to have few or impotent resources for coping. They are isolated from social networks and other sources of modeling and support. They have histories of deprivation, mental illness, and low self-esteem, and are often, but not always, from a lower socioeconomic group.

Berry, *supra* note 45, at 72 (citations omitted); see also BLENDING PERSPECTIVES, *supra* note 1, at x (observing the substance abuse problem is complex and often combined with mental health problems that make servicing these families very difficult); Garrison, *supra* note 17, at 1790 ("Most parents show massive disability in their functioning, and many are mentally ill, alcoholic, or addicted to drugs.") (citations omitted).

B. The Legal System

The child protection legal system, by focusing on coercive intervention, has narrowed our professional and societal visions and options for handling neglect cases. When parents do not voluntarily accept and respond to services, the court must make a true finding that the child is in need of protection.⁵⁰ This black and white determination masks the underlying dynamics of neglect and is difficult to make in borderline cases.⁵¹ Moreover, social workers usually refrain from attempting a coercive intervention under such borderline circumstances.⁵²

Child protection laws require that a child who is found to be at risk of harm be protected until his parents are cured of their deficiencies and can protect the child on their own.⁵³ Historically, this approach has led to indeterminate involvement with the social services departments and juvenile courts that monitor the interventions.⁵⁴ In response to foster care drift and concerns for children's developmental needs for permanence and security, federal and state laws were adopted requiring that children be reunified with their parents or placed in a permanent setting in a relatively short period of time.⁵⁵ Under both federal law and the state laws, children must have a permanent disposition no later than eighteen to twenty-two months from the time they are removed from their parents.⁵⁶ Child protective services agencies are required to provide reasonable efforts to reunify families up to the

50. See, e.g., CAL. WELFARE & INST. CODE § 356 (West 2000) (requiring courts to determine that allegations in the petition are true).

51. See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversarial System*, 52 MIAMI L. REV. 79, 111-12 (1997).

52. See Wolock & Horowitz, *supra* note 1, at 537 (finding perception of abuse as more serious than neglect may cause social workers to screen out neglect cases).

53. See, e.g., CAL. WELFARE & INST. CODE §§ 366.21-366.26 (West Supp. 2000) (setting forth general scheme of review of parents' progress toward reunification).

54. See, e.g., Garrison, *supra* note 17, at 1753-54 (describing unbridled discretion of child welfare authorities and indeterminate stays in foster care).

55. See, e.g., The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 42 U.S.C. §§ 671 *et seq.* (1994). For a brief review of the history of child welfare reform, see INGER J. SAGATUN & LEONARD P. EDWARDS, CHILD ABUSE AND THE LEGAL SYSTEM 9-12 (1995); Gelles & Schwartz, *supra* note 45, at 96-99; Guggenheim, *supra* note 7, at 141; O'Flynn, *supra* note 48, at 248-57.

56. See, e.g., The Adoption and Safe Families Act of 1997, 42 U.S.C. § 675(5)(E) (Supp. 1997) (applying to a child who has been in foster care for fifteen of the most recent twenty-two months); CAL. WELFARE & INST. CODE § 366.21-22 (West 2000) (mandating that a permanent plan must be selected from six to eighteen months following removal from home depending upon age of child and other factors; for children under age three at the time of removal, the permanent plan is to be made after six months).

time of permanent disposition, except in certain cases where no reunification plans are required.⁵⁷ Unfortunately, this "reasonable efforts" requirement has remained vague and underfunded.⁵⁸ The time limit often proves to be too short for parents dealing with major problems such as substance abuse or intergenerational neglect patterns.⁵⁹ Neglected children, who often are not brought into the system until they reach school age, are frequently unadoptable because of their age and serious behavioral problems resulting from neglect.⁶⁰ These children may end up in long-term foster care or in institutions, making them more or less permanent burdens on the system and society. Because the Adoption and Safe Families Act (ASFA) requires that parental rights be terminated in most cases when there is no reunification,⁶¹ it is possible that many children will grow up as orphans with no family identity or attachments.⁶²

57. 42 U.S.C. § 671; *see also* CAL. WELFARE & INST. CODE § 361.5; O'Flynn, *supra* note 48, at 247 ("[C]hildren of substance-abusing parents will be unfairly removed permanently from their parents' care because of the increased speed of termination of parental rights proceedings under ASFA and because of the inadequacy of available drug treatment programs to serve parents whose children are in foster care."). *But see* ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 109 (1999) (stating that most parents whose children enter the child welfare system are too dysfunctional to benefit from services).

58. *See generally* HEALTH, EDUC., AND HUMAN SERV. DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-00-1, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON HUMAN RESOURCES, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, *FOSTER CARE, STATES' EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT* 4 (1999) (discussing how misunderstanding about the reasonable efforts requirement led to agency actions that, while well-intentioned, were not always in the best interest of the children's need for permanency); Alice C. Shotton, *Making Reasonable Efforts in Child Abuse and Neglect Cases: Ten Years Later*, 26 CAL. W. L. REV. 223 (1990) (discussing appropriate use of the "reasonable efforts" mandate in various settings). *See also* O'Flynn, *supra* note 48, at 253-54 (discussing lack of funding for treatment programs).

59. *See generally* O'Flynn, *supra* note 48.

60. *See, e.g.*, Richard P. Barth, *Effects of Age and Race on the Odds of Adoption Versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 296 (1997) (revealing infants and Caucasian children are most likely to be adopted).

61. The Adoption and Safe Families Act of 1997 § 103, 42 U.S.C. § 675(E) (Supp. 1997).

62. *See, e.g.*, Jennifer Ayres Hand, *Preventing Undue Terminations: A Critical Evaluation of the Length-of-Time-Out-of-Custody Ground for Termination of Parental Rights*, 71 N.Y.U. L. REV. 1251, 1272 (1996) (noting child neglect statutes can result in termination of parental rights without providing permanency for the children); O'Flynn, *supra* note 48, at 247 (noting that the lack of substance abuse treatment programs for these parents, combined with the shortened time for providing services, will result in increased numbers of terminations of parental rights); *see also* Roberts, *supra* note 35, at 139 ("In focusing on the physical pain of children abused by their parents, we may forget the emotional pain of children who were needlessly removed from their parents and desperately want to return home.").

C. Attitude

Professionals in the field and policy makers have long recognized that the consequences of neglect include both poor social adjustment and academic achievement.⁶³ However, the popular professional opinion has been that the iatrogenic damage to children caused by coercive intervention is probably worse than the harm they would suffer if left with their parents.⁶⁴ Adoption of this rationalization limits the number of children who can be protected by the system. As discussed below, the resulting need to draw a clear line, defined by immediate physical harm, leaves a large number of children at risk for lifelong problems that will affect the quality of their existence.⁶⁵ The decision to neglect neglect⁶⁶ was made without fanfare or complete disclosure. Certainly many professionals required to report child neglect, particularly teachers and those in the medical profession, have discovered to their dismay that a report of child neglect will often bring no meaningful response.⁶⁷

Michael Wald, one of the most influential educators involved in legislation and policymaking in this area, as early as 1988, noted that research had demonstrated that the emotional damage suffered by abused and neglected children might be more harmful for many than the physical consequences.⁶⁸ Wald's conclusions were the result of a longitudinal study of children who had been in

63. See POLANSKY ET AL., *supra* note 46, at 121-22.

64. See, e.g., Wald, *Realistic Standards*, *supra* note 21, at 996. In examining the range of intervention, Wald found that a more limited intervention (than termination of parental rights) was not warranted because it still could cause harm to the child and because there was no proven effectiveness of such interventions, particularly in light of their cost. *Id.*; see also Garrison, *supra* note 17, at 1746-47 (stating that some accuse the child welfare system of creating risks for children). Similar charges are voiced today in criticism directed at the child welfare system's impact on poor families. See, e.g., Guggenheim, *supra* note 7, at 144-45 (arguing that the link between child protection and poverty is staggering; reduced financial support systems for poor families result in greater likelihood that children of color will be raised outside of their families); Roberts, *supra* note 35, at 120 (showing ASFA will increase the number of black children waiting for adoptive homes).

65. See discussion *infra* Part II.

66. See generally Wolock & Horowitz, *supra* note 1 (describing the process by which a phenomenon becomes recognized as a social problem to be targeted for resolution).

67. Overworked social workers are forced to prioritize their activities to protect children perceived to be in greatest danger of immediate harm. See *supra* note 44 and accompanying text.

68. See MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 192 (1988) ("Our data clearly demonstrate that the great majority of the abused and neglected children were at substantial risk in terms of academic and social development even if they were not at risk of serious physical injury.").

foster care.⁶⁹ The results of the study caused him to reevaluate his prior stance upon which federal and state legislation had been enacted. Wald's earlier position, that intervention can be as harmful to a child as abuse or neglect,⁷⁰ resulted in a recommendation that intervention only occur "when a child has suffered or is likely to suffer certain serious harms."⁷¹ This standard has been in place in state legislation across the country for over a decade and has influenced the failure to respond to the needs of neglected children.⁷² Wald's position may have been justified at the time, given the lack of knowledge of neuropsychological development. Wald himself called for standards based upon the "best available knowledge about child development."⁷³ Unfortunately, the adopted legal standard failed to encompass the distinction between various ways the state might intervene, ranging from the provision of services to removal, and, at the end of the continuum, termination of parental rights.⁷⁴ Concern about the slippery slope of intervention⁷⁵

69. *Id.* at 3-4.

70. Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 637 (1976) [hereinafter Wald, *Standards for Removal*]. But see Garrison, *supra* note 17, at 1748 (arguing that current evidence does not support the claim that intervention poses serious risks to children).

71. Wald, *Standards for Removal*, *supra* note 70, at 637. In an earlier article, Wald stated:

In contrast to those who advocate extending the reach of neglect laws, I submit that a narrowing of neglect jurisdiction is needed. . . . No national consensus exists concerning what constitutes a "healthy" adult. Even more importantly, we really know very little about how to raise a child to make him "healthy"—however "healthy" may be defined.

Wald, *Realistic Standards*, *supra* note 21, at 987, 992. In examining the range of intervention, Wald found that a more limited intervention than termination of parental rights was not warranted. A more limited intervention still could cause harm to the child because there was no proven effectiveness of such interventions, particularly in light of their cost. *Id.* "The proposed standard assumes that over-intervention and over-removal are more significant problems than under-intervention, and that therefore more children will be benefited than will be harmed by restricting coercive involvement." *Id.* at 1020.

72. See, e.g., CAL. WELFARE & INST. CODE § 300(b) (West 2000) (defining neglect in part as, "[t]he child has suffered, or there is a substantial risk that the child will suffer, *serious physical harm or illness* . . .") (emphasis added). As discussed *infra* Part III, neglect usually does not meet this definition. See also Note, *Constitutional Limitations on the Scope of State Child Neglect Statutes*, 79 COLUM. L. REV. 719, 720 (1979) [hereinafter Note, *Constitutional Limitations*] (examining the restricted definitions of neglect adopted by states in response to criticism of indiscriminate and ineffective interventions).

73. Wald, *Realistic Standards*, *supra* note 21, at 1038 n.278.

74. All cases, other than voluntary services cases, enter a system that has, as its potential ultimate consequence, the termination of parental rights. It is this "same size fits all" approach that creates concerns over intervention.

75. See, e.g., Wald, *Realistic Standards*, *supra* note 21, at 1020 (stating that over-intervention is a greater concern than failure to intervene because once the state intervenes

meant no protection for neglected children until harm, perhaps irreparable harm, had been done.

II. CURRENT STATE OF THE LAW AND PRACTICE

Current law and practice continue to reflect the ambivalence toward child neglect discussed above. Recent statutory changes have done little to improve the situation of neglected children.⁷⁶ Furthermore, the continual underfunding of services for families and children, and the focus on rehabilitating parents, have left children in devastating circumstances that basically function to keep them forever disadvantaged.⁷⁷

A. The Law

All state intervention is limited by constitutional principles aimed at protecting the integrity of the family and family privacy.⁷⁸ Unfortunately, the law fails to clarify how these constitutional limitations are relevant across the broad range of interventions available to the state. In part, this failure to clarify is because the cases announcing the principles have not always been clear⁷⁹ and

parents are held to standards that they often cannot attain because government interventions have not been proven to be successful).

76. A number of authors have criticized the Adoption and Safe Families Act of 1997 for its impact upon poor children, the majority of the victims of child neglect. See, e.g., Guggenheim, *supra* note 7, at 144 (stating that a policy encouraging adoptions will divert attention from prevention and reunification services); Roberts, *supra* note 35, at 120 (showing ASFA's accelerated timeline for the termination of parental rights will increase the number of "state wards").

77. See Roberts, *supra* note 35, at 123 & n.50 (concluding that services provided to families are inadequate and underfunded).

78. See Judith G. McMullen, *Privacy, Family Autonomy, and the Maltreated Child*, 75 MARQ. L. REV. 569, 572, 585 (1992) (positing that the interest in family autonomy is based upon "a presumption that parents can be trusted to act in the best interests of their children" and questioning the assumption that family privacy strengthens families); see also Roy T. Stuckey, *Guardians Ad Litem as Surrogate Parents: Implications for Role Definition and Confidentiality*, 64 FORDHAM L. REV. 1785, 1795 (1996) (arguing that the appointment of a guardian ad litem overcomes the presumption that parents can be expected to act in the child's best interests).

79. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 769 (1982) (requiring the clear and convincing standard of proof to terminate parental rights, but leaving unclear what level of proof is required for other interventions); see also, Note, *Constitutional Limitations*, *supra* note 72, at 727 (discussing the balance of family integrity with the state's interest in protecting children in the context of neglect).

intervention tends to lead to more intervention, the end result of which may be the most serious intervention—termination of parental rights. This is particularly true in light of the abbreviated time frames now mandated by ASFA.⁸⁰

The principle of *parens patriae* allows the state to intervene in order to protect its vulnerable citizens.⁸¹ The state has a compelling interest in doing so for a number of reasons, including the duty to protect children and the state's interest in having a productive citizenry for future generations.⁸² The state's intervention must be justified by a comparable state interest.⁸³ In cases where children are being neglected but are not yet manifesting the consequences, the state may have more difficulty demonstrating that it is not overreaching. The class of persons affected by state action must be restricted to those who can be helped, and the state must be able to show that its action will, in fact, result in the desired effect.⁸⁴

A sense of urgency, missing from most neglect cases, has become a requirement for government intervention governed by statutory directives and definitions.⁸⁵ While neglecting parents may be offered voluntary services for limited periods,⁸⁶ a coercive intervention requires a finding of imminent physical harm.⁸⁷ This

80. See, e.g., Guggenheim, *supra* note 7, at 145 (positing more children likely will become legal orphans due to accelerated time for reunification services).

81. See, e.g., *Santosky*, 455 U.S. at 761 (discussing state's right and duty to protect children); SAGATUN & EDWARDS, *supra* note 55, at 7 (describing *parens patriae* as state's power to protect child's interests).

82. See generally Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747 (1993).

83. See *Matthews v. Eldridge*, 424 U.S. 319, 334–35 (1976).

84. See generally Note, *Constitutional Limitations*, *supra* note 72. The three-part balancing test set forth in *Matthews v. Eldridge* for determining the constitutionality of state action weighs the private interest affected by the action, the risk of erroneous deprivation through that action, including the safeguards that can be taken to prevent such deprivation, and the state's interest. *Id.* at 732. The author notes that the risk of erroneous deprivation in a child neglect case is great enough to require the state to prove that intervention will, in fact be useful. *Id.* at 733. The greater the injury to the child, the easier it would be to prove that intervention would be helpful and vice versa. In the case of neglect, however, the worse the existing harm is, at least in terms of brain development, the less helpful the intervention will be. See discussion *infra* Part III.

85. Hutchison, *supra* note 20, at 62 ("Legal definitions of child maltreatment are used to guide judicial decision making about conditions that require reporting of maltreatment, conditions that warrant coercive state intervention, and conditions that warrant termination of parental rights to custody.").

86. See, e.g., CAL. WELFARE & INST. CODE § 16506 (West 1999) (limiting family maintenance services to six months).

87. For a discussion of the development of this standard see Garrison, *supra* note 17, at 1758. Douglas Besharov argued that the concept of "cumulative harm" should be a part of the definitional process. Hutchison, *supra* note 20, at 7 (citing Douglas Besharov, *Right versus Rights: The Dilemma of Child Protection*, 43 PUB. WELFARE 19, 25 (1985)).

standard is reflected in state child abuse legislation discussed below, and was adopted upon the recommendation of many prominent professionals in the field.⁸⁸

California Welfare and Institutions Code section 300(b) provides the definition of neglect governing state intervention. It reads, in pertinent part, as follows:

The child has suffered, or there is a *substantial risk* that the child will suffer, *serious physical harm or illness*, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, . . . or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse.⁸⁹

The requirement for coercive intervention is a substantial risk of serious harm or illness to the child.⁹⁰ Wald was critical of vague definitions that allowed broad intervention.⁹¹ He was particularly critical of statutes that define neglect on the basis of parental conduct without requiring evidence of specific harms to children.⁹² He recommended that neglect be statutorily defined, for purposes of intervention, to require serious harm.⁹³

When a child actually suffers serious physical injury as a result of parental inattention or unsafe home conditions, statutory authorization for intervention is justified for the same reasons as in physical abuse cases. However, when no injury has occurred, the possibility of unwarranted intervention is increased. . . . [I]ntervention should be permissible when a child has suffered physical injury causing disfigurement or impairment of bodily functioning or where there is a *substantial risk* that the child will suffer *imminent* death, disfigurement, or impairment of bodily functions as a result

88. See, e.g., WALD, *supra* note 68. Wald's changing attitude toward the need for intervention and extensive services in neglect cases preceded developments in understanding about neglect over the past two decades. *Id.* at 200 (urging society to do much more to protect the development of neglected children).

89. CAL. WELFARE & INST. CODE § 300(b) (West 2000) (emphasis added).

90. Wald, *Realistic Standards*, *supra* note 21, at 1002.

91. *Id.*

92. *Id.*

93. *Id.* at 1005.

of conditions created by his parent or the failure of his parent to adequately supervise him.⁹⁴

Wald's position changed when he was presented with dramatic evidence of the harm caused by neglect.⁹⁵ Interestingly, Wald examined the consequences of neglect measured by the children's academic and social outcomes, rather than the actual harm to brain development.⁹⁶ The consequences of neglect that convinced Wald to change his position regarding intervention for neglect were well known at the time of his original proposals. Wald wrote:

Such parents may provide little emotional support for their children. While the children may not be physically abused, left unattended, dangerously malnourished, or overtly rejected, they may receive little love, attention, stimulation, or emotional involvement. The children do not usually evidence emotional damage as serious as that previously discussed. However, they may be relatively listless and may perform poorly in school and social relations. It is certainly very tempting to intervene to help such children. Intervention might be justified both to protect the children by providing them with an environment in which they can better reach their potential and to protect the state, since it is claimed that such children will probably end up as delinquents, criminals, or welfare recipients. Without intervention, we may be perpetuating a "culture of poverty."⁹⁷

What was not known was the relationship between parental behavior and the consequences to the child for purposes of predicting outcomes. "In addition, we cannot predict the consequences for a child of growing up in a home that lacks affection or stimulation, or with a parent who suffers from alcoholism, drug addiction, mental illness, or retardation."⁹⁸ Wald insisted that unless this connection was scientifically established, it was too difficult to predict what would happen to the child as the result of neglectful behavior and, therefore, any intervention could not be assessed

94. *Id.* at 1013-14.

95. *See* WALD, *supra* note 68, at 200 (concluding that current interventions are inadequate).

96. *See generally id.* (summarizing Wald's study examining academic and social outcomes of foster children).

97. Wald, *Realistic Standards*, *supra* note 21, at 1021-22 (citations omitted).

98. *Id.* at 1022-23.

for effectiveness.⁹⁹ Wald's conclusion may have foreseen our current proposal: "Perhaps as we acquire more knowledge about child development, and when society is willing to expend more resources to provide services to children, different standards will become appropriate."¹⁰⁰ Wald called for longitudinal research in this area.¹⁰¹

The legal requirement of a serious harm or illness does not resemble the definitions used by those who research and provide treatment for neglect.¹⁰² The significant difference between the legal and other professions definitions is the law's decision to screen out all but the most immediately serious cases of neglect and to focus on *physical* harm.¹⁰³ Legislation in all states has basically "solidified the idea that the lack of adequate food, clothing, shelter, medical care, and supervision, or abandonment, [are] the cornerstones of a definition of neglect."¹⁰⁴

Some states have defined neglect more broadly. These definitions include phrases such as the following: "[Permitting the child] to live in an environment when such . . . environment causes the child's physical, mental, or emotional health to be significantly

99. *Id.* at 1017.

100. *Id.* at 1038.

101. See Michael S. Wald, *Thinking About Public Policy Toward Abuse and Neglect of Children: A Review of Before the Best Interests of the Child*, 78 MICH. L. REV. 645, 691 (1980).

102. See generally Hutchison, *supra* note 20. For discussions of definitional problems in neglect research, see Burke et al., *supra* note 43, at 391; Julie L. Crouch & Joel S. Milner, *Effects of Child Neglect on Children*, 20 CRIM. JUST. & BEHAV. 49, 50 (1993).

103. See discussion *infra* notes 83, 84, 102 and accompanying text. In spite of this reluctance to intervene in neglect cases, in California

[c]hildren who are reported for neglect are somewhat more likely to have their cases opened for services (22 percent) than are children who are reported for physical abuse (17 percent) or sexual abuse (16 percent). The cases of infants reported for neglect are opened for services at a higher rate (33 percent) than are those of any other group.

BERRICK ET AL., *supra* note 40, at 46 (citation omitted). While the explanation is unclear, it may be that in cases of alleged physical and sexual abuse there may be explanations for the injuries, difficulties in proof, and/or a supportive parent who can protect the child, thus alleviating the need to open a case. Even when a case is opened, this does not mean that the child will be permanently protected. "A large proportion of young children are reported for maltreatment more than once, yet young children are no less likely to be rereported if they are provided services after investigation." *Id.* at 51.

104. Rose & Meezan, *supra* note 17, at 281 (focusing on physical neglect, which may simplify the work of the courts and social workers, overlooks the reality that families who are psychologically neglectful function less well than do those whose neglect is only physical); see also Gaudin, *supra* note 45, at 68; Loue, *supra* note 18, at 485; see, e.g., ARIZ. REV. STAT. ANN. § 8-531 (West 1999) (defining "neglect" as the inability or unwillingness to provide a child with supervision, food, clothing, shelter, or medical care).

impaired or to be in danger of being significantly impaired";¹⁰⁵ "physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired as a result of failure to exercise minimum degree of care . . .";¹⁰⁶ "[parent] neglects . . . or refuses to provide . . . care . . . necessary for the child's health, morals, or well-being" and "because of the omission . . . [the child] suffers physical or mental injury that harms or threatens to harm child's health or welfare."¹⁰⁷ In spite of the seeming breadth of the language of such statutes, in practice the tendency is to look for immediate physical harm or risk of physical harm.¹⁰⁸ One commentator has observed that, "[t]he presence of *actual* harm meets most definitions of neglect. More controversial is whether *potential* harm should also be viewed as neglect. . . . [P]rofessionals have been reluctant to rate a situation as maltreatment unless actual harm was evident."¹⁰⁹

B. Practice

It is difficult to get a sense of how a typical neglect case is encountered by the child welfare system by reading case law. Appellate opinions provide few facts that would allow one to have a clear idea of what the children's lives have been like up to the time of the subject intervention; one can only imagine. In fact, the typical appellate cases involve newborn infants who have been screened positively for toxic substances at birth and who are not going to be returned to their biological parents because the parents have failed to demonstrate their ability to safely care for these children.¹¹⁰ Sometimes, however, a case provides a hint of the history of the family's contacts with child protective services. For

105. FLA. STAT. ANN. § 39.01(46) (West Supp. 2000).

106. N.Y. FAM. CT. ACT § 1012(f) (McKinney 1999). The New York Code further defines impairment of mental or emotional condition as including "a state of substantially diminished psychological or intellectual functioning in relation to, but not limited to, such factors as failure to thrive, control of aggressive or self-destructive impulses, ability to think and reason." *Id.* at § 1012(h) (McKinney 1999).

107. OHIO REV. CODE ANN. § 2151.03 (West 2000).

108. See, e.g., ARIZ. REV. STAT. ANN. § 8-201 (1999) (defining neglect as failure "to provide that child with supervision, food, clothing, shelter or medical care if that inability or unwillingness causes substantial risk of harm to the child's health or welfare"); FLA. STAT. ANN. § 39.01 (West Supp. 2000) (defining neglect as "when a child is deprived of, or is allowed to be deprived of, necessary food, clothing, shelter, or medical treatment.").

109. Dubowitz, *supra* note 17, at 17 (citations omitted).

110. See, e.g., *In re Britanny C.*, 90 Cal. Rptr. 2d 737 (1999) discussed *infra* in text accompanying notes 157-64.

instance, numerous reports have been made to authorities concerning the children, the family has been visited several times, voluntary services may have been offered, and a significant amount of time has passed in the children's lives without any substantial improvement in their condition.¹¹¹ Sometimes it is the birth of a new, "pos tox" baby that provides authorities with enough ammunition to remove the older children at the same time they are removing the infant.¹¹² These children have often been living in filth, have had little or no attention paid to their needs, have reached school age, and have spotty school attendance records.¹¹³ The significant, foundational developmental stages have come and gone. An even worse, but not atypical, result is that the older children are left in the home even though the infant is removed.¹¹⁴ The California Welfare and Institutions Code has been amended to reflect some concern for child development by treating children under the age of three differently with respect to the time parents may be allowed to attempt to reunify.¹¹⁵ Provisions allowing for "concurrent planning," intended to establish potential adoptive homes for children who may not reunify, also reflect concern for child development.¹¹⁶

The cases discussed below demonstrate the system's tolerance of inadequate parental care in neglect situations.¹¹⁷ These appellate opinions provide no indication of concern for the developmental needs of the children nor for the damage that has been inflicted upon them. At the same time, these cases, particularly *In re Rocco M.*, show that the statutory requirement of proving serious physical harm or injury, or a substantial risk of the same, serves as a true barrier to intervention on behalf of these children.

111. See, e.g., *id.* at 738-39.

112. See, e.g., *In re Susan Lynn M.*, 125 Cal. Rptr. 707 (1975), discussed *infra* in text accompanying notes 132-56.

113. See, e.g., *id.* at 710.

114. BERRICK ET AL., *supra* note 40, at 6 ("Since 1990, there has been no apparent change in the fact that more than 20 percent of all children who enter foster care are infants, many of whom were exposed to drugs") (citations omitted). According to the authors, the average age of children in the child welfare system has been falling, and the number of children under age six increasing. "Although the ages of children receiving child welfare services has changed, there has been no concomitant change in policy or practice to reflect a developmental perspective; the child welfare law does not speak to the ages of children." *Id.* at 7.

115. CAL. WELFARE & INST. CODE § 361.5(a) (West 1998).

116. See, e.g., CAL. WELFARE & INST. CODE § 366.21(e) (West 1998) (stating that if concurrent planning has occurred, it is not deemed to be a failure in providing reasonable services); see also Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(F) (1995) (calling for concurrent planning).

117. See discussion *infra* Parts II.B.1-II.B.4.

1. *Rocco M.*—¹¹⁸ Rocco was an eleven-year-old whose mother had a history of alcohol and drug abuse problems.¹¹⁹ He was often left in the care of other people, some of whom were also drug addicts.¹²⁰ The minor was a dependent and placed out-of-home for approximately three years, from December 1984 to February 1988, as a result of his mother's neglect.¹²¹ The child testified that he had witnessed his mother drinking and had found drugs in the bathroom.¹²² One individual who was supposed to take care of Rocco got angry with him, kicked him in the ribs, and threw him out of the house.¹²³ In general, this case illustrates a child being bounced from one caretaker to another with little stability or attention to his developmental needs.¹²⁴ According to Rocco, his mother did very well in order to regain custody of him, but "then she blew it again."¹²⁵ The court found ample evidence of neglect.¹²⁶ The central question was whether the evidence was sufficient to find that as a result of this neglect Rocco had suffered, or there was a substantial risk that he would suffer, "serious physical harm or illness."¹²⁷ The court stated "[t]he addition of such a requirement [a separate showing of concrete harm or risk of physical harm to the child] implies that the Legislature intended to narrow the grounds on which juvenile court jurisdiction could be invoked."¹²⁸ The court continued:

Cases finding a substantial physical danger tend to fall into two factual patterns. One group involves an *identified, specific hazard* in the child's environment—typically an adult with a proven record of abusiveness. . . . [T]he second group involves children of such tender years that the absence of

118. *In re Rocco M.*, 2 Cal. Rptr. 2d 429 (1991).

119. *Id.* at 430.

120. *Id.*

121. *Id.*

122. *Id.* at 431.

123. *Id.*

124. *See id.*

125. *Id.* Relapse is common in substance abuse cases. *See, e.g.*, BLENDING PERSPECTIVES, *supra* note 1, at 12 (showing that addiction may be a chronic, relapsing disorder). The problem of addiction relapse presents a challenge for child welfare system struggling to balance family preservation goals with the developmental needs of children. ASFA has made clear that the latter should prevail, bringing to attention the great need for substance abuse treatment programs. 42 U.S.C. § 671(a)(15)(A) (1995) (stating child's health and safety shall be the paramount concern). *See generally* O'Flynn, *supra* note 48.

126. *See In re Rocco M.*, 2 Cal. Rptr. 2d at 431.

127. *Id.* at 433.

128. *Id.*

adequate supervision and care poses an inherent risk to their physical health and safety.

....

In light of these authorities we seriously question whether the dependency order is adequately supported by evidence of (1) appellant's general failure to supervise Rocco, (2) the one instance of physical abuse by a caretaker, or (3) appellant's having neglected Rocco in infancy. At 11 years, Rocco was old enough to avoid the kinds of physical dangers which make infancy an inherently hazardous period of life. . . . We see little indication of physical danger in the general lack or inadequacy of Kathryn's supervision. Rocco proved that he could take care of himself, at least physically, on these occasions, generally by placing himself under the care of other adults, including a grandmother and an uncle.¹²⁹

The court decided, however, that there was sufficient evidence of danger that Rocco might ingest dangerous drugs and thus upheld the trial court's dependency determination.¹³⁰ But for the evidence of drug paraphernalia in the home, Rocco apparently would be unprotected by the child welfare system. There is no mention of Rocco's development. The court merely states that Rocco has shown to be able to take care of himself. There is no discussion of the needs or rights of this child to an environment that promotes his developmental health.

2. *Susan Lynn*—¹³¹Susan Lynn was the infant child of Carolyn M., a divorced mother who had recently returned to California

129. *Id.* at 435-36.

130. *Id.* at 436. The court's explicit reluctance to afford protection to an eleven-year-old child reflects a general attitude and practice of denying protection to "older" children. In a system of limited resources, decisions have had to be made to provide protection to the most vulnerable children, the youngest. While the law sets forth no such limitation, the reality of practice forces these children to wait for their services until they enter the delinquency or mental health systems. These policies are reflected in risk assessment forms and child abuse hotline response categories that identify levels of risk, identifying children under age 2 as highest risk. *See, e.g., BERRICK ET AL., supra* note 40, at 126 (stating age may be a determinant for investigation, with children under age five considered to be at higher risk).

131. *In re Susan Lynn M.*, 125 Cal. Rptr. 2d 707 (1975). Note that this case was decided under California law that predated the dependency system now in operation. It is presented here because the facts continue to be typical of neglect cases, where the infant becomes the focus of child protection services and older children are mentioned in passing. While Susan Lynn's outcome hopefully would be different today, the older children might not fare any better.

from Kansas.¹³² Most noteworthy in this case to terminate Carolyn's custody of Susan Lynn is the fact that Carolyn had two other young children, Mark and Michelle.¹³³ Mark had been sent home from school because he was filthy and smelled so badly of urine and other disagreeable odors that his classmates were complaining.¹³⁴ The school nurse found that the children's home was filthy and that Carolyn and the children were in dire need of assistance.¹³⁵ The case was reported to the welfare department.¹³⁶ A public nurse visited the home in January 1971, and found it extremely dirty.¹³⁷ Both children appeared poorly nourished and pale; neither child had been washed for some time and both were "caked" with dirt.¹³⁸ At this time Carolyn was pregnant with Susan Lynn.¹³⁹ Visits continued in February.¹⁴⁰ After Susan Lynn was born in March, the county welfare worker and public nurse visited again and found the baby crying and smelling of old milk.¹⁴¹ The house was still very dirty, and flies were abundant.¹⁴² Carolyn attempted to feed the baby from a bottle containing sour milk.¹⁴³ In the middle of May, a pediatrician examined Susan Lynn and found her severely anemic, cyanotic, inflicted with bronchiolitis, malnourished, dehydrated, and suffering from severe diaper rash.¹⁴⁴ In June, the juvenile court declared the infant to be a dependent and removed her from Carolyn's custody.¹⁴⁵ Carolyn's visits with her infant daughter were sporadic at best.¹⁴⁶ At the end of July 1972, Carolyn, who had moved to San Francisco, returned to Tulare County and told the welfare worker that she was having mental difficulties and was not ready for her kids to live with her.¹⁴⁷ This is the first indication in the case that anything had happened with the two older children.¹⁴⁸ The remainder of the case deals with the termination of parental rights as to Susan Lynn with no indication of what

132. *Id.* at 709.

133. *Id.*

134. *Id.* at 710.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 711.

147. *Id.*

148. *Id.*

happened with the other children.¹⁴⁹ In spite of the terrible record presented regarding Carolyn's care and visitation of this infant, the court found that she had not abandoned the infant.¹⁵⁰ The court rationalized that Carolyn's mental and economic problems prevented her from attending court hearings and visiting the child as she might have otherwise.¹⁵¹ The court found ample evidence of neglect, but it also found that appropriate services were never offered to the appellant as a possible solution to the problems.¹⁵² The court reversed the lower court's order referring Susan Lynn for adoption.¹⁵³

While the health and safety of an infant is always of great concern, the opinion's brief reference to the older children is a reflection of the neglect they have suffered throughout their lives. These children certainly had developmental issues as a result of this neglect.¹⁵⁴ The case demonstrates how the system tolerated inadequate childcare, for although there were interventions, nothing really changed for Mark and Michelle until Susan was born. Even now, the outcome for all the children is unknown.¹⁵⁵

3. *Brittany C.*—¹⁵⁶Brittany was the third of her mother's five children.¹⁵⁷ She became the subject of a dependency action when she was five and a half years old, at the time her mother gave birth to the fifth child.¹⁵⁸ The mother had a long history of drug use.¹⁵⁹ Moreover, there had been ten previous referrals to the Department of Social Services for abuse and neglect, as well as three convictions for driving under the influence and one conviction for willful cruelty to a child.¹⁶⁰ The two oldest children lived with their father, and their mother was under a restraining order to prevent her from seeing them.¹⁶¹ By the time of the twelve-month hearing, Brittany's interpersonal skills were reported by her therapist as

149. *Id.* at 711–17.

150. *Id.* at 712.

151. *Id.* at 713.

152. *Id.*

153. *Id.* at 717.

154. See discussion *infra* Part III.

155. One shortcoming of working with appellate opinions is that the eventual outcome of a case remains a mystery. As the law and the legal system are only considered with the correctness of the *legal* decision, there is no apparent need to do follow-up reporting on the welfare of these children.

156. *In re Brittany C.*, 90 Cal. Rptr. 2d 737 (1999).

157. *Id.* at 738.

158. *Id.*

159. *Id.* at 739.

160. *Id.*

161. *Id.*

"marginal."¹⁶² By the time of the contested hearing regarding whether services should be continued, Brittany was a "special needs child due to hyperactivity and attention deficit disorder, and thus she needed a highly structured environment. She attended special education classes and counseling."¹⁶³

Brittany C.'s case demonstrates several points. First, this is yet another case where older children have languished in an intolerable situation, not to be helped until the birth of a sibling. By age five and a half, when Brittany was removed from her mother, important developmental milestones had passed. Second, the developmental damage that occurred is evidenced by Brittany's need for special services even after living in a healthy environment for two years. Third, the fact that there had been ten prior referrals for abuse and neglect is a strong indication of the system's ambivalence toward these cases.

4. *Phillip F.*—¹⁶⁴Like Brittany C., Phillip F. was born to a substance-abusing mother.¹⁶⁵ He was under the supervision of the juvenile courts of four counties during the first seven years of his life, beginning in February 1992.¹⁶⁶ He was originally removed from his mother when he was twelve days old due to neglect and the fact that four siblings previously had been removed and not reunified.¹⁶⁷ Although the mother had not submitted to drug testing, the court returned Phillip to her custody at the eighteen-month hearing.¹⁶⁸ For the next four and a half years the mother inconsistently complied with maintenance services directed at her substance abuse problem.¹⁶⁹ A supplemental petition to remove Phillip from her custody was filed in February 1997, alleging that she had not complied with her family maintenance plan for the previous six months.¹⁷⁰ By then Phillip had a younger brother, George.¹⁷¹ Again, the mother did not comply with her plan and was not located for approximately six months.¹⁷² After locating the family, Phillip was taken into custody, but returned to his mother

162. *Id.* at 739–40.

163. *Id.* at 740–41. At this time Brittany had been living with her foster family for about two years. *Id.*

164. *In re Phillip F.*, 92 Cal. Rptr. 2d 693 (2000).

165. *Id.* at 695.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 695–96.

170. *Id.* at 695.

171. *Id.*

172. *Id.* at 695–96.

again.¹⁷³ At an unannounced visit made two months later, social workers found the following:

Appellant was sleeping and Phillip answered the door. Phillip and George were dirty, and there was little food in the house and no working stove. Appellant was unable to produce a urine sample for drug testing and refused the offer of a food basket. She said she would purchase food that day with the food stamps she had. The social worker telephoned the next day and told appellant to begin drinking water so she could provide a sample for testing. However, when the social worker came to the house, appellant was unable to produce a sample and reported she had not yet been to the market to buy food.

On subsequent visits, the social worker found virtually no food in the house and, on one occasion, the only electricity was supplied by way of an extension cord from a neighbor's residence to the refrigerator and television. On June 12, 1998, appellant told the social worker she had been unable to buy food because her eligibility worker had stopped her food stamps. She planned to turn in some aluminum cans to get money for food. She provided a urine sample to the eligibility worker in order to have her food stamps and cash benefits reinstated. The test was strongly positive for cocaine. On June 30, appellant was unable to provide a sample for drug testing and admitted she had been drinking alcohol that day. Appellant was "extremely" agitated and impatient with Phillip and George while the social workers were present. She agreed to come to the . . . [Department] the next day to drug test but failed to do so.¹⁷⁴

In July 1998, when the supplemental petition was filed, Phillip was almost six and a half years old, and George was five years old.¹⁷⁵ The mother's June drug test indicated a "very strong" presence of cocaine.¹⁷⁶ In April 1999, more than seven years after the first intervention on Phillip's behalf, the order to terminate the mother's parental rights was made.¹⁷⁷ In that time, Phillip and George had spent the great majority of their significant developmental years in the environment provided by their mother.

173. *Id.* at 696.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.* at 697.

This case is yet another clear example of the plight of neglected children. It is difficult to comprehend that numerous visits were made to this family over an extended period of time with no real improvement in circumstances for these children. The case provides no discussion of the developmental consequences for these children, but they are not difficult to imagine. The pattern that emerges from these cases is one of ambivalent interventions over long periods of time with no real services to the children. These cases also demonstrate the devastating consequences of parental substance abuse and mental health problems, as well as the difficulties of attempting to fix them.

The reluctance to intervene coercively in these cases is a reflection of all the factors mentioned above,¹⁷⁸ but, most importantly, the fact that the law does not allow intervention unless the child welfare authorities can demonstrate *significant risk of substantial physical harm*.¹⁷⁹ As shown by these cases, the nature of most neglect cases is that the harm to children is cumulative. At no one point in time is it easy to say that the substantial harm that is likely to occur is *imminent*. Caseworkers investigating a report of neglect may visit a home, check to see if there is some food for the children, that there is an adult present to supervise, and that the condition of the home does not present physical hazards. Once that test is passed, coercive intervention is unlikely due to the concern that the legal definition threshold has not been crossed. For older children, it might be said that the risk of imminent and substantial harm has passed, as the significant developmental harm has been rendered. In other words, the older children, like Rocco M.,¹⁸⁰ may have passed the critical developmental stages when interventions could have been most useful. By the very fact these children have survived, they seem to have proven themselves not at risk according to the strict meaning of the neglect statutes. As in the case of Rocco M., older children are usually declared to be capable of protecting themselves and, therefore, will not be protected by the overburdened child welfare system.¹⁸¹

As a matter of social policy, it may be correct to screen out of the judicial system all but the most life-threatening forms of child maltreatment. At the same time, advances in the fields of neurobiology, neurophysiology, and neuropsychology have provided overwhelming proof of the seriousness of the problem we have

178. See discussion *supra* Part I.

179. See discussion *supra* Parts I.B, II.A.

180. *In re Rocco M.*, 2 Cal. Rptr. 2d at 435.

181. *Id.*

chosen to neglect.¹⁸² At the time current statutory definitions were enacted, much of this information was unavailable. In their 1988 book, Wald et al. stated "[t]he precise reasons why abused and neglected children have peer problems has not been established by previous research. . . . It also is not fully clear why abused and neglected children perform so poorly academically."¹⁸³ The requirement that there be imminent physical harm, which has always presented a challenge to protecting neglected children, may be closer to being satisfied by our new understanding of brain growth and functioning.

III. NEUROPSYCHOLOGICAL DEVELOPMENT AND CONSEQUENCES OF NEGLECT

While increasing attention is being paid to the issue of child abuse, little research has yet addressed the equally significant problem of child neglect. Yet child neglect may relate to profound health consequences, including premature birth and perinatal complications, physical injuries (such as central nervous system and craniofacial injuries, fractures, and severe burns), disfigurement, disabilities, and mental and behavior problems (e.g., suicide, lowered IQ, depression, anxiety, post-traumatic stress disorder, delinquency and later adult criminal behavior, drug and alcohol abuse, and a greater likelihood of growing up to repeat the cycle of negative behaviors as a parent). Moreover, child neglect can place children at higher risk for a variety of diseases and conditions (e.g., through elevated exposure to toxins causing anemia, cancer, heart disease, poor immune functioning, and asthma; through inadequate health promoting behaviors—medical checkups, proper diet, etc.—needed to prevent disease or manage chronic disorder). Child neglect can also interfere with normal social, cognitive, and affective development, including the development of language, social relationships, and academic skills.

182. See discussion *infra* Part III.

183. WALD ET AL., *supra* note 68, at 193. These authors recognized that multiple factors, including poverty, exposure to violence, malnutrition, and school absenteeism influence outcomes for maltreated children, *id.*, but did not have the information on brain development that is so crucial to understanding the consequences of neglect, because it was not yet available.

Thus, child neglect is a serious public health, justice, social services, and education problem, not only compromising the immediate health of our nation's children, but also threatening their growth and intellectual development, their long-term physical and mental health outcomes, their propensity for pro-social behavior, their future parenting practices, and their economic productivity as eventual wage earners.¹⁸⁴

The consequences of neglect have been known for a long time.¹⁸⁵ As recognized by the Request for Applications for federal funding,¹⁸⁶ they include developmental impairment in all domains of functioning¹⁸⁷ and depend upon the child's developmental stage at the time of neglect.¹⁸⁸ Specific outcomes include poor attachment, lower IQ and academic performance,¹⁸⁹ behaviors ranging

184. *Research on Child Neglect*, *supra* note 5.

185. See generally James M. Gaudin, Jr., *Child Neglect: Short-Term and Long-Term Outcomes*, in NEGLECTED CHILDREN: RESEARCH, PRACTICE AND POLICY 89, *supra* note 34 (citing to studies of the consequences of neglect). See *supra* text accompanying note 97 (demonstrating that in 1975 Wald recognized these consequences). But see POLANSKY ET AL., *supra* note 46, at 119 (reporting there has been no major study of the consequences of being reared in a neglectful family, but stating inferences could be drawn from other studies linking definable deficits in early child care to the onset of developmental deficits); Dubowitz et al., *supra* note 17, at 8 ("[t]here is little information on the causes or consequences of neglect.").

186. *Research on Child Neglect*, *supra*, note 5, at 1-2.

187. *Id.*

188. See Crouch & Milner, *supra* note 102, at 52 (discussing neglect from a developmental perspective). The domains are affective, cognitive, and physical. See also BERRICK ET AL., *supra* note 40, at 11; Harrington et al., *Maternal Substance Use and Neglectful Parenting: Relations with Children's Development*, 24 J. CLINICAL CHILD PSYCHOL. 258, 259 (1995) (finding lower scores on standardized tests of cognitive, motor, and language development, beyond effects of poverty); Cynthia M. Perez & Cathy Spatz Widom, *Childhood Victimization and Long-Term Intellectual and Academic Outcomes*, 18 CHILD ABUSE & NEGLECT 617, 629 (1994) ("Some researchers have suggested that neglect may be potentially more damaging to the development of the child than abuse . . . particularly in the areas of language development, psychosocial development, and empathic responsiveness.") (citations omitted).

189. See, e.g., BERRICK ET AL., *supra* note 40, at 15 (relating delay in language development to socioeconomic status); Rex Culp et al., *Maltreated Children's Language and Speech Development: Abused, Neglected, and Abused and Neglected*, 11 FIRST LANGUAGE 377-89 (1992) (indicating neglect as the type of maltreatment most strongly associated with both expressive and receptive language delays and overall language delay).

[P]oor-scoring infants who are reared in unstimulating circumstances may not recover. Infants with prenatal problems and depressed performance on standardized IQ tests are more likely to remain low scoring on tests of mental performance during early childhood if they are reared in impoverished or other environments that are less likely to support cognitive development.

BERRICK ET AL., *supra* note 40, at 15 (citation omitted); see also POLANSKY ET AL., *supra* note 46, at 126 (finding intellectual deficit among neglected children); Erickson et al., *Effects of Maltreatment on the Development of Young Children*, in CHILD MALTREATMENT, *supra* note 45, at

from acting-out and aggression to passivity, poor interpersonal skills, emotional difficulties ranging from extreme anger to apathy,¹⁹⁰ vulnerability to substance abuse, and antisocial and criminal behavior.¹⁹¹

672 (concluding neglected children stood out as having more varied and more severe problems than children in all other groups, including physically abused children, sexually abused children, and children with psychologically unavailable parents). By kindergarten, sixty-five percent had been referred either for special intervention or retention. *Id.* at 677.

Neglected children present poorer over-all social and emotional and academic functioning. These children have extremely poor work habits, do not work independently, and are low in reading. Teachers rated them on the interview as lacking leadership skills, lacking a sense of humor, and showing little sensitivity and empathy. Neglected children also were judged by their teachers to be less cooperative and to be poorer at following directions and expressing themselves when compared to children in the control group.

Id. at 673.

190. As one commentator notes

[a]lthough they still functioned more poorly than the control group academically and socially, it was the neglected children who had the severest and widest variety of problems at the time of kindergarten. Their ratings on cognitive assessments were lower than those of the control group, the group with psychologically unavailable mothers, and the sexually abused group. They were anxious and inattentive, lacked initiative, and had trouble understanding their work. Socially, they were both aggressive and withdrawn. They were uncooperative, insensitive, and rarely had a sense of humor. By the end of kindergarten, nearly two-thirds of the neglected group had been referred for intervention or retention in grade.

BERRICK ET AL., *supra* note 40, at 19. "It is that pervasive insensitivity to the child's needs rather than the incidence of abuse per se which is the primary factor accounting for long term psychological consequences." *Id.* (citing Pianta, et al., *supra* note 45, at 164).

191. In particular, "[b]oth child neglect and child abuse significantly increase the risk of juvenile involvement in crime but child neglect is more important as a cause of juvenile involvement in both property and violent crime than child abuse." Bureau of Crime Statistics and Research, *Media Release: Economic and Social Stress, Child Neglect and Juvenile Delinquency* (Nov. 5, 1997), available at <http://www.lawlink.nsw.gov.au/bocsar1.nsf/pages/media51197> (on file with the *University of Michigan Journal of Law Reform*). Note that most research studies have included both abused and neglected children, and there is relatively little literature on the consequences of neglect alone or undifferentiated from other maltreatment. Burke et al., *supra* note 43, at 390-91.

Violence is often explained as the expression of accumulated frustration or as identification with an abusive parent. But we have also noticed among neglected children the "deprivation-detachment" sequence and the massive repression of feelings that accompany it. This kind of affect-inhibition makes it far less likely such children will empathize with others' pain, so they may prove peculiarly capable of cold-blooded torture or businesslike brutality.

POLANSKY ET AL., *supra* note 46, at 121 (citation omitted); see also Melissa Jonson-Reid & Richard P. Barth, *From Maltreatment Report to Juvenile Incarceration: The Role of Child Welfare Services*, 24 CHILD ABUSE & NEGLECT 505, 516 (2000) (finding neglect increased risk of future incarceration).

The exact mechanisms that lead to these consequences have not been well understood.¹⁹² This lack of understanding allowed “noninterventionists” to argue against coercive interventions on the basis that intervening factors, such as the individual child’s resiliency or temperament, prevented prediction of outcomes in individual cases.¹⁹³ Noninterventionists argue that intervention in families where certain risk factors are evident would be an overbroad reaction to the problem and unnecessarily interfere with family privacy and autonomy, as well as subject children to possible iatrogenic harm within the system.¹⁹⁴

Advances in the neurosciences have provided hard data on cause and effect that contradicts this approach. Empirical evidence concerning the influence of experience on early brain development permits us to draw fairly certain conclusions about what will happen to the development of neglected infants.

The brain’s development is an “experience-dependent” process, in which experience activates certain pathways in the brain, strengthening existing connections and creating new ones. Lack of experience can lead to cell death in a process called “pruning.” This is sometimes called a “use-it-or-lose-it” principle of brain development. An infant is born with a genetically programmed excess in neurons, and the postnatal establishment of synaptic connections is determined by both genes and experience. Genes contain the information for general organization of the brain’s structure, but experience determines which genes become expressed, how, and when. . . . Experience—the activation of specific neural pathways—therefore directly shapes gene expression and leads to the maintenance, creation, and strengthening of the connections that form the neural substrate of the mind. Early in life, interpersonal relationships are a primary

192. See Crouch & Milner, *supra* note 102, at 63 (“The developmental impacts of experiences of neglect remain poorly understood, despite data that suggest that neglect is the most frequently reported category of maltreatment in the United States (comprising approximately 46% of all reported cases of maltreatment in 1990)”) (citation omitted); see also *supra* text accompanying notes 42–44, regarding the overwhelming nature of the problem.

193. See, e.g., Wald, *Realistic Standards*, *supra* note 21, at 992 (stating that knowledge about appropriate childrearing is too uncertain to predict outcomes).

194. See *id.* at 991–93 (showing intervention frequently results in placing children in more detrimental situations).

source of the experience that shapes how genes express themselves within the brain.¹⁹⁵

Enriched environments have been found to result in increased density of synaptic connections and an increased number of neurons and actual volume of the hippocampus in research animals.¹⁹⁶ The hippocampus is the region of the brain important for learning and memory.¹⁹⁷ While the brain continues to change throughout life, the experiences in early childhood seem to have the most significant influence.¹⁹⁸ These early experiences will determine the brain's receptivity and ability to process new information throughout life.¹⁹⁹

The stimulation an infant receives will determine which synapses (neuron connections) will strengthen and which will wither. This initial construction of synaptic connections serves as the foundation for all future learning.²⁰⁰

Different parts and functions of the brain develop at different stages in a fairly definite sequence, beginning with birth. The earliest development occurs in the motor cortex, at about two months,²⁰¹ followed by the visual cortex at three months.²⁰² "At 8 or 9 months the hippocampus, which indexes and files memories, becomes fully functional In the second half of the first year . . . the prefrontal cortex, the seat of forethought and logic, forms synapses at such a rate that it consumes twice as much energy as an

195. DANIEL J. SIEGEL, *THE DEVELOPING MIND: TOWARD A NEUROBIOLOGY OF INTERPERSONAL EXPERIENCE* 13-14 (1999).

196. *Id.* at 14; see also BRYAN KOLB & IAN Q. WHISHAW, *FUNDAMENTALS OF HUMAN NEUROPSYCHOLOGY* 500 (4th ed. 1996).

197. SIEGEL, *supra* note 195, at 14.

198. *Id.*

199. *Id.*

Relationship experiences have a dominant influence on the brain because the circuits responsible for social perception are the same as or tightly linked to those that integrate the important functions controlling the creation of meaning, the regulation of bodily states, the modulation of emotion, the organization of memory, and the capacity for interpersonal communication. Interpersonal experience thus plays a special organizing role in determining the development of brain structure early in life and the ongoing emergence of brain function throughout the lifespan.

Id. at 21.

200. See BRYAN KOLB, *BRAIN PLASTICITY AND BEHAVIOR* 76 (1995) Comparing brain development to building a house, Kolb states: "If the foundation is inadequate, there is nothing in the framing that will help." *Id.*

201. Sharon Begley, *How to Build a Baby's Brain*, *NEWSWEEK*, Special Edition, Spring/Summer 1997, at 28, 30.

202. *Id.*

adult brain."²⁰³ "By 12 months, an infant's auditory map is formed. He will be unable to pick out phonemes he has not heard thousands of times for the simple reason that no cluster of neurons has been assigned the job of responding to that sound."²⁰⁴ Brain development in the first year of life is most important and, by age three, "a child who is neglected or abused bears marks that, if not indelible, are exceedingly difficult to erase."²⁰⁵

While positive experiences provide healthy brain development, negative experiences result in unhealthy development. One researcher has noted:

Experience may alter the behavior of an adult . . . but it literally provides the organizing framework for the brain of a child. If the brain's organization reflects its experience, and the experience of the traumatized child is fear and stress, then the neurochemical responses to fear and stress become the most powerful architects of the brain.²⁰⁶

Neglect is a stressful experience for an infant.²⁰⁷

203. *Id.*

204. *Id.* at 31.

205. J. Madeleine Nash, *Special Report: Fertile Minds*, TIME, Feb. 3, 1997, at 48, 51.

206. Begley, *supra* note 201, at 31 (quoting Dr. Bruce Perry of Baylor College of Medicine).

207. See Sarah Van Boven, *Giving Infants a Helping Hand*, NEWSWEEK, Special Edition, Spring/Summer 1997, at 45. The failure to physically touch an infant can lead to its failure to grow and even to death. T. Berry Brazelton, *Building a Better Self-Image*, NEWSWEEK, Special Edition, Spring/Summer 1997, at 76. Emotional neglect demonstrated as a failure to respond to an infant denies the infant the external feedback that is an essential element to the development of a positive self-image, self-confidence and trust.

[W]e have learned all too well that a non-responsive, neglectful, abusive or depressed environment produces angry, depressed, hopeless children by the ages of 2 and 3 years. The opportunity for recovery and reorganization is not lost, but it becomes more and more endangered and expensive. Our children can't wait. We can't afford to ride insensitively over these vital early years any longer. Helping parents to help their children may cost businesses or the government some money. But if we fail, the cost to our nation will be far higher. And our own children and grandchildren will pay too high a price.

Id. at 77; see also Debra Rosenberg, *Raising a Moral Child*, NEWSWEEK, Special Edition, Spring/Summer 1997, at 92.

Children who go emotionally hungry in infancy may simply not have the biological wherewithal to be compassionate. Dr. Bruce Perry, a psychiatrist at Baylor College of Medicine, studied brain scans of children who had been severely neglected. He discovered that the brain region responsible for emotional attachments never developed properly. According to Perry, babies who don't get their quota of TLC early in life may lack the proper wiring to form close relationships.

Id. at 93.

We have some understanding of the consequences of neglect on social interactions based upon neuropsychological dynamics. The popular press helped to raise public awareness of this issue in 1997 by reporting on children's brain development.²⁰⁸ The knowledge structures, or schema, created by experience determine the child's future expectations. In the area of relationships, past experiences create schema that include expectations of future relationships.

[A] child whose early social environment has in some way failed to provide for his/her basic physical and psychosocial needs is likely to develop knowledge structures that reflect negative evaluations of themselves and others, as well as negative expectations for the future. Research with abused and neglected children indicates that many of these children are likely to exhibit negative evaluations of self and other people. Consequently, they also possess negative expectations for future social interactions.²⁰⁹

....

Social information-processing variables have been found to be related to behaviors reflective of both externalizing behavior problems (e.g., conduct disorders) and internalizing problems (e.g., depression). In general, this research indicates that children with aggressive and disruptive behavioral orientations and depressed children display biased and ineffective processing across several processing stages and across several types of social situations.²¹⁰

It is not surprising that the parents of these children tend to have similar relationship skills deficits.²¹¹

208. See Nash, *supra* note 205, at 48. Shortly after the publication of the Nash article, *Newsweek* published a special edition, *Your Child*, Spring/Summer 1997.

209. Joseph M. Price & John Landsverk, *Social Information-Processing Patterns as Predictors of Social Adaptation and Behavior Problems Among Maltreated Children in Foster Care*, 22 *CHILD ABUSE & NEGLECT* 845, 846 (1998) (references omitted).

210. *Id.* at 847.

211. Gaudin, *supra* note 45, at 76 (finding that neglectful parents typically have poor interactional skills); see also POLANSKY ET AL., *supra* note 46, at 109 (reporting on a study of white low-income families in Philadelphia).

What have we learned about the neglectful parents thus far? These parents were certainly functioning on a level far better, say, than that of regressed psychotics or severely retarded adults. But their standard for comparison was other adults of similar cultural background who were also caring for young children. The assessment by the research caseworkers, which was corroborated by the case judges, depicted a

Interestingly, neglected children do not necessarily perceive that their upbringing is lacking or different from what should occur. In a study examining neglected children's perceptions of their family functioning, these children reported much more positively about their families than did the caseworkers that worked with them.²¹² The author of the study queries, "if neglected children do not discern inadequate supervision or unmet basic needs, will they be at greater risk for repeating these patterns of neglectful parenting?"²¹³ If the answer is positive, as it appears to be, then the consequences of neglect can be expected to continue in an intergenerational pattern.²¹⁴ Indeed, one characteristic of psychologically neglectful mothers is psychological immaturity, "often related to their failure to receive nurturing as children."²¹⁵ They also have been found to share a perspective regarding supportive relationships that reflects this intergenerational pattern.²¹⁶ A partial explanation for this pattern is

group of people with a modal personality: less able to love, less capable of working productively, less open about feelings, more prone to living planlessly and impulsively, but also susceptible to psychological symptoms and to phases of passive inactivity and numb fatalism. The image is one of men and women who do not cope well with life. Based on what has now been learned about residua of chronic deprivation and life accidents on the personality, one assumes their histories have left them with developmental failures and fixations. Perhaps the term infantile will now appear to the reader less bizarre or extreme than when it was first introduced.

Id.

212. Sara Gable, *School-age and Adolescent Children's Perceptions of Family Functioning in Neglectful and Non-Neglectful Families*, 22 CHILD ABUSE & NEGLECT 859, 865-66 (1998) (discussing results of study showing positive perception of family by neglected children).

213. *Id.* at 860.

214. *Id.* at 866; *see also supra* note 45 and accompanying text (discussing the persistent nature of abusive and neglectful behavior).

215. Gaudin, *supra* note 45, at 69.

216. *See generally* Sandra Beeman, *Reconceptualizing Social Support: The Results of a Study on the Social Networks of Neglecting Mothers* (1993) (unpublished Ph.D. dissertation, University of Chicago), *available at* <http://www.cyfc.umn.edu/Children/sh4.html> (last visited Sept. 1, 2000) (on file with the *University of Michigan Journal of Law Reform*) (explaining that neglecting mothers were found to differ from nonneglecting mothers in their perceptions of social support in the following ways:

- "1. Expectations of relationships
2. Perspectives on when to ask for help
3. Characteristics of the nature of interactions with network members when seeking, receiving, and giving help
 1. Intensity/ability to count on others
 2. Mutuality/fairness
4. Affective qualities of relationships
5. Satisfaction with relationships and support,"

the fact that infants develop patterns of cognition dependent upon the modeling provided by their caretakers. Early environmental influences will influence behavior—"children raised by wolves behave like wolves and are difficult to socialize."²¹⁷ Similarly, children raised by parents who lack appropriate parenting skills will have parenting models in their memories that will make them likely to repeat those parenting behaviors in the absence of meaningful interventions.

IV. EFFECTIVENESS OF TREATMENT FOR NEGLECT AFTER THE FACT

Having failed to develop the neural pathways that allow for healthy interpersonal relationships, communication skills, and cognitive achievement, the child who has been neglected enters school at an incredible disadvantage. Not only must he learn the academic material presented, but now he also must learn to maneuver in a social environment without the skills to do so. These children easily become frustrated, fall behind in their schooling, and may fail to acquire positive experiences in school, affecting their future ability to relate to others.²¹⁸ Special education classes that deal only with academic matters are inadequate.²¹⁹ These children need to learn basic living and relating skills to overcome their previous conditioning. Further, the developmental timing for this learning is inopportune, as the brain continues to grow less plastic after age three.²²⁰ The incredible burden placed on these children handicaps all but the most exceptional—those who have strong resilience²²¹

and concluding that interventions for mothers must be directed at training in interpersonal skills). *Id.*

217. KOLB & WHISHAW, *supra* note 196, at 499 (citation omitted).

218. See, e.g., Price & Landsverk, *supra* note 209, at 846 (theorizing child exposed to negative social environment likely will develop negative expectations of self and others).

219. See *id.* (discussing how negative experiences in social environment lead to poor social information processing skills). See generally Crittenden, *supra* note 34 (discussing lack of social communication skills among neglecting mothers).

220. See, e.g., Nash, *supra* note 205, at 51 (showing the first three years are crucial to building developmental foundations); Rutter, *supra* note 22, at 466 (stating change must occur in the first couple of years of life).

221. See BERRICK ET AL., *supra* note 40, at 8 ("Resilience is a characteristic of the individual that mitigates stress."). This characteristic may include environmental properties and individual characteristics, "such as cognitive ability, attractiveness, athleticism, and educational achievement . . . but they are almost certainly less important in infancy. . . . We agree that the concepts of resilience and invulnerability should not be applied to the circumstances of young children and may interfere with clear thinking about developmentally appropriate services." *Id.* at 9.

and genetic potential that allow them to overcome the early neglect.²²²

The reports of treatment outcomes are mixed. As discussed earlier, most studies have found that neglected children remain behind in cognitive skills, IQ, and social relationships throughout their schooling years.²²³ Studies of Romanian orphans who were adopted in the United Kingdom found almost complete developmental "catch-up" at age four for children who came to the United Kingdom *before six months of age*, and impressive, but not complete developmental catch-up for those who came after six months of age.²²⁴ The authors of these studies conclude that "the total duration of privation during the first 2 years of life is more important as a predictor of cognitive outcome than is the extent to which the privation involved subnutrition."²²⁵ Current child protection practice that focuses on an inspection of the home for food and safety ignores this conclusion, although it arguably reflects the legal standard for neglect.²²⁶

V. PROPOSALS

Even if the ambivalence about how to deal with neglect has been understandable, it is no longer justified. Regardless of the cause(s) of neglect, the consequences are real. While research continues on how to better understand the etiology of neglect and how to provide treatment for parents, the focus of intervention must be on

222. See discussion *supra* Part III. But see BERRICK ET AL., *supra* note 40, at 22 (citing M. Rutter, *Intergenerational Continuities and Discontinuities in Serious Parenting Difficulties*, in CHILD MALTREATMENT, *supra* note 45, at 334, 338).

[T]he overall pattern of circumstantial evidence suggests that early parent-child relationships may have a particular importance for later relationships with other people. The usual consequence of early adversities is, however, vulnerability and not necessarily a lasting capacity. . . . *There is very little that is unalterable even with respect to the sequelae of severe and prolonged maltreatment in childhood.*

Id. at 338 (emphasis added) (citations omitted).

223. See discussion *supra* Part III.

224. See generally Rutter, *supra* note 22, at 475.

225. *Id.* One problem with this study is that the comparison group was adoptees within the U.K. *Id.* at 466. It is unknown whether all of the adoptees faced early deprivations (before adoption or placement) that would have lowered developmental expectancies for the entire study and what role genetics played in developmental outcomes. *Id.* at 473. A more useful comparison would be to nonmaltreated children living with their biological parents.

226. See discussion *supra* Part II.

the children.²²⁷ We now know what can be done to prevent at least some of the developmental damage.²²⁸ It makes no sense to focus attention primarily on the parents while the children are passing through critical developmental stages.²²⁹ The response to child neglect must be multifaceted, serious, and intensive. The suggestions discussed below represent some of the more critical components of such a response.²³⁰ If society can approach the problem as an education challenge, a policy could be adopted to provide every child education from birth through childhood. This would include the support systems necessary to make that education effective. While poverty programs generally lack support,²³¹ and services aimed to "fix" these children after the fact are not nearly as effective as early intervention,²³² an education focus might alleviate at least some of the obstacles to providing all children the opportunity to live to their full potential.

A. Recognize Inadequate Brain Development as Harm

Child welfare law and practice must recognize that behavior resulting in inadequate brain development presents a substantial risk of significant harm.²³³ From what is now known, it is more than merely a risk. The brain will not develop in a healthy way without appropriate stimulation.²³⁴ This harm is far more serious than a broken arm, as it has long-lasting consequences that penetrate

227. The focus of services provided to families within the child welfare system is typically on the parents. See WALD ET AL., *supra* note 68, at 192. "Unless the child exhibits significant behavioral problems, most agencies do not evaluate the child's academic or social development. The majority of children do not receive any services aimed at promoting their social development." *Id.*; see also Dubowitz et al., *supra* note 17, at 13 ("We propose that the focus of concern in defining neglect be on children and their unmet needs, rather than on the presence or absence of parental . . . behaviors.").

228. See e.g., Boocock & Lerner, *supra* note 4, at 72. The authors conclude that programs to ameliorate the consequences of poverty and discrimination share general characteristics, "(1) they are comprehensive, typically providing nutritional and medical services as well as educational enrichment; (2) they provide adequate training for caretakers, whether parents or others; and (3) they begin early in the child's life and continue over sustained periods of time." *Id.*

229. See discussion *supra* Part III.

230. See discussion *infra* Parts V.A-E.

231. See *supra* note 34 and accompanying text.

232. See discussion *supra* Part IV.

233. See BERRICK ET AL., *supra* note 40, at 17 ("Although the enhancement of development is not a primary goal of child welfare services, it deserves consideration when it is consistent with the mandates to protect children, to make reasonable efforts to support families, and to promote legal permanent homes for children.").

234. See discussion *supra* Part III.

every domain of a child's life."²³⁵ By changing the language of the law, courts can recognize this fact.

All professionals working within the child welfare system, including judges and child advocates, should be educated about the developmental consequences of neglect. The seriousness of inadequate brain development needs to be understood, recognized, and responded to with as much commitment as is generally given to cases of broken bones and sexual abuse. In the language of juvenile courts that hear these cases, child neglect should translate into "substantial risk of serious harm."²³⁶ If the legal vernacular shifts in this way, child welfare practice will follow.

B. Adopt a Meaningful Legal Definition of Neglect

Definitional issues also need to be eliminated. Courts, legislatures, and government agencies must adopt a definition of neglect that sets a clear societal policy that no child shall be left behind. Specifically, we propose neglect be defined as follows: *All children, from birth, require physical safety, nutrition, medical care, and environmental stimulation and nurturing sufficient to ensure healthy development. Failure to provide any of these requirements constitutes neglect.* The needs of children, as discussed in this Article, and this definition, transcend cultural considerations. All human beings need stimulation and nurturing. While our interventions should always be culturally sensitive, there should be no question that failing to provide the above-mentioned requisites for healthy growth is neglect in any cultural setting.²³⁷

235. See discussion *supra* Part III.

236. See discussion *supra* Parts I.B, II.

237. This does not mean that the parents must directly provide these requirements, but rather that they ensure that the requirements are provided. Cultural practices may differ in a variety of ways reflecting different attitudes toward the appropriateness of sibling caretakers, displays of emotion and affection, eye contact, and basic child-parent relationships.

Of course, there are tremendous societal implications to adopting a definition such as the one we suggest. Given the association of poverty and neglect, a society that allows between twenty and twenty-five percent of its children to live in poverty would appear to be neglectful. See Child Welfare League of America, *Children '99: Countdown to the Millennium Fact Sheet*, at <http://www.cwla.org/publicpolicy/1999nationalfactsheet.html> (last visited Sept. 1, 2000) (on file with the *University of Michigan Journal of Law Reform*). It is hypocritical to denounce child neglect and its consequences while at the same time accepting a general standard of parenting that is a contributor to that neglect. See, e.g., Dubowitz et al., *supra* note 17, at 23 ("There is a need to clarify what our society accepts as adequate care and protection of children."); Garbarino & Collins, *supra* note 1, at 5 (discussing societal neglect).

Traditional legal definitions of neglect have not begun with a clear, positive statement of what children need for safe, healthy development. This definition establishes a standard focused on healthy development rather than imminent serious injury. Definitions requiring serious injury, or risk of serious injury, prevent intervention in most cases of neglect, where the harm is cumulative rather than imminent.²³⁸ Definitions referring to the child's health or well-being, while appearing to be more inclusive, are so broad that they do not establish clear limits or direction for intervention.²³⁹ This definition specifically states the need for environmental stimulation and nurturing, taking it beyond the usual focus of neglect cases (physical and medical needs). While there may be some quibbling about just how much stimulation is required for healthy development, chances are that at least more cases of neglect will be given attention without concern that the court will refuse to take jurisdiction for failure to provide evidence sufficient to meet the statutory definition.

C. Focus on the Child

There are some clear criteria that can be applied to ensure that children have the opportunity to develop to their full potential.²⁴⁰ First, the approach to neglect must be child-centered and needs-based, rather than focused on parental deficits.²⁴¹ Typical interventions today provide services to parents in the form of parenting classes, support groups, therapy, and drug and alcohol treatment.²⁴² Very little is offered in the way of services to neglected

238. See discussion *supra* Part II.B.

239. See discussion *supra* Part II.A.

240. See Barbara Bennett Woodhouse, *A Public Role in the Private Family: The Parental Rights and Responsibilities Act and the Politics of Child Protection and Education*, 57 OHIO ST. L.J. 393 (1996). Professor Woodhouse contends that the law should be child-focused—rather than focusing on parental rights it should focus on children's rights, which include a right to protection and nurture. *Id.* at 394. Responsible taxpayers should be willing to share the cost of ensuring that every child receives these things. *Id.* at 420; see also James G. Dwyer, *Parents' Religion and Children's Welfare: Debunking the Doctrine of Parents' Rights*, 82 CAL. L. REV. 1371, 1374 (1994) (arguing children's rights, not parents' rights, should be the basis for child welfare decisions).

241. See Dubowitz et al., *supra* note 17, at 22 (stating that the focus should be placed on the needs of children rather than parental behavior).

242. See, e.g., Phyllis T. Howing et al., *Effective Interventions to Ameliorate the Incidence of Child Maltreatment: The Empirical Base*, 34 SOCIAL WORK 330 (1989) (describing the need for an array of interventions).

children.²⁴³ The child protection system must understand the developmental needs of children, from a neuropsychological perspective as well as a physical perspective, and institute policies and programs to satisfy those needs.²⁴⁴ Because many neglecting parents are handicapped by long-standing problems of their own, including neglect by their parents, it is unrealistic to expect rapid recovery that would allow them to satisfactorily parent their own children within a short time.²⁴⁵ In fact, many of these parents need

243. See Laurel K. Leslie et al., *Children in Foster Care: Factors Influencing Outpatient Mental Health Service Use*, 24 CHILD ABUSE & NEGLECT 465, 467 (2000) (indicating mental health services are less likely to be provided to children who experienced neglect than to other foster children).

244. While the cost of providing services to neglected children might seem overwhelming, this preventive intervention would eventually reduce costs in many areas including child protection, physical and mental health, education and criminal justice. See Elizabeth Moore et al., *A Twelve-Year Follow-Up Study of Maltreated and At-Risk Children Who Received Early Therapeutic Child Care*, 3 CHILD MALTREATMENT 3, 12-13 (1998) (illustrating children who had received treatment had fewer behavioral problems, fewer early arrests, less frequent violent delinquency, and fewer school disciplinary problems than control group children). Total child welfare spending in fiscal year 1996 was higher than \$14.4 billion. ROB GEEN ET AL., THE URBAN INSTITUTE, THE COST OF PROTECTING VULNERABLE CHILDREN: UNDERSTANDING FEDERAL, STATE, AND LOCAL CHILD WELFARE SPENDING 5 (1999).

245. See Caudin, *supra* note 45, at 68 ("Chronically neglectful families are typically multiproblem families with pervasive deficits in knowledge, skills, and tangible resources . . .").

Few infantile persons have much capacity for self-observation. They are quite unable to take distance, as we say, and observe their own roles in bringing on their troubles. Most of the time, in fact, social workers deal with people whose initial approach to their own unhappiness is alloplastic: they want others to change, or their situations to change. Rarely are they motivated from the beginning autoplastically, toward altering their own ways of operating. Neglectful parents almost never seek autoplasic solutions. Thus the protective service worker too often finds himself or herself involved with a client who is unmotivated to change, or even to look hard at what she is doing. And the worker is dealing with neglect within a system that presumes the average-expectable American adult is mature, decent, and able to conduct his or her life to the family's best advantage.

POLANSKY ET AL., *supra* note 46, at 161; see also, Crittenden, *supra* note 34, at 66 (indicating traditional approaches to providing services to neglecting parents have failed to recognize information processing barriers and the length of time services are provided is too short to accomplish real change); Gelles & Schwartz, *supra* note 45, at 103-06 (arguing change is a complex and difficult process and it is unrealistic to expect substantial change in parental behavior in most cases).

We're finding—and I don't know how to say this so it doesn't sound pejorative or offensive—but we're finding many of these women who are poor come from families where poverty and deprivation have been intergenerational. Unfortunately, it seems like some of their capacity to change and be responsive is limited, even with support.

Carey Quan Gelernter, *An Early Start: Experiments May Change How a Child is Raised*, SEATTLE TIMES, Apr. 27, 1997, available at http://www.seattletimes.com/extra/browse/html97/altearl_042797.html (on file with the University of Michigan Journal of Law Reform).

parenting themselves²⁴⁶ and some of the more successful treatment programs have recognized this need.²⁴⁷ The presence of substance abuse and mental health problems complicates efforts in servicing these families.²⁴⁸

There is no reason that children's developmental health should depend upon their parents' success when an effective intervention can be made for many children without separating the family.²⁴⁹ These interventions cannot be "quick fixes." Sustained and stable interventions throughout early childhood are required to ensure lasting change.²⁵⁰ Furthermore, the most intensive and long-term programs have proven to be most successful at producing lasting improvement in academic and behavioral outcomes.²⁵¹ The most

246. See Gaudin, *supra* note 45, at 71 (demonstrating that neglectful parents need nurturing themselves).

247. See, e.g., Berry, *supra* note 45, at 76 (describing the In-Home Family Care family preservation programs); Gaudin, *supra* note 45, at 74 (describing interventions with neglecting families); James M. Gaudin et al., *Remedying Child Neglect: Effectiveness of Social Network Interventions*, 15 J. APPLIED SOC. SCI. 97, 99 (1990-91) (describing the need for variety of interventions). Many programs provide parenting role models for teaching basic life skills that should have been learned in childhood including hygiene, organization, communication, affection, and responsibility. See, e.g., Gaudin, *supra* note 45, at 81, 82 (discussing need to teach social skills).

248. See, e.g., Gaudin, *supra* note 45, at 73 (showing presence of drug or alcohol problems decreased chances for successful intervention with neglectful families). The large proportion of substance-abusers among neglecting parents magnifies the need for prolonged intervention.

In their study of a placement prevention program designed for substance-abusing caregivers, researchers Dore & Doris found:

The present study also highlights the importance of parent education and early intervention in drug-involved families and communities. Findings on the Denver of such low numbers of preschoolers functioning within developmentally normative ranges are particularly disturbing. The most pernicious effect on children of substance-abusing primary caregivers may not be physical maltreatment but more subtle, ongoing neglect of cognitive and physical stimulation.

Dore & Doris, *supra* note 47, at 421.

249. See, e.g., Joint Conference for Poverty Research, *Congressional Research Briefing Summary: Early Childhood Intervention Programs: What Are the Costs and Benefits?*, available at <http://www.jcpr.org/conferences/oldbriefings/childhoodsummary.pdf> (May 10, 2000) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter *Briefing Summary*] (citing research suggesting that ages one to three offer unique opportunities for intervention).

250. *Id.* (positing two years is not enough intervention to overcome socioeconomic status based achievement disparities).

251. See, e.g., Janet Currie, *Early Childhood Intervention Programs: What Do We Know?*, at <http://www.jcpr.org/conferences/oldbriefings/childpaper.pdf> (Apr. 2000) (on file with the *University of Michigan Journal of Law Reform*) (describing preschool interventions with notable outcomes). Studies from the Head Start program showed that the "bigger, lasting improvements came from the highest-quality, most intensive preschool programs" and that program resources varied widely. Gerlenter, *supra* note 245.

successful programs appear to be center-based, where services are provided at a day-care type center, rather than in the home.²⁵² Given the length of time services need to be provided to these parents, and the uncertainty of success of these services,²⁵³ it is unreasonable to leave the children in a status quo position. The developmental needs of the children can and must be served while the parents are receiving help.

D. Label Intervention as Education

Rather than being intimidated and overwhelmed with case plans and threats of removal, neglecting parents must engage in the kinds of programs introduced in recent years to prepare underprivileged children for school—for example, Early Head Start and similar programs with a child-centered focus.²⁵⁴ The delivery of

252. *Briefing Summary*, *supra* note 249, at 2 (showing almost all positive results involve center-based early childhood intervention).

253. *See, e.g.*, Gelernter, *supra* note 245 (“[W]e’re finding many of these women who are poor come from families where poverty and deprivation have been intergenerational. Unfortunately, it seems like some of their capacity to change and be responsive is limited, even with support.” (quoting Kathryn Barnard, a researcher at the University of Washington)).

254. In recognition of the powerful research evidence that the period from birth to age three is critical to healthy growth and development and to later success in school and life, the 1994 Head Start Reauthorization established a new program for low-income pregnant women and families with infants and toddlers. *See* Administration for Children and Families, *Early Head Start Fact Sheet*, at <http://www.acf.dhhs.gov/programs/hsb/erlyhsfs.htm> (last visited June 24, 1999) (on file with the *University of Michigan Journal of Law Reform*) [hereinafter *Fact Sheet*]. The four cornerstones of Early Head Start are: 1) promote the health, intellectual and emotional growth of infants and toddlers; 2) support parents to become self-sufficient, stable and equipped with good parenting skills; 3) develop better-trained and paid child-care workers; 4) spur communities to improve fragmented services for families of young children. Gelernter, *supra* note 245. Either directly or through referrals, the program provides early, continuous, intensive and comprehensive child development and family support services to low-income families with children under the age of three. *See* Administration for Children and Families, *About Early Head Start*, at <http://www/dcf.dhhs.gov/programs/hsb/about/programs/chs.htm> (last visited Sept. 24, 2000) (on file with the *University of Michigan Journal of Law Reform*). “Total new funding for the Early Head Start program in FY 1995 was \$47.2 million, and in FY 1996, \$40 million was made available for new grantees.” *Fact Sheet*, *supra*. While this may sound like a significant investment, it is relatively little in comparison to the total government spending in 1996 for child welfare of \$14.4 billion. ROB GEEN ET AL., *supra* note 244, at 5. In 1997 President and Mrs. Clinton hosted “The White House Conference on Early Childhood Development and Learning: What New Research on the Brain Tells Us About Our Youngest Children.” White House, *Policy Announcements*, at <http://www.whitehouse.gov/WH/New/ECDC/Policy.html> (last visited June 24, 1999) (on file with the *University of Michigan Journal of Law Reform*). The Administration made a commitment to expand the Early Head Start Program. *Id.* Unfortunately, the number of children served to date is a small percentage of those needing services. Gelernter, *supra*

services to the children is crucial—therapeutic daycare, play groups, preferably involving the mothers, home visiting nurses or surrogates, support groups for parents with children, whatever it takes to make sure that the babies are being stimulated, nurtured, and cared for enough hours during the day to ensure their healthy development.²⁵⁵

As babies grow, early preschool would continue stimulation and oversight.²⁵⁶ By the time these children enter kindergarten, they should be on a firm foundation for future growth that should con-

note 245 (finding approximately 10,700 families served compared to 2.8 million nationwide eligible children). Similarly, Head Start only serves about thirty-five percent of eligible children. Currie, *supra* note 251, at 11. Funding for total Head Start programs for fiscal year 2000 was budgeted at \$5,267,000,000. *FY 2000 Appropriations*, CHILD PROTECTION REP., Jan. 7, 1999, at 187. The fiscal year 2000 set-aside for Early Head Start is eight percent. *Head Start Reauthorized by Congress*, at <http://www.headstart.gen.mi.us/Oct98reauth.htm> (last visited Nov. 30, 1999) (on file with the *University of Michigan Journal of Law Reform*). But see Fiscal Year 2000 Discretionary Announcement for Select Areas of Early Head Start, 64 Fed. Reg. 51,765–67 (Sept. 24, 1999), available at http://www2.acf.dhhs.gov/programs/hsb/announce/im/im99_15.htm (last visited Nov. 30, 1999) (on file with the *University of Michigan Journal of Law Reform*) (demonstrating some discrepancy in the total funding available, \$46,570,000, for forty-nine geographic areas).

255. See Gaudin, *supra* note 45, at 83–85 (concluding “[p]revention of . . . consequences of neglect requires interventions to supplement the inadequate nurturing that children receive from their parents” and describing reviews of successful treatment programs). This early intervention approach has recently been implemented in Early Head Start, although the extent of coverage is grossly inadequate to meet the needs discussed in this Article. See *Briefing Summary*, *supra* note 249.

Early-childhood programs have proven successful in preparing underprivileged children for school in other countries. Boockock & Lerner, *supra* note 4, at 72. Successful interventions have the following characteristics: “(1) they are comprehensive, typically providing nutritional and medical services as well as educational enrichment; (2) they provide adequate training for caretakers, whether parents or others; and (3) they begin early in the child’s life and continue over sustained periods of time.” *Id.* Commentators also report that although the “United States dominates the world in the quantity and quality of its research on early-childhood programs, . . . the weight of empirical evidence showing the benefits of such programs has not produced the political will to support a universal system of high-quality services.” *Id.* at 73. The political will, then, must be moved to address this problem. Perhaps an educational campaign, emphasizing the costs of failing to address the problem would mobilize taxpayers and legislators. Intervention should not wait until the consequences of neglect have manifested as developmental delays or worse.

Marsha Garrison discusses the problems associated with basing intervention on symptomatology, in particular that it would preclude interventions in cases where the symptoms could not yet be identified, such as in infants, and would require children to be harmed before intervention could occur. Garrison, *supra* note 17, at 1798. Modern technology and understanding of the brain may allow for more accuracy in identifying developmental problems even before they manifest in behavior. See, e.g., KOLB & WHISHAW, *supra* note 196, at 493 (improving imaging procedures will allow imaging at different ages).

256. Vice President Al Gore’s presidential agenda included a \$115 billion “Education Reform Trust Fund that would include universal preschool for all young children.” *Briefs*, CHILD PROTECTION REP., Feb. 3, 2000, at 23.

tinue to be enhanced by supplemental school programs.²⁵⁷ For children who have already experienced the consequences of neglect, services aimed at all domains are appropriate.²⁵⁸ All services need to be of sufficient duration to ensure success.²⁵⁹ Training in social skills must play a significant part in these services.²⁶⁰

While these early interventions might also be conceived as childcare,²⁶¹ for the most part, the needed services are forms of education, providing the most basic building blocks for future academic and life success. Government fiscal policy and political feasibility suggest that framing interventions in an education context may increase their acceptability.²⁶² Public and political outcry for increased accountability of schools, and improved test scores and outcomes have imposed impossible demands on schools.²⁶³ Increased spending on education will not achieve the desired gains as long as children continue to enter school with

257. See, e.g., *Briefing Summary*, *supra* note 249 (illustrating two years intervention is not enough).

258. See generally Price & Landsverk, *supra* note 209 (discussing the need for training in social communication).

259. Services provided for abused and neglected children often end too soon, as they are based upon interventions limited in duration by ASFA and most state law to a maximum of 15 months for out-of-home placements and 6 months for voluntary services. See, e.g., 42 U.S.C. § 675(5)(e) (1995); CAL. WELFARE & INST. CODE § 16506 (West 1998) (limiting voluntary services to 6 months); see also Cheryl A. DeMichele, *The Illinois Adoption Act: Should A Child's Length of Time in Foster Care Measure Parental Unfitness?*, 30 LOY. U. CHI. L.J. 727 (1999) (criticizing the time limits imposed by ASFA). This is particularly true in the cases of young children who might not demonstrate deficits that will appear later on in the developmental process. See, e.g., *Parental Substance Abuse: Picking up All Possible Impacts on Children Takes Some Time*, *supra* note 27, at 186 ("Services may not be provided long enough to adequately assess language delays not present in the first year.").

260. See Phyllis T. Howing et al., *Effective Interventions to Ameliorate the Incidence of Child Maltreatment: The Empirical Base*, 34 SOC. WORK 330, 334 (1989) (describing models developed for training in social skills). See generally Price & Landsverk, *supra* note 209.

261. See, e.g., *Child Care Advocate Questions Gore, Bush Early Education Plans*, CHILDREN & YOUTH FUNDING REP., July 10, 2000, at 1 (demonstrating children will be short-changed if proposals ignore link between early education and child care).

262. See *id.* (discussing Bush's emphasis on moving Head Start to the Department of Education to address the need for more funding); see also Secretary Richard W. Riley, *Remarks at the Early Childhood Summit* (June 23, 2000), available at <http://www.ed.gov/Speeches/06-2000/000623a.html> (last visited Sept. 30, 2000) (on file with the *University of Michigan Journal of Law Reform*) (calling for "new, powerful and sustained focus on the early years—ages 0 to 5 years—, before children even enter the first grade" and showing Title I funds can be used for pre-kindergarten initiatives). But see *Early Childhood Programs for Low-Income Families: Availability and Impact: Hearing Before the Senate Comm. on Health, Education, Labor and Pensions, Subcommittee on Children and Families*, 106th Cong. (2000) (statement of Douglas J. Besharov, Resident Scholar, Amer. Enter. Inst.) (criticizing idea that early child care is a cost-effective strategy for improving child development).

263. See, e.g., Peter Schrag, *Rethinking School Reform in California*, SAN DIEGO UNION-TRIB., Dec. 16, 1999, at B12 (reporting that school reform is not well-considered, that demands are unrealistic, and that a particular problem exists in the schools serving poor and minority children).

significant learning disadvantages.²⁶⁴ Poverty, more than any other factor, correlates with low standardized test scores in school.²⁶⁵ The relationship between poverty and neglect, as discussed above, must not be overlooked in this finding.²⁶⁶ Further, if these interventions are viewed as mandatory education, courts should be much less likely to second guess them in favor of family privacy rights.²⁶⁷

In a review of early care and education programs for poor children, researchers Boocock and Lerner found that "large-scale national efforts to expand preschool systems at reasonable levels of quality can reduce rates of early school failure among disadvantaged children" and that "well-designed, cost-effective interventions targeted at disadvantaged groups can ameliorate some of the adverse effects of poverty and discrimination."²⁶⁸ Most studies have focused on school performance and advancement.²⁶⁹ Studies that examine a broader spectrum of performance for neglected children would undoubtedly support the need for comprehensive programs.²⁷⁰

264. See, e.g., William Raspberry, *Standards Won't Make Children Equal*, SAN DIEGO UNION-TRIB., Nov. 13, 1999, at B8 (discussing the fact that poor children who come to school are already greatly disadvantaged).

265. See, e.g., Iris C. Rotberg, *The Trouble with Ranking*, 185 AM. SCH. BOARD J. 26, 28 (1998) (illustrating that ranking by test scores shows the powerful influence of poverty); Stephen J. Schellenberg, *Does It Matter Where Poor Kids Live? A Look at Concentrated Poverty and Achievement* (paper presented at the Annual Meeting of the American Educational Research Association, San Diego, Cal., Apr 13-17, 1998) (available from Education Document Reproduction Service) (finding students from more affluent neighborhoods had consistently higher test scores and lower absenteeism than those from poorer areas of the city). See generally JONATHAN KOZOL, *SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS* (1992).

266. See discussion *supra* Part I.

267. In *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923), the Supreme Court approved of mandatory education, but stated that the states did not have the power to require a standardized curriculum that conflicted with parents' other compelling interests. In neglect cases, there can be no compelling parental interests to defeat a requirement of early childhood education beginning at birth. In *Wisconsin v. Yoder*, 406 U.S. 205, 229-38 (1972), the Court again balanced parental interests against the state's requirement for mandatory public education, finding that parental interests that risk the child's health or safety, or the public welfare, would not outweigh the state's interest. See also McMullen, *supra* note 78, at 569 ("[W]e should not sacrifice the healthy development of a significant number of children to achieve a society that respects the privacy of individuals and the autonomy of families.").

268. Boocock & Lerner, *supra* note 4, at 72.

269. See generally Boocock & Lerner, *supra* note 4 (discussing studies from a number of countries focused on academic outcomes).

270. The preferable approach would be to offer these services on a voluntary basis, as a non-coercive intervention that could bypass the legal system. See discussion *infra* Part I.B. In other words, the basic education would be mandated for all children, but would only be coerced where there was evidence it was not being provided. Services also should be provided without time limitations because children will need this support as long as their parents are unable or unwilling to provide adequate care. However, parents who do not

In her review of early educational interventions, Wasik found that "[c]enter-based programs, as compared with home-based programs, seem to have stronger and more enduring effects, although this conclusion is confounded with program intensity."²⁷¹ Further, she found that

[p]rograms that start earlier tend to have stronger effects than those that begin later, but age of entry is also confounded with duration. The most effective programs not only began in infancy, but also continued throughout the pre-school years, providing children with a continuous enriched experience throughout this time. . . . Furthermore, programs that focus on the role of the parent in helping his or her child tend to have less effects on the child and inconsistent parent effects.²⁷²

These are the kinds of programs that must be provided for neglected children and their families. They should be provided through the collaboration of the child protection and educational systems.

voluntarily comply would need to be court-ordered into participation. As long as there is fairly healthy parent-child bonding and attachment, and no threat of physical harm, efforts to maintain the child with the biological parents are appropriate, but only when these intensive, child-focused services are in place. *See, e.g.,* Moore et al., *supra* note 244, at 3 (describing follow-up data from the Childhaven program in the Seattle area). In the Childhaven program, comprehensive services that included "individualized programs of concrete services, practical parenting education, involvement with the child's program, support groups, counseling, and linkages to other professional services when appropriate" were provided to the treatment group. *Id.* at 5. Long-term outcomes for the treatment group, as compared to the control group, showed that adolescents were "significantly less prone to violent delinquency, clinical-level aggression, and anger" and "functioning significantly more positively than were [control] youths in other psychosocial areas as well." *Id.* at 12. Adolescents who had not received treatment "had more difficulties in such areas as aggression, anxiety/depression" and had an earlier onset of delinquency. *Id.* at 13. This study, however, did not find enhanced academic performance in treated youths. *Id.* at 11-12.

271. Wasik, *supra* note 33, at 528 (citations omitted).

272. *Id.* (citations omitted). "The most consistent finding is that children who participated in child-focused programs tended to experience a significant increase in intelligence by the end of the program, typically of the magnitude of 8 to 10 IQ points or one-half a standard deviation, in comparison to control children." *Id.* (citation omitted).

E. Other Measures

The other factors that have led to the neglect of neglect, in particular its chronic nature with associated societal costs,²⁷³ and the fact that its effects are not immediately apparent,²⁷⁴ must also be addressed. Public education programs regarding child development and mandatory child development courses in high schools might make some difference in public attitudes toward this problem.²⁷⁵ While taxpayers might not want to pay for these programs, they would probably see them as the better choice than spending for later delinquency, criminal, mental health, and social welfare costs.²⁷⁶

Concerns about caseworker discretion could be alleviated by a change in societal attitudes regarding intervention—from one of fear and disdain to one of appreciation and support—and would be particularly improved if services were aimed at the children rather than removing, or threatening to remove the children from the parents and struggling with their reunification.²⁷⁷ Additionally, processes such as the family group conference,²⁷⁸ which elicit support from family, friends, and the community, can make the process more “user friendly” and effectively stretch limited resources.²⁷⁹ The kind of attention and caring needed to satisfy the developmental concerns of infants does not necessarily require frequent and costly oversight by professionals. Regular visits from a public health nurse could be supplemented by visits from well-trained and skilled paraprofessionals²⁸⁰ who have received basic training in child development with special attention regarding ap-

273. See discussion *supra* Part I.

274. See discussion *supra* Part I.

275. See, e.g., Lutzker, *supra* note 45, at 314 (demonstrating primary prevention programs in schools might help correct problem of neglect).

276. See discussion on consequences *supra* Part III.

277. See discussion *supra* Part I.B. But see Elizabeth Bartholet, *Taking Adoption Seriously: Radical Revolution or Modest Revisionism?*, 28 CAP. U.L. REV. 77 (1999) (discussing the reluctance to intervene in families and heavy emphasis on family preservation as outdated notions).

278. See, e.g., Joan Pennell & Gale Burford, *Family Group Decision Making: Protecting Children and Women*, 79 CHILD WELFARE 131, 144 (2000) (finding family group decision making strengthens collaborative efforts for families); Weinstein, *supra* note 51, at 153 (discussing family group conferencing in child welfare cases). But see BARTHOLET, *supra* note 57, at 141 (criticizing family group conferencing as placing too much discretion with dysfunctional families).

279. See, e.g., Weinstein, *supra* note 51, at 153 (involving the extended family in child welfare cases creates additional resources for the child).

280. Paraprofessionals and volunteers have been used successfully in other programs. See Gaudin, *supra* note 45, at 82.

propriate stimulation and nurturing.²⁸¹ These would supplement the center-based education system for infants through preschool. Well-trained providers are essential for the center-based education system component.²⁸²

A more inclusive approach would go as far as providing public co-housing for single mothers, where, in a communal setting, services and support could be provided as well as supervision.²⁸³ In light of the fact that many of these mothers need parenting themselves, such an environment could be an efficient and cost-effective approach to treating neglect.²⁸⁴

CONCLUSION

While it may seem distasteful and awkward to consider using a coercive legal system to resolve a major social problem,²⁸⁵ perhaps a "reframing" of this proposal would allow the law to be seen as a therapeutic²⁸⁶ agent, even while it is coercive.²⁸⁷ According to

281. See, e.g., WALD ET AL., *supra* note 68, at 194 (recommending "alternative support systems" such as "[a]fter-school day-care programs, community centers for older children, and . . . a 'Big-Sister' or 'Big-Brother' [program].").

282. See, e.g., Riley, *supra* note 262 (recommending that every teacher helping children in early years have a bachelor's degree with specialized knowledge in early childhood education and development).

283. See, e.g., Laura M. Padilla, *Single-Parent Latinas on the Margin: Seeking a Room with a View, Meals, and Built-In Community*, 13 WIS. WOMEN'S L.J. 179 (1998). A similar approach has been used as part of a recovery program for substance abusing mothers. *Unique Public Housing Program Helps Formerly Addicted Parents*, CHILD PROTECTION REP., Feb. 23, 2000, at 46; see also Gaudin, *supra* note 45, at 86 (demonstrating that intervention consisting of personal networking, mutual aid groups, volunteer linking, neighborhood helpers, and social skills training, combined with intensive casework, advocacy, and case management achieved over eighty percent improvement in low socioeconomic status neglectful parents who volunteered to participate); Sonia Nazario, *Orphans of Addiction: Part 2*, L.A. TIMES, Nov. 17, 1997, at A1 (describing Keith Village in southern California).

284. Co-housing and the other educational and support mechanisms for parents could also serve to alleviate the social isolation that is often connected with depression and neglect. See, e.g., McMullen, *supra* note 78, at 591; Padilla, *supra* note 283, at 201-06.

285. Lutzker, *supra* note 45, at 313 (arguing that providing intensive treatment program for neglect is invasive and intrusive).

286. The law can be used as a therapeutic instrument for solving problems. LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE xvii (David B. Wexler & Bruce J. Winick eds., 1996); Ken Kress, *Therapeutic Jurisprudence and the Resolution of Value Conflicts: What We Can Realistically Expect, in Practice, from Theory*, 17 BEHAV. SCI. & L. 555, 555 (1999) (indicating therapeutic jurisprudence attempts to determine the effects of law on individual and society's mental health and to advocate for legal reform).

287. Similar to those made by McMullen, *supra* note 78, at 598, the proposals in this Article call for a helping and therapeutic involvement, rather than intrusion. However, in the face of noncompliance by a neglecting parent, the child's interests in healthy development would mandate coercion. See Ana Maria Irueste-Montes & Francisco Montes, *Court-Ordered*

Gaudin, "the exercise of legal authority by the professional helper is sometimes necessary to overcome the initial denial and apathy of the neglectful parent."²⁸⁸ Laws mandating health (e.g. vaccination programs)²⁸⁹ and education services (e.g. mandatory school attendance)²⁹⁰ to children are of a similar nature, requiring the intervention of government into family life, limiting the autonomy of parents, and setting a standard for the well-being of children that can be enforced by legal sanctions. Framing these interventions as early childhood education could make them more palatable to taxpayers and legislators. As stated earlier, the current societal demands to improve the quality and outcome of elementary and secondary schooling in this country place unrealistic expectations on our schools,²⁹¹ and could be better satisfied by attending to fundamental early education needs.

The ideal would be to have the political and social will to meet this problem through expansion of social service and educational programs.²⁹² Until this expansion of and collaboration between the two occurs, however, the law needs to protect these children. Expanded protection merely extends the scope of the existing child protection framework. Without funding for programs such as Early Head Start or quality daycare, social service agencies would be placed in the undesirable position of having an impossible mission to fulfill. In essence, this is the current situation, but

vs. Voluntary Treatment of Abusive and Neglectful Parents, 12 CHILD ABUSE & NEGLECT 33 (1988) (finding court-mandated treatment had as much impact as voluntary treatment).

288. Gaudin, *supra* note 45, at 72.

289. See generally Michael Sanzo, *Vaccines and the Law*, 19 PEPP. L. REV. 29, 30 (1991) (noting that all states have laws requiring that children be immunized before entering school).

290. See Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550 (1992). "Today, every state has enacted laws mandating the education or school attendance of children within certain age ranges." *Id.* at 551 (citing E. GORDON GEE & STEPHEN R. GOLDSTEIN, *LAW AND PUBLIC EDUCATION* 11 (2d ed. 1980)).

291. See, e.g., Schrag, *supra* note 263.

292. Felton Earls, *Positive Effects of Prenatal and Early Childhood Interventions*, 280 JAMA 1271, 1272-73 (1998). Earls notes that:

Perhaps by deepening understanding of the effects of early intervention on brain development, the political resolve to use this knowledge will be strengthened. It is certain, however, that by not responding to the accumulating evidence that early intervention matters, disadvantaged children will continue to pay a price in terms of educational underachievement, vulnerability to substance abuse, and the many negative consequences of antisocial and criminal behavior.

Id.; see also Garrison, *supra* note 17, at 1797 ("As long as we remain unwilling to give families sufficient support to avert the extreme stresses that produce neglect there will be damaged children and families.").

because neglected children can currently be ignored by the system, the problem does not become apparent to legislators who are responsible for funding.

The preventive savings from a child-centered approach should be realized in decreasing costs in special education, law enforcement, medical care, social services, mental health services, and costs related to future unemployment within one generation.²⁹³ The cost benefit in terms of human potential and well-being are immeasurable, not just to the children who are directly affected by such programs, but to the children who share classrooms with them and to all who live and will live in the same communities.²⁹⁴

Community responsibility for child neglect is an important factor to consider in responding to the problem. "If the community defines parenting as a private, individual act, it may rightly be judged neglectful, in contrast to a community that recognizes parenthood as a social contract."²⁹⁵ Yet, overall spending on child welfare in prevention and in direct services to children is pitifully low.²⁹⁶ The bulk of spending on children tends to be for placement of children who are removed from their parents.²⁹⁷ Spending on services is primarily directed at services for parents.²⁹⁸

While the proposals described in this Article do not directly aim at reducing the underlying problem of poverty, it is conceivable that by ensuring the healthy brain development of present and future generations of infants, a critical factor leading to poverty can be reduced.²⁹⁹ Ensuring healthy brain development in children is the truest form of primary prevention.

293. See, e.g., Currie, *supra* note 251, at 35 (describing cost-benefit analysis of Head Start programs).

294. Bureau of Crime Statistics and Research, *Media Release: Economic and Social Stress, Child Neglect and Juvenile Delinquency*, at <http://www.lawlink.nsw.gov.au/bocsarl.nsf/pages/media051197> (Nov. 5, 1997) (on file with the *University of Michigan Journal of Law Reform*) ("Recent research by the Rand Corporation in the United States has shown that, dollar for dollar, investment in effective child protection programs produces a greater long-term reduction in crime than investment in longer gaol [sic] terms.").

295. Garbarino & Collins, *supra* note 1, at 5 (citing GARBARINO, RAISING CHILDREN IN A SOCIALLY TOXIC ENVIRONMENT (1995)).

296. See, e.g., GEEN ET AL., *supra* note 244, at 19-20 (concluding there is little money for prevention).

297. Total child welfare spending in fiscal year 1996 was at least \$14.4 billion. *Id.* at 18. More than half of this expenditure is for out-of-home placements. *Id.* at 5. Preventive services that could keep children at home and substantially decrease the likelihood of intergenerational transmission of neglect would be a sound societal investment. *Id.*

298. Gaudin, *supra* note 45, at 83 (showing most programs focus on services for parents).

299. See SANFORD N. KATZ, WHEN PARENTS FAIL: THE LAW'S RESPONSE TO FAMILY BREAKDOWN xiii (1971) ("One of the indices of the progress of a society toward the promotion of human dignity is its care and treatment of all children in all social strata.").

